

**The London School of Economics and Political Science**

**Killing to Rescue?**

**Liberal political theory, non-consequentialist ethics and military  
humanitarian intervention**

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## **Declaration**

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Alexander Christoph Leveringhaus

## Abstract

This thesis offers a philosophical defence of military humanitarian intervention (MHI). To do so, it develops the ‘other-defensive conception’ of MHI. The other-defensive conception of MHI draws an analogy between so-called rescue killings in domestic society and MHI. In a domestic rescue killing, a rescuer defends a victim against an unjust aggressor. In fact, the thesis argues that the rescuer has a right to intervene on behalf of the victim. This right is correlated to a negative duty falling upon the attacker not to resist the intervention. By analogy, a state that is guilty of committing Atrocity Crimes against those under its rule forfeits its equal sovereign standing in international society. As a result, an intervening state does not violate negative duties not to aggress the ‘target’ state. Further, like a rescuer in a domestic rescue killing, the intervening state is holder of a (moral) right to intervene. The latter obliges the target state not to resist the intervention. The thesis supports this claim through two additional arguments. First, it argues that because Atrocity Crimes constitute grave moral evils, a military response to them is proportionate. Second, states that commit Atrocity Crimes do not perform their sovereign function of preserving the peace amongst those under their rule. Accordingly, the purpose of MHI is not merely to halt Atrocity Crimes, but also to reconstruct stable political institutions in the target state. On this basis the thesis explores the following four issues: 1) the relationship between the declaration of war and its conduct, 2) the problem of non-combatant immunity, 3) the foundation of a duty to intervene, and 4) the ethics of humanitarian occupation. In doing so, it offers a comprehensive discussion of central problems in contemporary just war theory and the ethics of killing and saving.

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## **List of Acronyms and Abbreviations**

DDE: Doctrine of Double Effect

JAB: Jus ad bellum

JEB: Jus ex bello

JIB: Jus in bello

JPB: Jus post bellum

MHI: Military Humanitarian Intervention

NATO: North Atlantic Treaty Organisation

R2P: Responsibility to Protect

UN: United Nations

## Chapter I

### *A normative theory of military humanitarian intervention*

*‘Humanity itself is a dignity; for a man cannot be used merely as a means by any man ... but must always be used at the same time as an end. It is just in this that his dignity (personality) consists... so neither can he act contrary to the equally necessary self-esteem of others... he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other man’.*

(Immanuel Kant)<sup>1</sup>

*‘To see others suffer does one good, to make others suffer even more: this is a hard saying but an ancient, mighty, human, all-too-human principle to which even the apes subscribe; for it has been said that in devising bizarre cruelties they anticipate man and are, as it were, his ‘prelude’. Without cruelty, there is no festival’.*

(Friedrich Nietzsche).<sup>2</sup>

*It is injustice, not justice, that brings us into normative politics --- despotism, not freedom. Moral political theory should start with negative politics, the politics that informs us on how to tackle evil before telling us how to pursue the good.*

(Avishai Margalit)<sup>3</sup>

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<sup>1</sup> Immanuel Kant quoted in: J. Glover, *Humanity: A moral history of the twentieth century* (London: Pimlico, 2001), p. 23.

<sup>2</sup> Friedrich Nietzsche quoted in: (ibid.), p. 16-17.

<sup>3</sup> A. Margalit, *On Compromise and Rotten Compromises* (Princeton/N.J: Princeton University Press, 2010), p. 176.

## I

### Atrocities and the tasks of political philosophy

Considering Ancient Sparta's agrarian and expansionist ideology as a template for later genocides and related forms of atrocious mass killing, Ben Kiernan shows that, throughout history, human beings have tried to 'eliminate' or 'enslave' fellow humans and their societies.<sup>4</sup> The 20<sup>th</sup> century turned out to be particularly bloody in this respect. Although the Holocaust perpetrated by Nazi Germany prompted the rediscovery of the language of pre-political 'natural' rights, genocidal and non-genocidal mass slaughter continued post-World War II. Millions lost their lives during Mao's Cultural Revolution, the civil war in East Bengal, Idi Amin's rule over Uganda, the Khmer Rouge's attempt to turn Cambodia into an agrarian utopia, the gassing of members of the Kurdish minority in Northern Iraq, the return of ethnic nationalism in ex-Yugoslavia, the Russian war against secessionist rebels in Chechnya, the Rwandan genocide, and the pillaging and looting of pro-Indonesian militias in East Timor. This rather bleak picture is complemented by the large-scale displacement of individuals and groups during these conflicts.

There are reasons to be sceptical whether the 21<sup>st</sup> century is going to be more peaceful. First, in 2003 the Arab Janjaweed militia, with backing from the Sudanese government, began to systematically empty the Northern Sudanese region of Darfur of non-Arab tribes, extending its operations into neighbouring Chad in 2005. At the time of writing the conflict remains unresolved. Between 1993 and 2003, according to the United Nations (UN), the Rwandan and Ugandan Army committed acts that 'may be genocide' against Hutus who had fled to Zaire/DR Congo in the aftermath of the Rwandan genocide. Second, the experience of state failure in some areas of sub-Saharan Africa has resulted in war crimes. Mass rape, for example, has become common in the ongoing civil war in East Congo. Finally, the removal of Saddam Hussein and his Baath Party regime led to bloody confrontations between Sunni and Shiite Muslims in Iraq. It remains to be seen whether it is possible to secure long term peace between the two groups.<sup>5</sup>

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<sup>4</sup> B. Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Dafur* (New Haven: Yale University Press, 2007).

<sup>5</sup> For a treatment of the situation in Dafur and some thoughts on the actions of Al-Qaeda in Iraq, see B. Kiernan, *Blood and Soil*, pp. 594-604. On the situation in Congo, see Office of the High Commissioner for Human Rights, *DRC: Mapping Human Rights Violations 1993-2003*,

Considering the prevalence of mass atrocities in human history, Claudia Card, who, amongst contemporary philosophers, has gone furthest in disambiguating the notion of atrocity, seems to be correct in concluding that it is unrealistic to suppose that there will be no more large-scale atrocities, such as genocide, mass murder and ethnic cleansing, within our future as a species.<sup>6</sup> Given the likely occurrence of atrocities in the future, political philosophers must turn their attention to this bloody phenomenon.

Unfortunately, though, there is a tendency amongst political philosophers, especially those working in the ‘analytic tradition’, to operate within the realm of ‘ideal theory’. The best contemporary example of ideal theorising is John Rawls’ famous theory of justice as fairness. It assumes *a*) the existence of autarkic national basic structures, *b*) full employment in the labour market, *c*) favourable economic conditions, and *d*) full compliance with principles of justice. Yet, as Rawls recognises in a later work, *The Law of Peoples*, the problem of mass atrocities falls into the realm of ‘non-ideal theory’.<sup>7</sup> The occurrence of atrocities signals *a*) large scale non-compliance with basic negative duties against harming and *b*) that affected societies have not reached a level of development conducive to peaceful relations amongst their members.

This is not to suggest that ideal theorising has no implications for the study of atrocities. To counterbalance Card’s pessimism somewhat, ideal theorising remains useful because it provides us with the vision of a just society. Interestingly, Rawls argues that some of the great social evils, such as genocide, mass killing, and religious persecution, result from political injustices. By delineating what he calls a ‘realistic utopia’, we can engineer more stable political institutions that avoid the mistakes and injustices of current ones.<sup>8</sup> That said, if they take the value of justice seriously, philosophers must devote more attention to non-ideal theory. The relationship between ideal and non-ideal theory is dialectical. Without peace and stability the realisation of justice is impossible. Conversely, without the creation of just social relations, societies are unlikely to remain stable and peaceful.

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<http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ProjectMapping.aspx>: both accessed 01/10/2010. The ambiguous formulation ‘it may have been genocide’ is due to the interventions of DR Congo, Rwanda and Uganda before the publication of the report.

<sup>6</sup> C. Card, *The Atrocity Paradigm: A theory of evil* (Oxford: Oxford University Press, 2002), p. 8.

<sup>7</sup> See J. Rawls, *A Theory of Justice*, revised edition (Cambridge/Mass: Harvard University Press, 1999). For Rawls’ observations on non-ideal theory in international affairs, see J. Rawls, *The Law of Peoples* (Cambridge/Mass: Harvard University Press, 1999).

<sup>8</sup> (*ibid.*), pp. 6-7.

This thesis is an exercise in non-ideal theory. It assumes that, when confronted with the non-ideal phenomenon of atrocities, political philosophers face three main tasks.

1. They must identify what is morally distinctive about mass atrocities as opposed to other types of wrongdoing.
2. They must develop governing principles for our immediate response to atrocities.
3. They must specify our moral obligations towards those currently threatened by atrocious violence.

In order to approach these and related questions, the thesis focuses on one particular response to atrocities, namely, the phenomenon of military humanitarian intervention (abbreviated as MHI hereinafter). Roughly, the term MHI describes situations where a state (henceforth the ‘intervening state’) intervenes militarily in the internal affairs of another state (henceforth the ‘target state’) in order to alleviate a humanitarian crisis.<sup>9</sup> In recent history, famous instances of MHI include India’s intervention in the East Bengal crisis in 1971, Vietnam’s intervention in Democratic Kampuchea in 1979, Tanzania’s intervention in Uganda in 1979, the US-led UN intervention in Somalia in 1992, NATO’s interventions in the Balkan civil wars in 1995 (Bosnia) and 1999 (Kosovo), respectively, and the Australian-led UN intervention in East Timor in 1999/2000. Rwanda, by contrast, serves as an example of a lamentable failure to intervene. A historical judgement of the failure to intervene in Darfur is still outstanding.<sup>10</sup>

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<sup>9</sup> For the sake of convenience, the thesis uses the term intervening state in the singular to also cover instances of multilateral MHI.

<sup>10</sup> Addendum 13/05/2011: In the time span between the submission of the thesis on 22 December 2010 and its oral examination on 29 March 2011, the practice of MHI experienced an unexpected revival in international politics, when the UN Security Council, via Resolution 1973, authorised the international community to protect Libyan civilians, by military means if need be, from attack by (Libyan) government forces. This resulted in a large-scale bombing campaign against Libyan military installations and troops. As I prepare the corrected thesis for resubmission in early May 2011, operations in Libya are ongoing, though it remains unclear what direction the campaign is going to take. In fact, there are some worries about the effectiveness of the operation, now led by NATO, and it is fair to say that the intervention has caused a deep rift amongst NATO members. The case of Libya is fascinating, not least because it came at a time when, partly due to the abuse of interventionist language in the so-called War on Terror and an increasingly inward-looking US administration under President Obama, future interventions seemed unlikely. Needless to say, the Libya intervention raises many issues, especially with regard to the aims of the intervention, the use of bombing, the use of ground troops, and the possibility of occupation. It would have been interesting to see how the Libyan case develops further, but, unfortunately, an analysis is not possible here. Nevertheless, this case demonstrates that the issue of MHI is still an important topic, warranting theoretical scrutiny.

To be clear, being a philosophical work, it is not the purpose of this thesis to provide a detailed examination of historical case studies of MHI. Instead, it critically approaches MHI via the framework of contemporary just war theory (abbreviated just war theory).<sup>11</sup> In the history of (western) political thought, just war theory is the most significant attempt to place normative restrictions on the use of force.<sup>12</sup> Rejecting realism and pacifism, just war theory assumes that the use of force is morally justifiable and can be subjected to various moral constraints. Given that any military response to atrocities must not in itself be ‘inhumane’, just war theory is a natural and normatively defensible starting point for a theoretical inquiry into MHI. This does not mean, though, that one should uncritically accept its central assumptions. In fact, since the relationship between MHI and just war theory is not unproblematic, the discussion of the former provides a good opportunity to probe the tenets of the latter.

One reason for the tension between MHI and just war theory is that the latter, exemplified by Walzer’s seminal approach in *Just and Unjust Wars*, considers self-defence against (unjust) aggression as *the* paradigmatic case of a just war. Consequently, many just war theorists construct, for better or worse, the normative framework for the regulation of military force around the ethics of (domestic) *self*-defence. Certainly, the rationale of MHI can sometimes include considerations of self-defence. India’s intervention in East Bengal, for instance, was partly motivated by a worry that the influx of (Bengali) refugees into Indian state territory was going to have a destabilising effect on India’s domestic social relations. For the purpose of this thesis, however, it is more interesting to discuss interventions where self-defence either plays no role or only a subordinate one.

To illustrate the point, while strategic rivalries with Russia may have contributed to NATO’s decision to intervene in ex-Yugoslavia, the national security of its member states was not acutely threatened by the Balkan civil wars, though eventually the crisis may have spread. Similarly, if Western states had intervened to halt the Rwandan genocide, it is unlikely that they could have done so on grounds of self-defence.

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<sup>11</sup> The problem of MHI, of course, is not new. It has been discussed by some of the classic early just war theorists. Augustine, whose views became influential for the theoretical development of MHI, already thought that force in defence of the innocent is justified. For a historical overview of just war theory, see A.J. Bellamy, *Just Wars: From Cicero to Iraq* (Polity: Cambridge, 2006).

<sup>12</sup> For an overview of non-western approaches to the ethics of war, see R. Sorabji & D. Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Aldersholt: Ashgate Publishing, 2006).

While the constant stream of refugees had destabilising effects on what was then known as Zaire (DR Congo today), Rwanda was not of strategic importance to most Western states. We must assess, then, how the (potential) absence of a self-defence-based justification for military action impacts on the normative framework of just war theory.

More generally, any just war-based treatment of MHI must tackle the following six issues. First, proponents of MHI deny that states are sovereign if they exercise absolute power over their territory. This denial of sovereignty reflects the rediscovery of the language of pre-political moral rights after World War II. Contrary to Thomas Hobbes' argument that in order to establish a sovereign body individuals need to *lay down* their rights, theories of MHI are usually closer to John Locke's views on legitimate political authority. To wit, they assume that individuals hold certain (pre-political) rights *against* the state, and if the latter fails to respect these, MHI, in principle, becomes permissible. Rawls even eschews the language of sovereign states altogether, replacing it with the more ambiguous concept of 'peoples', whose internal power over their citizens is limited by human rights.<sup>13</sup> This indicates that any theory of MHI must deal with fundamental questions about the nature of sovereignty and the function of the state. One important task for philosophers, therefore, is to spell out the normative background assumptions that go into the construction of theories of MHI.

Second, due to the paradigmatic status of self-defensive war, contemporary just war theory, taking cues from international law, has developed sophisticated accounts of the crime of state aggression.<sup>14</sup> But there is no suitable analogue for theories of MHI. In fact, the literature on the subject, quite uncharacteristically for analytical philosophy, is marred by a lack of precision. Some theorists view MHI as a response to 'tyranny' or 'crimes that shock the conscience of mankind', whereas others contend that its aim consists in the halting of 'crimes against humanity' or the removal of 'injustice'. This leads to three interrelated questions. First and foremost, we must disambiguate these concepts. That is, we must clarify what constitutes, say, a 'crime against humanity' and what is morally distinctive about it. Second, because the relationship between these concepts is obscure, we must determine whether they

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<sup>13</sup> Rawls, *Law of Peoples*, pp. 25-27.

<sup>14</sup> See, Walzer, *Just and Unjust Wars*, 4<sup>th</sup> ed. (New York: Basic Books, 2004), chapter 4; Y. Dinstein, *War, Aggression and Self-Defence*, 4<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2005) & L. May, *Aggression and Crimes against the Peace* (Cambridge: Cambridge University Press, 2008).

describe similar or different states of affairs. Finally, we must find out how they relate to the atrocities just mentioned. Do they cover all or only some types of atrocities? More challengingly, are some concepts perhaps broader than the category of atrocities suggests? Depending on the answer, we may end up with fairly similar or radically different theories of MHI.

Third, once a sound analogue to the crime of aggression has been established, it must be shown that it is permissible for a foreign state to declare a non-self-defensive war. This is a complicated undertaking. Since it is assumed here that the potential intervening state does not face an existential threat by the target state, the declaration of MHI must count as an act of aggression. In this way, theorists of MHI defend what contemporary just war theory views as the paradigm of an unjust war, namely, state aggression.<sup>15</sup> It needs to be clarified, therefore, whether state aggression, even in aid of a good cause, can ever be morally permissible. But even if the answer is affirmative, it warrants further consideration whether the target state is morally permitted to defend itself against the *aggressor*, i.e. the intervening state. After all, it is the victim of an unprovoked attack.

Fourth, the permissibility of state aggression is not sufficient to establish the overall moral permissibility of MHI. This point can be attributed to the fact that MHI, like any other military campaign, has a dual normative structure.<sup>16</sup> This is because a military campaign involves relations between corporate entities, i.e. states, *as well as* individuals. Thus, even if it can be shown that the intervening state is allowed to declare a non-self-defensive war against the target state, it is not automatically the case that its combatants gain a moral permission to use force against individuals located in the target state. Indeed, finding a solution to this problem is one of the key tasks of this thesis.

Fifth, as a response to the interventions (or, in the case of Rwanda, lack thereof) of the 1990s, the Canadian-led International Commission on Intervention and State

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<sup>15</sup> From a legal perspective, the UN Charter rules that it is permissible to declare war if *a*) it is an individual response to an act of aggression, *b*) it constitutes a collective response to an act of state aggression (collective self-defence) or *c*) it has been authorised by the UN Security Council in order to prevent threats to international peace and security. International lawyers, though, disagree about how to interpret the UN Charter's prohibition of the use of force. Being interested in the ethics of MHI rather than its legality, the thesis will not enter into the legal debate. For a philosophical assessment of the significance of MHI for the reform of international law, see A. Buchanan, 'From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform', *Ethics*, Vol. 111/No. 4 (2001), pp. 673-705.

<sup>16</sup> D. Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), pp. 163-165.



Sovereignty (ICISS) developed the so-called Responsibility to Protect (abbreviated as R2P hereinafter) in 2000/2001.<sup>17</sup> According to R2P, the international community, represented by the UN Security Council, has a (moral) responsibility to prevent and halt atrocities. Clearly, although it is currently not recognised as a legal norm in international law, R2P has interesting implications for the legal permissibility of MHI. Yet, due to the contested relationship between the practice of MHI and the legal prohibition of the use of force in international law, the ICISS was more interested in establishing the *permissibility* of MHI than specifying the actual (moral) foundations of the *duty* to intervene. Here philosophical analysis can make an original contribution to the field by closing the normative gap between permission and obligation in the debate about R2P.

Sixth, the role of interveners has rarely been limited to the halting of atrocities. In order to rebuild the institutions of what the thesis calls post-atrocity societies, intervening states have usually exercised considerable amounts of power over the territory of the target state. In recent years, in fact, efforts to socially engineer post-atrocity societies have resulted in the legal phenomenon of ‘humanitarian occupations’ or ‘internationalised territories’. Here the international community takes over the role of local government to ensure the transition from conflict to peace. This development is duly reflected by R2P, which also asserts a responsibility to rebuild. But just as MHI challenges the prohibition of aggression in international affairs, the practice of humanitarian occupation appears to threaten our notions of collective self-determination. The question is whether MHI constitutes a reversal of the process of decolonisation heralded by the UN in the aftermath of World War II, leading to the establishment of a new empire, albeit, as Michael Ignatieff puts it, a ‘humanitarian’ one.<sup>18</sup>

In order to lay the groundwork for the discussion of these and related issues, the remainder of this chapter examines some general definitional and methodological questions. Part II identifies the problems faced by attempts to define MHI. Part III then introduces, at a normative and methodological level, the broader moral project into which just war theory must be embedded. In doing so, Part III also introduces the core argument of the thesis, namely the claim that MHI is normatively analogous

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<sup>17</sup> For excellent treatments of R2P, see A.J. Bellamy, *Responsibility to Protect* (Cambridge: Polity, 2008); T.G. Weiss, *Humanitarian Intervention* (Cambridge: Polity, 2007); G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes once and for all* (Washington/D.C: Brookings Institution, 2009).

<sup>18</sup> M. Ignatieff, *Empire Lite: Nation building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003).

to a domestic rescue killing. Finally, Part IV gives an overview of the individual chapters.

## II

### What is a military humanitarian intervention?

Before we can develop a normative theory of MHI, we must first attend to some definitional issues. Although it states the obvious, the concept of MHI is made up of two basic concepts, namely ‘military intervention’ and ‘humanitarianism’. Taken together, these two concepts suggest the following:

1. There is a particular category of acts that can be classified as interventions.
2. The relevant interventionist acts involve the use of military force.
3. The relevant acts of military intervention are carried out for humanitarian reasons.
4. The relevant acts of military intervention have humanitarian features.

Depending on whether one rejects the compatibility of humanitarianism with the use of military force, a *military* humanitarian intervention could turn out to be an oxymoron. This indicates that it is difficult to define MHI without impinging on normative territory. Perhaps MHI is an ‘essentially contested concept’ because it is impossible to avoid normative evaluation.<sup>19</sup>

In order to shed light on the nature of MHI, let us begin by considering the concept of an intervention. The verb ‘to intervene’ is derived from the Latin verb *intervenire*, which means ‘come between’. Consequently, for the *Oxford English Dictionary (OED)*, ‘to intervene’ means ‘to come between so as to prevent or alter the result or course of events’. Interveners come between individuals, groups, or corporate entities in order to prevent the occurrence of a specific result. The act of ‘coming between’, in the present context, has three features. First, it should be understood as the interference in the *internal* affairs of another state. Second, it involves the use of military force. Third, it is almost always coercive. This is because the intervener

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<sup>19</sup> W.B. Gallie, ‘Essentially Contested Concepts’, *Proceedings of the Aristotelian Society*, Vol. 56 (1956), pp. 167-198.

deliberately interferes in the area in which the target state would have otherwise acted.<sup>20</sup>

While this constitutes an important part of the conceptual core shared by all theories of MHI, the concept of an intervention itself is ‘essentially contested’. In the current discourse on MHI, there are two ways in which the ‘act of coming between’ can be interpreted. First, according to the dominant interpretation of the Cold War era, intervention can be seen as a form of ‘self-help’. Put differently, interventionism represents the unilateral recourse to force in the absence of world government.<sup>21</sup> Second, in the context of a post-Cold War world, R2P transcends the self-help model by maintaining that intervention is not an act of self-help, but represents the discharge of the responsibility to protect. But since R2P vaguely assigns the duty to intervene to the international community, it appears that states still play a key role in its discharge. At least in this regard, the self-help model, which is statist in orientation, and R2P seem to agree. We shall return to the role and status of states and non-state actors in theories of MHI in a short moment.

As we saw above, defenders of MHI also argue that relevant acts of military intervention are carried out for humanitarian reasons. According to the *OED*, a humanitarian is concerned with the promotion of human welfare. As Richard Shapcott notes, in its most basic version, humanitarianism can be defined as a commitment to respond to the suffering of others.<sup>22</sup> But humanitarianism does not amount to a coherent philosophy. This is because it is thoroughly rooted in the practical concerns of humanitarian organisations. Not surprisingly, many humanitarian organisations eschew a closer philosophical engagement with the concept of humanitarianism, whereas theorists of MHI retain the label ‘humanitarian’ for convenience rather than philosophical accuracy.

However, there are ways to disambiguate the concept of humanitarianism. The term, as Shapcott points out, connotes that human beings share morally significant

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<sup>20</sup> The thesis follows Isaiah Berlin’s definition of coercion. According to Berlin, ‘coercion implies the deliberate interference of other human beings in the area in which I would otherwise act’. See, Isaiah Berlin, ‘Two concepts of liberty’, in: I. Berlin, *Liberty*, edited by T. Hardy (Oxford: Oxford University Press, 2002), p. 169.

<sup>21</sup> For the legal self-help argument, see O. Ramsbotham & T. Woodhouse, *Humanitarian intervention in contemporary conflict* (Cambridge: Polity, 1996), chapter II.

<sup>22</sup> R. Shapcott, *International Ethics: A critical introduction* (Cambridge: Polity, 2010), p. 150.

attributes as a species that are due to recognition as such.<sup>23</sup> One of these attributes is our susceptibility to pain and our general vulnerability. As Peter Singer succinctly puts it, the suffering resulting from a lack of certain goods, e.g. food, medical aid, and shelter, is bad.<sup>24</sup> As a result, human suffering is morally relevant, regardless of membership in a specific association. Humanitarianism, writes Shapcott, entails solidarity with distant strangers.<sup>25</sup>

But human suffering in itself is not a useful guide for theories of MHI. It should be seen in the context of a theory of basic needs. The latter underwrite what Henry Shue refers to as a list of ‘basic rights’.<sup>26</sup> In particular, as we shall see, one group of basic rights, which Shue calls security rights, is central to the theory of MHI developed in this thesis. It is noteworthy, though, that the concept of humanitarianism, even if it is conceived in terms of Shue’s basic rights, neither offers a comprehensive list of human rights nor a fully-developed theory of justice.

In regard to human rights, Shue’s basic rights are conceptually classifiable as human rights because they are shared by all human beings. But not all human rights are ‘basic’ in the sense outlined by Shue. For example, although the rights to be allowed to marry or to periodic holidays are included in the UN Universal Declaration of Human Rights, they are not essential to securing immediate survival. Shue’s account of basic (human) rights, then, is less demanding than many other human rights. Nevertheless, some of the more demanding rights can be instrumentally valuable because they guarantee the fulfilment of basic ones. In this way, basic and ‘demanding’ rights are closely related.

In regard to justice, while humanitarians and many contemporary theorists of justice agree on the importance of prioritising the needs of the ‘worst off’, they pursue different projects. Theories of justice aim to determine a distribution of goods that enables individuals to pursue a conception of the good life. Humanitarians, by contrast, seek to mitigate some of the worst excesses of human suffering. To illustrate the difference between the two approaches, although a person in a refugee camp has her basic rights fulfilled, she may not be able to pursue a conception of the

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<sup>23</sup> (ibid), p. 124.

<sup>24</sup> P. Singer, ‘Famine, affluence and morality’, *Philosophy & Public Affairs*, 1 (1972), pp. 229-243.

<sup>25</sup> Shapcott, *International Ethics*, p. 150.

<sup>26</sup> H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 2<sup>nd</sup> (Princeton/N.J: Princeton University Press, 1996).

good. In this sense, humanitarianism is less demanding than, say, Harry Frankfurt's theory of sufficiency. For Frankfurt, individuals have sufficient resources if they lack an active interest in more.<sup>27</sup> But it is conceivable that the person in the refugee camp has legitimate interests in additional resources, e.g. *decent* housing.

While the above indicates that the goal of a humanitarian intervention consists in ensuring compliance with basic rights, the concept of humanitarianism is also relevant for the conduct of the interveners. For, as was observed above, the concept of MHI suggests that interventionist acts should have humanitarian features. According to the International Committee of the Red Cross (ICRC), humanitarian acts are characterised by *a) universality, b) neutrality, c) impartiality and d) consent*.<sup>28</sup> It is easy to see how these criteria lead to the charge that the concept of MHI is an oxymoron. There may be military interventions where the intervening party, with the consent of the target state's government, uses its military to, say, deliver food to *alleviate* a humanitarian crisis, and it is fair to say that these types of intervention can be conducted within the ICRC framework.

However, as soon as the interveners 'come between' victims and perpetrators in order to *put an end* to violations of basic rights, it becomes difficult to meet the ICRC criteria. For instance, perpetrator groups with the most to lose are unlikely to consent to MHI. In fact, this accounts for the coercive feature of MHI. Further, the practice of MHI raises questions about the scope of humanitarian concern. According to a 'broad' interpretation of humanitarian scope, any distribution of basic humanitarian goods must *ignore* the distinction between perpetrator and victim or aggressor and defender.<sup>29</sup> This, it is argued, is required by the values of impartiality, universality and neutrality. Needless to say, this claim is deeply problematic. Even for practical reasons, the delivery of aid to perpetrators or would-be perpetrators may be akin to pouring oil into the fire, prolonging human suffering rather than shortening it.<sup>30</sup> From a moral perspective, the broad interpretation is also counterintuitive. It is odd to argue that someone who is about to participate in a massacre is entitled to the same humanitarian assistance as his victims.

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<sup>27</sup> H. Frankfurt, 'Equality as a Moral Ideal', *Ethics*, Vol. 98/No. 1(1987), pp. 21-43.

<sup>28</sup> Ramsbotham & Woodhouse, *Humanitarian Intervention*, pp 14-18.

<sup>29</sup> Shapcott, *International Ethics*, p. 128.

<sup>30</sup> See, D. Rieff, *A bed for the night: humanitarianism in crisis* (London: Vintage, 2002).

However, according to a narrower interpretation of the scope of humanitarianism, individuals must be treated ‘equally’ or impartially if (and only if) they have assumed the status of non-combatants.<sup>31</sup> This interpretation is reinforced by R2P, which requires interveners to protect victims of atrocities. As later chapters will show, the concept of a non-combatant raises difficult theoretical questions, but these can be ignored here. In any case, since the narrow interpretation does not explicitly rule out the unequal or partial treatment of *combatants*, the military halting of a humanitarian crisis does not contradict the spirit of humanitarianism. Of course, just war theory must provide a more detailed argument for why combatants, unlike non-combatants, need not be treated equally. But assuming this can be done, a *military humanitarian* intervention is not an oxymoron.

In fact, the humanitarian emphasis on the values of neutrality and impartiality, if it is construed along the lines of the narrow interpretation, serves as an important reminder not to resort to Manichean thinking. Given what we know about mass atrocities, the purpose of MHI cannot consist in assisting a ‘good’ group of victims against a ‘bad’ group of rights violators.

First, as Card points out, since the categories of ‘victim’ and ‘perpetrator’ are abstractions, it is likely that individuals and groups occupy both roles.<sup>32</sup> To illustrate the point, consider the aforementioned UN report on war crimes and atrocities committed against Hutus who had fled to Zaire/DR Congo in the aftermath of the Rwandan genocide. During the Rwandan genocide the dominant Hutus turned against the elite Tutsis. But the Rwandan Army, whose actions the UN report singles out, was led by Tutsis. Here the roles of victim and perpetrator are reversed. Alternatively, consider Primo Levi’s well-known account of the *Sonderkommandos* in Auschwitz. The *Sonderkommandos* were groups of Jewish prisoners who were ordered to kill fellow Jews in the gas chamber and crematoriums of the concentration camp. Building on Levi’s work, Card argues that conflicts can give rise to ‘grey zones’ where victims become complicit in atrocities by assisting the principal perpetrators.<sup>33</sup> As the two examples show, victims may become perpetrators because they want to exact revenge or out of fear for their own survival. Conversely, perpetrators can also become victims.

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<sup>31</sup> Shapcott, *International Ethics*, p. 128.

<sup>32</sup> C. Card, *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge: Cambridge University Press, 2010), pp. 15-16.

<sup>33</sup> Card, *Atrocity Paradigm*, pp. 211-234.

Second, contemporary (domestic) conflicts often amount to complex emergencies, which are characterised by a plurality of actors with different agendas.<sup>34</sup> It is thus increasingly difficult to determine who deserves support.

Third, although atrocities are collectively perpetrated, ‘perpetrator groups’ are rarely homogenous entities. In fact, they often exert violence against their own members. During the Bosnian civil war, for instance, Bosnian Serb forces threatened to kill fellow Serbs if they refused to participate in the massacring of Bosnian Muslims.<sup>35</sup> Victims, as one can see, can even exist within perpetrator groups.

In sum, the three points show that MHI must be conducted in the interest of *all* of those who suffer from the effects of a conflict. Humanitarian values remind us that there are no first or second class victims.

Having argued that a commitment to humanitarianism is compatible with military intervention, let us now try to formulate a working definition of MHI:

*The term military humanitarian intervention describes uses of military force that a) constitute a deliberate interference in the internal affairs of another state, i.e. the target state, b) constitute a coercive act, c) are carried out in the name of non-citizens via an appeal to their basic rights and d) are conducted in such a way as to serve the interests of all victims of a humanitarian crisis equally.*

Admittedly, the definition can be challenged, but it is attractive because it can be developed further. For instance, it can easily accommodate R2P by adding a special reference: *e) [MHI] represents the discharge of the responsibility to protect.* Moreover, note that this basic definition does not include any reference to the nature of the intervening party. Although we have used a rather statist language so far, it is worthwhile pointing out that one of the central debates in contemporary just war theory is concerned with the status of the so-called ‘right authority criterion’, which forms an important part of the normative (and legal) justification of a just war. Taking a cue from international law, some contemporary just war theorists, most notably Walzer, assume that (only) (nation) states have the right authority to declare war. Recently, however, the state-centric version of the right authority criterion has

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<sup>34</sup> D. Keen, *Complex Emergencies* (Cambridge: Polity, 2007).

<sup>35</sup> See, D. Rieff, *Slaughterhouse: Bosnia and the Failure of the West* (London: Simon & Schuster, 1996).

been challenged.<sup>36</sup> Without going into more detail, while the above definition is clearly compatible with a statist or self-help-based approach to MHI, it does not foreclose the possibility of formulating a non-statist ethic of MHI, including a more radical version of R2P.

As should be apparent, though, any theory of MHI must be embedded in a broader theoretical project. First, our definition of MHI only provides a starting point for thinking about MHI. Second, the concept of humanitarianism in itself does not help us tackle some of the deeper points in the MHI debate mentioned in Part I. Part III outlines the ‘broader theoretical project’ in which the following reflections on MHI are couched.

### III

#### **Killing and constraint: Liberalism, non-consequentialism and war**

##### *A. Liberalism: cosmopolitan, nationalist, or legalistic?*

The broader theoretical project underpinning our analysis of MHI is contemporary liberal political theory. The core of the ‘Rawlsian’ brand of liberalism defended here assumes that individual human persons are primary objects of moral concern because they are capable of autonomously choosing a conception of the good.<sup>37</sup> As a result, they must be considered as free and equal, sharing a universal moral personality. One major debate in liberal political theory concerns the implications of this view for the moral status of (state) borders. Some theorists claim that the idea of a universal moral personality is compatible with special obligations (of distributive justice) owed to those with whom one shares the coercive (legal) institutions of a state (let us call this view liberal legalism), whereas others argue that liberal considerations allow the partial treatment of fellow members of democratic national communities (liberal nationalism). Against these two perspectives, cosmopolitan liberals argue that if one

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<sup>36</sup> See, C. Fabre, ‘Cosmopolitanism, Legitimate Authority, and the Just War’, *International Affairs*, 84 (2008), pp. 963-976 & U. Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), especially chapter I.

<sup>37</sup> In this sense, what follows is closer to Rawls’ *A Theory of Justice* than the revised version of his theory espoused in *Political Liberalism*, paperback edition (New York: Columbia University Press, 1996). As Richard Taylor shows, without a commitment to autonomy the Rawlsian conception of justice as fairness collapses. R.S. Taylor, ‘Rawls’s Defense of the Priority of Liberty: A Kantian Reconstruction’, *Philosophy & Public Affairs*, Vol. 31/Issue 3 (2003), pp. 246-271.



accepts the existence of a universal moral personality, boundaries have secondary moral importance.<sup>38</sup>

The following discussion of MHI is couched within the framework of liberal legalism. Generally, as we shall see over the course of the thesis, when compared to the remaining liberal theories, liberal legalism has three main advantages. First, unlike liberal nationalism, it is compatible with the fact that many ‘nation states’ are, in reality, ‘multi-nation states’. Since liberal legalists focus on the coercive functions of the law, they do not need to argue that a shared ‘national identity’ accounts for special relationships. Second, contrary to cosmopolitanism, liberal legalism expresses the intuition that membership in a political association gives rise to special relationships. Third, the rationale behind liberal legalism hints at a possible definition of the state. Following David Copp, the thesis understands the state as an ‘animated legal system’.<sup>39</sup> States are legal systems and enforce, via their various organs, the law against those under their rule. They are ‘animated’ in the sense that we cannot separate their operation from those who currently occupy offices within their apparatus. As will become apparent later, this definition of the state is particularly conducive to the discussion of the ethics of war.

Now, with regard to the more specific treatment of MHI, liberal legalism is helpful for three reasons. First, it is compatible with a normative commitment to humanitarianism. While liberal legalists do not extend egalitarian principles across the globe, they are nevertheless committed to confronting some of the worst excesses of human suffering.

Second, Part I pointed out that any theory of MHI must engage with fundamental questions about the value of sovereignty and the function of the state. Liberal

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<sup>38</sup> Representatives of liberal legalism include: M. Blake, ‘Distributive Justice, State Coercion and Autonomy’, *Philosophy & Public Affairs*, Vol. 3/Issue 3 (2001), pp. 257-296; T. Nagel, ‘The Problem of Global Justice’, *Philosophy & Public Affairs*, Vol. 33/Issue 2 (2005), pp. 113-147; A. Sangiovanni, ‘Global Justice, Reciprocity and the State’, *Philosophy & Public Affairs*, Vol. 35/Issue 1 (2007), pp. 3-39. It should be stressed that although these three authors pursue different objectives, they converge on the normative significance of membership in a shared legal system. The most influential representative of liberal nationalism is David Miller, see his *On Nationality* (Oxford: Oxford University Press, 1995) & *Global Justice and National Responsibility* (Oxford: Oxford University Press, 2007). Influential representatives of quasi-Rawlsian cosmopolitanism include: C. Beitz, *Political Theory and International Relations*, with a new afterword by the author (Princeton/N.J.: Princeton, 1999); G. Brock, *Global Justice: a cosmopolitan account* (Oxford: Oxford University Press, 2009); D. Moellendorf, *Cosmopolitan Justice* (Boulder/Col: Westview Press, 2002) & *Global Inequality* (London: Palgrave, 2009); T. Pogge, *Realizing Rawls* (Ithaca/N.Y: Cornell University Press, 1989).

<sup>39</sup> D. Copp, ‘The Idea of a Legitimate State’, *Philosophy & Public Affairs*, Vol. 28/No.1 (1999), pp. 3-45.

legalism is in a good position to provide the necessary theoretical background. Thomas Nagel, for instance, stresses that sovereignty is an ‘enabling condition’ that makes the pursuit of other values possible, especially distributive justice. Nagel’s point reinforces an important strand of argumentation in this thesis. It will later be argued that the occurrence of large-scale atrocities signals the failure of (formally) sovereign institutions to carry out their ‘enabling’ function. This has important implications for the aims of MHI.

Third, Part I argued that political philosophers must determine the obligations of outsiders to those threatened by atrocities. Without going into detail, rescue obligations always have individual and collective dimensions. In regard to the latter, David Miller argues that rescue obligations should be assigned nations and their states. But given the diversity of actually existing ‘nation’ states, this claim is deeply problematic. On the other hand, by stressing that the operation of the law establishes special relationships between citizens, liberal legalism enables us to develop a model of political community to whom collective duties, including the duty to intervene, can be assigned, even in the face of internal diversity.

While these points indicate some of the strengths of the liberal legalist position, its overall relation with the ethics of war remains vague. This is so because, unlike cosmopolitan theorists, non-cosmopolitan liberals, with the exception of Michael Walzer and John Rawls, have not addressed the issue of war in greater detail. Conversely, many just war theorists have not clarified their relationship with contemporary liberal political theory. To make progress on this issue, the endorsement of autonomy necessitates the development of a non-consequentialist perspective on MHI.<sup>40</sup> In order to get a better grasp of non-consequentialism, Section B gives a general overview of its main normative assumptions. Section C then outlines five normative challenges a non-consequentialist approach to just war theory must solve. Section D looks at the methodological dimension of non-consequentialist thought and examines its relevance for just war theory.

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<sup>40</sup> For a recent consequentialist perspective on MHI, see E. A. Heinze, *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention* (New York: State University of New York Press, 2009).

## B. *Ends and means*

As its names suggest, non-consequentialism is critical of consequentialist approaches to ethics.<sup>41</sup> The latter assume that the rightness or wrongness of an act has to be assessed in terms of its consequences. Utilitarianism is the most prominent form of consequentialism. Though it exists in various guises, it essentially rests on the claim that acts are deemed good if (and only if) their consequences maximise the welfare for the greatest possible number (of individuals).

To pre-empt potential misunderstandings, non-consequentialists agree with their consequentialist counterparts on the importance of consequences in our ethical reasoning. For individual agents, failure to take consequences into account is unreasonable at best and negligent at worst. Yet, in order to avoid any counterintuitive or even morally perverse results, non-consequentialists place so-called deontological constraints on the extent to which consequences can legitimately enter into our ethical reasoning. In the absence of such restrictions, for example, a doctor may be permitted to kill a healthy patient in order to save five others, provided doing so leads to preferable overall consequences. Similarly, bombing a kindergarten during war becomes permissible if doing so frightens the enemy into submission, thereby shortening the overall bloodshed of war.

According to (some) non-consequentialists, these examples show that consequentialism, especially in its utilitarian form, fails to respect what Rawls calls 'the separateness of persons'. Immanuel Kant's second formulation of the Categorical Imperative, i.e. that one should never merely treat individuals as means but always *also* as ends-in-themselves, is often cited as the main inspiration for this criticism.<sup>42</sup> As the above invocation of autonomy suggests, what is distinctive about human persons is their ability to deliberate and make autonomous choices about what to do. According to Kantian critics of consequentialism, then, the problem is that although, at the input level, consequentialists initially take the status of each individual seriously, their interest in consequences entails that some individuals are

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<sup>41</sup> The following account of non-consequentialism and consequentialism is based on, respectively, F.M. Kamm, 'Non-consequentialism', in: Kamm, *Intricate Ethics: Rights, responsibilities and permissible harm* (Oxford: Oxford University Press, 2007), pp. 11-47 & W. Shaw, 'The consequentialist perspective', in: J. Dreier (ed.), *Contemporary Debates in Moral Theory* (Oxford: Blackwell, 2006) pp. 5-20.

<sup>42</sup> I. Kant, *Groundwork of the Metaphysics of Morals*, edited by M. Gregor/with an introduction by C.M. Korsgaard (Cambridge: Cambridge University Press, 1998).

treated, at the outcome level, as mere means rather than autonomous ends-in-themselves.

Of course, consequentialists can reply that even non-consequentialists cannot avoid treating individuals as means. But while Amy treats the bus driver as a means in order to travel to college, she must not fail to *also* treat him as an end-in-himself. Just as the killing of an innocent person to harvest his organs is not compatible with the ends-not-means thesis, beating up the bus driver because he does not have the right change for Amy's fare money is certainly a violation of his status as an end-in-himself.<sup>43</sup> The fact that social life is impossible without treating individuals as means supports, rather than challenges, the non-consequentialist attempt to protect our separate moral standing.

In fairness to consequentialism, however, few of its adherents want to deter people from visiting their doctor or put schoolchildren in the firing line of bombing squads. So-called rule utilitarians have tried to respond to the above criticisms by stressing that welfare should be maximised indirectly through the introduction of rules. The latter form an 'ideal code', whose consequences are preferable, in terms of long-term utility maximisation, to any comparable set of rules. To illustrate the point, the rules of 'due process' governing our legal system are more conducive to the long-term maximisation of welfare than, say, a policy allowing the police to lock up innocent individuals in order to pacify public opinion. Similarly, in order to prevent war from deteriorating into massacre, there should be rules that grant civilians immunity from (intentional) attack.<sup>44</sup>

Although it is impossible to survey the burgeoning literature in the field here, it is doubtful that the move from direct to indirect welfare maximisation can vindicate utilitarianism and other forms of consequentialism. First, rule utilitarians owe us an account of how we can choose between different sets of codes, otherwise their approach remains too vague to be practically useful.<sup>45</sup> Second, the security rule-utilitarianism offers is only surface deep because it is likely to collapse back into act-

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<sup>43</sup> G.A. Cohen, *Self-ownership, freedom and equality* (Oxford: Oxford University Press, 1995), especially chapter 10.

<sup>44</sup> R.B. Brandt, 'Utilitarianism and the rules of war', in: M. Cohen, T. Nagel & T. Scanlon (eds.), *War and moral responsibility* (Princeton: Princeton University Press, 1974), pp. 25-45. For a more contemporary treatment, see S. Nathanson, *Terrorism and the ethics of war* (Cambridge: Cambridge University Press, 2010), especially chapter 14.

<sup>45</sup> T. Mulgan, *Understanding utilitarianism* (Stocksfield: Acumen Publishers, 2007), pp. 126-127.

utilitarianism with its direct concern for consequences.<sup>46</sup> On the one hand, the ‘ideal code’ could simply consist of the rule that everyone is obliged to directly bring about the best possible short-term consequences. On the other hand, in order to avoid the charge of ‘rule worship’, rule utilitarians could concede that it is permissible to break rules, perhaps on a case by case basis, in order to bring about desirable consequences in the short run. As a result, rule utilitarianism abandons us in exactly those circumstances where we are the most vulnerable. This point is especially pertinent in the context of war.

These brief observations show that there are good reasons to reject consequentialism in its direct and indirect forms. We can now turn to three key deontological constraints that non-consequentialists place on consequentialist reasoning.

*Rights:* Moral rights, Robert Nozick argues, function as normative side constraints on consequentialist reasoning, while Ronald Dworkin contends that rights trump consequences.<sup>47</sup> ‘Individuals’, writes Nozick, ‘have rights, and there are things no person or group may do to them (without violating their rights)’. Having already encountered the idea of a basic right, we must now clarify *a*) how rights can be defined conceptually and *b*) on what basis it is possible to hold rights.

In regard to the conceptual question, the thesis understands rights as Hohfeldian claim-rights.<sup>48</sup> These are correlated to negative and positive duties, giving rise to a triadic relationship between a subject (right holder), object (duty bearer), and content (what the right entails).<sup>49</sup> In a rights-based relationship, then, the right holder holds a claim against the duty bearer to perform/not perform a certain act. Three points are noteworthy about the Hohfeldian concept of claim-rights.

First, Hohfeld’s analysis was originally intended to disambiguate the nature of *legal* rights. The correlation between duties and claim-rights appears natural because (legal) rights are usually enforceable via the legal system. The thesis, however, is interested in moral rights, which are, by definition, pre-legal and pre-political. But leaving the

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<sup>46</sup> (ibid), p. 122.

<sup>47</sup> R. Nozick, *Anarchy, state and utopia* (New York: Basic Books, 1974); R. Dworkin, ‘Rights as trumps’, in: J. Waldron (ed.), *Theories of rights* (Oxford: Oxford University Press, 1984).

<sup>48</sup> W.N. Hohfeld, *Fundamental legal conceptions as applied in judicial reasoning*, edited by D. Campbell, P. Thomas & N.E. Simmonds (unkown: Dartmouth Publishing, 2001). For a contemporary re-statement of Hohfeld’s ideas, see L. Wenar, ‘The nature of rights’, *Philosophy & Public Affairs*, Vol. 33/No. 3 (2005), pp. 223-253.

<sup>49</sup> L.W. Sumner, ‘Rights’, in: H. LaFollette (ed.), *The Blackwell Guide to Ethical Theory* (Oxford: Blackwell, 2009), p. 288-305.

issue of legal enforceability aside, Hohfeld's distinction between claim-rights and liberties is still useful because it enables us to render *moral* relationships precise.

Second, it is fallacious to draw a rigid distinction between negative and positive duties. Basic rights, according to Shue's analysis, are correlated to both. For Shue, basic rights entail negative duties not to deprive the right holder of a certain good as well as positive duties to protect rights holders and assist them in case their rights have been violated.<sup>50</sup>

Third, according to the Hohfeldian scheme, the opposite of claim-rights are liberty-rights, which are characterised by the absence of a duty [no duty not to]. Beyond this basic distinction, though, the relationship between liberty-rights and claim-rights is a complex one. Sometimes, for instance, a liberty-right may be embedded within the periphery of a claim-right. As we shall see in Chapter II, the so-called right to rule, held by legitimate states, consists of a liberty-right which allows states to enforce the law against those within their jurisdiction. The right to rule, however, also consists of a claim-right correlated to duties falling upon other states not to interfere with the rule of a legitimate state. Generally and for brevity's sake, whenever the thesis uses the term 'right' it has in mind the Hohfeldian concept of a claim-right. It simply refers to Hohfeldian liberty-rights as a 'liberty' or 'liberties'.

In regard to the justification of rights, the thesis takes a twofold approach. First, it uses Rawls' idea of natural duties of justice (abbreviated as natural duties hereinafter) as a possible justification of rights.<sup>51</sup> Natural duties reinforce the humanitarian account of basic rights offered in Part II. For Rawls, natural duties are owed between human persons, regardless of institutional relationships. They obtain, as Rawls puts it, between all of us as equal moral persons. Natural duties oblige us not to be cruel. In particular, the duty not to kill, which is correlated to the basic security right not to be attacked, is an important natural duty that applies irrespective of consent.

Second, the thesis appeals to the interest theory as formulated by Joseph Raz. The central idea for Raz is that one has rights insofar as one can benefit from the performance of the correlative duty.

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<sup>50</sup> Shue, *Basic Rights*, pp. 52-55.

<sup>51</sup> Rawls, *A Theory of Justice*, pp. 98-99.

*'X, has a right, if and only if X can have rights, and other things being equal, an aspect of X's well being (is a sufficient reason) for holding some other person under a duty'.<sup>52</sup>*

The interest theory is useful for two reasons. First, in conjunction with natural duties, it can back up our account of basic rights. Second, just war theory has to make judgements about the moral standing of groups. Because groups can have interests, the interest theory is able to provide us with a sound normative perspective on group rights. In this respect, the asset of the interest theory is that it does not force us to abandon moral individualism. For Raz, as will be explained in Chapters II and III, groups can have rights in virtue of the interests of their *individual* members.

*Doctrine of Double Effect* (abbreviated as DDE hereinafter): The Doctrine of Double Effect denies the claim, popular amongst utilitarians, that all the consequences of our actions should be given (roughly) equal weight. Non-consequentialists reply that we must be careful to distinguish between intended and foreseen consequences. For DDE, it is permissible to carry out an act if (and only if) its positive consequences are intended and its negative ones merely foreseen (subject to proportionality). For instance, it is permissible for a doctor to relieve a terminally ill cancer patient's pain (intended effect) by administering a high dose of morphine, which, eventually, will kill the patient (foreseen side-effect). As will be explained in a later chapter, the distinction between intended and foreseen side-effects is said to be crucial for the protection of our status as ends-in-ourselves.

*Doctrine of Doing and Allowing*: Utilitarian versions of consequentialism usually operate with a notion of negative responsibility. To wit, they hold agents responsible for negative consequences they failed to prevent. The doctrine rejects negative responsibility by distinguishing between consequences that result from our actions and those that we allow to happen through inaction. In this respect, it is possible to distinguish between killing and letting die. According to the doctrine, the former is worse than the latter. Suppose that one has a choice between two options: either one sends poisoned food to the victims of a famine or one does not send any food at all. For the doctrine, the first option is worse than the second. By sending the poisoned food we would kill the victims of the famine, whereas by not sending any food we let them die.

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<sup>52</sup> The interest theory, it needs to be stressed, is, in reality, a family of theories. For Raz's version, see *Morality of Freedom* (Oxford: Oxford University Press, 1986). For an exploration of the concept of 'interest', see C. Swanton, 'The concept of interest', *Political Theory*, Vol. 8/No. 1 (1980), pp. 83-101.

It is noteworthy that none of these deontological constraints is unproblematic. Interestingly, the ethics of war contains some of the strongest challenges to the status and role of deontological constraints in our moral reasoning. Let us draw attention to five central problems that a non-consequentialist theory of the just war must tackle. Somewhat dauntingly, these are particularly pressing in the context of MHI.

*C. Key questions for a non-consequentialist theory of war*

*The problem of proportionality:* We just saw that non-consequentialists and consequentialist are in agreement about the moral importance of consequences in our moral reasoning. Consequences also play a crucial role in just war theory, not least due to the proportionality criterion, which pertains to the declaration and conduct of war (see below). The criterion demands, quite reasonably, that the harms resulting from a certain course of action must not outweigh the benefits. Although the proportionality criterion remains obscure, it rests on two-interrelated claims.

First, according to what one may term the ‘qualitative claim’, an action, even if it leads to roughly the same benefits as an alternative action, is impermissible if the harms it causes are morally intolerable. The use of, say, the anthrax virus, rather than a conventional weapon, on enemy combatants is therefore impermissible. Second, according to what one may term the ‘quantitative claim’, numbers (of victims) count morally. For instance, if Green’s air force can chose between bombing Yellow’s munitions factory during the day or during the night when most of its workers have gone home, Green’s generals are obliged to pursue the second option.<sup>53</sup> It matters, then, how people are killed and how many of them are killed.

For a non-consequentialist theory of the just war, the problem of proportionality arises at an epistemological and normative level. In regard to the former, unlike in a philosophical thought experiment, we only have limited knowledge of the possible consequences any action, in the real world, might have. Due to an increase in demand for shell supply, for example, Yellow’s munitions workers, unbeknownst to

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<sup>53</sup> In a famous article, John Taurek casts doubt over this claim, concluding that one should decide impartially whom to harm or rescue (e.g. by tossing a coin). But given that non-consequentialists do not entirely discard consequences, Taurek’s line seems unnecessarily harsh. Intuitively, we do think it is worse if more people die. The thesis therefore follows those non-consequentialists who assume that numbers do count, though they disagree over exactly how this claim can be justified. See, J. Taurek, ‘Should the numbers count?’, *Philosophy & Public Affairs*, Vol. 6/No. 4 (1977), pp. 293-316. For two non-consequentialist writers who defend saving the greater number, see F.M. Kamm, *Morality, Mortality*, volume I (Oxford: Oxford University Press, 1996) & T.M. Scanlon, *What we owe to each other* (Cambridge/Mass: Harvard University Press, 1998).



Green's generals, may have returned for an additional shift during the night. The solution, it seems, consists in the introduction of an appropriate decision procedure through which one can assess the likelihood of different options. Even if an act does not result in the 'reasonably' expected outcome, the fact that it was reached through a sound procedure renders it at least excusable. But for reasons of space, we shall not pursue the epistemological component of the problem of proportionality here.

At a normative, rather epistemic, level it must be clarified how numbers are to be balanced against each other. It must be answered whether different weight may be attached to similar numbers, depending, say, on the relationship in which those affected stand to each other. Consequences matter, but the challenge is to find out *how* they matter. This is a task to which we return later.

*The problem of combatant liability:* As we just saw, for Nozick, individual rights, including the right not to be attacked, are important 'side-constraints' on political action. The problem of combatant liability consists in establishing why (if at all) combatants lose their basic security right not to be attacked during war.<sup>54</sup> In what follows, the term liability indicates the loss of the right not to be attacked. War entails, by definition, the large-scale and intentional killing of combatants. If it cannot be shown that combatants are liable to attack, war is nothing but a violation of natural duties and basic rights.

It is possible to respond that combatants are not individuals in their own right but representatives of sovereigns. But this does not explain how individuals assume this role and why doing so leads to the loss of some of their rights. Perhaps war is analogous to a boxing match where participants consent to harm each other in the name of their respective sovereigns (subject to certain rules). Yet, as Jeff McMahan convincingly argues, combatants rarely, if ever, 'consent' to being attacked.<sup>55</sup> But even if consent was rendered, it is questionable whether it is possible to consent to the infliction of deadly harms at the hands of another party.

The problem of combatant liability is amplified in the context of MHI. As was observed above, the intervening state has to engage in an act of aggression. As a result, intervening combatants need to attack the soldiers of the target state, although

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<sup>54</sup> See, J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 8-9.

<sup>55</sup> J. McMahan, 'On the moral equality of combatants', *Journal of Political Philosophy*, Vol. 14/Issue 4 (2006), pp. 377-393.

the latter do not pose a threat to them. It is possible to argue that, through their participation in atrocities, the target state's soldiers incur liabilities to attack. But it is not necessarily true that *all* of the target state's soldiers are involved in the perpetration of atrocities. Intervening soldiers, therefore, are likely to encounter combatants who are merely ordered to defend the target state. Theories of MHI need to prove that the latter incur liabilities to attack, despite the fact that *they* are victims of aggression.

*The problem of mandatory killing:* The problem of mandatory killing is simply the other side of the same coin. Just as it needs to be shown that combatants are liable to be killed, it must also be shown that individuals are morally obliged to *a)* surrender their autonomy to the military apparatus of the state and *b)* kill in the name of a broader political project. As is to be expected, consent plays, again, a central role here. Historically-speaking, however, just as many individuals never consented to being targeted in battle, few had a choice over whether to kill or not. Because, due to the recent rise of R2P, we are interested in whether MHI can ever be morally obligatory, the thesis discusses the problem of mandatory killing as it pertains to the citizens of potential intervening states. It tries to find out whether it can ever be obligatory to kill on behalf of *non*-members of one's own political community.

*The problem of non-combatant immunity:* In addition to the large-scale killing of combatants, the use of military force inevitably impacts on those who do not participate in hostilities. The problem of non-combatant immunity gives rise to two central issues. First, from a conceptual perspective, one of the major challenges for just war theory is to specify how one can draw a line between combatants and non-combatants. This is a particularly difficult undertaking for theories of MHI. As was pointed out in Part II, just as the boundaries between victims and perpetrators may be fluid in atrocities, the distinction between perpetrators and bystanders is less than clear cut.

Second, from a normative perspective, it needs to be demonstrated that non-combatants can be permissibly harmed. To solve this problem, DDE has been conscripted, for better or worse, into just war theory. Accordingly, Green's air force is permitted to destroy Yellow's weapons factory even though non-combatants in a nearby settlement will be harmed as a side-effect. But it is impermissible to intentionally bomb the civilian settlement *in order* to scare the enemy into submission.

Yet, in addition to the issue of whether it is conceptually possible to distinguish between what we foresee and what we intend, the question is whether so-called ‘strategic bombing’ is normatively defensible. For it must be proven that although they are exposed to lethal harm, those non-combatants in the settlement are still treated as ends-in-themselves.

*The problem of non-consequentialist anti-interventionism.* The Doctrine of Doing and Allowing does not merely challenge just war theory. Rather, it seems to undermine the idea of MHI as such. In fact, it could amount to what one may term a form of non-consequentialist anti-interventionism. Non-consequentialist critics of MHI can argue that if a state fails to intervene in order to halt atrocities, it lets innocent people die. By contrast, if it intervenes it will kill innocent people. Since killing is worse than letting die, MHI should not take place.

We must investigate how far a non-consequentialist approach to MHI can resolve these problems. To do so, we must first gain a better understanding of the methodology underlying non-consequentialist theorising.

#### D. *From intuitions to equilibrium*

From a methodological perspective, non-consequentialism can be considered as an intellectual heir to the Enlightenment project. Unlike fashionable poststructuralist approaches, its adherents do not rule out the attainability of objective moral knowledge. Assuming a sound methodology is available, non-consequentialists are optimistic about the prospect of finding out what is the right or wrong thing to do. An influential strand of non-consequentialism assumes that intuitions play a key role in our moral theorising.<sup>56</sup> In order to defend the central status of intuitions in moral theorising, this section argues that Rawls’ method of reflective equilibrium represents the best methodology available to contemporary non-consequentialists. It argues that reflective equilibrium is particularly suited for a critical discussion of the ethics of war.

To begin, it is noteworthy that our intuitions may contradict each other or collide with some of our other beliefs. To deal with this possibility, Rawls proposes a

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<sup>56</sup> For an example, see F.M. Kamm, ‘In Search of the Deep Structure of Morality’, in: A. Voorhoeve (ed.), *Conversations on Ethics* (Oxford: Oxford University Press, 2009), pp. 15-42.

method called ‘reflective equilibrium’.<sup>57</sup> In a nutshell, reflective equilibrium is a critical and inductive approach to moral theorising, which, by moving back and forth between our intuitions, seeks to render them coherent. To achieve coherence, agents must *a)* test principles against each other, *b)* look for ways in which beliefs support each other, *c)* look for coherence amongst the widest possible sets of beliefs, and *d)* revise them if they do not fit. Coherence is finally achieved when there are no inclinations to revise principles further. This process does not only assist us in adjudicating clashes between our intuitions. It also delivers, Rawls claims, objective moral knowledge. As Rawls puts it, moral objectivity obtains when we reason about what is distinct from any given individual’s point of view and arrive at determinate answers in at least as many cases that all reasonable people have good reasons to regard as authoritative.<sup>58</sup>

However, Rawls, it needs to be stressed, eschews the term intuitions, appealing to what he calls considered judgements instead. These judgements are more complex than mere intuitions. They have four features:

1. Considered judgements are held in a confident manner.
2. Considered judgements are, at least initially, held intuitively without recourse to further principles.
3. Considered judgements are held in knowledge of the relevant facts and when we are cool, calm and collected.
4. Considered judgements occur at different levels of generality, ranging from the particular (Amy should not steal from Ben) to the most abstract (human persons should be treated as ends-in-themselves).

Furthermore, we must distinguish between considered judgements that have been rendered coherent in narrow and wide reflective equilibrium.<sup>59</sup> In the former, we merely render our considered judgements coherent. This leads to what Thomas Scanlon calls a ‘weak justification’, that is, a person who has rendered her views

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<sup>57</sup> See J. Rawls, ‘Outline for a decision procedure for ethics’, in: J. Rawls, *Collected papers*, edited by S. Freeman (Cambridge/Mass: Harvard University Press, 1999), pp. 1-19.

<sup>58</sup> Rawls, *A Theory of Justice*, pp. 450-456.

<sup>59</sup> For this distinction, see J. Rawls, ‘The independence of moral theory’, in: Rawls, *Collected papers*, pp. 286-302. Also, see N. Daniels, ‘Wide Reflective Equilibrium and Theory Acceptance in Ethics’, *Journal of Philosophy*, Vol. 76/No.5 (1979), pp. 256-82

coherent is justified in holding them.<sup>60</sup> By contrast, in a wide reflective equilibrium, we render our considered judgements coherent by testing them against different moral theories. We also contrast and test these theories against each other. If carried out correctly, we achieve what Scanlon calls a strong level of justification, that is, there are in themselves good and sufficient reasons to support a principle.

Having outlined the method of reflective equilibrium, we must examine three criticisms that are commonly levelled against it. First, although the rules of astrology can, in principle, be rendered coherent,<sup>61</sup> this does not mean that they gain any epistemological validity. By analogy, rendering considered judgements coherent does not necessarily lead to objective moral knowledge. Advocates of reflective equilibrium can respond that the analogy between the rules of astrology and our considered judgements held in reflective equilibrium is mistaken. This is because the former depend on *independent* empirical or factual judgements that are fallacious. But reflective equilibrium does not depend on any independently existing moral properties. The latter may indeed be ‘queer’ if they existed.<sup>62</sup> The attraction of reflective equilibrium as a moral philosophical method partly lies in the idea that, without ruling out the attainability of moral knowledge, it manages to bypass complex meta-ethical issues. Reflective equilibrium is concerned with finding sound philosophical justifications for moral principles rather than solving meta-ethical puzzles.

Secondly, reflective equilibrium is sometimes criticised for being inherently conservative. Especially utilitarian thinkers hold that because our considered judgements are shaped by contingent historical processes, they result in unduly conservative moral principles.<sup>63</sup> But this charge overlooks that reflective equilibrium is a critical moral methodology. On the one hand, considered judgements, although held intuitively, entail a process of reflection. On the other hand, as Scanlon emphasises, reflective equilibrium is Socratic in orientation because it relies on a critical examination of our views.<sup>64</sup> The very process of working back and forth

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<sup>60</sup> T.M. Scanlon, ‘Rawls on justification’, in: S. Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), pp. 139-167.

<sup>61</sup> The example comes from (ibid.), p. 146.

<sup>62</sup> J.L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977).

<sup>63</sup> These doubts are raised by R. B. Brandt, ‘The Science of Man and Wide Reflective Equilibrium’, *Ethics*, Vol. 100/No. 2 (1990), pp. 259-278 & P. Singer, ‘Ethics and Intuitions’, *Journal of Ethics*, Vol. 9/Issue 3/4 (2005), pp. 331-352.

<sup>64</sup> Scanlon, ‘Rawls on justification’, p. 149.

between our considered judgements is designed to help us realise the conservative nature of some of our assumptions. We can even modify our considered judgements or abandon them in case they become untenable. Furthermore, we may, upon receiving further information, introduce new considered judgments into the process. The method of reflective equilibrium can even lead to a ‘moral surprise’ because, upon closer inspection of one’s considered judgements, one may arrive at a moral position that one has previously rejected.<sup>65</sup>

The third challenge is the charge of relativism. In brief, since different people may have different considered judgements about similar cases, we are faced with the possibility of different reflective equilibriums. Yet, as was pointed out above, since we may readjust or abandon our considered judgements during our search for reflective equilibrium, it is theoretically possible to arrive at a widely shared equilibrium, notwithstanding different starting points. Moreover, disagreement does not necessarily signal that the method of reflective equilibrium has failed. Agents may have made mistakes in their moral reasoning by, say, overlooking or misinterpreting a certain point. In such cases, we must enter the process of reflective equilibrium again in order to re-evaluate some of our considered judgements. Finally, the distinction between ‘narrow’ and ‘wide’ versions of reflective equilibrium assists us in overcoming the relativism objection. As we saw above, in the wide version of reflective equilibrium agents test their principles against different moral theories. By adding an even more demanding layer of complexity to our moral reasoning, wide-reflective reflective equilibrium narrows the scope for disagreement.

If the above is correct, reflective equilibrium is a sound methodology for moral philosophical inquiry. Let us now consider why it is a particularly useful method for the normative analysis of MHI. First, reflective equilibrium is a critical methodology. As such, it can assist us in probing some of the tenets of just war theory. To make sense of the phenomenon of MHI, we must test our considered judgements about, say, the value of community, the value of human life, the moral standing of states, or the meaning of innocence. In order to render them coherent, we will have to reconsider some of our values or even abandon them entirely. One considered judgement that will figure prominently in this thesis is that targets of aggression are allowed to defend themselves against aggressors. But as will be argued later, when

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<sup>65</sup> N. Daniels, ‘Reflective Equilibrium’, *The Stanford Encyclopaedia of Philosophy* (Winter 2003 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/entries/reflective-equilibrium/>

balanced against considered judgements about the function of the state and the value of individual life, it has to be abandoned.

Second, the inductive nature of reflective equilibrium enables us to critically contrast our considered judgements about war with related cases of killing and saving in domestic society. To discuss the ethics of war, we need to start somewhere, and the best way of doing so entails turning to our considered judgements about killing and saving in *domestic* circumstances. There is an influential tradition within just war theorising that draws an analogy, henceforth the Domestic Analogy, between the ethics of self-defence in a domestic context and the ethics of war in an international one. The thesis uses reflective equilibrium to revive the Domestic Analogy and broaden its scope by applying it to the problem of MHI. The process of reflective equilibrium, then, should enable us to render some of our key considered judgements about killing and saving coherent *across* domestic and international contexts. It is, strikingly, one of the staunchest (utilitarian) critics of reflective equilibrium, Peter Singer, whose thoughts on MHI illustrate how this process might work.

‘But in the end, we need to do something that will make potential perpetrators of genocide fear the consequences of their actions. Just as, at the domestic level, the last line of defence against individual crimes of murder, rape, and assault is law enforcement, so too the last line of defence against genocide and similar crimes must be law enforcement, at global level, and where other methods of achieving that fail, the method of last resort will be military intervention’.<sup>66</sup>

Let us leave aside the normative substance of Singer’s argument, i.e. the appeal to the concept of law enforcement. From a methodological perspective, the quote illustrates that one starts by examining one’s considered judgements about domestic responses towards certain types of crimes and then works one’s way up towards the international sphere by moving back and forth between considered judgements in both realms. Applied to the topic of MHI, the result of this approach is the other-defensive conception of MHI.

#### E. *The other-defensive conception of military humanitarian intervention*

The above outlined the normative and methodological dimensions of liberal and non-consequentialist political and moral theorising. On this basis, the thesis develops

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<sup>66</sup> P. Singer, *One World: The Ethics of Globalisation* (New Haven: Yale University Press, 2002), p. 112.

the other-defensive conception of MHI. Utilising the Domestic Analogy, the other-defensive conception of MHI draws an analogy between domestic rescue killings and MHI. A rescue killing obtains when a rescuer defends a victim against an attacker. By analogy, the intervening state defends victims of atrocities against perpetrators. The endorsement of the Domestic Analogy is the outcome of two considerations. First, it provides a mechanism through which we can link the ethics of killing and saving with theories of MHI. Second and from a methodological perspective, it enables us to reconcile our considered judgements about the ethics of killing and saving with the ethics of war. As Chapter II shows, theorists of MHI do not engage with the ethics of killing and saving. This is a serious shortcoming that the other-defensive conception of MHI seeks to address.

The other-defensive conception of MHI articulates a liberal and non-consequentialist understanding of the ethics of war. The liberal element results from the aforementioned endorsement of the value of autonomy. The latter has two important implications for the theory of MHI defended here.

First, the other-defensive conception of MHI stresses that individual agency is central to the solution of the problem of combatant liability. Combatants are liable to attack precisely because they are morally responsible agents. Liberalism considers individuals as agents who are capable of regulating their conduct according to basic moral principles. Failure to do so establishes liability to attack in certain circumstances. In other words, an agent loses his right not to be attacked because he is morally responsible for an unjust threat. The agency-based solution to the problem of combatant liability is particularly suitable for the specific circumstances posed by atrocities and has far reaching implications for the relationship between intervening combatants and the target state's combatants.

Second, the other-defensive conception of MHI contends that certain public goods are necessary for the realisation of autonomy. In this way, the other-defensive conception of MHI connects the ethics of MHI with a key theme from liberal political thought in general and the liberal legalist position in particular, namely the rule of law. In order to be able to act autonomously, we must be subject to a legal system that is capable of preserving the peace amongst us. As a result of this view, the other-defensive conception of MHI broadens the objective of interventionist action. The goal of MHI does not merely consist in halting a humanitarian crisis.



Interveners are also obliged to assist members of post-atrocity societies with the construction of decent, secure and law governed social relations. Controversially perhaps, the other-defensive conception of MHI maintains that the liberal democratic model of government is well suited for the pacification of post-atrocity societies. The emphasis on the importance of public goods is congruent with R2P. Advocates of the latter also defend ‘a duty to rebuild’.

Note, however, that the invocation of the value of autonomy gives rise to a central tension at the heart of the other-defensive conception of MHI. On the one hand, the other-defensive conception of MHI focuses on individuals. At the same time, though, it follows liberal legalism by making a positive case for state sovereignty. Can liberals have it both ways? Can they attach moral weight to individuals *and* states? Although it is not possible to give a detailed answer here, we return to these questions when we consider the relationship between intervening combatants and their adversaries in Chapter IV. For now let us outline four points in defence of the other-defensive conception of MHI.

First, as was already indicated in Part I, any just war theory, liberal or not, is subject to the same tension between individuals and states because war encompasses both units of analysis. Of course, statists can respond that individuals, especially combatants, should not be considered in virtue of their standing as free and equal human persons. Instead, they are agents of the state. But even an entirely statist theory would still have to provide a mechanism that convincingly accounts for how individuals become part of the sovereign. Considering McMahan’s criticisms of consent, it is doubtful that pure statism would succeed in this regard.

Second, the intentional (and non-consensual) killing of an individual is normally considered as a grave moral wrong. Because war entails the large-scale and intentional killing of combatants, even those committed to statism must pay attention to the standing of individuals as such. As we shall see in Chapter IV, while Walzer, by far the most influential contemporary advocate of a *statist* version of just war theory, argues that war is a legal condition between states, he acknowledges that it is also a moral condition which obtains between armies and individual soldiers.<sup>67</sup> Accordingly, for Walzer, the mere fact that states have entered into the legal relation of war is not sufficient for combatants to be liable to attack. Hence he provides a

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<sup>67</sup> Walzer, *Just and Unjust Wars*, p. 41.

number of justifications [for intentional killing] that focus on the individual. Regardless of whether this claim is normatively sound, it illustrates that statism and individualism are not morally exclusive in just war theory.

Third, MHI is a special case for just war theory because it is, for the other-defensive version at least, aimed at the halting of large-scale atrocities. There will be large numbers of individuals in the target state who violate basic rights by participating in atrocities. Those who do not abide by the laws of war cannot claim the (legal) protection of their state. Historically speaking, the Nuremberg Trials emphasised the importance of *individual responsibility* for our normative and legal assessment of atrocities. As Walzer, quoting a famous scene from Shakespeare's *Henry V*, makes clear, while obedience to the king wipes the crime of war out of soldiers, superior orders are no defence for committing atrocities.<sup>68</sup> The very subject matter of MHI, then, forces us to supplement a statist perspective with an individualist one.

Fourth, the statism of the other-defensive conception of MHI is heavily qualified. As Chapter II explains, for liberals, the state has no intrinsic value. States matter because individuals matter. The other-defensive conception of MHI is statist *and* liberal because its commitment to autonomy informs its endorsement of sovereignty and the rule of law. If we are interested in protecting individuals, we must pay attention to states. In this sense, qualified statism and individualism mutually reinforce each other.

If these points are correct, one should not set up a false dichotomy between individuals and states. A liberal version of just war theory can and should incorporate both. Having clarified and defended the liberal element of the other-defensive conception of MHI, we can now turn to the non-consequentialist element.

The relationship between non-consequentialism and the other-defensive conception of MHI is complex. On the one hand, the other-defensive conception of MHI affirms the importance of restricting the way in which consequences enter into our moral reasoning. To do so, it affirms the relevance of the distinction between combatants and non-combatants for just war thinking. It also defends the incorporation of DDE into just war theory. Moreover, the other-defensive conception of MHI stresses the importance of rights as side-constraints. It tries to

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<sup>68</sup> (ibid.), p. 39.

show that negative duties not to harm are much more stringent than some dominant strands of contemporary just war theory assume. For instance, it contends that individuals who do not possess agency, so-called non-responsible attackers, are not liable to attack. It further argues that those who pose a *just* threat are not liable to attack either.

On the other hand, the other-defensive conception of MHI is critical of some aspects, or possible interpretations, of non-consequentialism. First, it criticises those non-consequentialists, who utilise the Doctrine of Doing and Allowing, in order to defend an anti-interventionist position. Of course, this does not necessarily mean that the distinction between killing and letting die is unsound. Rather, its normative appeal is limited in the context of *atrocities*. The other-defensive conception of MHI questions whether watching genocide unfold without intervening is worse than bringing about the deaths of a certain number of individuals in order to halt it.

Second, although rights act as important side-constraints on actions, the other-defensive conception of MHI opposes the ‘strict deontological’ claim that rights, especially the right not to be attacked, are absolute. If this was the case, it would never be morally permissible to endanger the lives of those who are not liable to attack. To avoid this conclusion, the other-defensive conception of MHI maintains that rights can sometimes be permissibly infringed. That is to say, in certain circumstances it is permissible to override, i.e. not observe, the correlative duty of the right in question, especially the right not to be attacked. For the other-defensive conception of MHI, rights infringements are morally defensible due to the general claim that a concern for numbers is compatible with non-consequentialism. But more interestingly, the permissibility of rights infringements also arises from the morally distinctive context of MHI. As we shall see, it matters morally that MHI aims to *a)* prevent ‘intolerable’ harms and *b)* provide certain public goods for those in the target state.

With these remarks about the background assumptions of the other-defensive conception of MHI out of the way, let us outline a definition of MHI.

*Being analogous to the domestic use of force by a rescuer in defence of a victim of unjust aggression, MHI entails the halting of Atrocity Crimes via military force by an ‘intervening party’. The use of military force a) constitutes a deliberate interference in the internal affairs of another state, i.e. the*

*target state, b) constitutes a coercive act (because it is undertaken without the target state's consent), c) is carried out in the name of non-citizens via an appeal to their basic rights, d) is conducted in such a way as to serve the interests of all victims of a humanitarian crisis equally, particularly through the provision of certain public goods necessary for the establishment of a reasonably secure basic structure, and e) represents the discharge of the Responsibility to Protect.*

Six main benefits follow from this conceptualisation of MHI. First, as will be shown over the course of the next few chapters, the other-defensive conception of MHI is in a good position to solve the problems of proportionality, combatant liability, and non-combatant immunity. It also sheds some light on the problem of mandatory killing. Second, it draws attention to some of the neglected issues in the MHI debate, most notably the conduct of MHI. Third, it provides a philosophical foundation for R2P. Fourth, it is sufficiently broad to appeal to liberals who do not subscribe to the liberal legalist position. Fifth, the idea of a war *in defence of others* coheres with some of the classic Augustinian and modern natural law-based views on MHI in just war theory. Thus, although the thesis approaches MHI through the framework of contemporary liberalism, it fits into the broader tradition of just war thinking. As will become apparent in Chapter IV, it tries to revive some of the older assumptions of just war theory that have been neglected in modern times.

Sixth, it was observed in Part II that the status of the right authority criterion is disputed in contemporary just war theory. The other-defensive conception of MHI, as our definition shows, does not take sides in this dispute. It refers vaguely to an 'intervening party', which can be a state or a non-state actor. As such, it is compatible with statist and post-statist versions of MHI and can be amended accordingly. In what follows, however, it is assumed that states are likely to act as intervening parties. On the one hand, the thesis does so for the sake of convenience. As Chapter II explains, the framework for and language of contemporary theories of MHI is predominantly statist, and it is, in my view, easier to discuss the ethics of MHI by using a language we already know.

More importantly, due to the liberal legalist emphasis on the importance of public goods, the other-defensive conception of MHI is fairly demanding and, at the moment at least, it seems that states have the necessary resources at their disposal to carry out a military campaign. For this and related reasons, the thesis sticks with the formulation introduced in Part I of this chapter and refers to the intervening party as

the ‘intervening state’. While, as the endorsement of liberal legalism shows, the other-defensive conception of MHI is certainly not unsympathetic towards a (liberalised) form of statism, it is not categorically committed to it, at least insofar as the identity of the intervening party is concerned.

Generally, the issue of ‘right authority’ reveals a tension at the heart of the other-defensive conception of MHI, which is, I think, characteristic of many theories of MHI. On the one hand, the other-defensive conception of MHI is concerned with efficient interventionism. Far too often potential interveners have stood by while tragedies unfolded. In this sense, those who ‘can’ intervene ‘should’ intervene, subject to further criteria set out in the following chapters. If states cannot be persuaded to intervene, non-state actors should take over this task. On the other hand, given that, as was indicated above, the other-defensive conception of MHI is fairly demanding, potential interveners need to have considerable resources at their disposal in order to stabilise societies ravaged by Atrocity Crimes. As one can see, then, there is a tension between ‘efficiency’ and ‘capacity’, which is difficult, if not impossible, to resolve. Since capacity plays an important role in the formulation of the central contours of the other-defensive conception of MHI, especially in Chapters VI and VII, the argument will, initially at least, be entirely expressed in statist terms.

Before we outline the arguments of this thesis in detail, the idea of an other-defensive war, it should be stressed, is *one* (liberal) conception of MHI amongst others. To wit, it is a (particular) conception of the (general) concept of MHI. The distinction between concept and conception goes back to Rawls’ work.<sup>69</sup> As Chapter II explains, contemporary liberal theorists are pro-interventionists. As a result, their views share certain similarities. For instance, all are committed to the quasi-Lockean view of political authority mentioned Part I, all are concerned with rights, and none of them attaches intrinsic moral importance to the state. But, as Chapter II shows, liberal theorists differ on how central aspects of the concept of MHI should be interpreted. In this sense, liberal theorists develop different conceptions of MHI. The other-defensive conception of MHI, then, should not be taken to be the ‘last’ or ‘only’ word on MHI. Instead, the following theoretical reflections are intended as a starting point for what will hopefully be a wider discussion of MHI. Indeed, as Rawls

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<sup>69</sup> Rawls, *A Theory of Justice*, p. 5.

admits, moral theorising via reflective equilibrium should not be understood as a closed process but an open-ended one.

#### IV

Just war theory operates with three central categories that underlie the chapter structure of this thesis. First, the *jus ad bellum* (abbreviated as JAB hereinafter), which contains the just cause, proportionality, right intention, last resort, right authority and reasonable likelihood of success criteria, judges the permissibility of the declaration of war. Second, the *jus in bello* (abbreviated as JIB hereinafter), which contains the discrimination and proportionality of means criteria, governs the conduct of war. Third, the *jus ex bello* and *jus post bellum* (abbreviated as JEB and JPB hereinafter) govern the termination of hostilities and the establishment of a just post-war order, respectively. Chapters II and III mostly deal with JAB. Chapter IV is interested in the relationship between JAB and JIB, whereas Chapter V narrows the focus to JIB. While chapters II-V have established the permissibility of MHI, Chapter VI asks whether the latter should also be made obligatory. Chapter VII rounds off the inquiry by turning to JEB and JPB. More precisely, the six main chapters of the thesis explore the following issues.

#### Chapter II

Chapter II surveys the treatment of MHI by contemporary liberal political theorists. It is the most exegetical chapter of this thesis. It begins by critically discussing Michael Walzer's and Fernando Teson's influential approaches. Due to their pioneering role, it is impossible to grasp the debate about MHI without an understanding of their work. Walzer's and Teson's theories also indicate some of the wider challenges in the normative debate about MHI. The chapter then examines the status of MHI in Rawls' *Law of Peoples*. It finally turns to the work of contemporary cosmopolitan writers who link the ethics of MHI with theories of global distributive justice. By offering a detailed overview of the central issues a liberal theory of MHI must address, Chapter II provides crucial groundwork for the conceptualisation of MHI as an other-defensive war.

### Chapter III

Chapter III attends to JAB by asking under what circumstances potential intervening states are permitted to declare an other-defensive war. To do so, the chapter outlines the analogy between MHI and domestic rescue killings. It argues that MHI is permitted to halt Atrocity Crimes, including genocide, mass murder, and ethnic cleansing. There are two reasons for why the halting of these crimes is analogous to a domestic rescue killing. First, just as those domestic attackers who engage in unjust aggression against their victims forfeit their negative right not to be attacked, states guilty of committing or tolerating Atrocity Crimes forfeit their right not to be subjected to aggression in international society. Second, just as domestic rescuers hold a *right* against the unjust aggressor *not* to be subjected to a counterattack, the intervening state is holder of a right to intervene, holding the target state under a negative duty not to defend itself. But the right to intervene is qualified in two ways. First, it is not held by *any* potential intervening state. Rather, potential interveners need to satisfy certain preconditions in order to be recognised as right holders. Second, the right to intervene is a *prima facie* right. Its existence depends on the ‘tacit consent’ of the victims of Atrocity Crimes.

### Chapter IV

As we saw above, since war is a relation between corporate entities as well as individuals, the existence of a state-held right to intervene is not sufficient to show that any individual located within the territory of the target state is liable to attack. Turning to the problem of combatant liability, Chapter IV examines the relationship between JAB and JIB. It resists attempts to assert the normative independence of the two. It argues that the justness of the cause of war determines the permissibility of the use of force during its conduct. In order to analyse the repercussions of this claim for the other-defensive conception of MHI, the chapter proceeds in two steps. First, it argues that combatants who engage in Atrocity Crimes are neither permitted nor excused for resisting intervening combatants. Second, appealing to the concept of complicity in criminal law, the chapter contends that the prohibition to use force against intervening combatants also applies to those combatants who are merely ordered to defend the target state against the interveners. As a result, intervening combatants, provided they abide by the rules of war, hold a right to use force against

the combatants of the target state. The state-held right to intervene, in other words, is 'mirrored' at the individual level.

## **Chapter V**

Chapter V turns to the problem of non-combatant immunity by asking three interrelated questions. First, it critically discusses the conceptual distinction between combatants and non-combatants. Second, it scrutinises the conscription of DDE into just war theory, arguing that its application to an other-defensive war is problematic. It tries to rescue DDE for theories of MHI by developing the Public Goods Argument. The latter allows intervening combatants to infringe the rights of non-combatants, subject to certain conditions. Third, the chapter approaches the problem of proportionality. In particular, it argues that JIB's proportionality criterion is more stringent than previously assumed. Because interveners merely infringe the rights of non-combatants, they must make adequate provisions to remedy some of the negative side-effects of their campaign. In this regard, the chapter considers the controversial case of bombing targets that have dual military and civilian functions. Though it defends the destruction of those targets as morally permissible, it stresses that interveners are obliged to render some humanitarian aid to civilian populations.

## **Chapter VI**

Since the other-defensive conception of MHI seeks to reinforce R2P, Chapter VI uses the Domestic Analogy to determine whether MHI is morally obligatory. Arguing that there can be mandatory rescue killings in domestic circumstances, the chapter contends that the declaration of an other-defensive war is sometimes obligatory. Victims of Atrocity Crimes, in fact, hold a right to be rescued against potential intervening states, subject to certain conditions. To defend this claim, the chapter pursues a twofold strategy. First, it defends the right to be rescued via an appeal to egalitarianism. Second, it dispels the myth that the causes of mass killing are exclusively found within the domestic political arrangements of the target state. Rather, the influence of external factors on the domestic dynamics of mass killing strengthens the case for a moral right to be rescued. However, these considerations do not show that individual citizens of potential intervening states are under a duty to participate in MHI. Potential intervening states, the chapter concludes, may not be



able to fulfil the correlative duty of the right to be rescued if they lack suitable volunteers for an other-defensive war.

## **Chapter VII**

Taking the contemporary legal debate about humanitarian occupations as a starting point, Chapter VII discusses some of the issues arising in the reconstruction of post-atrocity societies. It begins by exploring the relationship between the other-defensive conception of MHI and notions of negative and positive peace, arguing that interveners should bring about both types of peace. It then provides a critical examination of the value of peace treaties, contending that the intervening state is permitted to non-consensually and unilaterally occupy the target state's territory and remove its government from power. That said, drawing on the legal concept of internationalised territories, the chapter argues that the reconstruction of the target state should be undertaken multilaterally. Finally, it offers a qualified defence of the construction of (liberal) democratic institutions in the target state. The costs of democratic reconstruction, though, must not be disproportionate to the benefits. Democracy can provide a normatively desirable framework for post-atrocity societies, but it may not always be realisable.

## **Chapter VIII/Conclusion**

Chapter VIII summarises the main arguments of the thesis. In doing so, it responds to those non-consequentialists who utilise the Doctrine of Doing and Allowing to advance an anti-interventionist position. It also gives an outlook on future fields of research for theorists of MHI.

## Chapter II

### Military Humanitarian Intervention and Contemporary Liberal Political Theory: A critical survey

*Justice is the first virtue of institutions’.*

(John Rawls, *A Theory of Justice*)

*But the evil is, that if they have not sufficient love of liberty to be able to wrest it from  
the hands of domestic oppressors, the liberty bestowed on them by other hands of their  
own, will have nothing real, nothing permanent.*

(John Stuart Mill, *A Few Words on Non-Intervention*)

## I

### Liberalism, the right to rule and the value of the state

It is the task of this chapter to critically survey how contemporary liberal political theorists have approached the problem of MHI. Liberalism, as it is understood here, covers the tradition of analytical political theorising following the publication of John Rawls' *A Theory of Justice* in 1971. Since numerous methodological as well as normative disagreements exist between contemporary liberal thinkers, we shall not attempt the impossible by offering an authoritative definition of liberalism here. Instead, the chapter draws attention to the liberal elements of each theory discussed below. But despite their disagreements, it is characteristic for liberal theorists to reject what Fernando Teson calls 'absolute non-interventionism'. The latter usually stems from a restrictive (legal) interpretation of what the thesis calls the Principle of Sovereign Equality in international law:<sup>70</sup>

1. States *qua* states are holders of rights and bearers of correlative duties in international society. Most importantly, states are at liberty to adopt a political system of their own choosing for their internal constitution. Furthermore, they are protected, via a negative right, from (coercive) interference by other states in their internal domain.
2. States have equal standing as right-holders in international society if they meet the following three conditions: *a*) they rule over a population that *b*) resides within their territory via *c*) an effective government.
3. It is necessary to differentiate between domestic and international society. In the former, justice is a legitimate, and important, political goal. In a world of sovereign states, by contrast, the primary purpose of international law is to ensure order. Therefore:
4. Non-consensual intervention in the internal affairs of states is prohibited.

While the Principle of Sovereign Equality has come under pressure through the introduction of R2P, liberal political theorists deny the claim that states *qua* states can have rights. This is so because they are not *intrinsically* valuable. For liberals, states are *instrumentally* valuable in virtue of the functions they perform for those under their

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<sup>70</sup> The exposition of the Principle of Sovereign Equality draws on Fernando Teson's work. See, F. Teson, *A Philosophy of International Law* (Boulder/Col: Westview Press, 1998), p. 39-40.

rule. In particular, states must further the interests of those under their rule by exercising morally legitimate authority over them. Not surprisingly, then, all of the liberal theorists discussed below operate with a conception of state legitimacy. The implications of the liberal commitment to state legitimacy are twofold. First, theories of state legitimacy restrict the state's liberty to choose a particular political system for its internal constitution. Second, moral legitimacy entails immunity from outside interference. A morally legitimate state is usually considered as the holder of a 'right to rule'. The latter, amongst other things, takes the shape of a negative right correlated to a duty of non-aggression/interference. This right is held *in rem*, to wit, it is held against *all* other states in international society.<sup>71</sup>

Needless to say, contemporary liberal theorists disagree about the nature of state legitimacy. As a result, they also disagree over the scope and moral permissiveness of liberal interventionism. Those theorists committed to 'limited interventionism' maintain that MHI is justified in cases of what Chapter I referred to as atrocities, i.e. genocide, ethnic cleansing, and possibly cases of state failure and mass starvation.<sup>72</sup> Those who defend 'broad interventionism' allow armed intervention in circumstances that fall short of atrocious mass killing. Since the differences between 'broad' and 'narrow' interventionists result from intricate philosophical debates over the nature of rights, the role of justice, and the conditions of state legitimacy, the chapter will explore these disputes in detail.

Before we can do so, however, let us note a neglected point in the liberal debate about MHI. Rather curiously, none of the liberal thinkers discussed here engages with the concept of humanitarianism. The debate about MHI, in liberal political philosophy at least, is normative, not conceptual. This may be taken as an indicator of the 'essentially contested' nature of the concept of MHI mentioned in Chapter I. Nevertheless, the liberal lack of engagement with the concept of humanitarianism is

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<sup>71</sup> The right to rule has generated considerable controversy. Traditionally, it has been viewed as a 'right to be obeyed', that is, it was thought to constitute a claim-right held by the state against its subjects to obey the law. A. John Simmons in particular has argued against the view that states could be holders of such a right. This chapter operates with a slightly weaker notion of the right to rule, which is defended by Allen Buchanan and David Copp. In what follows, the right to rule merely entails a liberty to enforce the law in a given territory. For reflections on the weaker version of the right to rule, see, D. Copp, 'The Idea of a Legitimate State', especially p. 18; pp. 26-27 & A. Buchanan, 'Recognition Legitimacy and the State system', *Philosophy & Public Affairs*, Vol. 28/No.1 (1999), pp. 46-78, esp. p 49. For Simmons' critique of the classic notion of the right to rule, see A.J. Simmons, *Moral Principles and Political Obligations* (Princeton/N.J: Princeton University Press, 1979).

<sup>72</sup> F.R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2<sup>nd</sup> ed. (Irvington-on-Hudson/N.Y: Transnational Publishers, 1997), pp. 23-24.

lamentable for two reasons. First, as Chapter I showed, the concept of humanitarianism has important implications for the aims and conduct of MHI. Second, it is questionable whether some liberal theories of intervention are classifiable as theories of *humanitarian* intervention. As we shall see below, some theorists pursue extremely demanding normative aims that exceed the humanitarian goal of reducing human suffering. Conceptually speaking, it could be argued that some theorists defend *pro-democratic* interventions rather than *humanitarian* ones. In any case, these conceptual worries illustrate the necessity of a *critical* approach to contemporary liberal interventionism.

Since most contemporary theories of MHI are incomprehensible without reference to Michael Walzer's seminal contribution to the subject, Part II begins with an analysis of his views. Part III discusses Fernando Teson's equally influential Kantian/Rawlsian theory of MHI, which, in many ways, is a response to Walzer. Parts IV and V then looks at two sets of approaches that emerged over the past decade or so. Part IV engages with Rawls' *The Law of Peoples*, while Part V analyses recent cosmopolitan contributions to the subject.

## II

### **The society of states, the rights of communities, and the politics of rescue**

#### *A. A liberal theory?*

Just as Rawls' *A Theory of Justice* revived normative political theorising about social justice in the Anglo-American tradition, Michael Walzer's book *Just and Unjust Wars: A Moral Argument with Historical Illustrations* reinvigorated the debate about the just war amongst contemporary political philosophers.<sup>73</sup> But because his work is often associated with the so-called communitarian critique of liberalism, the classification of Walzer as a liberal political theorist may raise some eyebrows.<sup>74</sup> Indeed, in their critique of Walzer's just war theory, liberal critics have accused him of being thoroughly illiberal. But while it is true that there are illiberal elements in Walzer's thought, it is also possible to find liberal ones. The following discussion aims to

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<sup>73</sup> Walzer, *Just and Unjust Wars*. For the sake of convenience, all references to *Just and Unjust Wars* are placed directly in the main text. The work is abbreviated as *JUJW* hereinafter.

<sup>74</sup> Walzer is uncomfortable with the label of communitarianism. He prefers to view his political theory as a corrective of, rather than an alternative to, liberalism. See, M. Walzer, 'The Communitarian Critique of Liberalism', *Political Theory*, Vol. 8/No. (1990), pp. 6-23.

readjust the perception of Walzer's work somewhat, without neglecting the problematic aspects of his position.

The main premise of Walzer's approach to just war theory serves as an indicator of the liberal aspirations of his philosophy. There exists, Walzer assumes, an international society of independent states which is anarchical in the sense that there is no world government to police it (JUIW: 61). Accordingly, Walzer's account of MHI as well as just war theory in general is state-centric; that is, MHI is carried out by *states* in response to crimes perpetrated by other *states* against their own people. But Walzer's claims about the anarchical society are not only intended as a factual assessment about the nature of international politics. Rather, they also have a clear normative dimension:

'To tear down the walls of the state is not, as Sidgwick worriedly suggested, to create a world without walls, but rather to create a thousand petty fortresses. The fortress, too, could be torn down: all that is necessary is a global state sufficiently powerful to overwhelm the local communities. Then the result would be the world of the political economists, as Sidgwick described it – a world of radically deracinated men and women'.<sup>75</sup>

In a world of independent states, Walzer contends, communities are able to pursue their own conception of the common good, thereby bestowing the benefits arising from group membership on individual members. Although it may be too strong to call this a liberal argument, Walzer arguably appears to be committed to a form of moral individualism that stresses communal belonging as an essential ingredient of individual well-being.<sup>76</sup> Obviously, the challenge for Walzer's theory of MHI is to specify when state independence ceases to further individual interests in communal integrity. In what follows, we will assess whether he can tackle these issues satisfactorily.

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<sup>75</sup> M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 39.

<sup>76</sup> One might detect certain parallels between Walzer's just war theory and contemporary *liberal* nationalist arguments in favour of collective self-determination see A. Margalit & J. Raz, 'National self-determination', *Journal of Philosophy*, Vol. 87/No.9 (1990), pp. 439-461 & D. Miller, *On Nationality*. Note that *JUIW* refers to the rights of political associations. The latter might or might not be equivalent to nations. We return to this issue later.

## B. *The Legalist Paradigm and the moral standing of states*

The famous Legalist Paradigm constitutes the normative core of *JUJW*. It provides a philosophical rationale for why state aggression is a crime. In later writings, though, Walzer implicitly differentiates between *justified* and *unjustified* aggression. As we saw in Chapter I, this distinction is crucial for the debate about MHI because the intervening state must initiate hostilities against the target state without having suffered an attack by the latter. For Walzer, as will be explained later, aggression for humanitarian reasons can sometimes be justified.<sup>77</sup> With regard to the normative status of state aggression, Walzer pursues two projects in his theory of MHI. The first, which this section discusses, concentrates on the question when MHI counts as an act of *unjust* aggression. The other, analysed in Section D, is concerned with MHI as a justified act of aggression. Interestingly, Walzer's work is predominantly concerned with the first project. This indicates that the overriding aim of his theory is to minimise instances of MHI.

According to the Legalist Paradigm, states are holders of rights *in rem* not to be attacked. The latter are derived from the state-held rights to territorial integrity and political sovereignty (*JUJW*: 61-63). Any unjustified violation of these two rights constitutes an act of unjust aggression which is the only crime states can commit against other states (*JUJW*: 51). The next question, then, is in what sense states can qualify as right holders. Though the Legalist Paradigm takes international law as a point of orientation, Walzer, like all liberals, rejects PSE's claim that states *qua* states hold rights. States gain their *moral* standing in international society by exercising legitimate authority over those under their rule. Let us refer to this claim as the Argument from Moral Legitimacy:

1. The rights of states are derived from the moral rights to life and liberty of those under their rule (*JUJW*: 54).
2. The exercise of authority by the state depends on the consent of the governed (*JUJW*: 54).

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<sup>77</sup> M. Walzer, 'Arguing for Humanitarian Intervention', in: N. Mills & K. Brunner (eds.), *The New Killing Fields: Massacre and the Politics of Intervention* (New York: Basic Books, 2002), pp. 19-35, at p. 22; reprinted as: M. Walzer, 'The Argument about Humanitarian Intervention', in: M. Walzer, *Thinking Politically: Essays in Political Theory*, edited and introduced by D. Miller (New Haven: Yale University Press, 2007), pp. 237-250.

3. The people have a right to revolution that entitles them to overthrow an illegitimate government that violates their rights.<sup>78</sup>

The Argument from Moral Legitimacy appears Lockean in character, but Walzer departs from Locke in significant respects. First and foremost, he does not understand the social contract as involving the ‘express’ or ‘tacit’ consent of individuals. Instead, it serves as a metaphor for our ‘cooperative activity’ and ‘shared experiences’ as members of a ‘political association’. Unfortunately, Walzer does not tell his readers what kind of experiences and traditions constitute a *political* association. But leaving these ambiguities aside, the implications of this revised version of the social contract for the issue of state legitimacy are illustrated by the following quotation:

‘When states are attacked, it is their members who are challenged, not only in their lives, but also in the sum of things they value the most, including the political association they have made. We recognise and explain this challenge by referring to their rights. If they were not morally entitled to choose their form of government and shape the policies that shape their lives, external coercion would be no crime ...’ (JUJW: 53-54).

First, contrary to Locke’s theory, the rights of the state are not derived from natural rights which we hold *qua* human persons. Instead, they result from what Walzer calls our ‘shared rights’ held in virtue of our membership in a political association (JUJW: 54). Second, as Walzer’s assertion that the people are ‘entitled to choose their form of government’ indicates, the rights of the state are not merely derived from the rights of *individual* citizens. Perhaps more importantly, they are founded upon the right to collective self-determination which, logically, can only be held by groups. Third, the revised version of the contract adds a strong teleological element to the Argument from Moral Legitimacy.<sup>79</sup> In Walzer’s case, the state is justified precisely because of its ability to defend the ‘common life’ against ‘external encroachment’ (JUJW: 54).

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<sup>78</sup> M. Walzer, ‘The Moral Standing of States: A reply to four critics’, *Philosophy & Public Affairs*, Vol. 9/No. 3 (Spring 1980), pp. 209-229, at p. 214, reprinted in: M. Walzer, *Thinking Politically*, pp. 219-236.

<sup>79</sup> Teleological approaches seek to justify the institutions of the state in terms of what they accomplish, see D. Schmidtz, ‘Justifying the State’, *Ethics*, Vol. 101/No. 1 (1990), pp. 89-102, p. 90.



But the Argument from Moral Legitimacy poses a variety of problems.<sup>80</sup> For instance, it is not clear why the institutions of the state are the best guarantors of communal self-determination. Given that many states are home to more than one community, the state's right to territorial integrity is often in tension with the right to collective self-determination. This problem could be overcome by an inclusive account of political association that transcends narrower claims to nationhood. But since Walzer leaves the notion of a political association vague, it is impossible to resolve this matter here.

Furthermore, given that the Legalist Paradigm plays down the importance of *individual* consent, one wonders what Walzer means when he writes that a state 'stands guard over a community'. His response is that the 'representativeness' of a government is an indicator of state legitimacy. But there are two reasons for why this argument is dubious.

First, Walzer has to specify the relationship between the institutions of government and those of the state. It is true that Walzer maintains that a state is a union of the government and the people.<sup>81</sup> Yet, although it is unlikely that an illegitimate state would have a legitimate government, it is not inconceivable that an otherwise legitimate state might have an illegitimate government. This means that the legitimacy of a state is not wholly decided by the legitimacy of its government.

Second, Walzer's account of 'representation' does not offer a reliable proof of state legitimacy either. To explain, for Walzer, 'a fit' between governors and the governed is a sufficient condition for representative government. As he puts it, a 'fitting' government is not a gang of rulers acting in their own interests, but one that governs the people according to its own traditions. The community's acquiescence in the government's exercise of authority through the state apparatus must be taken as a sign of state legitimacy. But Walzer neither considers the possibility that revolution might be impossible nor that powerful governments are often able to create a 'fit' through intimidation and threats.<sup>82</sup>

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<sup>80</sup> For two penetrating critiques, see D. Luban, 'Just War and Human Rights', *Philosophy & Public Affairs*, Vol. 9/No. 2 (1980), pp. 160-181 & G. Doppelt, 'Walzer's Theory of Morality in International Relations', *Philosophy & Public Affairs*, Vol. 8/No. 1 (1978), pp. 3-27.

<sup>81</sup> Walzer, 'The Moral Standing of States', p. 212.

<sup>82</sup> This point is raised by G. Doppelt, 'Statism without foundations', *Philosophy & Public Affairs*, Vol. 9/No. 4 (1980), pp. 398-404 & D. Luban, 'The Romance of the Nation State', *Philosophy & Public Affairs*, Vol. 9/No. 4 (Summer 1980), pp. 392-397.

Faced with these problems, Walzer proposes that the international community should treat states *as if* they were legitimate. It may be impossible to ascertain whether a state genuinely represents a community, but we should generally give states the benefit of the doubt. This argument seems to be motivated by Walzer's fear that, if the criterion of state legitimacy was too demanding, widespread armed intervention would become permissible, leading to *a*) more disorder in international society and *b*) a loss of communal integrity. Hence Walzer abandons the Argument from Moral Legitimacy and reverts to the Principle of Sovereign Equality. This implies that, for Walzer, MHI will *almost always* constitute an act of *unjust* aggression under the Legalist Paradigm.

It is questionable, however, whether the move towards the Principle of Sovereign Equality is necessary. This is so because Walzer overlooks that the permissibility of MHI does not solely hinge on the question of state legitimacy. Clearly, a lack of state legitimacy is a necessary precondition for the permission to intervene. For MHI to qualify as an act of just aggression, the target state must lack a right not to be interfered with. But the lack of a right to rule cannot be a sufficient condition for MHI. It is, therefore, possible that an armed intervention in the internal affairs of an illegitimate state is unjust, although the intervening state does not violate the rights of the target state. This means that even a demanding conception of state legitimacy does not necessarily give rise to broad interventionism.

For instance, interventions that violate the 'proportionality' or 'right intention' criteria inherent in JAB remain impermissible, regardless of the (moral) standing of the target state. Moreover, armed interventions in an illegitimate state may be unjust because they violate the rights of communities and individuals that reside within its territory. If S lacks a right not to be interfered with, it is not necessarily permissible to impose the costs arising from a military campaign on those residing in S's territory. We need a separate argument, then, that justifies the imposition of the (human) costs of MHI on those in the target state.

Walzer could reply that because these considerations hardly deter potential interveners, we should put more emphasis on the rights of states, notwithstanding our uneasiness about their justification. But now suppose that the people (P) of S rebel against their government (GS) because there is no 'fit'. For the sake of argument, let us also assume that GS and S are *both* illegitimate. If we employ

Walzer's own 'fit' criterion of legitimacy, it seems inappropriate to treat S *as if* it was a legitimate state. In this case, Walzer replies that S is internally illegitimate but externally, i.e. in the context of international society, legitimate.<sup>83</sup> But states are either illegitimate or not. In light of these criticisms, it becomes apparent that Walzer must appeal to P's right to collective self-determination to show why MHI is impermissible. While Walzer goes to great lengths to link the rights of states with the rights of those under their rule, he must acknowledge some normative independence between them.

### C. *The right to collective self-determination and the Millian Argument*

Leaving the issue of state legitimacy aside, let us explore the ramifications of Walzer's account of collective self-determination for MHI. In order to do so, let us make two preliminary assumptions. First, since Walzer repeatedly stresses the importance of citizenship for individuals, let us utilise the interest theory's collective conception of group rights as a loose analytical framework. This version of the interest theory assumes that group rights protect the shared, collective interests of individual group members, provided these are sufficiently weighty to hold another party under a corresponding duty.<sup>84</sup> Second, given that the concept of unjust aggression already signals violations of the rights of states by another state, let us use the term 'undue interference' to denote the violation of a community's right to collective self-determination. In what follows, we will assess when MHI counts as an act of 'undue interference' rather than 'unjust aggression'.

In his discussion of the Legalist Paradigm, Walzer gives three main reasons for why political associations should have a right to collective self-determination:

1. A political association is entitled to choose a form of government *that reflects its own traditions*.
2. Citizens value the political association they made.
3. Citizens should be able to shape the policies that shape their lives.

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<sup>83</sup> Walzer, 'The Moral Standing of States', p. 212.

<sup>84</sup> The corporate account of the interest theory, by contrast, maintains that groups *qua* groups are holders of rights. For a longer treatment of the relationship between the interest theory and the right to collective self-determination, see C. Fabre, *Justice in a Changing World* (Cambridge: Polity, 2007), chapter 4.

Since the right to collective self-determination seeks to protect the interests of *individual* citizens in the exercise of their ‘shared rights’ in particular and the continued existence of their political community more generally, it is not too farfetched to interpret Walzer’s theory as a (quasi-) *liberal* defence of collective self-determination. But contrary to liberal accounts of collective self-determination that make the right to collective self-determination conditional upon the observance of human rights, Walzer’s account of self-determination has *illiberal* implications. These result from his differentiation between ‘political liberty’ and ‘collective self-determination’. The former, he contends, is a sufficient but not a necessary condition for the latter. That is to say, political associations can be said to be self-determining even though their members are not free. As a result, Walzer maintains that highly illiberal, internally unstable, violent, and oppressive political associations must be protected from undue interference.

From the perspective of the interest theory, let us note that it is doubtful whether *a*) the existence of such societies furthers individual well-being and *b*) the oppressors and the oppressed have sufficiently strong *shared* interests that justify holding another party under a duty not to unduly interfere in their internal affairs. It seems, in fact, that Walzer unjustifiably privileges the interests of the powerful over those of the vulnerable. Walzer might be able to overcome this challenge by appealing to John Stuart Mill’s famous essay ‘A few words on non-intervention’. Because this thesis is not an exercise in the history of political thought, we can leave open whether Walzer’s interpretation of Mill is sound:<sup>85</sup>

‘The members of a political community must cultivate their own freedom, just as the individual must cultivate his own virtue. They cannot be set free, as he cannot be made virtuous, by an external force. Indeed, political freedom depends on the existence of individual virtue, and this the armies of another state are unlikely to produce ... Self-determination is the school in which virtue is learned (or not) and liberty is won (or not) [...] Self-determination, then, is the right of a people ‘to become free by their own efforts’ if they can, and non-intervention is the principle

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<sup>85</sup> J.S. Mill, ‘A Few Words on Non-Intervention’, reprinted in: C. Brown, T. Nardin & N. Rengger (eds.), *International Relations in Political Thought: Texts from the Ancient Greek to the First World War* (Cambridge: Cambridge University Press, 2002), pp. 486-493. For some interesting thoughts on Mill’s account of (non-) intervention, see C. A. L. Prager, ‘Intervention and Empire: John Stuart Mill and International Relations’, *Political Studies*, Vol. 53/Issue 3 (2005), pp. 621-640.

guaranteeing that their success will not be impeded or their failure prevented by the intrusions of an alien power' (JUJW: 87-88).

As one can see, Walzer argues that although oppression is in no one's interest but the oppressor's, citizens must be left to fight for their liberty themselves. Utilising the tools of contemporary political philosophy, there are two possible interpretations of what we can call the Millian Argument. Let us refer to these as the Argument from Excessive Harm and the Argument from Undue Interference, respectively.

The Argument from Excessive Harm is relatively uncontroversial. It assumes that it is practically impossible to force a people to become virtuous at the barrel of a gun. Again, this appears to be an empirical statement of fact, but, like Walzer's argument in favour of state independence, it has a normative dimension. If the people whom MHI is supposed to liberate are not yet ready for liberty due to their lack of civic virtue, it is likely that MHI will be unsuccessful, producing more harm than good. The Argument from Excessive Harm is consequentialist in orientation because it assesses the permissibility of MHI in terms of its consequences for the affected community. It is virtually shared by all theorists of MHI, even those who would normally be critical of Walzer. Simon Caney, one of Walzer's strongest contemporary critics, maintains that 'there is no case for intervention if it does not work'.<sup>86</sup>

But like most consequentialist arguments, the Argument from Excessive Harm does not offer a strong defence of non-interventionism. If harms did not outweigh the benefits, MHI would be permissible. For this reason, as we saw in Chapter I, the non-consequentialist position in ethics stresses that, while assessments of consequences are important for the ethics of war, we must introduce certain side constraints into just war theory. Drawing on Nozick's idea of rights as side-constraints, the Argument from Undue Interference maintains that, even though MHI may be beneficial for the oppressed, it violates their right to collective self-determination.

However, in order to account for why an external party is under a duty not to interfere with an oppressed people, it must be shown that the right to collective self-

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<sup>86</sup> S. Caney, *Justice beyond Borders: A global political theory* (Oxford: Oxford University Press, 2004), p. 234. Also, see C. Beitz, 'Non-intervention and Communal Integrity', *Philosophy & Public Affairs*, Vol. 3/No. 4 (1980), pp. 385-391.

determination protects the shared interests of members of a political association ‘to become free by their *own* efforts’. Roughly, one could argue as follows:

1. Individuals *qua* citizens have an interest they share with fellow citizens to live in a free political community that pursues its own conception of the common good.
2. The creation of a free political community is possible if (and only if) its members have civic virtue.
3. Civic virtue can only be acquired via a collective struggle for liberation. Therefore:
4. Individuals *qua* citizens have an interest they share with fellow citizens that no one interferes with their struggle for liberation.
5. This shared interest is best protected by the right to collective self-determination. Therefore:
6. MHI in order to dispose of an oppressive regime is unjust because it violates the right to collective self-determination, to wit, it constitutes a form of undue interference.

If sound, outside parties must not deprive individuals of their opportunity to become *virtuous* citizens by their own efforts. Accordingly, the right to collective self-determination not only protects our interest to be a member in a distinct political association, but also to become a *good* citizen. This line of reasoning, though, leads to two problems.

First, the right to collective self-determination, Walzer argues, protects the success as well as the failure of members of a political community to liberate themselves. But it is difficult to see why intervention in aid of a ‘virtuous’ yet unsuccessful people should count as undue interference. Walzer seems to assume that failure to become free reflects an insufficiently developed sense of civic virtue. But given the immense powers at the disposal of governments to crush opposition, this is a dubious assertion.

Second, the Argument from Undue Interference gives rise to a tension between our interests *qua* citizens protected by the right to collective self-determination and our interests *qua* human persons protected by what Chapter I called basic rights. Suppose

that GS uses S's state apparatus to prosecute and torture members of P. If the Argument from Undue Interference is correct, we must maintain that non-intervention is in the interest of those members of P who are being tortured.<sup>87</sup> It is not clear, though, that the latter would consider their (long-term) interest in civic virtue to be stronger than their (immediate) interest in bodily (and mental) integrity.

If these two criticisms hold, the Argument from Undue Interference faces considerable challenges, casting doubts over whether it can provide a strong *moral* case against MHI. That said, it also reflects that Walzer not only writes as a political philosopher but as an activist for whom solidarities have to be built, political movements must be formed, and individuals must be prepared to endure the significant hardships resulting from the fight for freedom. In other words, Walzer's theory relies on a model of 'political men and women' that is difficult to represent via contemporary liberal political theory with its narrower focus on individual interests and autonomy. This explains why outsiders cannot and must not replace the 'political' via a 'moralised' version of armed intervention where Cruise Missiles, US Marine Corps, and F-16s take over the tasks of citizens.

Obviously, Walzer's philosophical critics can reply that 'citizens', virtuous or not, have interests in not being tortured, arbitrarily detained, or otherwise subjected to severe state repression. But Walzer recently clarified the Millian Argument. It does not, he argues, prohibit the rendering of *non-military* assistance via *non-state* actors to those suffering at the hands of oppressive states. Compared to states, individual members of 'free' communities have more extensive rights to interfere in the sovereign domain of an oppressive state.<sup>88</sup> Although it is not the purpose of this chapter to assess this particular hypothesis, it illustrates that it is unfair to solely read Walzer as an apologist of authoritarian or oppressive politics. His theory seeks to establish the practical and moral limits of what *military* force can, and should, achieve

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<sup>87</sup> It is worth pointing out that the above analysis of Walzer's defence of collective self-determination yields different results from those of Walzer's critics. For instance, Fernando Teson rightly opposes the Millian Argument on grounds that, if Amy is being tortured, her fellow countrymen who are not being tortured cannot cite *their* interests in self-determination to prevent MHI. However, if we read Walzer carefully, this is not really the point. The real question is whether the citizens of Amy's community, *including Amy herself*, have an interest in stopping these practices *themselves*. F.R. Teson, 'The Liberal Case for Humanitarian Intervention', in: J.L. Holzgrefe & R. O. Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 93-129.

<sup>88</sup> Walzer, M., 'On Promoting Democracy', *Ethics and International Affairs*, Vol. 22/Issue 4 (2008), pp. 351-355.

in international society. Nevertheless, since Walzer does not advocate an absolutist version of (military) non-interventionism, we must now turn to his defence of ‘narrow interventionism’.

#### D. *Walzer’s defence of military humanitarian intervention*

While the Legalist Paradigm and the Millian Argument are more concerned with the ‘rights of citizens’ than the ‘rights of man’, Walzer is not entirely opposed to the claim that the latter sometimes warrant protection in international society. Although he does not explicitly say so, human rights set a threshold of state legitimacy in international society, albeit a fairly minimal one. Although states should generally be treated *as if* they were legitimate, they lose their equal standing under the Legalist Paradigm when they abuse the human rights of those under their rule. Moreover, as Walzer admits, in case of human rights abuses, ‘talk of community or self-determination [is] cynical and irrelevant’ (JUIW: 90). For Walzer, MHI undertaken to rectify human rights abuses violates neither the rights of the target state nor the right to collective self-determination held by the community in its territory. Walzer refers to the circumstances under which MHI becomes permissible as the ‘Standard Case’.<sup>89</sup> Essentially, the Standard Case entails that the target state uses its power and organisational capacity to carry out genocide and/or ethnic cleansing.

Although his account of the Standard Case does not explicitly mention human rights, it points us towards Walzer’s conception of human rights. For Walzer, we have human rights to life and liberty which prohibit ‘massacre’ and ‘enslavement’.<sup>90</sup> This is congruent with Shue’s idea of basic rights, especially security rights. In *JUIW*, the Nazi Holocaust and the killing of the Bengali people at the hands of the Pakistani government serve as historical examples of massacre. In later writings, they are complemented by mass killings that took place in Rwanda and ex-Yugoslavia. The notion of ‘enslavement’ remains obscure, though. As Gerald Doppelt speculates, it involves the ‘forceful resettlement of a people’.<sup>91</sup> Yet, as Caney critically observes, this shortened list of human rights seems rather arbitrary. As he puts it, ‘one might reasonably ask why Walzer justifies intervention only when people are being

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<sup>89</sup> Walzer, ‘Arguing for Humanitarian Intervention’, p. 20.

<sup>90</sup> (ibid), p. 21.

<sup>91</sup> Doppelt, ‘Walzer’s Theory of Morality in International Relations’, p. 7.



massacred or put into slavery --- why not 'political murder' or 'torture'? Why not when they do not have enough to eat'?<sup>92</sup>

Without restating the Millian Argument, Walzer's answer is likely to be twofold. On the one hand, the shortness of the list of human rights seems to be normatively motivated. That is to say, a short list of human rights is normatively desirable because it *a)* preserves pluralism and *b)* prevents excessive interventionism. We shall return to *b)* in Part IV when we discuss John Rawls' *Law of Peoples*. In regard to *a)*, as Charles Taylor shows, it is not necessarily true that a more expansive list of human rights undermines pluralism, as there are different political models in which observance of human rights can be realised.<sup>93</sup> Walzer, as one can see, overstates the cultural inflexibility of human rights discourse.

On the other hand, Walzer's rejection of a longer list of human rights is also likely to be methodologically motivated, reflecting his distinction between thick and thin moralities.<sup>94</sup> The former can only exist in a communal context, whereas the latter represent the lowest common moral denominator across communal boundaries. Since the anarchical society of states is not comparable to a morally 'thicker' political association, our list of human rights can only represent a 'minimal morality' or a 'threshold of minimal decency' rather than a more ambitious moral ideal. Especially Walzer's use of the phrase 'crimes that shock the conscience of mankind' is revealing here. It suggests that there are certain acts that are considered to be morally intolerable across cultures. Crimes of this type seem to lead to a consensus on human rights. Moreover, they indicate what is morally distinctive of certain crimes, namely their moral shock value.

But the methodological reply fails. As Peter Singer rightly objects, different cultures have disagreed over what is shocking.<sup>95</sup> Claudia Card complements this argument through her analysis of moral evils.<sup>96</sup> Put simply, many evils are so pervasive that we do not find them shocking. There is a tendency, writes Card, to tolerate the intolerable due to its commonness. Under many totalitarian regimes, killings are not

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<sup>92</sup> Caney, *Justice beyond Borders*, p. 247

<sup>93</sup> C. Taylor, 'Towards an unforced consensus on human rights', in: A. An-Naim (ed.), *Human rights in cross cultural perspective: the quest for consensus* (Philadelphia: Philadelphia University Press, 1992).

<sup>94</sup> M. Walzer, *Thick & Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994).

<sup>95</sup> Singer, *One World*, pp. 122-123.

<sup>96</sup> C. Card, *Confronting Evils: Terrorism, Torture and Genocide* (Cambridge: Cambridge University Press), pp. 24-27.

rare. For instance, in his penetrating analysis of mass killing during the Third Reich, Harald Welzer, a noted German social psychologist, points out that killing became nothing more than a job for many perpetrators.<sup>97</sup> If this is correct, the fact that we do not find *q* shocking has little to do with the question whether *q* constitutes a moral wrong. The relevant question is whether *q* violates the interests, and thus the rights, of another party. Neither our notion of human rights nor our notion of those types of human rights abuses that warrant MHI can rely on some form of cross-cultural anthropology. Inevitably they are the outcome of a process of philosophical reflection, notwithstanding the controversy this engenders.

Before we move on to some of Walzer's more recent concerns, let us look at a related shortcoming of the Standard Case. Walzer does not answer how the notion of 'crimes that shock the conscience of mankind' relates to the permission of potential intervening states to declare a non-self-defensive war against the target state. The reason for this omission lies in the very construction of Walzer's just war theory. As we saw above, the social contract provides the rationale for the state-held right to self-defence. Obviously, this model faces difficulties in justifying the defence of 'the rights of man'. We need to know, then, what replaces the 'social contract' in theories of MHI. The notion of 'crimes that shock the conscience of mankind' is in itself insufficient to do so. Unfortunately, Walzer has not addressed these problems, as his interests have shifted from the permissibility of MHI towards an engagement with the duty to intervene and the question of post-atrocity reconstruction.

#### E. *Recent Developments*

As was indicated in Chapter I, recent years witnessed the emergence of the 'responsibility to protect' (R2P). Although Walzer does not explicitly refer to R2P, he offers his own defence of a 'duty to intervene'.<sup>98</sup> He argues that if states fail to stop a large-scale humanitarian crisis, their own security will eventually be threatened. In other words, mass murder has a destabilising effect on the international community.

This defence of the duty to intervene is problematic for two reasons. First, the duty to intervene is an extension of the duty of states to defend their citizens against external threats. To be sure, as Chapter I noted, it is possible that the motives for

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<sup>97</sup> H. Welzer, *Täter: Wie aus ganz normalen Menschen Massenmörder werden* [Perpetrators: Why ordinary people turn into mass murderers] (Frankfurt a.M: S. Fischer, 2007).

<sup>98</sup> M. Walzer, 'The Politics of Rescue', in: M. Walzer, *Arguing about War* (New Haven: N.J: Yale University Press, 2004), pp. 67-81, at p. 74.

MHI may include considerations of self-defence. But even if this was true, Walzer's position is not satisfying. For one thing, the empirical link between a humanitarian crisis and global security is shaky at best. For another, it seems bizarre that the duty to intervene makes no reference whatsoever to the interests of those who are imperilled by genocide and ethnic cleansing.

Second, given that Walzer's just war theory is state-centric, he assigns the duty to 'intervene' to states. But if we assign the duty to intervene to a corporate agent, i.e. the state, we must also show that it can be distributed amongst those who constitute that corporate body. This confronts us directly with the problem of mandatory killing introduced in Chapter I. For it must be shown that the duty to intervene can be distributed amongst members of potential intervening states. It is probably too much to expect Walzer to tackle this weighty issue in his brief comments on the duty to intervene. All he argues is that 'soldiers are destined for dangerous places, and they should know that (if they don't, they should be told)'.<sup>99</sup> It unclear, though, what this means. After all, soldiers who are drafted into the army could well be aware that they are going to be sent into 'dangerous' places without having any real opportunity not to go.

Walzer's second recent interest has to do with the question of post-atrocity reconstruction. Although he initially argued that a quick withdrawal by the forces of the intervening state is mandatory, he now accepts that some internal restructuring in the target state is necessary in order to prevent the reoccurrence of atrocities.<sup>100</sup> Walzer does not offer a systematic exploration of the ethics of reconstruction. But he briefly addresses two issues that will be vital for any theory of post-intervention justice. First, he maintains that our expectations as to what reconstruction can reasonably achieve politically should be modest. We can hope for replacing a murderous regime with a less murderous one, but not a model democracy.<sup>101</sup> The second issue concerns the supervision of the reconstruction process. Walzer advocates a form of neo-trusteeship according to which the intervening power rules the target state and acts in the trust of its inhabitants. Alternatively, the intervening state brings a coalition of local agents to power and defends them against challengers (protectorate).

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<sup>99</sup> (ibid.), p. 73.

<sup>100</sup> (ibid.), p. 70.

<sup>101</sup> See, M.Walzer, 'On Promoting Democracy'.

Taken together, these two recent developments in Walzer's theory are good indicators of the direction of the *contemporary* debate about MHI. The 'traditional' debate, represented by the Legalist Paradigm and the Millian Argument, was overwhelmingly concerned with the permission to intervene in a world governed by PSE and a restrictive interpretation of the UN Charter. Recent years have witnessed a broadening of the debate, not least because of R2P and the phenomenon of 'internationalised territories' or 'humanitarian occupations'. Walzer's thoughts on these new challenges may not constitute a coherent theory, but they provide a starting point for contemporary theorists of MHI.

#### F. *Conclusion*

It is hard to overestimate Walzer's contribution to the contemporary debate about just war theory. His theory of MHI is the most complete we currently have in contemporary political theory, as it touches upon all philosophically relevant issues in the field. Ironically, though, it is predominantly concerned with the question of when MHI *is not* justified. This indicates that Walzer defends a limited (military) form of interventionism. Despite its complexity, his theory revolves around four core ideas. First, states are to be treated as legitimate entities and are therefore immune to attack, provided they do not engage in genocide and ethnic cleansing. Second, MHI is permissible, perhaps even mandatory, if (and only if) states commit acts of genocide or ethnic cleansing. Third, oppression does not warrant armed intervention but must be confronted by the people themselves. Fourth, the rendering of *non-military* aid via non-state actors to the oppressed is not impermissible.

The above drew attention to the theoretical weaknesses of Walzer's argumentation, but also hinted at its political strengths. Hopefully, this should prompt a more balanced assessment of his work. We must now turn to a thinker whose work on MHI is more ambitious than Walzer's, namely Fernando Teson.

### III

#### **Rawls, Kant and Locke: Teson's liberal case for broad interventionism**

##### A. *Teson's theory: a preliminary look*

Fernando Teson's work *Humanitarian Intervention: An inquiry into law and morality* is one of the few book-length treatments of MHI in analytical political philosophy, though

half of it, as the title suggests, is actually concerned with the legal implications arising from Teson's philosophical reflections.<sup>102</sup> It is partly a response to Walzer's limited interventionism, which Teson criticises for being too restrictive. Since we have just engaged in a detailed analysis of Walzer's work, we do not need to engage with Teson's criticism of it here. Instead, let us examine Teson's defence of broad interventionism. It involves five steps:

1. A philosophical critique of the absolutist interpretation of PSE via what the chapter calls the Rawlsian Argument.
2. A justification of universal human rights and a subsequent defence of a liberal, quasi-Rawlsian conception of state legitimacy via what we refer to as the Kantian Argument.
3. The (partial) attempt to define 'extreme tyranny' via what Section C calls the Argument from Historical Injustice.
4. The justification of the right to intervene as a derivative of the Lockean 'right to revolution' via what we refer to as the Lockean Argument.
5. A solution to the problem of non-combatant immunity via what we call the Argument from Hypothetical Consent.

Section B surveys the Rawlsian Argument, while Section C addresses the Kantian Argument and the Argument from Historical Injustice, respectively. Section D and E examine the Lockean Argument and the Argument from Hypothetical Consent, respectively

*B. The Rawlsian Argument and the case against absolute non-interventionism.*

Teson's critique of absolutist non-interventionism results from his legal engagement with PSE and his philosophical interest in John Rawls' conception of justice as fairness. Briefly, in *A Theory of Justice*, Rawls initially argues that representatives of states would, when placed behind the famous Veil of Ignorance in the Original Position, decide on an international norm that allows a people to settle its own affairs without foreign intervention. Teson's Rawlsian Argument holds that, if we take into account Rawls' maximin principle, it would be unreasonable to suppose that the

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<sup>102</sup> F.R. Teson, *Humanitarian Intervention: An inquiry into Law and Morality*. An up-dated version of the argument can be found in, F.R. Teson, "The Liberal Case for Humanitarian Intervention".

parties would adopt the absolute non-interventionism of PSE.<sup>103</sup> Being risk-averse, the parties would want to avoid a situation where, once the Veil of Ignorance has been lifted, they find themselves in an oppressive state with no prospect of being rescued.

But the Rawlsian Argument does not automatically entail that the contracting parties agree on *broad* interventionism. Gillian Brock, for instance, who also operates with a quasi-Rawlsian approach, argues that the representatives in the Original Position should know that powerful states have meddled inappropriately in the affairs of less powerful ones, supposedly for their own good.<sup>104</sup> While the parties would not go to the extreme of adopting a form of absolutist anti-interventionism, they have an interest in avoiding another extreme, namely constant, and possibly illicit, intervention. As becomes apparent, the Rawlsian Argument is not predisposed to a *specific* form of interventionism.

### C. *The Kantian Argument and the problem of state legitimacy.*

Teson's Kantian Argument assumes that states can be instrumentally valuable if (and only if) they protect the status of human persons as autonomous agents with an ability to pursue their own conception of the good life.<sup>105</sup> At least in this regard, liberal legalism and Teson are in agreement. Now, for Teson, states are legitimate if (and only if) *a*) they observe the liberal civic and political rights of their citizens and *b*) their exercise of authority rests on the (hypothetical) consent of those under their rule. In what follows, let us leave aside whether this is a sound theory of state legitimacy. Let us also ignore whether the version of liberal legalism defended here agrees with it, notwithstanding its endorsement of autonomy. Rather, we must focus on the implications of the Kantian Argument for Teson's theory of MHI.

The Kantian Argument, it seems, lends itself to broad interventionism because only very few states (if any) enjoy the protection against outside interference offered by the right to rule.<sup>106</sup> Teson's work, in principle, seems to give rise to a wide-ranging

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<sup>103</sup> Teson, *Humanitarian Intervention*, p. 66.

<sup>104</sup> Brock, *Global Justice: A cosmopolitan account*, p. 176.

<sup>105</sup> Teson, *A Philosophy of International Law*, p. 4.

<sup>106</sup> Incidentally, Kant himself was critical of interventionism. The fifth article of his famous sketch for perpetual peace demands that 'no state shall forcibly interfere in the constitution and government of another state'. Rather confusingly, though, intervention, Kant contends at a later stage of the argument, may be permissible if 'a state was split into two parts due to internal discord'. It is not entirely clear what this means, but it is apparent that Kant's position is more complex than absolute

permission for liberal states to militarily intervene in the internal affairs of all illiberal ones. Perhaps shying away from such a radical conclusion, Teson restricts the scope of broad interventionism to cases of what he refers to as ‘extreme tyranny’. Regimes of this type are extremely oppressive, but because they have not yet implemented policies of genocidal proportions, do not fall under Walzer’s Standard Case.

Yet the notion of ‘extreme tyranny’ remains obscure. There are many oppressive states that abuse the civil and political rights of those under their rule. Especially if we consider that Teson would argue for a fairly comprehensive list of those rights, he may have to concede that all illiberal governments are tyrannical, which is tantamount to arguing that all non-democratic regimes are potentially legitimate targets for intervention.

On the other hand, in Teson’s work, the notion of ‘extreme’ tyranny seems to have a strongly historical dimension. The latter is expressed via the Argument from Historical Injustice. For instance, in his discussion of the second Iraq War, Teson argues that Saddam Hussein was an ‘extreme tyrant’ not only because of the oppressive nature of his regime, but also due to his actions against the Kurdish minority in Northern Iraq in the 1980s and immediately after the end of the first Gulf War.<sup>107</sup> But it is questionable whether the Argument from Historical Injustice can settle the issue of tyranny satisfactorily. Most states were borne out of considerable bloodshed, and the effects of past injustice are still manifest in the operation of present institutions. While the Argument from Historical Injustice may show that none of our actually existing political institutions are legitimate, it is insufficient to separate ‘extreme tyranny’ from other types of regimes.<sup>108</sup> In response to this problem, Teson provides two further arguments, the Lockean Argument and the Argument from Hypothetical Consent.

#### D. *The Lockean Argument: two sides of the same coin?*

The Lockean Argument contends that the ‘right to intervene’ is derivative of the ‘right to revolution’. That is to say, if the people in the target state have justified

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non-interventionism. Kant’s theory, though, seems to be more applicable to cases of secession than atrocities. See, I. Kant, ‘Perpetual Peace: A philosophical sketch’, in: I. Kant, *Political Writings*, 2<sup>nd</sup> enlarged edition, edited by H. Reiss (Cambridge: Cambridge University Press, 1991), pp. 93-130.

<sup>107</sup> Teson, ‘Ending Tyranny in Iraq’, *Ethics & International Affairs* Vol. 19/Issue 2 (2005), pp. 1-20. Also, see T. Nardin’s critical reply, ‘Humanitarian Imperialism’ in the same volume, pp. 21-26.

<sup>108</sup> On the violent birth of states and its implications for their legitimacy, see Copp, ‘The Idea of a Legitimate State’, pp. 31-36.

grounds for exercising their ‘right to revolution’ against their government, it is permissible for another party to intervene in the internal affairs of the target state. Before we can scrutinise the Lockean Argument in detail, two preliminary points are on order. First, as the term Lockean Argument suggests, Teson is forced to abandon the Kantian emphasis that has so far dominated his theory. This is so because Kant did not recognise the existence of ‘a moral right to revolution’.<sup>109</sup> Second, the ‘right to revolution’ does not disambiguate the concept of ‘extreme tyranny’. The people may have a right to revolt against a highly oppressive government that violates their natural rights, even though it may not yet have become ‘extremely tyrannical’. With these two comments out of the way, let us now try to assess whether the right to revolution and the right to intervene are two sides of the same coin.

To tackle this point, we must ask whether the right to revolution is *a)* ‘agent-neutral’ in the sense that, once a ground for revolution has been established, *any* party is allowed to overthrow an oppressive government or *b)* ‘agent-relative’ in the sense that it is only held by a particular party, i.e. the people who reside within the territory of the target state. It is useful to restate the point in Hohfeldian terms. The right to revolution entails a liberty, initially for those whose natural rights are being violated, to remove an oppressive government. But as Chapter III explains, a *right* to revolution is usually also correlated to a negative duty which obliges third parties not to interfere with the actions of the right holder. Because of this, the Lockean Argument cannot exist independently of the Argument from Hypothetical Consent. For MHI to be permissible, then, the holders of the right to revolution must waive the negative duty that prohibits non-consensual outside interference.

Before we turn to the Argument from Hypothetical Consent, it is useful to consider two further points that indicate why the Lockean Argument is problematic. First, as we saw above, Walzer agrees with Teson that there is a right to revolution, but, via the Millian Argument, denies that outsiders should be allowed to overthrow oppressive regimes. In particular, the Argument from Undue Interference holds that our interests in having our rights secured as well as our interests to be good citizens go hand in hand. That is to say, if we follow Walzer by placing the ‘right to revolution’ within the periphery of the right to collective self-determination, there are

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<sup>109</sup> See, Teson, *Philosophy of International Law*, p. 6. For a critical discussion of Kant’s rejection of the right to revolution, see K. Flikschuh, ‘Reason, Right and Revolution: Kant and Locke’, *Philosophy & Public Affairs*, Vol. 36/Issue 4 (2008), pp. 375-404.



good grounds for considering it agent-relative. Citizens must be given the opportunity to become free by their own efforts.

Second, it is questionable whether the Lockean Argument can successfully deal with the problem of non-combatant immunity. For the sake of the argument, let us assume that the right to revolution entails a permission to use force, subject to various constraints. Now, being a non-consequentialist, Teson argues that any forceful actions undertaken by the interveners are constrained by DDE. A 'strict deontological' approach that categorically rules out harming the innocent is, according to Teson, normatively undesirable. It means that a revolution against an oppressive regime or a self-defensive war against an unjust aggressor would never be permissible, for it is usually impossible to avoid harming the innocent in the course of a revolution or a self-defensive war.

But while Teson is right to reject what he calls 'strict deontology', the analogy between self-defensive wars/revolutions and MHI is flawed. If we have weighty duties not to harm the innocent, then, as Thomas Hurka suggests, the special relationships obtaining between members of the same political association in a *self-defensive* war account for why it is permissible to override strong negative duties not to inflict (unintended) harm on innocent individuals in the aggressor state.<sup>110</sup> Likewise, following Hurka's logic, one could argue that only members of the same political association are allowed to expose each other to unintended harm during the exercise of the right to revolution. These are the burdens that citizens must accept if they, as Walzer suggests, value the political association they have made. Since MHI takes place in the name of non-citizens, the interveners are not allowed to impose the costs of 'revolution' on those in the target state even if their actions were suitably constrained by DDE. Put differently, negative duties not to harm the innocent outweigh positive duties to aid victims of 'extreme tyranny'.

If the above observations are sound, the right to revolution and the right to intervene *militarily* are not two sides of the same coin. This is not to say, though, that Teson's argumentative strategy is entirely flawed. The right to revolution provides (part of) a justification for the rendering of *non-military* assistance to the oppressed. If the people of an oppressive state were not permitted to overthrow their government, it would

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<sup>110</sup> T. Hurka, 'Proportionality in the Morality of War', *Philosophy & Public Affairs*, Vol. 33/Issue 21 (2005), pp. 34-66.

not be permissible for outsiders to assist them in becoming free. But insofar as military assistance is concerned, the Lockean Argument must be read in conjunction with the Argument from Hypothetical Consent.

E. *The Argument from Consent: Contracts without duties?*

Our definition of MHI states that MHI is coercive because it is undertaken without the consent of the target state. However, while Teson agrees that interveners do not need to secure the consent of the target state, he argues that MHI must not be undertaken without the consent of those whom it seeks to liberate. The argument appears desirable for two reasons. First, if the intervening state was authorised by those in the target state to act on their behalf, it is self-evident that the former has a permission to engage in an act of aggression against the latter. Second, the invocation of consent also seems to solve the problems of combatant liability and non-combatant immunity. Perhaps contractualism provides the most elegant solution to the challenges faced by a non-consequentialist approach to just war theory.

Yet it is difficult to secure consent from those in the target state for obvious reasons. In contemporary international affairs, the problem of consent is solved via the state's ability to enter into contracts with other sovereign entities. But given that intervention is not in the interests of the rulers of the target state, the chances of securing their consent are negligible. Teson, therefore, appeals to hypothetical consent via the Original Position. Stated simply, since they do not know whether they would find themselves in the position of perpetrators, victims, or bystanders once the Veil of Ignorance has been lifted, the parties will agree to MHI, subject to constraints. Being risk averse, they seek to minimise the risk of falling victim to tyranny.<sup>111</sup> But there are two reasons for why Teson's appeal to the Rawlsian version of the Argument from Hypothetical Consent is unlikely to succeed.

First, the possibility that innocent individuals might be harmed during MHI is problematic for the 'maximin' criterion. If death, albeit at the hands of different agents, is the worst case scenario under MHI *as well as* tyrannical government, there is no minimum that could be *maximised*. In this case, it seems more appropriate to argue that the parties would abandon maximin by employing the Bayesian principle of expected utility maximisation. According to the latter, the parties consider the

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<sup>111</sup> Teson, 'The Liberal Case for HI', p. 119-120.

*probability* of death at the hands of the tyrant and the interveners, respectively.<sup>112</sup> If the risk of being killed by the interveners during the course of MHI is significantly lower than the risk of being killed by the tyrant, a choice in favour of MHI is risky yet reasonable. Still, the parties would require access to large amounts of highly context-sensitive information about the interveners, the nature of tyranny and the dynamics of mass killing. It is not clear that reliable information is readily available and could be introduced into the Original Position.

Second, Teson does not realise that the *contractualist* defence of MHI generates a duty of non-resistance. It is contradictory if parties consented to MHI, while at the same time acknowledging the existence of a permission to repel the interveners. In order not to run into the problem of self-contradiction, the decision in favour of MHI must encompass a duty of non-resistance. But the problem is that, as German political theorist Lothar Fritze observes, the duty of non-resistance may sometimes entail a duty of *self-sacrifice* for individual citizens.<sup>113</sup> That is to say, in case they are attacked by the interveners, non-combatant/citizens in the target state would be obliged not to resist, so those who are currently imperilled by Atrocity Crimes can be rescued.

This argument is deeply problematic as it is, but it is especially damaging for the Rawlsian version of the Argument from Hypothetical Consent. This is so because Rawls assumes that parties in the Original Position are motivated by self-interest. It is thus highly unlikely that they would agree not to resist in case they are attacked. Furthermore, even if, contrary to all expectations, the parties in the Original Position hypothetically agreed to a duty of non-resistance, it is unlikely that self-interested citizens would, under certain circumstances, comply with it once the Veil of Ignorance has been lifted. This is a particularly stark illustration of Ronald Dworkin's

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<sup>112</sup> J.C. Harsanyi, 'Can the Maximin Principle serve as a Basis for Morality? A Critique of John Rawls's Theory', *American Political Science Review*, Vol. 69/No. 2 (1975), pp. 594-606, at p. 595.

<sup>113</sup> L. Fritze, *Die Tötung Unschuldiger* [Killing the Innocent] (Berlin: DeGruyter, 2004), pp. 62-67. The problem of self-sacrifice may only arise due to a distortion of the nature of contractualism. The device of the contract, it could be argued, does not seek to establish duties of non-resistance, but merely attempts to show that the imposition of a risk can be *justified* to each individual. But this 'modest' version of contractualism is unattractive for two reasons. First, according to most philosophical and legal understandings of a contract, the latter is valuable precisely because it establishes what is obligatory. Second, if one gets rid of individual consent, there is nothing *distinctive* that a contractualist approach can contribute to the present problem. One could, for instance, directly appeal to the interests of those individuals concerned in order to justify the imposition of a risk without having to rely on a procedure. We shall return to this issue in Chapters III and V.

well-known argument that a hypothetical contract is no contract at all.<sup>114</sup> If these observations are correct, the Argument from Hypothetical Consent fails. As a result, the invocation of hypothetical consent cannot vindicate Teson's Lockean Argument examined in the preceding section.

To sum up, then, Teson advances a philosophically and politically ambitious defence of broad interventionism. MHI is not only justified to stop genocide and ethnic cleansing, but also to topple tyrannical governments and replace them with liberal ones. The core of his theory is constituted by the Lockean Argument and the Argument from Hypothetical Consent. Neither of the two arguments, however, proves that foreign states have a permission to intervene in the internal affairs of the target state. It is doubtful, therefore, that Teson's case for broad interventionism succeeds. On the other hand, Teson's theory is useful for the current project because, like the other-defensive conception of MHI developed later, it shares a commitment to autonomy and deontological constraints. It clearly indicates many of the problems a non-consequentialist theory of MHI must solve.

As we saw above, Teson is heavily influenced by Kant and the procedural liberalism of Rawls. Interestingly, though, Rawls' own views on MHI are much closer to Walzer's than Teson's.

## IV

### **Military Intervention as the Enforcement of Human Rights?**

Peter Singer once noted that, strikingly, Rawls' *A Theory of Justice*, a work of 600 pages no less, had very little to say about the extreme disparities in wealth and life chances existing in the international sphere.<sup>115</sup> More than a quarter of a century after its publication, Rawls remedied this shortcoming in the *Law of Peoples*.<sup>116</sup> Paradoxically, MHI is central *and* peripheral to Rawls' reflections on international justice. It is peripheral in the sense that Rawls only devotes a few lines to it. On the other hand, it is central because Rawls' treatment of state legitimacy and human rights is indivisible

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<sup>114</sup> R. Dworkin, 'The Original Position', in: N. Daniels (ed.), *Reading Rawls* (Oxford: Blackwell, 1975). Fritze recognizes this dilemma. He then tries to devise a complicated scheme under which 'real world' citizens are allowed to withdraw from the contract. But this renders the very idea of a contract meaningless for reasons mentioned above. See, L. Fritze, *Die Tötung Unschuldiger*, pp. 81-85.

<sup>115</sup> Singer, *One World*, p. 8

<sup>116</sup> J. Rawls, *Law of Peoples*. All references to the work are in the main text.

from his thoughts on MHI. To understand the status of MHI in the Law of Peoples, let us begin by outlining some of its background assumptions.

According to Rawls, the Law of Peoples is ‘a political conception of right and justice that applies to the principles and norms of international law and practice’ (LP: 3). Overall, the Law of Peoples is intended to outline a progressive case for an ethical foreign policy. As we saw in Chapter I, Rawls believes that the great evils of human history, including unjust war, oppression, religious persecution, starvation, genocide and mass murder, are the result of political injustices (LP: 7). For Rawls, the social contract, represented by the Original Position, provides the mechanism through which we can formulate principles for a just world order that overcome the shortcomings of present institutions.

Unlike in a *Theory of Justice*, where, as we saw above, the parties in the [international] Original Position were representatives of states, the parties in the *Law of Peoples* represent ‘peoples’, which, according to Rawls, are the main actors in international politics. More specifically, they represent *liberal* peoples, which *a*) are committed to a political, i.e. non-metaphysical, form of liberalism, *b*) practice a constitutional form of government that serves the fundamental interests of their citizens, and *c*) are united by what Mill called ‘common sympathies’ (LP: 23-25).

The shift from states towards (liberal) *peoples* is significant because it represents a new understanding of sovereignty that reflects the development of the UN Charter system, while retaining some ambivalence with regard to PSE. The Law of Peoples concurs with the UN Charter that peoples have no right to declare war for any other reason than self-defence. Consequently the principles of the Law of Peoples chosen in the Original Position are non-interventionist (for a full list of the principles, see LP: 37). But, unlike states under PSE, the power of peoples to choose their internal constitution is limited via human rights. More precisely, human rights have a threefold role in the Law of Peoples:

1. [The] fulfilment [of human rights] is a necessary condition of the decency of a society’s political institutions and of its legal order.

2. [The] fulfilment [of human rights] is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit of pluralism among people (LP: 80).

The third aspect of human rights, though, seems surprising. Given that the social contract takes place between liberal peoples, (3) seems redundant. But this riddle is easily resolved by the most interesting aspect of Rawls' theory, namely the idea that the Law of Peoples can be extended to what he calls decent hierarchical peoples (abbreviated as Decent Hierarchical Peoples hereinafter). In a second run of the international version of the Original Position, the representatives of Decent Hierarchical Peoples are invited to decide on principles of international justice. They would, Rawls contends, choose the same principles as the representatives of liberal peoples. The result would not be a *modus vivendi* between liberals and Decent Hierarchical Peoples, but a well-ordered and stable conception of international justice.

Decent Hierarchical Peoples differ from liberal peoples because they *a*) pursue a specific comprehensive, i.e. metaphysical doctrine, *b*) do not view their citizens as free and equal but as members of associations, and *c*) do not have institutions of representative democracy but operate with a decent consultation hierarchy through which the country's leaders take into account their citizen's wishes (LP: 71-72). Since much more could be said about the construction of Decent Hierarchical Peoples than is possible here, let us reflect on the broader rationale for why Rawls thinks that the Law of Peoples should be extended from liberal peoples to Decent Hierarchical Peoples. One reason is that Rawls, like Walzer, seeks to create stability in international affairs. The second reason is that Rawls considers toleration as a key component of liberalism. It would, therefore, be unreasonable to expect non-liberal peoples to change their way of life and demand, like Teson, that all states should have liberal constitutions.

Nevertheless, Rawls recognises that diversity in international society must be limited. First, since war for reasons other than self-defence is prohibited, Decent Hierarchical Peoples must not pursue an expansionist foreign policy. Second, since human rights are a fundamental component of the Law of Peoples, Decent Hierarchical Peoples

must, in addition to operating with a decent consultation hierarchy, 'honour human rights'. Yet, if Decent Hierarchical Peoples are not required to govern themselves according to a liberal constitution, the ideal of human rights must be narrower than that advocated by some contemporary liberals. According to Rawls, human rights should not be confused with liberal constitutional rights. Rather, human rights 'express a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide' (LP: 79). The list resembles Walzer's account of 'crimes that shock the conscience of mankind', but the demands the Law of Peoples makes on Decent Hierarchical Peoples are stricter than the ones Walzer makes upon states. This difference is largely due to Rawls' insistence on the importance of a decent consultation hierarchy rather than a mere 'fit' between governors and governed.

Considering Rawls' list of human rights, we are faced with the question why it is so short. In order to think about the issue, Alistair McLeod proposes a useful distinction between 'justificatory minimalism' and 'enforcement minimalism'.<sup>117</sup> The former assumes that is difficult to philosophically justify a long list of human rights. As McLeod points out, justificatory minimalism can take a pragmatic form in the sense that it tries to advance the least controversial justification of human rights in order to secure a consensus. These pragmatic considerations surely stem from Rawls' emphasis on the value of toleration. Clearly the same rationale also underlies Walzer's distinction between 'thick' and 'thin' moralities. But since we have already raised some critical issues about 'justificatory minimalism' in the discussion of Walzer's work, we do not need to dwell on this point here.

The idea of 'enforcement minimalism' maintains that the list of human rights must be kept short in order to be enforceable. As we saw above, 'enforceability' is one of the key roles of human rights in the Law of Peoples, otherwise Rawls would not have stressed that their observance guarantees immunity from outside interference or diplomatic sanctions. Again, Rawls' theory evidently shares some similarities with Walzer's thoughts on the subject. For, as we saw above, Walzer also links, perhaps unconsciously, human rights to enforcement. It demands assessment, then, whether any list of human rights should be kept short precisely because it could not otherwise be enforced via military intervention.

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<sup>117</sup> A. McLeod, 'Rawls's Narrow Doctrine of Human Rights', in: R. Martin & D. Reidy (eds.), *Rawls's Law of Peoples: A realistic utopia?* (Oxford: Blackwell, 2006), pp.134-149.

The answer is likely to be negative for two reasons. First, a comprehensive list of human rights does not solve the moral problems inherent in the use of force. It does not show why it is permissible to kill in defence of human rights. Second, as James Nickel points out, our political practices aimed at the protection of human rights do not solely rely on the use of military force.<sup>118</sup> For instance, they include the pressuring of countries by recalling ambassadors or engaging in public criticism of a particular regime.

Defenders of the Law of Peoples can reply to Nickel's argumentation in two ways. First, they can argue that even actions like public criticism are incompatible with the demand for toleration. This seems to be implied by Rawls' claim that observance of human rights guarantees immunity from diplomatic sanctions. If this was true, we must abandon nearly all of our political practices. The world Rawls describes is strangely apolitical, which is normatively undesirable. This reply is also a misrepresentation of the value of toleration. The concept of toleration describes X's principled non-intervention in situation Y, despite X's ability to halt or change Y.<sup>119</sup> It does not rule out acts of public criticism. For Nickel, we must differentiate between disrespectful forms of criticism which are incompatible with a commitment to toleration, and public criticism. Criticism is legitimate as long as it is not hurtful or dishonours the opponent.

The second reply could appeal to the concept of a right as such. As we saw in Chapter I, following Hohfeld, one characteristic aspect of (claim-) rights is their enforceability, not least because they are correlated to duties. In this sense, defenders of the Law of Peoples could maintain that, if we separate human rights from enforceability, we cannot, conceptually speaking, think of them as rights anymore. There is some truth to this argument, but we must not lose sight of the fact that human rights are not only legal but also moral rights. They aspire to a certain political and moral ideal whose realisation cannot simply be 'enforced'. The successful implementation of human rights is a multifaceted and complex process that should not be reduced to military intervention.

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<sup>118</sup> J. W. Nickel, 'Are Human Rights mainly implemented by intervention?', in: Martin & Reidy (eds.), (op. cit.), pp. 263-277. Rawls' preoccupation with the use of force as a solution to the problem of non-compliance is critiqued by Henry Shue in his 'Rawls and the Outlaws', *Politics, Philosophy & Economics*, Vol. 1/No. 3 (2002), pp. 307-323.

<sup>119</sup> A.J. Cohen, 'What toleration is', *Ethics*, Vol. 115/No 1 (2004), pp. 68-95.



In sum, Rawls' work falls into the camp of limited interventionism. Its merits consist in drawing out some of the complexities associated with human rights discourse. However, if the above observations are sound, a commitment to human rights does not automatically lead to an endorsement of MHI, not least because the issue of enforceability is ambiguous. As a result, we should reject an artificially short list of human rights that is justified via an appeal to 'enforcement minimalism'. A better strategy, it seems, is not to artificially delimit the list of human rights, but to examine why acts of genocide, ethnic cleansing and mass murder are morally distinctive forms of human rights abuses. This is a task to which we turn in Chapter III.

## V

### **Global justice and the ethics of military humanitarian intervention**<sup>120</sup>

#### *A. The cosmopolitan thesis*

The term cosmopolitanism ordinarily describes an ideal of world citizenship. Although there are important normative and methodological differences between contemporary cosmopolitan thinkers, they usually converge on three assumptions which jointly constitute what we can refer to as the Cosmopolitan Thesis:

- a) The human individual is the prime unit of moral concern regardless of his or her communal affiliations. Therefore:
- b) The scope of justice is universal. Therefore:
- c) Demarcated communities are not the prime source and loci of our moral obligations, especially those of justice.

The Cosmopolitan Thesis accounts for the liberal element of contemporary cosmopolitanism. Perhaps it constitutes *the* pure expression of liberal morality in political theorising. It is not the purpose of this part of the chapter to assess the validity of the Cosmopolitan Thesis as such, though liberal legalism is critical of it. Instead, the following analysis focuses on two aspects of the cosmopolitan debate about interventionism. First, we shall scrutinise the claim, upheld by Simon Caney,

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<sup>120</sup> For a rare critical treatment of the cosmopolitan position on MHI, see Heinze, *Waging Humanitarian War*, pp. 24-27. Heinze, however, mostly focuses on Charles Beitz and Fernando Teson. This part of the chapter broadens the debate by including more recent thinkers. The arguments developed below concur with Heinze's main point, namely that the cosmopolitan position on MHI is excessively permissive.

Darrell Moellendorf, and Gillian Brock, that we should not divorce the issue of intervention from the broader question as to what individuals are entitled to as a matter of justice. According to Caney, separating the two would be arbitrary, but there remain doubts whether linking them is a good idea.<sup>121</sup> Second, in addition to linking justice with the ethics of MHI, cosmopolitans provide a welcome critical assessment of just war principles. Their proposals for a reformed just war theory warrant further scrutiny. In Section B, we examine the relevance of theories of justice for the ethics of MHI, whereas Section C turns to cosmopolitanism's critical engagement with just war theory.

*B. The value of justice and the use of force: some doubts*

According to Caney, the egalitarianism inherent in the Cosmopolitan Thesis stipulates that individuals have economic, civil and political rights and that they should be accorded equality of opportunity. Likewise, Moellendorf's book *Cosmopolitan Justice* defends an egalitarian conception of global justice. For both theorists, the question of intervention cannot be separated from the issue of justice. As a result, as Moellendorf puts it, armed intervention in the domestic affairs of a state is, in principle, justified if

1. an injustice exists in the basic structure or [because of] the international effects of [its foreign] policy.

This condition is intended to satisfy JAB's just cause criterion. But Caney and Moellendorf agree that a mere concern for justice is not sufficiently weighty for war to be permissible. For Moellendorf, three additional criteria must be met:

2. It must be reasonable to believe that the intervention is likely to reduce injustice.
3. The intervention is proportional to the existing injustice.
4. The intervention is a last resort after diplomatic means have failed.

Roughly, these three conditions are meant to satisfy JAB's reasonable likelihood of success, proportionality, and last resort criteria, respectively. Caney also agrees that the classic just war principles can serve as background conditions for the

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<sup>121</sup> Caney, *Justice beyond Borders*, p. 231.

cosmopolitan approach to MHI. But let us disregard these criteria here. After all, all theorists in the debate, regardless of their affiliation, subscribe to something resembling the Argument from Excessive Harm outlined above. If MHI produces more harm than good, it remains impressible, even if this means that specific injustices will continue to exist.

To render the relationship between theories of justice and the ethics of MHI more precise, Moellendorf contends that armed intervention is permissible to replace a comparatively unjust basic structure. The idea of a ‘comparatively unjust’ basic structure appears to have three dimensions:

1. A comparatively unjust basic structure exhibits a wide range of persistent injustices that are not merely the effect of a *single* unjust policy. Hence, as Moellendorf emphasises, MHI is permissible if (and only if) it replaces a basic structure that is unjust *as such*.<sup>122</sup>
2. There are comparatively *just* basic structures that set a standard of legitimacy, thereby providing an account of ideal theory.
3. In terms of non-ideal theory, states that ‘stand over’ a comparatively unjust basic structure are not holders of a right to rule, that is, they lack a negative claim not to be interfered with.

But now imagine two countries called Libertaria and Egalitaria. The former has high inequalities, but also a model legal system that enforces property rights. The latter, too, has a good record on rights, but also implements extensive redistributive policies. Redistribution is anathema for the ‘Libertarians’ as it ‘enslaves’ Egalitarians by denying them the full fruits of their labour. Conversely, Egalitarians find the inequalities arising in Libertaria’s basic structure appalling because they deny the worst off amongst Libertaria’s citizens their just claim to assistance. If we employ Moellendorf’s idea of a comparatively unjust basic structure, then, in both cases, we cannot merely speak of *some* isolated policies that are unjust. Rather, the categorical denials of socio-economic rights in Libertaria and absolute property rights in Egalitaria constitute the very essence of those two basic structures, respectively.

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<sup>122</sup> Moellendorf, *Cosmopolitan Justice*, p. 118.

The Libertaria-Egalitaria case illustrates three general problems for Moellendorf's and Caney's approach. First, justice must allow some room for reasonable disagreement. It is impossible to conduct international politics if disagreements about justice led to a situation where political entities constantly derecognised each other's legitimacy. If this was the case, cosmopolitanism would lead to an excessively permissive form of interventionism. Of course, we should not go so far as to follow Copp's suggestion that we should separate justice from legitimacy altogether.<sup>123</sup> Eventually we should establish an order that is just. But doing so will require a slow piecemeal process of reform. As a starting point, a minimalist conception of legitimacy is more likely to further this aim because it is not so idealistic as to be self-defeating.

Second, the overall relationship between justice and the ethics of war remains obscure. Intuitively, it does not seem permissible for Libertaria to declare a war against Egalitaria to end slavery by taxation. Libertarians are permitted to try and persuade Egalitarians to change their economic system, but the declaration of war is grossly disproportionate. Further, if Moellendorf and Caney followed Teson by arguing that it is permissible to end large-scale violations of civil and political rights through the removal of extremely tyrannical regimes, they would have to account for what differentiates 'extreme tyranny' from the Egalitaria-Libertaria case. In this regard, Moellendorf's and Caney's theories are less developed than Teson's. Rather than relying on the mere invocation of the value of justice, Teson's theory tries to derive the right to intervene from the Lockean right to revolution.

Third, as has been stressed throughout Chapter I, military campaigns encompass corporate and individual levels of analysis. In regard to the latter, Caney and Moellendorf must specify whether it is permissible to *kill* in defence of justice. However, neither of the two thinkers engages with the ethics of killing any detail. To be sure, injustices arise because of (individual) non-compliance with duties of justice. But considering Claudia Card's work on atrocities, it is doubtful that non-compliance with duties of distributive justice can establish liability to attack.

To be precise, violations of duties of distributive justice, Card contends, are less weighty than violations of negative natural duties not to cause intolerable harm.<sup>124</sup>

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<sup>123</sup> Copp, 'The Idea of a Legitimate State'.

<sup>124</sup> Card, *The Atrocity Paradigm*, chapter 5.

Even large-scale non-compliance with duties of distributive justice does not necessarily cause intolerable harm. Free-riding on public goods, for example, constitutes a violation of duties of fairness and reciprocity, and, in a worst case scenario, the public good in question simply ceases to be supplied. But there are normative differences between someone who does not pay the subway fare and someone who sets out to hack his neighbours to death. The consequences of these two acts differ greatly on any moral scale, and, as a result, our responses to them must differ too.

For Card, the difference between atrocities and injustices may, roughly, be described as follows. Perpetrators of atrocities, Card maintains, deprive their victims of the opportunity for a decent life or a dignified death. While injustices often hinder our pursuit of a conception of the good, they do not always make life intolerable or unbearable. Less affluent members of Libertaria, for instance, may still have decent lives due to charity provisions. In this light, it seems permissible to use force against perpetrators of atrocities but not against free-riders or right-wing libertarians. Although this intuition needs to be rendered more precise, it raises doubts over the link between (distributive) justice and the ethics of war.

Perhaps it is possible to rescue the link between global justice and the ethics of MHI by making the former less demanding. As was indicated above, Brock argues that representatives in the Original Position choose principles that will help each individual secure a minimum for a decent life.<sup>125</sup> A minimally decent life is defined in terms of five basic needs: physical and psychological health; security to be able to act; understanding the options one is choosing between; autonomy; decent social relations with at least some others. Being more cautious than Caney and Moellendorf, Brock argues that MHI is permissible if (and only if) individuals are deprived of those means necessary for the fulfilment of their basic needs in security and physical and psychological health. Arguably, Brock's theory would rule out intervention in the Libertaria-Egalitaria example. Though both countries disagree over a 'more comprehensive' set of principles of justice, we can assume for the sake of the argument that they have mechanisms in place in order to fulfil the basic needs of their members, albeit in different ways. As a result, intervention in their internal affairs is prohibited.

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<sup>125</sup> Brock, *Global Justice*, p. 50.

But Brock's minimalist theory of justice raises two problems. First, it is questionable whether her minimalist approach can be described as a theory of 'justice'. The value of justice, on an egalitarian understanding at least, has two features. It requires *a*) impartial treatment of individuals and *b*) compensation for undeserved disadvantages. This entails making comparative assessments of the standing of individuals within a given social structure. In other words, it matters that some fare better or worse than others, especially if they are better or worse off for reasons that are arbitrary from a moral point of view. Accordingly, the unjustifiably partial applications of a rule or the existence of double standards fall into the category of injustices. The rejection of equally qualified applicants on grounds of height, race or gender is an injustice. Compared to others, the rejected applicant is worse off due to factors beyond her control.

Brock's theory, on the other hand, does not have this structure. It is essentially non-comparative. Indeed, the wrongness of killing, rape, bodily mutilation, sensory deprivation, preventable mass starvation, torture or non-consensual medical experiments neither depends on an appeal to undeserved disadvantages nor on comparative judgements. As Card points out, the notion of atrocities suggests that there are certain acts no human being should suffer. It does not matter how deserving or undeserving a person is. Nor does it matter whether other individuals experience similar wrongs. For an egalitarian at least, atrocities are not analysable through the framework of justice. It seems, intuitively, as if Brock's theory describes something other than (in)justice, and Chapter III will discuss this intuition in detail.

Second, even if we assume that Brock's minimalist approach could be classified as a theory of justice, it is unclear whether anything is gained from the introduction of the concept of (minimal) justice into MHI. The normative and conceptual space in the analysis of atrocities is already occupied by other concepts. As we saw above, for Rawls, who rejects the application of justice to relations between peoples, decency is one of the defining features of those societies which can be tolerated. By definition, for the Law of Peoples, political institutions that commit atrocities are indecent or cruel rather than unjust.<sup>126</sup> For Card, whose work features prominently in the next chapter, atrocities are paradigmatic of evil rather than injustice. If this was true,

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<sup>126</sup> The themes of cruelty and indecency are further explored in A. Margalit & G. Motzkin, 'The Uniqueness of the Holocaust', *Philosophy & Public Affairs*, Vol. 25/No. 1 (1996), pp. 65-83.

atrocities are worse than mere injustices. Theorists of MHI, then, who operate with a minimalist theory of justice, must show that the concept of justice is preferable, perhaps even superior, to the concepts of decency or evil.

The above reflections on the relationship between global justice and theories of MHI reveal three problems for cosmopolitans. First, those who operate with a relatively demanding conception of justice face the charge that their theories encourage excessive interventionism. Second, the charge of excessive interventionism becomes even more problematic when one considers that, in cosmopolitan thought at least, there is no engagement between the ethics of killing and saving and theories of justice. Third, in addition to the argument that minimalist theories of justice do not adequately represent the value of justice, it is not clear what they can add to our understanding of atrocities. As a result, an appeal to justice may either be dangerous or superfluous.

### *C. Revising just war principles*

Cosmopolitan theorists have also tried to revise just war principles. Moellendorf, for instance, argues that the right intention criterion is redundant because the warring parties are obliged to ensure that rights are protected, regardless of their intentions.<sup>127</sup> However, it may be premature to abandon the right intention criterion. To see why this is so, it is useful to distinguish between an intrinsic and instrumental interpretation of it. According to the former, an act may be impermissible, or is at least corrupted, if carried out with the wrong intention, even though it does not violate any rights.<sup>128</sup> For the latter, the right intention criterion is instrumentally valuable because it may help to reduce rights violations during a military campaign. This is because, if a campaign is fought with the wrong intentions or in the ‘wrong spirit’, the potential for the abuse of rights, or non-compliance with the laws of war more generally, is much greater. While it is difficult to defend the intrinsic version of the right intention criterion without recourse to complex and controversial metaphysical assumptions, we should retain an instrumentalist version of it.

Second, Moellendorf wants to abandon the right authority criterion. This point is particularly relevant for the tension between capacity and efficiency briefly

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<sup>127</sup> Moellendorf, *Cosmopolitan Justice*, p. 121-122.

<sup>128</sup> Augustine’s famous requirement that soldiers must not kill out of hatred for the enemy can serve as an example for the intrinsic interpretation. A soldier who kills an enemy out of hatred might not violate the latter’s rights but would be acting wrongly.

introduced in Chapter I. The right authority criterion, Moellendorf claims, protects order at the expense of justice because it will unnecessarily delay intervention. In other words, if we are concerned with the efficiency of MHI, we should drop the right authority criterion. As I said in Chapter I, the other-defensive conception of MHI, to be developed in the remaining chapters of this thesis, does not take a line on this issue. It would, suitably conceived, be compatible with Moellendorf's views on right authority.

Nevertheless, though the other-defensive conception of MHI is agnostic about the status of right authority, it is worthwhile taking into account Caney's criticism that the abandonment of the right authority criterion is unlikely to resolve the issue. There will be, Caney points out, disagreement about whether to intervene or not, and someone just has to make an authoritative decision at some stage.<sup>129</sup>

Perhaps, then, we should aim to construct institutions, or revise existing procedures, to deal with the problem of possible delays. In this regard, Brock's proposal for what she calls the Vital Interest Protection Organisation (VIPO) is interesting. For Brock, the representatives in the Original Position decide to set up VIPO, charging it with the task to protect our basic needs in case our own states fail to do so.<sup>130</sup> Indeed, she proposes that MHI should be authorised by VIPO, though it is not clear whether VIPO would carry out MHI itself. The attractive feature of this proposal, for Brock, is that the illicit intentions of powerful states are kept in check because MHI can only be authorised via unanimous vote.<sup>131</sup>

This is surely problematic. For one thing, it would have to be specified how voting rights are to be distributed within VIPO. For another, even if we devised a feasible and just distribution of voting rights, the requirement of unanimity is too demanding. Powerful states are presumably going to use their voting rights in order to block MHI if it affects their partners or their sphere of interests more broadly defined, while weaker states are going to form alliances in order to protect themselves from stronger states. This will lead to an inevitable deadlock.

Nonetheless, Brock's account of VIPO signals a new development in the ethics of MHI. As we saw in Chapter I, MHI was considered as a form of self-help during the

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<sup>129</sup> Caney, *Justice beyond Borders*, pp. 251-252

<sup>130</sup> Brock, *Global Justice*, p. 177.

<sup>131</sup> (*ibid.*), p. 178.



Cold War era. Arising in a post-Cold war environment, one of R2P's tasks is to replace the self-help conception. Depending on how one interprets Brock's proposal it may be congruent with R2P or go beyond it. If VIPO relies on the assistance of states, it is similar to R2P. While R2P assigns the responsibility to intervene to the 'international community' via the UN Security Council, the actual discharge of the duty to intervene will be undertaken by member states. On the other hand, if VIPO has sufficient power to undertake MHI, its existence challenges the state-centric nature of current international politics, which, as we saw above, underlies Walzer's Legalist Paradigm. This would also differentiate Brock's theory from Teson's and Rawls's, both of which are, ultimately, state-centric.

If anything, Brock's argument indicates that there may be a nascent 'post-statist' conception of MHI that even surpasses R2P. But there are reasons to be doubtful that a post-statist framework, as opposed to a statist one, can entirely resolve the tension between efficiency and capacity. In regard to the former, given the aforementioned doubts over institutional design, Brock has to show that VIPO (or something closely resembling it) is more efficient in responding to atrocities than the current state system. In regard to capacity, since VIPO must have the capacities to effectively police the globe, its advocates must also defuse Walzer's worry that a 'global state' would ride roughshod over the interests of local communities. Walzer's concerns about communal integrity is amplified when one consider the background of Brock's theory. Regardless of whether one views justice in minimalist or more demanding terms, cosmopolitanism gives rise to a fairly permissive intervention regime. As a result, it is to be feared that VIPO would authorise interventions on a regular basis. There is a real danger, then, that local communities would indeed be overwhelmed by global institutions.

Arguably, it may well be the case that the tension between capacity and efficiency will haunt theories of MHI for some time to come. Neither statism nor post-statism seems to have a convincing answer to it. If we are to make any progress in formulating a normatively sound theory of MHI, it is necessary to set the issue aside.

After this rather negative assessment of contemporary cosmopolitanism let us end the discussion on a more positive note. It was pointed out above that the interests of the victims of mass murder hardly impact on Walzer's defence of a duty to intervene. The great advantage of Moellendorf's and Caney's Cosmopolitan Thesis is that it

turns our attention towards the interests of the imperilled. In particular, moral cosmopolitanism seems well suited to defend a duty to intervene precisely because its adherents assume that *a*) we have strong and universal moral duties to render assistance to the needy and *b*) the individual is the prime unit of moral concern.<sup>132</sup>

Although the argument is a step into the right direction, two issues have to be clarified. First, cosmopolitans must show when a duty to render assistance becomes a duty to intervene via *military* force. Second, as Moellendorf rightly notes, successful MHI will depend on the actions of collective and corporate bodies, such as states and armies. Although the duty to intervene is analytically reducible to the duties of individuals, it is likely to be assigned to states. Cosmopolitans must, therefore, specify the link between individual duty bearers and the collective agents that will undertake a military intervention.

To sum up, how should we judge the success of the cosmopolitan approach to MHI? The answer is mixed. On the one hand, insofar as they advocate ‘broad interventionism’, cosmopolitans run into similar problems as Teson. On the other hand, cosmopolitanism represents an interesting development for theories of MHI. Cosmopolitan thinkers have begun to critically explore the very rationale of the principles of just war theory itself, though, as we saw above, they disagree over the importance of particular principles. Cosmopolitanism shows that just war theory is not a dogmatic body set in stone, but warrants critical scrutiny. Especially the emergence of a possible ‘post-statist’ conception of MHI poses a number of challenges to the traditional debate about the ethics of war, though it is yet unclear whether it amounts to an improvement over statism.

## VI

### Conclusion

Despite some agreement, liberal political philosophers have offered conflicting accounts of the ethics of MHI. Following Teson’s classifications of different types of interventionism, Walzer and Rawls are in favour of limited interventionism, whereas Teson, Moellendorf, and Caney defend broad interventionism. Brock seems to fall between the two camps, as her approach is neither as restrictive as Walzer’s and Rawls’ nor as permissive as Moellendorf’s and Caney’s. If the above arguments are

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<sup>132</sup> Moellendorf, *Cosmopolitan Justice*, p. 123.

sound, there are good reasons to support 'limited interventionism' with respect to *military* interventions. The aims of broad interventionists are better served by non-military means of intervention and the development of a sense of solidarity with the oppressed.

In light of the foregoing, the biggest problem with the contemporary debate about MHI is that liberal political philosophers fail to seriously engage with the *ethics of killing*. Contemporary theories of MHI lack a clear framework for the non-self-defensive use of force. Now, while it is true that a more or less modified version of just war theory serves as a background to all of the theories discussed above, it is questionable whether it can serve as a reliable normative guide for the ethics of MHI. As we saw in Chapter I, for just war theory, the paradigm of a just war is a *self-defensive* one. If the above observations on, say, Teson's invocation of DDE are sound, the challenge MHI poses for just war theory is greater than previously assumed. Indeed, as Walzer's theory shows, the problem of the 'missing link' between the rights of the intervening state and the rights of those in the target state goes, with the exception of Teson's Lockean Argument and the Argument from Hypothetical Consent, unmentioned in the literature on MHI. This serves as a potent reminder of how our thinking about war is shaped by self-defence.

In addition to the aforementioned issues, the failure to engage with the ethics of killing leads to two further problems. First, the foundation of the duty to intervene remains vague. Given that self-defence is considered to be the paradigm for a just war, it is not surprising that, for Walzer, the duty to intervene stems from the duty of states to protect *their own* citizens. Contrary to Walzer, cosmopolitans are correct in asserting that we have duties of assistance towards those outside of our borders, but the question remains under what circumstances these include duties to *kill* on behalf of others. Second, because killing is such an extraordinary act, it is undeniable that the interveners will acquire some obligations towards those in the target state once the intervention is over. This seems to be fundamental for tackling the emerging discourse of the post-intervention justice which, with the exception of Walzer, is overlooked by most theorists of MHI.

What we need, then, is a framework that connects the traditional debate about MHI with the contemporary one by telling us *a)* when and why it is permissible to use lethal force in defence of those outside our borders, *b)* when it is obligatory to do so,

*c)* what kind of obligations those who use lethal force acquire towards their targets and *d)* how the use of force can be suitably restricted. It is the task of the following chapters to shed some light on these questions by developing the other-defensive conception of MHI.

## Chapter III

### Military Humanitarian Intervention as other-defensive war

*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs'*

(United Nations Charter, Article 51).

*State sovereignty, in its most basic sense, is being redefined – not least by forces of globalisation and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa.*

(Kofi Annan).<sup>133</sup>

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<sup>133</sup> K. Annan, 'Towards a New Definition of Sovereignty', in: G.M. Eichberg, H. Syse & E. Begby (eds.), *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell, 2006), pp. 683-693, at p. 685.

### **Military Humanitarian Intervention: in search of normative foundations**

The preceding two chapters gave an overview of the key issues a normative theory of MHI must tackle. In this chapter, we begin to develop the other-defensive conception of MHI. From the perspective of just war theory, the chapter is concerned with JAB. In particular, it seeks to find a sound interpretation of JAB's just cause criterion. In doing so, it raises some points about the 'right intention' criterion. To a lesser extent, the discussion will also offer some thoughts on JAB's proportionality criterion. In what follows, however, we shall leave aside the last resort, reasonable likelihood of success and right authority criteria that form part of JAB.

It is assumed here that the last resort and reasonable likelihood of success criteria should be incorporated into the proportionality criterion. As we saw in Chapter I, assessments of proportionality require that the harm caused by war is not excessive to its benefits. If MHI was not the last resort, the harm caused by an other-defensive military campaign is likely to be excessive. If there were alternative ways of ending a humanitarian crisis, they should be pursued. Similarly, if there was no realistic prospect of being able to halt a humanitarian crisis via military action, the use of force is disproportionate. Certainly it is disproportionate to endanger the lives of intervening combatants in a pointless military campaign. Moreover, if MHI was doomed to fail, it is excessive to impose the costs of war on those located in the target state.

In regard to the right authority criterion, as we saw in Chapter I, the other-defensive conception of MHI is statist in orientation, though it can be seen as an interpretation of R2P. The problem with R2P, however, is that its notion of international community is rather vague. Until a suitable post-statist conception of MHI has been developed, it is reasonable to assume that MHI should be carried out by states. Hence the chapter does not provide a detailed examination of the right authority criterion.<sup>134</sup> It does not discuss the tension between efficiency and capacity either,

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<sup>134</sup> For a critical view of the right authority criterion, C. Farbe, 'Cosmopolitanism, Just War Theory and Legitimate Authority', *International Affairs*, Vol. 84/No. 5 (2008), pp. 963-976 & U. Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007).

though it will soon become apparent why the latter is important for the other-defensive conception of MHI.

The endorsement of statism raises two critical points. First, it must be answered whether *any* state is allowed to halt a humanitarian crisis via military force. Michael Walzer thinks that those states with the capacity to intervene are automatically permitted to do so. Though, as has just been indicated, the other-defensive conception of MHI attaches importance to capacity, this chapter raises some concerns about Walzer's claim. Second, in our discussion of Walzer's just war theory in Chapter II, we saw that the state-held right to self-defence is derived from the rights of the state's citizens. But it is unclear how states can gain permissions, or even rights, to act in defence of *non*-citizens. It is one of the tasks of the ensuing discussion to shed light on this question.

This takes us to the broader objectives of what is to follow. Based on our analysis of the MHI debate in Chapters I & II, the current chapter pursues two main aims. First, it is concerned with finding an analogue to the crime of aggression that could justify the declaration of an other-defensive war. As we shall see, large-scale atrocities, most notably genocide, politically motivated mass murder and ethnic cleansing, can serve as suitable analogues to the crime of aggression. Second, Chapter I pointed out that theorists of MHI defend what is normally rejected in international politics, namely state aggression. The declaration of an other-defensive war by the intervening state is an act of aggression, not least because the intervening state has not suffered an attack at the hands of the target state. In what follows, then, it must be shown that aggression can be justified. Further, given that the target state is the victim of an unprovoked attack, we must also determine whether it is allowed to defend itself against the intervening state.

As was indicated in Chapter I, one way of meeting these challenges consists in drawing an analogy between MHI and domestic rescue killings. Utilising the idea of the Domestic Analogy, we must try and reconcile our considered judgements about the ethics of killing and saving in domestic circumstances with the ethics of war. According to the ethics of private self-defence, when the victim of an attacker is unable to defend herself, it is usually deemed morally permissible for a third party to come to her assistance by killing the attacker, subject to certain restrictions. In this chapter, we examine whether the rationale of this argument can be extended to MHI.

In other words, it needs to be shown that, morally speaking, MHI can be understood as a private rescue killing writ large.

In Part II, we begin with a brief overview of the main issues in the ethics of private self-defence. Part III develops an analogue to the crime of aggression. Part IV then defends the idea of a *prima facie* right to intervene. It rounds off the discussion with some brief reflections on the problem of proportionality.

## II

### From self-defence to rescue killings

#### A. *The use of force: A normative taxonomy*

Before we examine the ethics of self-defence in more detail, it is important to introduce a fourfold normative taxonomy for the use of force.

1. *Excusable uses of force*: If Amy was not permitted to kill Ben, Amy's use of force is excusable if (and only if) there is a strong exculpating reason for her actions.<sup>135</sup>
2. *Permissible uses of force*: Amy is permitted to use force against Ben if (and only if) Amy's use of force is not wrong, that is, if Amy is not under a moral duty not to use force against Ben. One can represent this argument in terms of the Hohfeldian concept of liberties introduced in Chapter I. To wit, the permission to use force indicates the absence of a duty not to use force. If Amy is at liberty to use force against Ben, Ben is *liable* to attack, that is, he must have lost his right not to be attacked.
3. *Justified uses of force*: Amy's use of force against Ben is justified if (and only if), in addition to not being morally wrong, there is a strong normative reason in favour of her actions. For instance, there might be certain facts about Ben that tip the moral scale in favour of using force against him.
4. *A right to use force*: Amy's use of force may be permissible or even justified, but this does not mean that she is the holder of a right to use force against Ben.<sup>136</sup>

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<sup>135</sup> Excusable uses of force will not play a role in this chapter. We return to the problem of excuses in Chapters IV and V.

<sup>136</sup> Conversely, Amy may have a right to do x, although she is neither morally permitted nor justified to do x. In this case, Amy is holder of a right to do wrong. We shall not discuss this problem here. For an account of the right to do wrong, see J. Waldron, 'A right to do wrong', in: J. Waldron, *Liberal rights: collected papers 1981-1991* (Cambridge: Cambridge University Press, 1993), pp. 63-87.



We must understand the concept of a right in terms of Hohfeld's idea of claim-rights introduced in Chapter I. For Hohfeld, a (claim-) right is correlated to duties. In the present context, the right to use force is correlated to two negative duties. First, Amy holds a negative claim against Carol not to interfere with her exercise of force against Ben. Second, Amy holds a negative claim against Ben not to ward off her attack. Arguably, it would be too radical to conclude that Ben is under a duty to die. He may always duck the bullet, run away, hide or wave a white handkerchief. Amy's right only obliges him not to use retaliatory force against her.

Let us note that the use of force is always subject to considerations of necessity and proportionality, regardless of whether it is merely permitted, justified, or rightful. As was argued in Chapter I, the problem of proportionality consists in establishing how harms and benefits should be balanced against each other. As we saw earlier, it matters how people are killed and how many are killed. For instance, if Amy had the option of killing Ben *a*) via an extremely painful method or *b*) painlessly, she is obliged, for reasons of proportionality, to pursue *b*). Likewise, if killing Ben was unnecessary, Amy must use different means to protect herself or another victim. For example, if Amy could scare Ben into retreat, she is obliged to do so.

The problem of proportionality points to an important issue for the ethics of rescue killings. In cases of self-defence, it is reasonable to assume that the victim is allowed to attach greater weight to her life than the attacker's. But in cases of other-defence, the rescuer is not threatened by the actions of the attacker.<sup>137</sup> It must be clarified, then, why the rescuer is permitted to attach greater weight to the victim's life than the attacker's. Sections B and C provide answers to this and related issues.

#### B. *Self-defence: the justice-based perspective*

In order to show that rescuers are permitted to intervene on behalf of victims, we must first inquire under what circumstances (if any) victims are permitted to defend themselves. Logically, Carol's permission to kill Ben on behalf of Amy depends on the existence of a moral permission for Amy to kill Ben. If Amy does not have a

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<sup>137</sup> Nancy Davis stresses this point in her critique of the self-defence-based argument in favour of abortion, see N. Davis, 'Abortion and Self-Defence', *Philosophy & Public Affairs*, Vol. 13/No. 3 (1984), pp. 175-207.

permission to kill Ben, Carol cannot have such a moral permission either. Consequently, in order to approach the problem of rescue killings, we must first discuss the ethics of self-defence.

Let us begin by assuming that, unlike in Hobbes' depiction of the state of nature where everyone has a 'right to everything', individuals possess a moral right not to be subjected to violent attack. Following the Hohfeldian scheme, it is correlated to a negative duty not to aggress others. The right not to be attacked is held *in rem*, to wit, it is held against every other moral agent in the world. It is the outcome of three normative considerations. First, it is based on Rawls' idea of natural duties introduced in Chapter I. These, you recall, include duties not to be cruel and not to kill. Importantly, for Rawls, natural duties are also held *in rem*, as they exist independently of membership in a cooperative venture. Second, for Shue, so-called security rights form an important part of the list of basic rights. As their name indicates, these rights protect our bodily integrity. Third, drawing on the interest theory of rights, we have strong interests in bodily integrity that are sufficiently weighty to hold others under a negative duty not to attack us.

For the ethics of self-defence, the main problem consists in showing that the attacker is liable to attack. For the attacker, too, is holder of a right not to be attacked. As Jeff McMahan succinctly puts it, 'in order to avert harm to herself, the agent who engages in self-defence intentionally affects a person [i.e. the aggressor] in a way that she believes will, if successful, kill that person. Her action offends against both the presumption against doing harm and the presumption against intentional harming'.<sup>138</sup> It must be shown, then, that *a*) it is not wrong to intentionally harm the attacker and *b*) harming the attacker is compatible with the ends-not-means-thesis, which underlies the version of non-consequentialism introduced in Chapter I.

The problem can be solved by arguing that the attacker forfeits his right not to be attacked.<sup>139</sup> The victim *harms* the attacker because she 'sets back' his interest in

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<sup>138</sup> J. McMahan, 'Self-Defence and the Problem of the Innocent Attacker', *Ethics*, Vol. 104/Issue 2 (1994), pp. 252-290.

<sup>139</sup> Critics might detect a tension between the interest theory of rights and the argument that attackers forfeit their right not to be attacked because the possibility of forfeiting one's right makes more sense if we subscribe to the choice or will theory of rights formulated by H.L.A. Hart and others. However, it is reasonable to assume that, although attackers have interests in not being attacked, these interests are not weighty enough to hold their victims (and, perhaps, even a third party) under a duty not to kill them. As Joseph Raz's formulation of the interest theory makes clear, merely having an interest is in itself not sufficient to hold others under a corresponding duty.

physical integrity. But she does not *wrong* him because she does not violate his right not to be attacked. Bearing in mind the normative taxonomy outlined above, the idea of forfeiture establishes the permissibility of self-defence. It shows, in other words, that self-defensive killings are not wrong because the attacker has made himself liable to attack. Moreover, the idea of forfeiture indicates that self-defensive killing is compatible with a general concern for equality. Simply put, the forfeiture of the right not to be attacked leads to a moral *asymmetry* between victim and attacker. It accounts for why the victim, by defending herself, is permitted to depart from a general presumption in favour of equal and impartial treatment.

In order to defend this argument, we must provide a more detailed account of the mechanism of forfeiture. In the contemporary literature on the ethics of self-defence, there are two influential approaches to it. The first, defended by Judith Jarvis Thomson, assumes that those who threaten a right lose their own right not to be attacked.<sup>140</sup> For Thomson, it is morally irrelevant how this threat has come about. Accordingly, a person whose body has become an involuntary missile due to a sudden gust of wind forfeits her right not to be attacked. Similarly, an assassin who has been plotting to kill his victim for weeks forfeits his right not to be attacked. But intuitively, it is odd that the former should be morally on a par with the latter. After all, the threat posed by the assassin is the outcome of his agency, whereas the involuntary human missile is the victim of bad circumstances.

The importance of human agency for the idea of forfeiture is better captured by Jeff McMahan's justice-based approach.<sup>141</sup> In a nutshell, McMahan argues that attackers who are morally responsible for posing an unjust threat to their victim forfeit their right not to be attacked.<sup>142</sup> Considerations of justice demand that the attacker should suffer the harm he would have otherwise inflicted on his victim. This argument is reinforced by the fact that the attacker is morally responsible for having brought about a forced choice between lives.<sup>143</sup> Compared to Thomson's theory, the justice-based approach exhibits greater compatibility with the non-consequentialist ends-

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<sup>140</sup> J.J. Thomson, 'Self-Defense', *Philosophy & Public Affairs*, Vol. 20/No. 4 (1991), pp. 283-310.

<sup>141</sup> McMahan, *The Ethics of Killing. Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), p. 402; McMahan, *Killing in War*, pp. 34-35; 162-167.

<sup>142</sup> For the sake of convenience, whenever the thesis uses the term 'attacker', it is assumed that, unless otherwise indicated, the attacker is morally responsible for the threat he poses.

<sup>143</sup> McMahan, 'Self-Defence and the Problem of the Innocent Attacker'.

not-means-thesis because it insists that the attacker's (autonomous) choices establish his liable to attack.

McMahan's justice-based perspective has important implications for the idea of a right to self-defence. First and foremost, because it connects forfeiture with agency, it clearly accounts for why killing the attacker is *permissible*. Second, the considerations underlying the justice-based position also indicate that killing the attacker is *justified* because he should suffer the harm for which he is morally responsible. Third, given that the attacker is morally responsible for having brought about a forced choice between lives, he cannot be allowed to resist efforts that prevent the victim from being harmed. In this sense, the victim is the holder of a right to self-defence. In our following discussion of the ethics of rescue killings, let us proceed on the (background) assumption that, under the circumstances outlined above, victims of unjust aggression are holders of a right to self-defence.

C. *The right to intervene: agent-neutral or agent-relative?*

If the observations of the preceding section are sound, we have fulfilled one precondition for a rescue killing: we have shown that, under certain circumstances, victims have a right to defend themselves against their attackers. Suzanne Uniacke, for instance, argues that, because the forfeiture of his right not to be attacked has resulted in a moral asymmetry between the attacker and *all* other moral agents, *anyone* has a right to attack him.<sup>144</sup> For Uniacke, the right to strike against the attacker is 'agent-neutral'. Some might object that, from the standpoint of causality, the rescuer has to 'aggress' the attacker in order to rescue the victim. But from a moral point of view, the rescuer is a *just* aggressor. Moreover, given that the attacker is morally responsible for a forced choice between lives, it is intuitively acceptable that the rescuer can hold him under a duty not to repel his use of other-defensive force. If other-defensive force is the only way to ensure that the victim is not harmed, the attacker is not permitted to prevent the rescuer's act of rescue. In this light, Uniacke's argument seems reasonable.

But it is premature to conclude that *any* third party should be recognised as a just aggressor. The fact that the victim is holder of a right to self-defence against the attacker is necessary but not sufficient for a rescue killing. As our normative

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<sup>144</sup> S. Uniacke, *Permissible Killing: The Self-defence justification of Homicide* (Cambridge: Cambridge University Press, 1994), p 157.

taxonomy for the use of force revealed, the idea of a right implies that outside parties are not allowed to interfere with the right holder's exercise of his right. Thus, if the victim is holder of a *right* to self-defence, third parties are not allowed to interfere with her use of self-defensive force against the attacker. In order to have a right to intervene, then, the rescuer must secure the victim's consent to the intervention.

However, even victim's consent is not sufficient to ground the right to intervene. For the rescuer might have illicit intentions unbeknownst to the victim. In order to be recognised as a just aggressor, the rescuer must fulfil the right intention criterion. To be sure, when defending herself against the attacker, the victim's intentions are not of overriding normative importance. After all, the justice-based perspective on self-defence reflects this because the moral permission to use force is determined by the responsibility of the attacker rather than the intentions of the victim. But intuitively, the right intention criterion may be of greater relevance for the ethics of rescue killings, even if we follow McMahan's framework. What needs to be clarified, though, is how demanding the right intention criterion should be. If it is too demanding, rescue killings will remain a mere hypothetical possibility. If it is not sufficiently demanding, we risk that 'illicit' rescuers exploit the vulnerability of victims. To deal with the problem, let us consider the following thought experiment:

Mob Boss:<sup>145</sup> *The Mob Boss of the Jersey Crew, Big P, has attempted to kill Lil' Frankie, a member of his 'family', in the past, but decided to let him live because he would be more useful to him alive. Now Lil' Frankie must carry out Big P's wishes, otherwise he will be killed. Unfortunately for Lil' Frankie, the rival mafia boss of the New York crew, Meat Cleaver Marco, whose clan the Jersey Crew has not aggressed, has captured him and is about to kill him in order to intimidate Big P. At the last minute, however, Big P appears and could (only) save Lil' Frankie by killing Meat Cleaver Marco. As a result, Frankie would survive and, as a side-effect, Big P's family would become more powerful due to the disappearance of an important rival.*

Leaving aside the issue of consent, it is possible to argue that Big P is prohibited from acting because he would rescue Frankie for 'the wrong reasons'. It is the perfect opportunity for him to cement his rule in the underworld. But why should this count? At the time of the rescue killing Big P does not wrong Frankie, notwithstanding his ulterior motives. The fact that Big P's criminal empire becomes more powerful does not impinge on Frankie's interest in being rescued. Similarly, it

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<sup>145</sup> I owe this example to Cecile Fabre's love of gangster movies.

would be odd to argue that Meat Cleaver Marco is wronged because he is killed by someone with ulterior motives. Meat Cleaver Marco, it must be stressed, is liable to attack anyway. If this is sound, the thought experiment suggests that the right intention criterion is superfluous.

But we should not jump to conclusions. Let us assume that once Frankie has ceased to be useful, Big P wants to kill Frankie because this will send out a clear message to fellow mobsters as to who is the boss. Though protecting Frankie's interests in physical integrity from Meat Cleaver Marco, Big P is plotting to violate Frankie's rights in the future. It is not clear, though, that his future plans disqualify Big P from acting. We do not know, for instance, whether Big P is going to be successful in putting his plans into practice. Big P clearly poses a threat to Frankie, but, unlike Meat Cleaver Marco, he is not yet an immediate threat. Of course, considering Big P's behaviour towards Frankie in the past, the likelihood that Big P is going to harm him is fairly high. But there is nothing inevitable about him killing Frankie.

On the other hand, if Big P was about to shoot Frankie immediately after he had killed Meat Cleaver Mike, he would be an immediate threat. In this case, killing Meat Cleaver Marco, the 'competing' aggressor, is merely Big P's way of ensuring that his own immediate aggression is going to be successful. Under those circumstances, it is impossible to speak of a genuine *rescue* killing.

However, we should not treat potential threats as morally on a par with immediate ones. The possibility that Big P plans to kill Frankie at  $t_2$  is not sufficiently weighty to bar him from using lethal force against Meat Cleaver Marco at  $t_1$ . Even if we take the rescuer's culpability for separate threats in the past/future or on-going potential threats into account, this does not affect his right to intervene. As Mob Boss indicates, being guilty of having done x to Y in the past or planning to do it in the future does not automatically disqualify an agent from trying to prevent someone else from doing x to Y. If these arguments are correct, the right intention criterion is a fairly thin one. Essentially, it demands that rescuers must not plan to immediately aggress the victim. In other words, the rescuer must not use other-defensive force in order to substitute one unjust threat, i.e. the original attacker, with another, i.e. himself.

#### D. Conclusion

Following McMahan's work on the ethics of self-defence, we argued that the right to intervene exists if (and only if) three conditions are met.

*Attacker-centric conditions:* The attacker must be morally responsible for a forced choice between his life and the victim's. First and foremost, in virtue of having created a forced choice between lives, the attacker forfeits his own right not to be attacked, creating a moral asymmetry between him, the rescuer and the victim. As a result, there is no tension between the ends-not-means-thesis and the ethics of self-defence/rescue killings because the culpable attacker incurs liabilities to attack through his own culpable wrongdoing. For a *right* to intervene to exist, though, it must also be shown that the attacker is not allowed to repel the rescuer's attack. The duty not to repel the rescuer results from our intuitive understanding of justice. The attacker, rather than his victim, should suffer the consequences of the forced choice between lives he created.

*Victim-centric conditions:* As we saw above, a right to intervene can exist if (and only if) the victim has a right to defend herself against the attacker. But contrary to Uniacke, the latter does not automatically translate into the former. This is so because the concept of a right entails that no third party is (initially) allowed to interfere with the exercise of self-defensive force by the victim. Thus, although the rescuer does not violate any negative duties not to harm the attacker, an unauthorised intervention violates negative duties owed to the victim. Therefore, in order for a rescue killing to be permissible, let alone be 'rightful', the victim must consent to the rescuer's intervention.

*Rescuer-centric conditions:* In addition to securing the victim's consent, the rescuer must meet the 'right intention' test. The test is not very demanding, but it is still important for the ethics of rescue killings. A rescuer meets the right intention criterion if he does not use the intervention to aggress the victim.

Having outlined the basic assumptions behind the ethics of self- and other-defence, we can now turn to the implications of the idea of a rescue killing for the ethics of war. More precisely, we must scrutinise how far the former can serve as a normative foundation of the latter. Let us begin with an analysis of atrocities.

### III

#### Atrocities: Crimes and Paradigms

The claim that the ethics of private self-defence underlies our moral thinking about war receives support from a very important strand of just war theory. According to the Domestic Analogy, just as individuals are allowed to defend themselves against attackers in domestic society, states are permitted to repel an unjust aggressor in international society. Accordingly, as Chapter I pointed out, many just war theorists have assumed that the paradigmatic just cause for war is self-defence. Just as a the attacker violates natural duties by striking his victim, aggressor states, in international society, violate the rights to territorial integrity and political sovereignty held by victim states. As Chapter II explained, for Walzer, these two rights are derived from the rights of those under a state's rule. Consequently state aggression is a crime precisely because it forces men and women to fight for their rights. But unfortunately, as was observed before, theorists of MHI have not developed a suitable analogue to the crime of aggression.

In order to address this shortcoming, let us draw on Claudia Card's idea of an Atrocity Paradigm. It indicates why *a*) certain crimes are morally distinctive and *b*) an interventionist response to them is justified. Most importantly, as we shall see, it also neatly intersects with our justice-based approach to rescue killings outlined in Part II.

For Card, what we can refer to as Atrocity Crimes, including mass murder, genocide and ethnic cleansing, are not mere injustices but grave moral evils. In fact, although Atrocity Crimes are not the only evils, they unite all the core features of evil writ large, and, as a result, they have paradigmatic status for Card's theory of evil.<sup>146</sup> According to Card, evils are foreseeable, intolerable harms produced by culpable wrongdoing.<sup>147</sup> They 1) are reasonably foreseeable, 2) culpably inflicted (tolerated, aggravated or maintained), and 3) deprive or seriously risk depriving others of the basics that make life tolerable or at least not indecent.<sup>148</sup> In light of this definition, Atrocity Crimes must have two core elements. The first can be termed the 'agency component', while we can refer to the second as the 'harm component'.

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<sup>146</sup> Card, *Atrocity Paradigm*, p. 9.

<sup>147</sup> (ibid.). p.3.

<sup>148</sup> (ibid.), p. 16.



Beginning with the agency component, evils consist in the culpable violation of certain normative standards.<sup>149</sup> Card is somewhat silent on the standards that are being violated. Drawing on our earlier observations in Chapter I, we can fill this gap via an appeal to natural duties and Shue's notion of basic rights. Atrocity Crimes, then, involve culpable violations of natural duties and basic rights.

The harm component of Atrocity Crimes follows directly from the agency component. For Card, culpable violations of natural duties and basic rights must produce *intolerable* harm in order to amount to evil. Evils ruin victims' lives. Victims may never be able to recover from them, or recovery may be extraordinarily difficult.<sup>150</sup> Of course, since murder, arguably the gravest of all evils, is often part of the strategy behind Atrocity Crimes, many victims will not survive. Hence there is no question about the possibility of recovery. But the notion of intolerable harm also raises some interesting questions about death. For instance, we intuitively distinguish between a 'dignified' or 'undignified' death. In all cultures death involves certain rituals. Being denied the social relationships and rituals necessary for a dignified death can be intolerably harmful.<sup>151</sup> To be killed at an anonymous killing site without access to loved ones, for instance, is, in addition to being murder, intolerably harmful.

As one can see, the agency and harm components show that the Atrocity Paradigm intersects with the justice-based approach to the ethics of rescue killings. Card's argument that Atrocity Crimes involve large-scale culpable wrongdoing is certainly compatible with McMahan's point that attackers must be morally responsible for creating a forced choice between lives in order to be liable to attack. In fact, if culpability, and not just moral responsibility, is one of the characteristics of Atrocity Crimes, those who participate in them exceed the criteria for liability to attack laid down by the justice-based approach to rescue killings. If this is true, it would strengthen the justice-based approach considerably. Indeed, it would present an almost unchallengeable rationale for a 'right to intervene', which is correlated to a

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<sup>149</sup> In a later version of her theory, Card de-emphasizes moral culpability in favour of inexcusability. Some evils are so common that those who participate in them are not necessarily blameworthy for doing so. Nevertheless, for Card, even non-culpable participation in evil is inexcusable. As Chapter IV suggests, however, many of those who participate in Atrocity Crimes are in fact morally culpable for their actions. Hence let us operate with Card's earlier account of the agency component. See, Card, *Confronting Evil*, chapter I.

<sup>150</sup> Card, *Atrocity Paradigm*, p. 4.

<sup>151</sup> Card, *Confronting Evils*.

duty of non-resistance falling (at least) upon perpetrators of Atrocity Crimes. But let us leave aside this issue until Chapter IV. For now, we will focus on the question in how far the idea of rescue killing can be applied at the level of states, rather than individuals.

While the agency component presents a strong normative link with the idea of forfeiting one's rights, the harm component inherent in the Atrocity Paradigm also indicates that a forceful response to atrocities is, in principle, proportionate. Because atrocities cause intolerable harm to victims, the use of force is intuitively more acceptable than in the case of mere injustices. If this is sound, the Atrocity Paradigm, in conjunction with the ethics of rescue killings, represents a significant step towards the formulation of a sound analogue to the crime of aggression.

Critics could reply that the Atrocity Paradigm is less helpful than it initially seems. This is so because it does not provide a sound rationale for why MHI should only be permissible in order to halt Atrocity Crimes. After all, there are *many* ordinary evils that also cause *intolerable* harms. In this sense, the Atrocity Paradigm does not seem to constitute a theoretical advance over the broad interventionism advocated by Teson and the various cosmopolitan theorists discussed in Chapter II. In fact, it runs into fairly similar problems. Like Teson's invocation of tyranny, the notion of Atrocity Crimes remains vague and arbitrary. Like the cosmopolitan emphasis on the importance of justice, the Atrocity Paradigm apparently generates an excessively permissive form of interventionism. Defenders of the Atrocity Paradigm can respond to these two challenges as follows.

First, the use of other-defensive force is constrained by considerations of proportionality and necessity. Many ordinary evils cannot be solved via military measures but only social reform. For instance, Card rightly points out that domestic violence and child abuse are grave evils.<sup>152</sup> Though it is often brushed under the carpet, domestic violence is also a relatively wide-spread phenomenon. But in order to conquer domestic violence, a military intervention is misplaced. Instead, it is necessary to, say, rethink the gender-based division of labour and introduce more liberal divorce laws. By contrast, when we consider genocide, mass murder or ethnic cleansing, there is little reforms could achieve to halt these crimes. Atrocity Crimes *necessitate* a military response, whereas many other evils don't.

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<sup>152</sup> Card, *Atrocity Paradigm*, chapter 7.

Second, Atrocity Crimes are morally distinctive forms of evil.<sup>153</sup> As was indicated above, they often involve the indiscriminate killing of defenceless individuals. Perpetrators of atrocities wilfully break down the distinction between combatants and non-combatants. In this way, as Chapter V shows, the underlying rationale of Atrocity Crimes is fundamentally opposed to just war thinking. Even if perpetrators of Atrocity Crimes bother to draw a distinction between those who are liable to attack and those who aren't, they mostly rely on indefensible arguments. While the ethics of war assumes that individuals incur liabilities to attack because of what they *do*, perpetrators target their victims because of who they *are*. This means that victims of Atrocity Crimes are defenceless in a twofold sense. On the one hand, they lack the practical means of resistance. On the other hand, they cannot escape the exterminatory logic of the perpetrators. For we have little control over our identities and usually cannot change them at will.

In addition to involving the 'politics of physical murder', Atrocity Crimes are also morally distinctive because they are often aimed at bringing about 'social death'. The concept of social death is the opposite of what Card terms 'social vitality'. The latter obtains when individuals are embedded in meaningful social relations. Social vitality, according to Card, can be interpersonal or institutionally-mediated; it encompasses contemporary and intergenerational relationships.<sup>154</sup> Social death occurs when the dense net of social relationships that define us is destroyed. Because it aims to destroy groups, genocide may be the ultimate form of social death, though the intent to bring about social death may not be the only defining feature of genocidal acts.<sup>155</sup>

But it is worthwhile pointing out that non-genocidal atrocities can also lead to the social death of victims. Territory, for instance, plays a complex role in the lives of many communities. The forcible removal of groups from their territory can, therefore, result in the destruction of relationships that define a group or at least lessen their strength. Even the children of survivors, once a group has been removed from its homeland, may not be able to establish socially vital relationships amongst

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<sup>153</sup> For Card, the Atrocity Paradigm does not rule out that some evils are worse than others. (ibid.). p, 15

<sup>154</sup> Card, *Confronting Evils*, p. 237.

<sup>155</sup> (ibid.), pp- 261-266. For a sympathetic yet critical discussion of the social death thesis, see L. May, *Genocide: A normative account* (Cambridge: Cambridge University Press, 2010), pp. 84-01. For a critical response to it, see S.P. Lee, 'The Moral Distinctiveness of Genocide', *Journal of Political Philosophy*, Vol. 18/No. 3 (2010), pp. 335-336; especially, pp. 341-345. It would be beyond the scope of this project to treat the debate about genocide in detail. The case of genocide only serves as an example that some evils are morally distinctive.

each other. In addition to being a sexual crime, the use of rape as a weapon leads to social death.<sup>156</sup> It disrupts many of the social patterns that define a community. In traditional communities, women who have been raped may be ostracised, while children born as a result of rape are unlikely to be accepted as full members. As Card argues, the children would already be born socially dead. Contrary to Derek Parfit's work on the non-identity problem, there are serious doubts that a socially-dead existence is better than non-existence.<sup>157</sup>

If these observations are correct, it is not arbitrary to distinguish between ordinary evils and Atrocity Crimes. As a result, while the just cause for a self-defensive war consists in the repulsion of unjust aggression, the other-defensive conception of MHI assumes that the halting of Atrocity Crimes constitutes a just cause for MHI. In contrast to the broad interventionist position advocated by Teson and recent cosmopolitan theorists, the aim of an other-defensive war is not to topple oppressive governments or make societies just. As we saw in Chapter II, although these are laudable aims, they do not constitute a just cause for war. Rather, the idea of an other-defensive war resembles Walzer's and John Rawls' narrow interventionist approach to MHI. Both philosophers restrict military interventions to roughly the same list of crimes singled out by the Atrocity Paradigm.<sup>158</sup>

Before we can pursue the link between the Atrocity Paradigm and the ethics of rescue killings further, let us briefly attend to two points. First, it is undeniable that the crime of aggression is an evil. But because the Atrocity Paradigm does not discourage comparisons between evils, it is possible to argue that unjust aggression is not as bad as Atrocity Crimes. The reason for this argument harks back to the issue of indiscriminate killing. According to one prominent view, subject to further examination in Chapter IV, it is possible to fight an unjust war via just methods, primarily by observing the distinction between combatants and non-combatants. By contrast, perpetrators of Atrocity Crimes transgress this very distinction. They kill indiscriminately, targeting defenceless individuals. If we assume that unjust

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<sup>156</sup> Card, *Confronting Evils*, chapter 10.

<sup>157</sup> See, D. Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), chapter 16.

<sup>158</sup> But the Atrocity Paradigm constitutes advancement over Walzer's theory in particular. As we saw in Chapter II, Walzer's notion of crimes that shock the conscience of mankind runs into serious problems. The Atrocity Paradigm, rightly, maintains that the distinctiveness of certain states of affairs arises from intolerable harm caused by culpable violations of basic rights rather than the 'shock value' of a particular act. Of course, Atrocity Crimes are often shocking, but this does not account for our moral judgment of them.

aggression is a lesser evil than Atrocity Crimes, MHI may be a better paradigm for a just war than self-defence against unjust aggression. The Atrocity Paradigm, then, forces just war theorists to rethink their (normative) priorities.

Second, some critics may balk at the invocation of the notion of evil. There is probably no other term that has been misapplied so consistently throughout history. This is hardly surprising since evil is the worst opprobrium one can level at a person or political organisation. Rather worryingly, the concept evil could undermine the humanitarian impulse not to resort to Manichean thinking. Interestingly, however, Card maintains that the Atrocity Paradigm supports humanitarian values.<sup>159</sup> Indeed, there are three reasons that indicate why Manichean thinking is misplaced in the context of Atrocity Crimes.

First, as Chapter IV contends, it is not necessarily the case that those who perpetrate evils are themselves evil persons. Thus, as Chapter I argued, just as a neat distinction between victims and perpetrators is difficult to achieve, a Manichean division of individuals along of lines of ‘good’ and ‘evil’ is a myth.

Second, a strict division between us (good) and them (evil) is historically unsound and morally mistaken. As we observed during the discussion of Teson’s Argument from Historical Injustice in Chapter II, the birth of almost all modern states involved considerable bloodshed, whose effects are still prevalent nowadays.

Third, as Chapter VI makes clear, the causes of evil are never limited to the target state and its society. External factors often have an impact on the dynamics of Atrocity Crimes. Good and evil exists on all sides.

## IV

### **In defence of a *prima facie* right to intervene**

#### *A. Self-Defence, Consent and Sovereignty*

In Part III, we outlined an analogue to the crime of aggression. To develop the other-defensive conception of MHI, let us pursue the link between rescue killings and Atrocity Crimes further. We argued that, in a domestic context, the right to intervene depends on three conditions. Beginning with the victim-centric conditions,

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<sup>159</sup> Card, *Confronting Evils*, p. 9.

let us the Domestic Analogy to defend a state-held right to intervene. To recapitulate, in order for the use of other-defensive force to be permissible, the victim-centric conditions require that *a*) the victim is holder of a right to self-defence against the attacker and *b*) the victim consents to the intervention. By analogy, for an other-defensive war to be permissible, victims of Atrocity Crimes must *a*) hold a right to defend themselves against what we can refer to as genocidal attackers and *b*) authorise potential intervening states to act on their behalf.

With regard to the right to self-defence, just war theorists who advocate the Domestic Analogy pursue two strategies.<sup>160</sup> The first, the reductive strategy, maintains that military resistance to unjust aggression represents the centrally coordinated mass exercise of individual rights to self-defence. For the reductive strategy, the statist right to self-defence is directly reducible to the individual right to self-defence. The analogical strategy, on the other hand, contends that self-defensive war is normatively reducible to the exercise of group rights to defend certain public goods against external threats.<sup>161</sup> Accordingly, the statist right to self-defence is reducible to the collective or corporate rights of communities. Walzer's Legalist Paradigm, for instance, unites both of these strategies. The rights of the state result from the rights of individuals who are parts of communities that provide them with certain public goods. Both of these strategies also clearly apply in cases involving genocidal attackers.<sup>162</sup>

First, because indiscriminate killing is one of the central features of Atrocity Crimes, victims usually face an immediate threat to their lives. Unless they defend themselves, they will be killed. Second, as we saw above, Atrocity Crimes often bring about the social death of their victims by destroying those goods that make social relations between members of a community possible. Cultural values are usually public goods, and, it seems, a state attacked by a genocidal attacker can rightly claim to be acting in defence of a community.

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<sup>160</sup> This discussion follows David Rodin's classification of the various strands of the Domestic Analogy; see Rodin, *War and Self-Defence*.

<sup>161</sup> For the idea of a public good, see J. Raz, 'Right-based moralities', in: J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) especially p. 187. Public goods are non-excludable once they are shared by members of a group (of course, one can always exclude individuals from the group, but this does not affect the distribution of the relevant public good within the group as such).

<sup>162</sup> Even Rodin, one of the strongest critics of the incorporation of the ethics of self-defence into just war theory, acknowledges this, see Rodin, *War and Self-Defence*, pp. 139-140.

If this is true, there is little doubt that victims of genocidal attackers are holders of individual and collective rights to self-defence. Of course, this presupposes that the various attacker-centric conditions are met. But since the Atrocity Paradigm assumes the centrality of culpable wrongdoing for Atrocity Crimes, let us assume that this is the case. Further, we can assume that the moral distinctiveness of Atrocity Crimes provides a strong normative justification for holding genocidal attackers under a duty not to repel the victim's counterattack.

But the victim's right to defend herself against a genocidal attacker is not sufficient to prove that the rescuer has a right to intervene. As we saw above, the right to strike an attacker is generally not agent-neutral. Rather, because the right to self-defence is correlated to a negative duty held against third parties not to interfere with the victim's exercise of her right, the rescuer must seek the victim's consent before he kills the attacker. As we already saw in Chapter II, the problem of consent is complex for theories of MHI. In order to make the discussion more manageable, let us begin by establishing whose consent is morally relevant. Suppose that Red attacks a large group called Minority Ethnicity located in its territory and Blue is about to intervene to halt Atrocity Crimes. In a domestic rescue killing, the rescuer is only required to secure the victim's consent but not the attacker's. Assuming that Red is analogous to an attacker, Blue does not need to secure Red's consent. According to the Domestic Analogy, Blue must only secure Minority Ethnicity's consent.

However, there are two problems with this argument. First, from a practical perspective, it is not clear how Blue can secure Minority Ethnicity's consent. In international politics, as has been mentioned before, the practical problem of obtaining consent is solved via the state's ability to enter into contracts with other corporate entities on behalf of its citizens. But given that Red is the perpetrator of Atrocity Crimes, it is highly unlikely that Red will consent to MHI. Interventionist action contradicts Red's interests.

Second, although the rescuer does not need to obtain the attacker's consent, the rescuer may have to secure consent from bystanders in case his actions will impact on them. By contrast, the victim does not need to secure consent from bystanders. The fact that her life is threatened usually means that the victim is allowed to attach greater weight to her life than that of bystanders, provided she abides by certain

constraints that restrict the harms she can permissibly inflict on bystanders.<sup>163</sup> Yet, as was pointed out before, the rescue does not share this agent-relative reason. Thus it is reasonable to assume that the rescuer must also secure consent from bystanders. By analogy, since military campaigns also affect those who are not engaged in hostilities, Blue may have to secure Majority Ethnicity's consent.

Fernando Teson, as we saw in Chapter II, tries to solve both of these problems via the Original Position. First, since it is a hypothetical contract, the Original Position shows that the express consent of the victims of Atrocity Crimes is not necessary for the permission to intervene militarily. Second, it also solves the problem of 'bystander consent'. Placed behind the veil of ignorance, representatives would choose suitably constrained pro-interventionist principles because they do not know whether they are going to be perpetrators, victims or bystanders.

But Chapter II argued that a hypothetical contract is no contract at all, not least because the duty of non-resistance that is hypothetically chosen would not be binding on real individuals in case their lives are threatened by the interveners. Furthermore, the construction of a hypothetical contract already relies on a large number of pre-contractual assumptions. Since all the important theoretical work is done prior to the contract, the device of the contract is redundant. Instead of taking a detour via a hypothetical contract, it is better to directly appeal to the conditions that would justify an interventionist response. To do so, let us utilise the liberal legalist claim that sovereignty is an enabling condition. Summarising a complex body of thought, liberal legalism offers a fourfold defence of sovereignty.<sup>164</sup>

First, many important political goals, such as the pursuit of justice, depend on the existence of sovereign institutions. To illustrate the point, in Hobbes' depiction of the state of nature progress is impossible. Second, given that we are physically vulnerable creatures, we depend on the protective services of the state. Third, assuming the existence of pluralism as a social fact, sovereign institutions are needed to preserve the peace between individuals who pursue rival conceptions of the good.

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<sup>163</sup> On this issue, see T. Hurka, 'Proportionality in the Morality of War'. Usually, the Doctrine of Double Effect (DDE), Hurka argues, would constrain the victim's actions. Accordingly, the victim is only allowed to non-intentionally harm bystanders. The victim, for instance, is not allowed to use the bystander in order to shield herself from the attacker.

<sup>164</sup> The discussion in this section follows and builds on the works of Michael Blake, Thomas Nagel and Andrea Sangiovanni. Blake, 'Distributive Justice, State Coercion and Autonomy'; Nagel, 'The Problem of Global Justice'; Sangiovanni, 'Global Justice, Reciprocity and the State'.



Fourth, as was pointed out in Chapter I, the brand of liberalism defended in this thesis assumes that individuals have the capacity for autonomous action. Autonomous action, however, is only possible if we can make reasonable assumptions about how others are going to act. In the Hobbesian state of nature, we do not act autonomously but are motivated by fear. Sovereign institutions, by preserving the peace, protect our capacity for autonomous choice.<sup>165</sup>

For the liberal legalist position, the state carries out these functions by enforcing the law against its subjects. This reinforces the definition of the state as an animated legal system. But although the rule of law and a sovereign order are public goods, it would be odd to argue that individuals *qua* individuals had rights to them. Bearing in mind the interest theory of rights introduced in Chapters I and II, individuals have a *collective* right to sovereign institutions *qua* members of a group.<sup>166</sup> Note that this interpretation of a group right does not rely on a ‘thick’ or communitarian notion of a group as defined by shared meanings and traditions. Given that liberalism is a response to pluralism, members of a state may disagree fundamentally about conceptions of the good. But notwithstanding their disagreements, they have collective interests in sovereign institutions. Drawing an analogy with Rawlsian primary goods, they have a collective interest in sovereign institutions, regardless of whatever else they want.

In light of the above, the other-defensive conception of MHI assumes that JAB’s just cause criterion needs to be broadened. Unlike earlier conceptions of MHI, the just cause of MHI is not merely negative, to wit, it does not solely rest on the claim that Atrocity Crimes should be halted. In addition, it has a strong positive component, namely that interveners should bring about sovereign institutions in the target state. For the occurrence of Atrocity Crimes signals that the target state does not fulfil its basic sovereign function of preserving the peace amongst those under its rule. The

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<sup>165</sup> Admittedly, this conception of autonomy falls short of the more demanding version of autonomy found in the works of Immanuel Kant and Jean-Jacques Rousseau. Autonomy, for the other-defensive conception of MHI, means that we can organise our desires by making reasonable predictive assessments of the effects of different courses of action. This ‘thin’ understanding of autonomy could even be accommodated by societies that do not value a stronger version of autonomy. The main point of the other-defensive conception of MHI is that autonomy, however demanding it may be as a value, depends on the existence of certain public goods. This point is explicitly recognised by Raz, but it can also be found in Rawls’ work. For Rawls, the realisation of justice as fairness depends on the existence of a reasonably stable basic structure.

<sup>166</sup> For the whole debate about public goods and collective rights, see Raz, ‘Right-based moralities’; J. Waldron, ‘Can communal goods be human rights?’, in: J. Waldron (ed.), *Liberal Rights* (Cambridge: Cambridge University Press, 1993), chapter 14; P. Jones, ‘Group Rights and Group Oppression’, *Journal of Political Philosophy*, Vol. 7/Issue 4 (1999), pp. 353-377.

task of MHI is to re-establish decent law governed institutions that prevent a relapse into Atrocity Crimes. In this respect, the other-defensive conception of MHI closely follows R2P. R2P also contends that there is a responsibility to rebuild the target state once Atrocity Crimes have been halted.

As was indicated above, the invocation of public goods can assist us in dealing with the issue of consent. Although it may be impossible to secure the express or hypothetical consent of victims and bystanders, MHI is justified if (and only if) it provides certain public goods that are in the interest of all those located in the target state, subject to certain constraints.<sup>167</sup> The liberal legalist argument that a sovereign order is required by a commitment to pluralism *and* autonomy indicates that MHI, suitably conceived, is in the interest of *all* those in the target state. One attraction of this view is that it is compatible with the humanitarian values of neutrality and impartiality because it stresses that MHI should benefit all members of a society in crisis. MHI does not consist in defending ‘good’ against ‘evil’. Instead, MHI should make a peaceful, law governed future for all those in the target state possible.

But while the invocation of public goods renders an appeal to express or hypothetical consent superfluous, it would be premature to abandon all forms of consent. There is, in fact, a tradition of ‘consent’ that has not received attention so far. Mostly associated with John Locke’s work, the idea of tacit consent supposes that X tacitly consents to the laws of the land simply by obeying them and enjoying their protection. Conversely, we can assume that X does not consent to the laws of the land if X actively opposes them. Perhaps it is possible to utilise the notion of tacit consent for the ethics of MHI. If there was wide-spread resistance to the interveners, we can assume that members of the target state do not consent to MHI. Of course, given what has been said above, we must focus on the tacit consent of the victims rather than the bystanders of perpetrators. If victims of Atrocity Crimes demanded that MHI should be halted, MHI should indeed be abandoned. The invocation of public goods and sovereignty, then, only provides a *prima facie* permission to intervene.

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<sup>167</sup> For a similar argument, see J. McMahan, ‘Humanitarian Intervention, Consent, and Proportionality’, in: N. Davis, R. Keshen & J. McMahan (eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: Oxford University Press, 2010), pp. 44-74. McMahan thinks that MHI should be in the interest of the majority of individuals in the target. It should also be welcomed by them. We return to the last point in a short moment.

If the above observations are sound, we have overcome two theoretical hurdles. First, we have shown that those threatened by genocidal attackers are holders of a right to defend themselves. Second, we have argued that the intervening state neither needs to secure the express consent nor hypothetical consent of the victims of Atrocity Crimes. The price for the abandonment of consent, however, is a more demanding conception of MHI. But this is not a bad price to pay. The goal of MHI, as Walzer once put it, cannot be to ‘get in and get out’. More realistically, MHI must include efforts to stabilise the target state. That said, if the victims of Atrocity Crimes explicitly rejected these efforts, MHI should be abandoned. Thus, the permission to intervene can only be a *prima facie* permission.

Having explored the implications of the victim-centred conditions of a rescue killing for the ethics of MHI, let us now turn to the attacker-centric conditions.

#### B. *Liability to attack and asymmetry*

As we saw above, for the justice-based approach, the use of force against the attacker is permissible because the attacker forfeits his right not to be attacked. This results in an asymmetry between the attacker and the victim, which, subject to further conditions, allows the rescuer to use other-defensive force against the attacker. By analogy, states guilty of engaging in or tolerating Atrocity Crimes also forfeit their right not to be attacked. This means that the intervening state, by declaring an other-defensive war, acts permissibly. It does not violate negative duties not to aggress the target state. This diffuses the charge that theorists of MHI defend what is normally rejected in international affairs, namely state aggression. Unjust aggression violates the rights of states not to be attacked. Just aggression, by contrast, does not, precisely because the target state has made itself liable to attack. The analogy between rescue killings and MHI is useful because it enables us to distinguish between just and unjust aggression. For the other-defensive conception of MHI, the intervening state must be considered as a just aggressor.

Let us render the process of forfeiture more precise. In domestic circumstances, the attacker forfeits his right not to be attacked because he is morally responsible for bringing about a forced choice between lives. In the international context, we can argue that the target state forfeits its right not to be attacked when it engages in or tolerates Atrocity Crimes. Bearing in mind the arguments of the preceding section,

the target state fails to fulfil its sovereign function of preserving the peace amongst those under its rule. Because of this, it cannot be considered as a member of equal standing in international society. To avoid confusion, the argument does not suggest that the target state ceases to be a state because it incurs liabilities to attack. The other-defensive conception of MHI only maintains that the target state cannot claim immunity from attack.

The claim that states guilty of committing or tolerating Atrocity Crimes forfeit their right not to be attacked is supported by three observations. First, as we saw in Chapter II, liberal political philosophers reject the statist interpretation of the Principle of Sovereign Equality, which, as we saw in Chapter II, claims that states have intrinsic value. As the liberal legalist position indicates, states have instrumental value because their institutions fulfil certain functions for those under their rule. Second, Walzer's Legalist Paradigm maintains that the rights of the state cannot exist independently of their people. If states violate the basic rights of their members, they cannot claim equal status under the Legalist Paradigm. Third, R2P asserts that states have a duty to protect their subjects. Sovereignty is increasingly seen as conditional, depending on the state's ability to serve its people. As the quotation by Kofi Annan at the beginning of the chapter indicates, states are servants of their people.

Of course, the representatives of the target state could reply that their state does not forfeit its right not to be attacked because its policies, violent though they may be, are necessary to fulfil its task as a sovereign. Its actions, in other words, are necessary to preserve the peace. This is likely to be a cynical distortion of the truth. But even if it was not, evils, according to the Atrocity Paradigm, can arise if an agent chooses illegitimate means to pursue otherwise legitimate goals. In this respect, the Atrocity Paradigm reinforces the non-consequentialist perspective that underlies this thesis. As we saw in Chapter I, individuals have rights that act as side-constraints on the pursuit of otherwise laudable social and political goals. For just war theorists and non-consequentialists alike, the ends do not justify the means.

While the above shows that the intervening states is permitted, perhaps even justified, to aggress the target state, we must clarify whether the latter is permitted to declare a self-defensive war against the former. If we consider the idea of a domestic rescue killing, the answer must be negative. For the rescuer holds the attacker under a duty not to repel his attack. For the other-defensive conception of MHI, the same

holds with regard to relations between the target and intervening states. In order to defend this point, let us turn to the analogy between domestic self-defence and self-defensive wars.

First, it is unlikely that the declaration of a self-defensive war against the intervening state could be justified via the reductive strategy. It is to be feared that, in a malicious twist, the target state simply ends up defending individual perpetrators against their victims. Furthermore, MHI, according to the just war approach, does not involve indiscriminate killing. If it did, the intervening state would be a genocidal attacker, and resistance to the genocidal attacker is usually justified. But as Chapter I argued, MHI is regulated via certain deontological constraints that seek to protect the status of individuals. Needless to say, this throws up the problems of combatant liability and non-combatant immunity. Moreover, we must clarify what should happen if the intervening state adopted some illegitimate means to carry out the intervention. But let us defer the discussion of these problems until Chapters IV and V, respectively.

Second, it is not the case that a self-defensive war against the intervening state could be justified via an appeal to public goods. For the other-defensive conception of MHI, MHI is necessary precisely because the target state fails to supply certain public goods to those under its rule. It would be odd to claim that the target state defends exactly those goods that it denies to (some of) its members against an external aggressor, i.e. the intervening state.

Yet illiberal critics of the other-defensive conception of MHI may try to rescue the analogical strategy that forms an important part of the analogy between the analogy between domestic self-defence and self-defence war. While they could concede that the target state cannot claim to defend a sovereign order against the intervening state, they can contend that it acts in defence of certain cultural public goods. But this argumentation is flawed for two reasons.

First, many states are home to more than one community. Indeed, the fact that many state territories do not coincide with national boundaries often accounts for internal conflicts. The question, then, is whose traditions, cultures and values the target state defends. The danger is that the target state defends the culture of the dominant group at the expense of a minority that finds itself threatened by Atrocity Crimes.

Second, even if MHI interferes in and changes the nature of a communal culture, it is not necessarily the case that this causes the social death of a community. There may be certain aspects of a communal culture that give rise to obnoxious identities, perhaps fuelling the perpetration of Atrocity Crimes. While communities have a right to preserve some of their ways of living, they cannot claim protection for obnoxious traditions. To use an analogy, while it is impermissible to deny supporters of a football club their right to associate, it is not impermissible to target the hooligan element within their midst.

If these observations are sound, the intervening state appears to be the holder of a *prima facie* right to intervene. For it can hold the target state under a duty not to repel its attack. However, it can only be the holder of such a right if it fulfils the rescuer-centric conditions of a rescue killing.

### C. *Gangsters and Trojan horses*

In a domestic rescue killing, the rescuer has a right to strike against the attacker if he fulfils the right intention criterion. In theories of MHI, the right intention of the rescuer has often been doubted by critics, most notably international lawyers. Some anti-interventionists contend that MHI is something of a ‘Trojan horse’.<sup>168</sup> Under the cloak of humanitarian engagement, states try to enlarge their sphere of influence. On this view, MHI is motivated by self-interest. Although this thesis is not concerned with the legality of MHI, there are three immediate non-theoretical replies to the Trojan Horse Objection.

First, it is probably a commonplace that almost any concept can be abused. The notion of self-defence is as susceptible to abuse as MHI. While states may pretend to be defending themselves against an ‘imagined threat’, their real intentions could be the enlargement of their territory. For the sake of consistency at least, those international lawyers intent on banning MHI should also ban self-defensive war.

Second, the other-defensive conception of MHI is rather restrictive with regard to the permission to intervene. Interventions that are not aimed at the halting Atrocity

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<sup>168</sup> The term comes from James Pattison. He calls this criticism the Trojan Horse Objection. J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who should intervene?* (Oxford: Oxford University Press, 2010), pp. 57-59. The most prominent advocate of this claim is David Chandler. D. Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto, 2002).

Crimes are not permissible. As a result, it should be apparent when the language of interventionism is used for illicit purposes.

Third, the actual practice of MHI has been much more conservative than the Trojan Horse Objections admits. As we shall see in Chapter VII, the current (legal) debate about MHI recognises that steps must be taken to stabilise post-atrocity societies. For international lawyers, the project of reconstruction is essentially conservative. International law has reaffirmed the centrality of the state in international politics. This is so because the aim of humanitarian occupation is to reconstruct the target state so it can carry out its sovereign functions. Although this leads to all kinds of practical difficulties, international law asserts the independence of the target state *qua* state, once it has been suitably reconstructed. Under these circumstances, it will be difficult for intervening states to engage in an almost unconstrained enlargement of their sphere of influence.

From a more theoretical perspective, let us draw an analogy between Mob Boss and MHI in order to deal with the problem of illicit intentions. In Mob Boss, we argued that Big P has a right to use other-defensive force against Meat Cleaver Marco, even though doing so will lead to an expansion of his criminal empire. The fact that Big P has ulterior motives does not mean that his actions violate Frankie's rights. Neither do Big P's actions violate Meat Cleaver Marco's rights. As we argued above, Meat Cleaver Marco is liable to attack anyway. What we can expect from Big P, however, is that he does not use the rescue killing to immediately engage in an act of unjust aggression against Frankie.

The example can also serve as a rough template for the other-defensive conception of MHI. For one thing, the existence of ulterior motives may be compatible with MHI. From the perspective of proportionality, one would have to assess whether the intervening state's successful realisation of its ulterior motives would be worse than the unabated large-scale perpetration of Atrocity Crimes. Unless the intervening state plans to engage in Atrocity Crimes itself, it does not seem that, say, an increase in its power through successful MHI would be excessive in relation to the halting of Atrocity Crimes. Atrocity Crimes are, as we argued above, paradigmatic of grave evil.

Directly related to the preceding point, just as Big P is not allowed to intervene if he plans to immediately aggress Frankie, we can argue that an intervening state is not

allowed to intervene if it violates the rights of those located in the target state during the conduct of MHI or in its immediate aftermath. This argument establishes an important theme for the following discussion, as it shifts our attention from the declaration of MHI at the level of JAB to the conduct of MHI at the level of JIB. The declaration of MHI is impermissible if the intervening state is unlikely to abide by central principles of JIB.<sup>169</sup> In particular, the intervening state must discriminate between combatants and non-combatants. It remains to be seen, though, how exactly the line between the two categories of individuals is to be drawn. But provided that the intervening state abides by the rules of JIB, it can be seen as the holder of a *prima facie* right to intervene.<sup>170</sup>

#### D. *The Problem of Proportionality: some brief thoughts*

Although the arguments of the preceding sections defend the idea of a right to intervene, the latter is always constrained by considerations of proportionality. Although we turn to the problem of proportionality in Chapter V, let us briefly engage with it here. In theories of MHI, proportionality can be understood along self- and other-regarding dimensions.

In regard to the former, the costs of MHI must not be excessive to the intervening state. Costs must be understood in terms of the liberal legalist argument about ‘enabling sovereignty’. Accordingly, the costs of MHI would be excessive for the intervening state if it was not able to carry out its governing functions by enforcing the law against those in its territory. Put simply, the protection of rights at home must not come at the expense of the protection of rights abroad. If, say, the target state was to launch a devastating counterattack against the intervening state, the latter must refrain from exercising its right to intervention.

In regard to the other-regarding perspective on proportionality, it is, once again, useful to contrast self-defensive action with rescue killings. Suppose that if the victim defends herself against the attacker, the attacker’s accomplice is going to vent his frustration on the bystander. As we saw above, because the victim’s life is threatened, it seems that the victim is permitted to attach greater weight to her life than the bystander’s. Now suppose that if the rescuer defends the victim against the attacker,

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<sup>169</sup> Pattison also argues that the conduct of the intervening state determines the legitimacy of the intervention; see Pattison, *Humanitarian Intervention*, pp. 99-101.

<sup>170</sup> For the sake of convenience, the following chapters will not restate the caveat *prima facie* every time we use the term right to intervene.



the accomplice is going to vent his frustration on the bystander. Since the rescuer's life is not threatened by the attacker, it seems that the rescuer, unlike the victim, must take the harm caused to the bystander into account. If the harm caused to the bystander was excessive to the benefits resulting from rescuing the victim, the rescuer must not proceed. As Chapter V explains, negative duties not to harm are usually stronger and more stringent than positive duties to assist.

Of course, so far we have only argued that MHI is permissible. But since acts must be permissible in order to be obligatory, we can apply the same rationale to the permission to engage in other-defensive uses of force. By analogy, then, it would be impermissible for the intervening state to exercise its right to intervene if doing so led to the large-scale destabilisation of the international order. Suppose that if Blue declares an other-defensive war against Red, Red would launch an attack against neighbouring Orange. The effects of Red's attack on Orange must be balanced against the effects of unabated Atrocity Crimes. If, say, Red's actions against its own citizens lead to large-scale streams of refugees that were about to destabilise *all* other neighbouring states, MHI, even though it led to further unjust aggression against Orange, may be proportionate.

## V

### Conclusion

In this chapter, we took the first step towards the other-defensive conception of MHI. To do so, we examined when the declaration of an other-defensive war would be permissible. The main argument in favour of other-defensive war rests on an analogy between MHI and domestic rescue killings. In domestic society, victims of unjust aggression are holders of a right to defend themselves against attackers. Third parties, provided they secure the consent of the victim and fulfil the right intention criterion, are holders of a right to use other-defensive force against attackers. In both cases, the victim and the rescuer hold the attacker under a duty not to use self-defensive force against them.

We began to build the analogy between rescue killings and MHI by developing an analogue to the crime of aggression. The aim of MHI is to halt what we called Atrocity Crimes. The latter include genocide, mass murder, ethnic cleansing as well as related crimes that usually occur during the perpetration of these atrocities. Atrocity

Crimes do not constitute injustices. Rather, they must be considered as grave moral evils. The permission to declare an other-defensive war, then, is fairly restrictive. It only permits MHI to confront Atrocity Crimes. Contrary to broad interventionism, MHI is neither a tool to topple oppressive governments nor to make societies just.

But the discussion also showed that MHI does not only involve the halting of Atrocity Crimes. In addition, interveners must aim to re-establish the rule of law via sovereign institutions. This argument has two important repercussions. First, since MHI is carried out in the (collective) interest of those in the target state, interveners do not need to secure the consent of the victims, though they might have to abort the intervention if the victims openly reject it. Second, because the occurrence of Atrocity Crimes signals that the target state does not preserve the peace amongst those under its rule, the target state forfeits, like a attacker in domestic society, its right not to be attacked. In fact, it is not allowed to defend itself against the intervening state. In this sense, the intervening state is the holder of a right to intervene, obliging the target state not to defend itself.

However, this does not mean that the intervening state has a moral blank cheque to conduct itself as it pleases during MHI. Although the right to intervene is compatible with the existence of ulterior motives, the intervening state must abide by the rules of JIB. The existence of a right to intervene depends on compliance with JIB. In this sense, the conduct of the intervening state is of crucial importance for the other-defensive conception of MHI. We will turn to the implications of this view for the ethics of MHI in Chapter IV and V.

Before we can do that, let us briefly pause in order to reflect on one of the advantages that follow from the analogy between MHI and rescue killings. Previous chapters noted that theories of MHI have had little to say about the relationship between the rights of intervening states and the rights of its own citizens. As we saw in Chapter II, Walzer's Legalist Paradigm maintains that the state-held right to *self-defence* is based on the social contract. It is not clear, though, what replaces the social contract in case states go to war in defence of non-citizens. The analogy between rescue killings can help us shed light on this 'missing link'. The idea of a rescue killing indicates that the intervening state's right to intervene also stems from the rights of its *own* citizens. Put simply, just as self-defensive war represents the coordinated mass

exercise of individual rights to self-defence, MHI represents the coordinated mass exercise of the individual right to use other-defensive force.

This view is supported by the notion of collective self-defence. Suppose that Yellow unjustly aggresses Green and Green asks Blue for assistance. For the Domestic Analogy, Blue's right to come to Green's assistance cannot be justified independently of the rights of Blue's citizens to come to the assistance of Green's citizens. Now, from a moral perspective, it does not matter whether Blue's citizens defend Green's citizen from an *external* threat, i.e. another state, or an *internal* one, i.e. their own state. To be sure, international lawyers would reply that, in the case of collective self-defence, we are concerned with the relationship between three states, Yellow, Green and Blue, whereas, in the case of MHI, we are only concerned with the relationship between two states, i.e. the intervening and target states. But the *moral* differences between the two cases are not that great. In both situations, the citizens of an unthreatened state have rights to come to the assistance of those threatened by unjust aggression and Atrocity Crimes, respectively.

## Chapter IV

### Military Humanitarian Intervention and the Problem of Combatant Liability

*I had to obey the orders of my superiors. If they ordered me to do something, I would do it. If we didn't obey we would have been killed.*

(Lor, an ex-Khmer Rouge cadre who served in Tuol Sleng/ S-21, the notorious Phnom Penh prison facility where approximately fourteen thousand people were killed during the Khmer Rouge's reign from 1975-79, on why he killed 'one or two people')<sup>171</sup>

*Under conditions of terror most people will comply but some people will not, just as the lesson of the countries to which the Final Solution was proposed is that "it could happen" in most places but it did not happen everywhere. Humanly speaking, no more is required, and no more can reasonably be asked, for this planet to remain a place fit for human habitation.*

(Hannah Arendt)<sup>172</sup>

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<sup>171</sup> Quoted in A.L. Hinton, *Why did they kill? Cambodia in the shadow of genocide* (Berkeley/Cal.: Berkeley University Press, 2005), p. 276. Contrary to Lor's account, the Tuol Sleng genocide documentation centre puts the number of his victims at approximately four hundred, whereas Cambodian eyewitnesses have suggested that the number might be as high as two thousand; (ibid.) p. 2.

<sup>172</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics Series) (Harmondsworth: Penguin Books, 2006 edition).

## I

### Two views on combatant liability

As we saw in Chapter I, military campaigns encompass corporate and individualist levels of analysis. Thus, even if the intervening state is the holder of a right to intervene in the internal affairs of the target state, this does not yet mean that intervening combatants are morally permitted to harm individuals in the target state. Having treated the corporate level of analysis in Chapter III, the present chapter moves towards the individualist level.

Confronted with individual members of the target state, just war theory requires us to distinguish between combatants and non-combatants. The former are liable to intentional attack, whereas the latter aren't. As Chapter I explained, the problem of combatant liability consists in specifying on what grounds combatants incur liabilities to attack. In this chapter, we examine this problem in the context of MHI. While, as Chapter V shows, theorists of MHI have started to pay attention to the problem of non-combatant immunity, the problem of combatant liability has so far escaped critical scrutiny.

According to Michael Walzer's approach in *Just and Unjust Wars*, the problem of combatant liability is solved by what Jeff McMahan calls the Orthodox View.<sup>173</sup> This position assumes that combatants are moral equals in the sense that they possess an equal permission to use force against each other.<sup>174</sup> Strictly speaking, then, combatants are not holders of a *right* to self-defence because they lack a negative claim against their adversaries not to repel their attack. Rather, combatants are at liberty to use force against each other, to wit, they are not under a negative duty not to use force. If this is sound, the Orthodox View implies that combatants<sub>target\_state</sub> are permitted to target combatants<sub>intervening\_state</sub> and vice versa. This means that, while the intervening state *qua* state holds the target state under a duty not to declare a self-defensive war, its own combatants lack a similar right to target combatants<sub>target\_state</sub>.

Under these circumstances, it is questionable whether it makes sense to speak of a *right* to intervene at all. When it comes to the actual conduct of MHI, the idea of a

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<sup>173</sup> J. McMahan, 'Innocence, Self-Defense and Killing in War', *Journal of Political Philosophy*, Vol. 2/Issue 3 (1994), pp. 193-221.

<sup>174</sup> M. Walzer, *Just and Unjust Wars*, pp. 34-37.

(state-held) right to intervene is rendered meaningless by the Orthodox View. Combatants *target\_state* are allowed to resist their adversaries anyway, regardless of the moral relationship between the intervening and target states. Perhaps the intervening state could demand reparations from the target state for any violations of the negative duty of non-resistance. But given that the *actual* conduct of a *self*-defensive campaign against the intervening state does not violate those moral duties that matter the most, i.e. negative duties not to kill or cause harm, it is difficult to see what exactly the intervening state should be compensated for. Since, for the Orthodox View, combatants *intervening\_state* are *liable* to attack, no morally relevant harm is done.

Interestingly, the Orthodox View not only undermines the idea of a right to intervene, but also leads to a division of labour between JAB and JIB. Because all combatants are morally equal, JAB and JIB are independent of each other. As a result, the former pertains *exclusively* to the declaration of a war, while the latter *exclusively* regulates its conduct. Accordingly, as Walzer notes, a just war can be fought unjustly, whereas an unjust war can be conducted justly.<sup>175</sup> Let us refer to this claim as the Independence Thesis. There is *some* truth to it. It may well be the case that the intervening state, despite its just cause, adopts some unjust methods, if only temporarily. Nonetheless, the somewhat rigid division between JAB and JIB is a relatively recent phenomenon in just war theory, which, as Chris Brown points out, is due to the increasing regulation of warfare via modern international law.<sup>176</sup> In the older just war tradition, the distinction between JAB and JIB is less rigid. For instance, it is impermissible to declare a war if there are doubts about the possibility of its just conduct.

This chapter rejects the Orthodox View by connecting the other-defensive conception of MHI with the Neo-Classical View of combatant liability.<sup>177</sup> Simply put, the Neo-Classical View, which is advocated by Jeff McMahan and others, rejects the

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<sup>175</sup> (ibid.), p. 21.

<sup>176</sup> C. Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Polity: Cambridge, 2002), p. 108.

<sup>177</sup> To be clear, it is neither the purpose of this chapter nor the thesis as a whole to establish whether the Orthodox View is *generally* invalid. The chapter only shows that the Orthodox View fails to generate normatively sound principles for the conduct of MHI. In order to establish whether the Orthodox View must also be rejected in other contexts, we would have to try and reconcile the insights of the other-defensive conception of MHI with our considered judgements about non-other-defensive wars. It would be interesting to find out whether the method of reflective equilibrium can assist us in formulating a *coherent* just war theory. But for reasons of space, the scope of the present project remains limited to MHI.

Independence Thesis. It can be traced back to the Catholic just war doctrine which urged soldiers not to serve in war if they had doubts about its justness. It shares, as McMahan acknowledges, certain similarities with the works of Francisco de Vitoria, Francisco Suarez and, more problematically, Elizabeth Anscombe.<sup>178</sup> Drawing an analogy with his justice-based approach to the ethics of self-defence outlined in Chapter III, McMahan assumes that combatants who participate in an unjust war violate stringent negative duties not to harm, provided they are morally responsible for their actions. As a result, contrary to the Independence Thesis, *unjust* combatants are not possessors of a liberty to target their adversaries. Just combatants, on the other hand, are *a*) under no duty not to target unjust combatants and *b*) protected by a negative claim not to be subjected to a counterattack.

Undoubtedly, some will find the Neo-Classical View unsound. Walzer, for instance, replies that it would be correct, provided war was a peace-time activity.<sup>179</sup> But for the discussion of MHI at least, the Neo-Classical View has two advantages. First, it enables us to reconcile individual and corporate levels of analysis. If the Neo-Classical View turns out to be defensible, the intervening state's right to intervene would be replicated, at an individual level, by a moral right held by combatants *intervening\_state* to use force against combatants *target\_state*. Second, as this chapter will show, the Neo-Classical View enables us to tackle some of the special challenges posed by MHI.

The chapter proceeds as follows. Part II explains why, in theories of MHI, the problem of combatant liability poses a special challenge. Part III discusses the problem of combatant liability as it pertains to perpetrators of Atrocity Crimes. Finally, Part IV turns to the moral status of those combatants *target\_state* who do not participate in the perpetration of Atrocity Crimes, but are ordered to defend the target state against combatants *intervening\_state*.

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<sup>178</sup> Walzer, *Just and Unjust Wars*, p. 39; McMahan, *Killing in War*, pp. 32-37. JAB, as we saw in Chapter I, is not exhausted by the just cause criterion. A war can have a just cause, but it may neither be proportionate nor have a reasonable likelihood of success. Following McMahan, we focus on the relationship between the just cause criterion and the permission to use force during MHI.

<sup>179</sup> Walzer, quoted in H. Shue, 'Do we need a morality of war?', in: D. Rodin & H. Shue (eds.), *Just and Unjust Warriors: the Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), pp. 87-111, at p. 89.

## II

### Military Humanitarian Intervention and the limits of the Orthodox View

Both, the Orthodox and Neo-Classical Views, have been developed against the background of *the* paradigmatic case of a just war, namely self-defensive war against unjust aggressors. In this case, two main groups of combatants confront each other: combatants<sub>aggressor\_state</sub> and combatants<sub>victim\_state</sub>. Not surprisingly, Walzer's defence of the Orthodox View and McMahan's neo-classical critique of it are focused on these two groups. Walzer maintains that their members relate to each other as moral equals, while McMahan assumes that combatants<sub>aggressor\_state</sub> lack an equal liberty to target combatants<sub>victim\_state</sub>.<sup>180</sup> In reality, of course, this is a gross oversimplification. In most conflicts, there have always been individuals who escape rigid categorisation.<sup>181</sup> This point is particular pressing for theories of MHI. As was argued in Chapter I, there are many 'grey zones' in conflicts where moral and conceptual boundaries between perpetrators and victims are blurred. Often intra-state conflicts involve different groups of combatants engaged in various activities. Imagine the following scenario.

*Extermination Policy: Red orders its soldiers and secret police to kill most or all members of Minority Ethnicity and drive any survivors out of the country. This extermination policy is the culmination of a long standing ethnic rivalry between Minority Ethnicity and the majority of Red's population, Majority Ethnicity, that reaches back to the time when the country was under colonial rule. Because Minority Ethnicity is generally resented by the majority of Red's citizens, some civilians join in the mass killing. Blue, a neighbouring state with which relations have at times been tense, is capable of putting an end to the killing and ethnic cleansing. As soon as Red's government learns that Blue's troops are underway, it orders its remaining soldiers to resist Blue's invasion.*

Extermination Policy contains at least three conflicts which have different implications for the moral permission to use force against individual combatants.

1. The first conflict opposes members of Minority Ethnicity to those who are threatening them. The chapter will say very little about this conflict here because it is primarily interested in the use of force by third parties. Based on

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<sup>180</sup> See, McMahan, *Killing in War*; 'On the moral equality of combatants'; 'The ethics of killing in war', *Ethics*, Vol. 114/No. 4 (2004), pp. 693-673.

<sup>181</sup> See, C. Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy & Public Affairs*, Vol. 33/Issue 2 (2005), pp. 148-180.



the arguments of the preceding chapter, we can assume here that members of Minority Ethnicity have rights to defend themselves against perpetrators of Atrocity Crimes; otherwise, at the corporate level of states at least, MHI would not be permissible.

2. The second conflict obtains between Blue's soldiers and those individuals who are engaged in the ethnic cleansing and murdering of Minority Ethnicity. Note that the perpetrator group consists of two sets of individuals. On the one hand, there are soldiers and members of Red's security apparatus who have been ordered to exterminate Minority Ethnicity. On the other hand, there are citizens who, as private individuals, have joined the killing effort.
3. The third and final conflict describes the ensuing confrontation between Blue's soldiers and Red's remaining soldiers who have been ordered to defend their 'homeland' against the interveners.

Theorists of MHI, then, face what one might term the Problem of Multiple Conflicts. Most just war theorists are oblivious to it and assume the relevance of the Orthodox View, or something like it, as a regulatory framework for interactions between the combatants *intervening\_state* and combatants *target\_state*. But this is clearly a mistake. The Orthodox View confers equal moral status on those individual members of an army if (and only if) they engage in military acts that are

1. taking place in a conflict where parties have entered into the legal relations of war;
2. discriminatory by observing the distinction between combatants and non-combatants;
3. necessary and proportionate by not inflicting harm that is excessive to a particular good; and
4. duly authorised through the chain of command within the political-military apparatuses of the warring states.

But needless to say, none of these criteria are met by perpetrators of Atrocity Crimes. In the first two conflicts mentioned above, those engaged in the killing of members of Minority Ethnicity are not carrying out acts of war that fulfil the second, third and fourth criteria. As we saw in Chapter III, one of the prominent features of Atrocity

Crimes is that their perpetrators, by killing indiscriminately, break the moral (and legal) rules that govern conflict. In addition, civilian perpetrators of Atrocity Crimes do not fight under the command of a sovereign power, but act on their own account. Even for the staunchest defender of the Orthodox View, it must be apparent that perpetrators of atrocious mass killing cannot relate to Blue's soldiers as moral equals. Walzer, in his defence of the Orthodox View, recognises this when he says that the atrocities a soldier commits are his own, regardless of superior orders.<sup>182</sup> But, regrettably, in his version of just war theory, he does not pursue this point further with regard to MHI.

All being said, the third conflict in Extermination Policy between Red's and Blue's combatants is assessable in terms of the Orthodox View. This is because its pursuit can potentially satisfy the five requirements that render military acts permissible. 'Regular' combatants *target\_state* can resist combatants *intervening\_state* by observing the laws of war. For the Orthodox View, the confrontation resembles a more conventional self-defensive war. In fact, since Blue's soldiers are victims of an unprovoked attack, it does not seem entirely unreasonable to suppose that they should be recognised as moral equals.

If this is sound, (more conservative) theorists of MHI can potentially adopt a twofold or 'hybrid' approach to the problem of combatant liability. On the one hand, it is possible to argue that other-defensive military action against participants in Atrocity Crimes falls outside the scope of the Orthodox View, though it remains to be seen which normative framework could replace it. On the other hand, one can maintain that military action against those with 'regular' combatant status is still governed by the Orthodox View. The chapter contends, though, that we should reject the 'hybrid' position. It argues that the normative relationships between combatants *intervening\_state*, perpetrators of Atrocity Crimes, *as well as* regular combatants *target\_state* should be regulated via the justice-based perspective of the Neo-Classical View. As we shall see, it is the great asset of the Neo-Classical View that its rationale can be extended to all types of combatants during MHI.

In what follows, let us first examine the problem of combatant liability as it pertains to the perpetrators of Atrocity Crimes. We can then turn to the relationship between regular combatants *target\_state* and combatants *intervening\_state*.

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<sup>182</sup> Walzer, *Just and Unjust Wars*, p. 39.

### III

#### **Participation in Atrocity Crimes and the problem of combatant liability**

##### *A. Perpetrators: guilty, responsible, or excused?*

For its defenders, the purpose of the Orthodox View is to separate those who engage in legitimate military acts from those who engage in indiscriminate mass killing. Accordingly, soldiers who participate in an unjust war but conduct themselves justly are not criminals. But those who engage in conflicts, just or unjust, in order to perpetrate massacres are not protected by the moral equality of soldiers. As we saw above, Walzer thinks that any atrocities a soldier commits ‘are his own’. It is not clear, though, what he means by this. Does he mean that perpetrators are culpable or at least morally responsible for their deeds? Intuitively, there is a certain reluctance to answer this question affirmatively. This is because regimes that order or tolerate Atrocity Crimes tend to be highly oppressive, often threatening their own people. Arguably, individuals who live under such regimes have fewer options than those who are members of relatively stable and peaceful societies.

To illustrate the point, consider Lor, the Khmer Rouge cadre quoted at the beginning of this chapter, who feared that he was going to be killed if he failed to comply with his orders. Alternatively, recall the case of Serb villagers, mentioned in Chapter I, who, during the Bosnian civil war, were forced, at gunpoint, by Serb militias to identify their Muslim neighbours. Since Lor and the villagers were acting under duress, one wonders whether their actions were really ‘theirs’.

In addition to duress, domestic criminal law recognises a variety of further excuses for wrongdoing, including brainwashing, (non-negligent) mistake, and provocation.<sup>183</sup> It is not difficult to apply these to Extermination Policy. Members of Red’s security services, for example, might participate in Atrocity Crimes because they have been entirely brainwashed by their government’s propaganda. Or civilian members of Majority Ethnicity who join into the killing could have been reacting to past provocations that resulted from the longstanding tensions with Minority Ethnicity. Perpetrators, as Chapter I argued, can often be found on both sides.

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<sup>183</sup> J. Horder, *Excusing Crime*, paperback ed. (Oxford: Oxford University Press, 2007).

From a more philosophical, and less legalistic, perspective, our uneasiness about the status of those who participate in Atrocity Crimes is reflected in Claudia Card's revision of the Atrocity Paradigm. As we saw in Chapter III, whereas Card's earlier theory stressed the centrality of *culpable* wrongdoing for the Atrocity Paradigm, her latest formulation emphasises the inexcusability and intolerability of certain acts. Because social evils can be institutionalised and wide-spread, individuals, Card contends, may not necessarily be blameworthy for participating in them. Nevertheless, since evils lead to intolerable harms, (non-culpable) participation in them is inexcusable. Card's revision does not seem to unhinge the tight fit between the Atrocity Paradigm and the justice-based perspective on rescue killings. As we saw in Chapter I, culpability is not required in order to incur liabilities to attack. Moral responsibility, McMahan contends, suffices. An agent must be responsible for his actions, without necessarily also being morally blameworthy for them.

But some doubts remain over Card's perceived lack of excuses as well as, more generally, over the presence of moral responsibility in all perpetrators of Atrocity Crimes. For instance, child soldiers, who have been used to perpetrate Atrocity Crimes in some conflicts, have little deliberative agency due to their lack of moral development.<sup>184</sup> Often, apart from brutalisation and brainwashing, child soldiers are also drugged by their captors in order to lower their threshold for aggression and ensure compliance. The harm caused by child soldiers is certainly intolerable, but, intuitively, the children seem to be excused for their actions, especially if they have been drugged.<sup>185</sup> Under those circumstances, it is also questionable whether they are morally responsible for their actions. To be sure, they may have *some* agency. But this may not be sufficient to consider them liable to attack.

Child soldiers, then, may (sometimes) have the status of what we can call non-responsible attackers, who, by definition, lack meaningful agency, and are, therefore, *not liable* to attack. Michael Otsuka, in fact, thinks that non-responsible attackers are

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<sup>184</sup> For a critical view that suggests that child soldiers are not entirely passive, see D. M. Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (Camden/N.J., Rutgers University Press, 2005). For an account of various issues involving child soldiers, see P.W. Singer, *Children at War* (Berkeley/CA., University of California Press, 2006).

<sup>185</sup> It is worthwhile adding that the use of child soldiers is also a grave moral evil. The process of becoming a child soldier, for instance, often subjects children to intolerable harms, radically diminishing their prospects for a minimally decent life.

equivalent to bystanders who, also by definition, are not liable to attack.<sup>186</sup> The result is what Otsuka calls Bystander-Equivalence Thesis. It accounts for why it is impermissible *and* inexcusable for a third party to use other-defensive force against non-responsible attackers.

The question, then, is how we can shed light on the moral status of those who participate in Atrocity Crimes. Because social psychologists, historians, and lawyers have treated the phenomenon of atrocities in more detail than philosophers, it is useful to draw their work into the discussion. More precisely, let us use the so-called Nuremberg Defence as a rough template for the philosophical analysis of individual participation in Atrocity Crimes.

As its name suggests, the Nuremberg Defence arose during the course of the Nuremberg Trials. To explain why they had participated in atrocious mass killing, one of the reasons commonly cited by German soldiers was that they ‘were just following orders’. As Larry May points out, the rationale behind the then valid Superior Orders Defence was that ‘soldiers do not intend or plan to kill, but only intend what they are ordered to do’.<sup>187</sup> According to the Superior Orders Defence, soldiers had to prove that they genuinely believed to be following a duly authorised order at the time.

The Nuremberg Defence, however, has replaced this kind of reasoning. The Nuremberg Defence is more demanding than the Superior Orders Defence because it requires soldiers to show that *a*) they thought the actions set out by a [duly authorised] order were morally and legally permissible (moral perception) and *b*) following the order was the only morally reasonable course of action available at the time (moral choice).<sup>188</sup> In what follows, let us examine the relevance of the moral perception and choice components for the other-defensive conception of MHI.

### *B. Atrocity Crimes and moral perception*

The moral perception criterion demands that soldiers demonstrate that actions set out by an order were morally permissible. Of course, this requires a set of principles

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<sup>186</sup> M. Otsuka, ‘Killing the Innocent in Self-Defence’, *Philosophy & Public Affairs*, Vol. 23/No. 1 (1994), 74-94.

<sup>187</sup> L. May, *Crimes against Humanity: a normative approach* (Cambridge: Cambridge University Press, 2005), p. 181

<sup>188</sup> (*ibid.*), pp. 181-184.

that enables soldiers to assess the moral permissibility of a specific order. These must be *a)* universal in scope and *b)* responsive to the highly stressful conditions soldiers face. According to May, the bare moral minimum we can expect from soldiers is not to intentionally attack those who are materially innocent. The intentional killing of *defenceless* individuals is usually deemed a great evil across cultures.<sup>189</sup> Whatever the precise nature of a conflict, because those who are defenceless are particularly vulnerable, soldiers have special duties of care towards them.<sup>190</sup> But despite its simplicity, two objections can be raised against the moral perception criterion. Let us outline these in more detail in order to assess whether they can potentially exculpate individuals from participating in Atrocity Crimes, or indeed show that individual perpetrators are not even responsible for their actions.

The first objection stresses the epistemological difficulties soldiers face when assessing who poses a threat. In some conflicts, it might be the case that enemy fighters are not directly marked or, in fact, pose as defenceless civilians. This can make the situation incredibly stressful for soldiers, and, as a result, mistakes are likely. But history shows that mass murderers deliberately target their victims when they expect the least resistance. In this sense, the circumstances of Atrocity Crimes are often not analogous to conditions on a battlefield.

For example, the Serb forces who executed 8000 Muslim men in Srebrenica did not face resistance from local groups or UN peacekeepers.<sup>191</sup> The killing of Jews in Eastern Europe, at the hands of the various military and paramilitary organs of the Germany state, customarily involved putting victims deliberately into a defenceless position, e.g. by stripping them naked and shooting them in the back. Finally, the objection becomes even weaker when we consider a society like Democratic Kampuchea where armed resistance movements did not exist. Like many mass murderers, Lor and his comrades did not have to fear that their victim's might attack them. Hence those who participate in Atrocity Crimes can usually not be excused for killing defenceless individuals *by mistake*.

This leads us to the second objection. Imagine that, in Extermination Policy, Red's soldiers have been told by their government that members of Minority Ethnicity posed a threat to the country's security. Given that it will be difficult for the soldiers

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<sup>189</sup> (ibid.), pp. 188-191.

<sup>190</sup> (ibid.), p. 189.

<sup>191</sup> See, J.W. Honig & N. Both, *Srebrenica: Record of a War Crime* (Harmondsworth: Penguin, 1996).

to verify this claim, one might argue that they are excused for following orders to ethnically cleanse Minority Ethnicity. There are two replies to this objection.

First, Red's soldiers will be able to assess the situation once they have been dispatched to the killing site. Given the above argument that the conditions of mass killing are much less stressful for soldiers than actual battlefield encounters with enemy troops, it must also be easier for Red's soldiers to verify whether their victims are defenceless individuals. Second, Red's soldiers must question whether orders to kill Minority Ethnicity were duly authorised. For David Estlund, although soldiers are sometimes obliged to (knowingly) follow orders that involve a moral wrongdoing, these orders are only binding if they are the product of sound deliberative and epistemic procedures.<sup>192</sup> Taking into account that Red's government will be likely to be authoritarian, Red's soldiers must know (or at least suspect) that Red fails on both counts.<sup>193</sup> It is, therefore, doubtful that soldiers of oppressive states can always cite non-culpable ignorance as an excuse for participating in mass murder.

Our engagement with the moral perception criterion reveals that perpetrators of Atrocity Crimes can often not be excused for indiscriminate killing because they morally misperceive the situation. Imagine the example of an attacker who strikes his victim in a case of mistaken identity. The attacker thinks that the victim is a famous serial killer, while, in reality, he is facing the serial killer's identical twin brother.<sup>194</sup> Under these circumstances, it is reasonable to excuse the attacker for his use of force due to the cognitive error he suffers.

But social psychological and historical research on mass killing reaffirms the argument of this section that perpetrators *do not* suffer from cognitive error. Rather, they suffer from a cognitive dissonance.<sup>195</sup> That is to say, they know that killing defenceless individuals is wrong, but, for a variety of reasons, also intend to comply

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<sup>192</sup> D. Estlund, 'On following orders in an unjust war', *Journal of Political Philosophy* Vol. 17/Issue 2 (2007), pp. 213-334. It would be beyond the scope of this chapter to treat Estlund's argument in full detail.

<sup>193</sup> German soldiers during WW II, for example, knew that the Nazi regime did not take due care of these considerations, Estlund, 'Following Orders'.

<sup>194</sup> This ingenious thought experiment comes from McMahan, *The Ethics of Killing*, p. 402; also, see McMahan, *Killing in War*, pp. 162-163.

<sup>195</sup> On this point, see H. Welzer, *Täter & Hinton, Why did they kill?*. For further social-psychological and sociological perspectives, see J. Weller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2007); M. Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2005). For two critical historical studies, see D.J. Goldhagen, *Hitler's Willing Executioners* (Lancaster: Abacus, 1997) & C. R. Browning, *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* (London: Penguin, 1992).

with their orders. There may be various psychological strategies available to those implicated in mass killings in order to overcome this cognitive dissonance. But this should not distract from the fact that perpetrators perceive the ‘wrongness’ of the situation correctly. Lor, the Khmer Rouge cadre, does not deny that ‘killing one or two people’ was wrong. Instead, he argues that he would have been killed if he had failed to comply with his order. To assess the moral strength of Lor’s argument, we must turn to the Nuremberg Defence’s moral choice criterion.

### *C. Atrocity Crimes and moral choice*

As we saw above, the moral choice criterion requires that there are morally reasonable alternatives to following an order. If the agent has justified concerns that disobedience is going to lead to his death, his scope for action seems severely limited. He may even be excused for his actions, though Card’s argument that some acts are inexcusable raises doubts over this. Of course, the status of duress during actual campaigns of mass killing will be difficult to ascertain. Perpetrators will commonly claim that they had no choice to act otherwise. Surviving victims will typically disagree. There are indeed four reasons that explain why the excusatory appeal to duress is not as strong as it initially appears.

First, there are some well-documented cases where perpetrators did not act because they were under duress. In Christopher Browning’s famous historical study of the role of the (German) Reserve Police Battalion 101 during the Final Solution in Poland, police officers were asked whether they wanted to take part in the killing of Jews. Most of the men complied, but not out of fear of death. There is not a single documented case that the refusal to kill Jews led to the death of potential perpetrators. Rather, the police officers acted out of loyalty to the head of the Battalion and a sense of camaraderie. Building on Browning’s analysis, killing, the noted German social psychologist Harald Welzer argues, was nothing more than a ‘job’ that had to be done properly.

Second, Atrocity Crimes are morally distinctive because they either make a decent existence impossible or deny their victims a dignified death. Gang rape, (sexually motivated) torture and even cannibalism are part of Atrocity Crimes.<sup>196</sup> In an

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<sup>196</sup> C. McKinnon, ‘Crimes of War, Crimes of Peace’, in: S. Shute & S. Hurely (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), pp. 84-109, at pp. 86, 90. Alex



influential article on the Bosnian civil war, Catherine McKinnon describes how ‘one woman was allowed to live so long as she kept her Serbian captor hard all night orally, night after night after night’, and how Muslim women who were taken away to be killed ‘were raped, had their breasts cut off and their wombs ripped out’. From the perspective of duress, the pure gratuitousness of violence and (sexual) sadism suggest that a shocking number of individuals, such as the Serb captor in McKinnon’s example, are not coerced into their role, but take advantage of the opportunities provided by their state to commit unspeakable crimes.

Third, it is notoriously difficult to determine what constitutes a justified belief that one’s life is endangered. Someone held at gunpoint will experience a different form of duress than someone who has a mere suspicion that his life is at risk.<sup>197</sup> Consider Lor’s account of why he killed ‘one or two people’. A senior Khmer Rouge cadre asked him to prove that his ‘heart was cut out for it’,<sup>198</sup> but the cadre did not threaten Lor with a weapon; however, it is not unreasonable to suppose that he could have taken action against Lor that might have led to Lor’s death in the future, e.g. by removing him from his post and ordering him to work in the fields. Generally, the greater the likelihood that the dreaded event is going to occur immediately, the more it seems appropriate to speak of duress. Conversely, if the likelihood is low (say, the threatening party is bluffing) or the consequences of non-compliance are vague or unclear, the less it seems appropriate to speak of duress.

Finally, even in cases where the death of the threatened party is likely, the criminal law does usually not recognise duress as an excuse for intentionally killing the innocent.<sup>199</sup> To illustrate the point, if Coerced Andy is about to kill Berta under duress, he still *activates* a forced choice between lives. It is true that the forced choice between Coerced Andy’s and Berta’s lives was created by someone else. To be precise, it was created by the agent, Threatening Tom, with whose demands Coerced Andy complies. If Threatening Tom had not structured the situation in a certain way, Coerced Andy would not have killed Berta. However, we can still deem Coerced

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Hinton offers an anthropological account of the practice of cannibalism during the reign of the Khmer Rouge, see Hinton, *Why did they kill?*, pp. 34-35.

<sup>197</sup> May, *Crimes against Humanity*, p. 193.

<sup>198</sup> Cutting one’s heart out is a euphemism for the ability to mercilessly kill in the name of the communist revolution; Hinton, *Why did they kill?*, p. 293.

<sup>199</sup> Rodin, *War and Self-Defence*, p. 171. But a thirteen year old boy who kills under duress has a very strong case to be excused for the killing. Hence it is doubtful that duress can *never* excuse murder. See, Horder, *Excusing Crime*, p. 63.

Andy morally responsible for activating the forced choice. After all, since Coerced Andy *chooses* to avert a threat to his life by killing Berta, he would be liable to attack, notwithstanding the fact that he finds himself in an extremely difficult situation and, unlike Threatening Tom, does not act out of malicious intent.

That said, although agents who kill under duress share the necessary feature of moral responsibility, it is important not to equate them with those who culpably participate in Atrocity Crimes. This is so because the criteria governing the exercise of the right to other-defence, including necessity, proportionality, and the duty to retreat, have greater stringency in cases involving merely morally responsible attackers than in cases involving culpable attackers.<sup>200</sup> Imagine that, in Extermination Policy, Blue's soldiers are faced with the following two scenarios.

OPTION 1: A group of Red's elite soldiers and security officers, many of whom are fully committed to Red's policies, are about to enter a Minority Ethnicity village to kill its inhabitants. The only way to prevent the ensuing massacre is an air strike on the advancing vehicles of *Redelite*. But there is a small chance that *Redelite* would withdraw if the fighter pilots destroyed their mobile command centre located at some distance from the village. Blue's pilots are not required to target the command centre first (this might change if the chance of withdrawal was greater) because, *ceteris paribus*, one is generally not required to take *costly* steps to avoid confrontation with someone who is morally culpable for creating a threat.

OPTION 2: But now imagine that the soldiers charged with the destruction of the village are extremely young recruits, most of who have been coerced into fighting. In this case, Blue's pilots are under an obligation to target the command centre first, provided that they can still stop *Redyoung\_recruits* if the destruction of their command centre does not lead to the desired result. Of course, if they were unable to return in time or if the chances that *Redyoung\_recruits* would withdraw were low, Blue's pilots are not required to undertake risky steps to spare their lives. If it is *strictly* necessary to kill an attacker in other-defence, then third parties have a right to do so.

If the observations of this section are sound, duress does not always function as a moral excuse for perpetrators of Atrocity Crimes. Generally, although highly oppressive societies reduce the options available to individual agents, perpetrators do

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<sup>200</sup> McMahan, *The Ethics of Killing*, p. 403-404; McMahan, *Killing in War*, pp. 155-156.

not always face moral alternatives that are entirely unreasonable. More disconcertingly, many perpetrators kill simply because they ‘want to do their job right’. Often they also exploit the killing opportunities offered to them by their state.

In conjunction with the arguments of the preceding section, our analysis of the moral choice criterion reveals that many perpetrators are indeed morally culpable for their participation in Atrocity Crimes. There are some exceptions to the rule. But we argued that coerced agents are also liable to attack because they exercise moral agency, albeit non-culpably. That said, considerations of proportionality are more stringent in rescue killings involving regular attackers than in those involving culpable attackers.

Still, it would be too optimistic to suppose that there will be no non-responsible attackers amongst the perpetrators of Atrocity Crimes. Let us therefore briefly look at the problem of non-responsible attackers in Section D.

#### D. *Child Soldiers: From the Bystander-Equivalence Thesis to the Harm-Numbers Thesis*

The case of child soldiers is a difficult one, not least because the category of child soldiers is rather broad. As McMahan points out, the difference between a six- or sixteen-year old in terms of moral and psychological development can be immense, while the difference between a seventeen-year old child combatant and an eighteen-year old adult-combatant may be minimal.<sup>201</sup> In case of older ‘child’ combatants, there are good reasons to view them as possessing the necessary moral agency to incur liabilities to attack. Of course, older child combatants could have been socialised into their role from a very early age onwards. This would mean that their moral development is seriously stunted. Nevertheless, it may still be appropriate to consider them as having ‘diminished responsibility’ for their actions. If this is true, they are liable to attack, though, given what we just said in Section C, proportionality criteria would have greater stringency than in cases involving *fully* responsible attackers.

However, there are doubts over whether the same applies to smaller children and those who have been drugged by their captors. Although it is difficult to reach a general judgement on the status of those types of child soldiers, it may not be

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<sup>201</sup> See, McMahan, *Killing in War*, pp. 198-202.

inappropriate to argue that they fall into the category of non-responsible attackers. If this is true, Otsuka's Bystander-Equivalence Thesis would apply to them.

There are two potential responses to the problem posed by non-responsible attackers, though. First, Otsuka concedes that the Bystander-Equivalence Thesis only applies in cases where the number of (potential) victims does not play a role, e.g. if a single victim would die at the hands of a single non-responsible attacker.<sup>202</sup> This may change, however, once numbers come into play. As we saw in Chapter I, non-consequentialists do not need to reject the claim that numbers count morally. In cases involving Atrocity Crimes, numbers matter more strongly than in ordinary forced choices between lives due to the extraordinarily high number of potential victims. If this is sound, it is morally acceptable to kill, say, two non-responsible attackers in order to save twenty victims.

Second, we must consider that the victims of some non-responsible attackers are often subjected to gratuitous violence and sadistic harm, especially in the case of child soldiers who act under the heavy influence of drugs. Interveners not only save a large number of individuals, they also spare them from the severest harm imaginable. Certain forms of harm are intolerable, regardless of who perpetrates them. The harms in question deprive victims of a dignified death and seriously damage the prospect of survivors for a decent life. Coupled with numbers, the intolerability of some kinds of harm explains why the Bystander-Equivalence Thesis does not apply to non-responsible attackers in the context of Atrocity Crimes. Unlike Card, though, we do not need to go so far as to argue that perpetrators can never be excused for their participation in Atrocity Crimes. At least in the case of some child soldiers, this is counterintuitive.<sup>203</sup>

Taken together, these two conditions form what we can call the Harm-Numbers Thesis. It replaces the Bystander-Equivalence Thesis in situations where intolerable harm would be inflicted on a very high number of victims. It denies, in other words, that non-responsible attackers who are implicated in Atrocity Crimes are morally

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<sup>202</sup> Otsuka, 'Killing the Innocent', p. 74.

<sup>203</sup> Critics can point out that this claim negates the Atrocity Paradigm because it abandons moral culpability and/or inexcusability. But we can assume that, although child soldiers are not blameworthy for their actions, their commanders are. In many cases, they will use child soldiers because the latter will perpetrate intolerable harms.

equivalent to bystanders. Two points of clarification about the nature of the Harm-Numbers Thesis are necessary.

First, in light of what has been said in the preceding section, the Harm-Numbers Thesis is constrained by the principles of proportionality and necessity. The killing of non-responsible attackers must be the last resort once all other options have been exhausted. If combatants *intervening\_state* can target regular attackers instead, they must do so. In fact, in cases involving child soldiers, it is not unreasonable to suppose that combatants *intervening\_state* have relatively demanding duties of due care towards their potential targets, that is, they must incur higher risks to themselves before they kill children.<sup>204</sup>

Second, the Harm-Numbers Thesis raises an interesting point for the ethics of killing and saving. Because, for the justice-based perspective on self/other-defence, they lack moral agency, non-responsible attackers do not forfeit their right not to be attacked.<sup>205</sup> In the absence of forfeiture, the Harm-Numbers Thesis should not be used to define negative duties out of existence. They are too important in our ethical thinking to be cast aside like that. Rather, the Harm-Numbers Thesis provides combatants *intervening\_state* with a normative reason in favour of overriding negative duties against harming. Since non-responsible attackers are not liable to attack, combatants *intervening\_state* justifiably *infringe* their rights. We return to the issue of rights infringements again in Chapter V. For now let us try to ascertain whether non-responsible attackers would be allowed to repel the attack launched by combatants *intervening\_state*.

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<sup>204</sup> David Rodin pointed out to me that the Harm-Numbers Thesis is problematic because it would justify terrorism. This is a legitimate worry. But we can reply to it as follows. While terrorism consists in the intentional killing of bystanders, one of its purposes is to use their deaths in order to create fear. Indeed, this is one of the features that differentiate terrorism from the mere random killing of innocents. In the case of the child soldiers, though, their death is not used to create fear. If this was the case, the Harm-Numbers Thesis would contradict our above observations on proportionality. For the Harm-Numbers Thesis, the killing of non-responsible attackers is strictly the last resort, once all other options have been exhausted and there is no other way to prevent a moral catastrophe. Further, as we just saw, intervening combatants have very stringent duties of due care towards child soldiers. Terrorists, by contrast, are neither concerned with considerations of proportionality nor due care. They will specifically target bystanders or non-responsible attackers because of the maximum impact their death may have on a conflict. In any case, while the Harm-Numbers Thesis challenges the distinction between combatants and bystanders, it does not easily lend itself to a normative defence of terrorism.

<sup>205</sup> As we saw in Chapter III, Judith Jarvis Thomson disagrees. Even a non-responsible attacker forfeits his right because he threatens the right of someone else. For Thomson, the Harm-Numbers Thesis is superfluous.

The answer to the question has to be negative because combatants *intervening\_state* do not pose an unjust threat. They are not liable to attack. Non-responsible attackers can thus only be excused for resisting combatants *intervening\_state*.

This raises the question whether combatants *intervening\_state* are allowed to defend themselves against non-responsible attackers. The other-defensive conception of MHI assumes that they aren't. Non-responsible attackers do not forfeit their right not to be attacked if they use force against combatants *intervening\_state*. They do not suddenly become 'agents' who can be liable to attack. Thus combatants *intervening\_state* are only excused for defending themselves against child soldiers. Neither of the two parties, then, poses an *unjust* threat to each other. Their use of self-defensive force can only result from an *agent-relative* excuse to harm each other because their lives are threatened.

Obviously, since potential rescuers do not share this exculpating reason, they are neither permitted to intervene nor excused for intervening on behalf of either of the two parties. Special relationships, though, may make a difference here. In what follows, let us assess this claim by looking at the role of special relationships in rescue killings.

A collective institution like the army establishes special relationships between members. Perhaps combatants *intervening\_state* would be excused for defending their comrades who have come under attack from child soldiers. But given that the Harms-Numbers Thesis already permits combatants *intervening\_state* to target non-responsible attackers, an appeal to special relationships is superfluous. It is possible to reply to this argument that one must distinguish between other-defensive force aimed at rescuing fellow combatants *intervening\_state* and other-defensive force aimed at rescuing the victims of Atrocity Crimes. Strictly speaking, the Harm-Numbers Thesis only permits the latter. In reality, though, the two acts, i.e. the defence of fellow combatants and the rescue of victims of Atrocity Crimes, are so closely intertwined that it would be difficult to separate them.

But probably it is possible to apply the special relationship argument to non-responsible attackers. The result is mixed. First, it would be strange to argue that child soldiers stand in a special relationship to their superiors. In general, special relationships can have moral weight if (and only if) they fulfil certain preconditions.

For instance, they must be non-exploitative, respectful of the rights held by the members of an association *qua* individuals, valued by the members of an association, and not detrimental to the rights of non-members of an association. None of these conditions are met in the case of child soldiers. Second, because MHI takes place in order to halt very grave moral evils, i.e. Atrocity Crimes, special relationships, especially those that appeal to shared nationality, are trumped by the necessity to prevent the further perpetration of intolerable harms.

That said, there are some exceptions to this rule. Intuitively, parents have strong exculpating reasons for defending their children. But this follows from the special nature of the parent-child relationship, rather than any general rule about special relationships. Similarly, some village or tribal communities may lead closely integrated lives. Arguably, fellow villagers or tribe members may be excused for trying to protect tribal children, drafted into a killing unit, from combatants *intervening\_state*. However, while these exceptions are intuitively defensible, one should mention that, for practical reasons, parents or villagers should assist combatants *intervening\_state* to eliminate those who irresponsibly (and culpably!) put children into the firing line.

#### E. *Conclusion*

The above proposed a solution to the problem of combatant liability as it pertains to perpetrators of Atrocity Crimes. The other-defensive conception of MHI views them analogously to *culpable* attackers who exceed the basic criterion for liability to attack, namely, moral responsibility. As a result, many perpetrators are neither permitted nor excused for defending themselves against combatants *intervening\_state*. Often perpetrators are culpable for their deeds. As the analytical tool of the Nuremberg Defence showed, perpetrators generally do not misperceive the situation. Further, they have moral choices not to kill. Duress, it was contended, does not have an exculpating function for perpetrators.

Yet, because they merely activate a forced choice between lives that was initially created by someone else, perpetrators who kill under (genuine) duress are morally responsible for their actions but not necessarily morally culpable. This means that proportionality and necessity criteria apply more strictly in their case. Put simply, it is preferable to target culpable perpetrators rather than those who act under duress.

Finally, the case of non-responsible attackers, most notably young child combatants, constitutes an exception. Because they lack relevant moral agency, non-responsible attackers do not forfeit their rights not to be attacked. Nevertheless, the Harm-Numbers Thesis maintains that it is permissible for combatants *intervening\_state* to override negative duties not to harm them. But because their rights are infringed (albeit permissibly), non-responsible attackers are excused for using self-defensive force.

It is useful to put these arguments into a broader perspective. In Chapter III, we argued that Atrocity Crimes are not injustices, but grave moral evils. Given the finding that many of those who participate in Atrocity Crimes are morally culpable for their actions, it would be tempting to conclude that they are evil people. The obvious danger is that we will demonise the perpetrators. Doing so would not only contradict any humanitarian impulses, but also bring us dangerously close to the Manichean thinking rejected in Chapter I. In order to avoid this, it is important to stress that even the category of culpable perpetrators is not a homogenous entity of ‘evildoers’.

First, as Card contends, evildoers are not necessarily malicious. They may simply be careless, lack foresight, bow to social pressures, close their eyes to the obvious, fail to critically distance themselves from policies or display overtly deferential attitudes to towards authority.<sup>206</sup> Arguably, participation in Atrocity Crimes can lead to behaviour that is anomalous for many, resulting from the extraordinary circumstances of a society in crisis.

Second and directly related to the preceding point, while culpable attackers are liable to moral blame for their conduct, they are not necessarily liable to equal degrees of blame.<sup>207</sup> Intuitively, as Card observes, the prison guard, who reluctantly tortures his victim by inflicting no more harm than necessary, is not as bad as the torturer who inflicts gratuitous levels of harm just because he likes it. Needless to say, neither of these two points exculpates perpetrators from wrongdoing. But we should be cautious not to label *all* perpetrators, even culpable ones, as inherently evil persons.

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<sup>206</sup> Card, *The Atrocity Paradigm*, pp. 3-4; p. 9.

<sup>207</sup> Card, *Confronting Evils*, p. 23.



Having dealt with the moral status of participants in Atrocity Crimes, we must now examine the relationship between regular combatants<sub>target\_state</sub> and combatants<sub>intervening\_state</sub>. This is the purpose of the final part of this chapter.

## IV

### The Argument from Derivative Liability

#### A. *The Neo-Classical View and the notion of complicity*

As was pointed out above, it is possible to adopt a hybrid position on the problem of combatant liability in the context of MHI. Defenders of the Orthodox View can maintain that, while perpetrators of Atrocity Crimes are not moral equals, regular combatants summoned to the defence of the target state are. In what follows, we will reject the hybrid position. In order to do so, we develop the Argument from Derivative Liability. It contends that regular combatants<sub>target\_state</sub> who defend their state against combatants<sub>intervening\_state</sub> are complicit in Atrocity Crimes. In the language of criminal law, they are derivatively liable for Atrocity Crimes. If this claim is sound, it would be a clear indicator that the Neo-Classical View, rather than the Orthodox View, governs the relationship between combatants<sub>intervening\_state</sub> and regular combatants<sub>target\_state</sub>, giving the former a right to intentionally target the latter.

Discussions of complicity usually involve two elements.<sup>208</sup> The conduct element, the *actus reus*, is sometimes referred to as the objective or external element of a crime. It describes the act through which an accessory's (S) is causally related to a wrongdoing perpetrated by a principal agent (principal/P). S typically enables P to do x by aiding, encouraging or counselling P (or via a combination thereof). However, a supporting act in itself is not sufficient to be (indirectly) liable for a crime. As the common law tradition assumes, *actus non facit reum nisi mens sit rea* (an act does not make a person guilty unless his/her mind is also guilty). The *mens rea* criterion, therefore, describes the mental element that, in order for a crime to have been committed, must appear in conjunction with *actus reus*. As we shall see, in the case of complicity, the *mens rea*

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<sup>208</sup> What follows is based on the following works, A.P. Simester & G. R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2<sup>nd</sup> ed., 2003); A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5<sup>th</sup> ed., 2006); S. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', *California Law Review* 73 (1985), pp. 323-410; C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000).

criterion is fairly demanding because it requires that S is responsible for his actions and has knowledge of P's intentions. In order to explore the relevance of complicity for MHI, it is easier to start with *actus reus*. We can then turn to *mens rea*.

#### B. *Resistance to intervention and Actus reus*

If one can consider regular combatants<sub>target\_state</sub> complicit with the perpetrators of Atrocity Crimes, they are also morally guilty of atrocious mass killing. For the Argument from Derivative Liability, they are on a par with those individuals who directly carry out the killing. This claim seems striking for three reasons.

First, regular combatants<sub>target\_state</sub> are not involved in mass murder themselves and might not even be close to the site where mass murder is taking place.

Second, regular combatants<sub>target\_state</sub> do not cause perpetrators to engage in Atrocity Crimes. Regular combatants<sub>target\_state</sub> are not, say, threatening to kill or otherwise punish potential perpetrators should the latter fail or refuse to comply with their orders.

Third, one can question whether regular combatants<sub>target\_state</sub> aid the perpetrators at all. Regular combatants<sub>target\_state</sub> do not support perpetrators by directly acting towards them, e.g. by transporting weapons to the killing site or providing other forms of assistance such as food, water, and medical supplies. All regular combatants<sub>target\_state</sub> are ordered to do is to defend their state against combatants<sub>intervening\_state</sub>. Contrast this with the Gun Case where *Sgun* gives P a gun that P uses to kill V. Here we encounter a positive act, the handing over of the weapon, for which *Sgun* is clearly responsible and, under certain circumstances, even culpable.

In light of these three arguments, it sounds reasonable to maintain that regular combatants<sub>target\_state</sub> are only responsible for actions restricted to their encounters with combatants<sub>intervening\_state</sub>.

The Argument from Derivative Liability negates this type of reasoning. It emphasises that, by defending the target state, regular combatants<sub>target\_state</sub> are (partly) responsible for sustaining a state of affairs in which very serious wrongs are committed. Hence they are accountable for and guilty of Atrocity Crimes. From the

perspective of the *actus reus* criterion, there are three points in support of this position.<sup>209</sup>

First, as the criminal law assumes, it is not required that S causes P to engage in x to be considered derivatively liable for x. Consequently, in order to have accomplice status, regular combatants *target\_state* do not need to cause the perpetrators of Atrocity Crimes to act. On the other hand, if it can be shown that P would have been, say, killed by S if he did not do x, it is likely that S's responsibility increases up to a point where S himself could become the principal. As we saw above, different levels of responsibility have implications for assessments of proportionality. If the perpetrators only engage in Atrocity Crimes because their comrades would otherwise kill them, combatants *intervening\_state* should try and minimise harming the former, while increasing their attack on the latter.

Second, an individual does not need to positively act towards a principal in order to be the latter's accessory. It is sufficient that the accessory's actions place P in a position where P can carry out the wrongdoing. If *Sbank* helps P rob a bank by distracting the police, *Sbank* has the same level of derivate liability as P's second accomplice who hands P the dynamite to break open the safe. By analogy, if, in Extermination Policy, Red's regular combatants successfully repel Blue, perpetrators are in a position to continue their attack on Minority Ethnicity. Red's regular combatants are thus on a par with, say, Red *transport* who transport weapons to the killing site.

Thirdly and directly related to this point, it is also not required that the accessory is present when the wrongdoing is carried out. If *Sbank* distracts the police three blocks away from the bank, his criminal guilt does not diminish. If Red's regular combatants render assistance that shields the perpetrators of Atrocity Crimes, it does not make a difference whether they are present or not. The point is that the perpetrators will not be able to continue killing if their comrades halt Blue's advance. The possibility that the accessory might not be causally responsibly for the wrongdoing or absent from its actual execution does not stand in the way of considering him complicit in it.

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<sup>209</sup> There is an important condition that must be fulfilled for complicity to obtain. S must help P before or during the wrongdoing. If S helps P flee the crime scene after P has shot V, then S is not accountable for V's death. In this case, he is only accountable for helping P escape the police.

Although we have overcome these initial obstacles, we must note a further problem. An accessory's contributions to another agent's design are not always impermissible. For example, if the private ownership of firearms is legal, *Sgun*'s act of giving P the gun is not in itself morally wrong. Therefore, one could argue that it is absurd to maintain that *Sgun* should be derivatively liable for V's murder. But we can say that, under these specific circumstances, *Sgun* is clearly under a duty not to give P the gun. *Sgun*'s liberty to dispose of his property ('the gun') as he pleases must be balanced against our concern for the rights of the prospective victim.<sup>210</sup> If the latter's rights are in danger of being violated, an otherwise permissible act can be wrong.

Needless to say, this argument has far-reaching implications for just war theory. In the case of Atrocity Crimes, it is clear that we must balance the Orthodox View's permission to participate in an unjust war against the rights of the victims of mass murder not to be attacked. Even if one supports the Orthodox View, one could maintain that it does not apply to MHI for exactly this reason. This point lends further support to the Neo-Classical View.

Since S can only be derivatively liable for a crime, though, if S meets the relevant mental conditions set out by *mens rea*. In the Gun Case, for instance, *Sgun* is only complicit in V's murder if he knows that P is plotting an attempt on V's life. This leads us towards the two *mens rea* criteria for complicity. Both are introduced and critically examined below.

### C. *Resistance to intervention and Mens Rea*

Taking into account, in Gun Case, P's intention to murder V, *Sgun* is in breach of a duty not to pass on the gun, provided *Sgun* is free to aid P and knows that P intends to kill V. More precisely, the *mens rea* (guilty mind) criterion for complicity, on which much of the Argument from Derivative Liability hinges, requires that:

1. S intends to do the acts by which he assists P and is aware that these acts aid P to engage in wrongdoing.
2. S must know what P is about to do --- he must know the relevant circumstances. This is not to say that S must be *fully* aware of all facets of P's

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<sup>210</sup> Ashworth, *Principles of Criminal Law*, pp. 434-435.

plans. Sometimes *culpable* ignorance --- ‘closing one’s eyes to the obvious’, as Ashworth puts it,<sup>211</sup> can also lead to complicity.

Of course, the question is to what extent these demanding criteria apply to regular combatants *target\_state*.

It is easier to begin with the second condition. Is it appropriate to suppose that regular combatants *target\_state* have reasonable knowledge of Atrocity Crimes? As we argued in Part III, soldiers who are ordered to directly participate in mass killing are still able to assess whether their victims are defenceless once they have arrived at the killing site. But regular combatants *target\_state* are not at the killing site. They are probably thousands of miles away from it. Moreover, while *Sgun* may know that P has a severe grudge against his brother, regular combatants *target\_state* have usually no personal knowledge of the orders issued to potential perpetrators by the target state’s government. Fortunately, both objections can be dealt with relatively quickly.

First, in Extermination Policy, Blue’s intervention, which Red’s regular combatants are ordered to repel, is a response to an already existing state of affairs. There are reasons to be sceptical that even an entirely authoritarian society can completely cover up mass killing. For example, in Cambodia, the epitome of an authoritarian state, many people had heard of the killing fields through eye witness accounts, word-to-mouth, and other more informal channels of communication.<sup>212</sup> Furthermore, Blue, keen to avoid large bloodshed, could try to persuade Red’s regular combatants to desert their ranks by informing them about the mass murder, e.g. by dropping leaflets over Red’s army barracks. It is unlikely, then, that there will be no information about the mass murder available to Red’s regular combatants.

Second, though Red’s regular combatants may have no knowledge of the orders the perpetrators received, they can reasonably be expected to know that their government is capable of ordering mass murder.<sup>213</sup> If they do not consider this possibility, they really do close their eyes to the obvious.

It is much more difficult, though, to meet the challenge of the involuntary accomplice. Consider the case of the Patriotic Soldier, who knows that Atrocity

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<sup>211</sup> (ibid.), p. 438.

<sup>212</sup> Hinton, *Why did they kill?*

<sup>213</sup> See, Estlund, ‘Following Orders’.

Crimes are taking place, but, though he is deeply opposed to his state's policies, denies that he intends to aid the mass murderers by resisting combatants *intervening\_state*. Known to be sincere, the Patriotic Soldier, in Extermination Policy, genuinely wants to protect Red and its culture from Blue. The Patriotic Soldier is an Involuntary Accomplice because, though he is opposed to mass murder, the actions necessary to defend his country contribute to its continuation.

But in reply, as we saw above, the theory of complicity does not require that S needs to agree or identify with P's aims in order to help P. It only demands that *a*) S intends to do y and *b*) is aware that doing y helps P to accomplish x.<sup>214</sup> If *Sgun* disagrees with P's plan to kill his brother but sells P the gun out of sheer greed, he is still derivatively liable for the murder. Likewise, the Patriotic Soldier can be considered complicit in Atrocity Crimes, despite the fact that he is opposed to them.

This leaves us with the case of the innocent accomplice. Innocent accomplice is not blameworthy for the aid he renders because he does not fully satisfy the *mens rea* requirements. If, in Extermination Policy, *Redconscript* is heavily bullied into resisting Blue, it would be wrong to consider him as an 'accomplice'. But if *Redconscript* knows all the facts and is responsible (though not blameworthy) for his actions, he is still morally responsible, though not necessarily culpable, for supporting the perpetrators of Atrocity Crimes. *Redconscript's* support of the mass murderers may be sufficient to hold him under a duty not to retaliate when attacked by Blue. Further, in regard to the conditions governing the use of force against *Redconscript*, one can offer an argument similar to that in Part III. The necessity and proportionality criteria are more stringent in cases involving *Redconscript* than in a situation where it is certain that members of Red (e.g. elite army units) are not merely non-culpably supportive of but fully complicit in Atrocity Crimes.

To conclude, in this part of the chapter, we developed the Argument from Derivative Liability in order to prove that regular combatants *target\_state* should not be considered as moral equals. This is because they, by resisting combatants *intervening\_state*, preserve a 'killing space' for perpetrators of Atrocity Crimes. The Argument from Derivative Liability, then, challenges the view that the

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<sup>214</sup> The Patriotic Soldier could claim that he is not aware that his acts aid the perpetrators. But it is undeniable that repelling Blue helps the mass murderers. This must be obvious for the Patriotic Soldier.

activities of regular combatants *target\_state* are entirely unrelated to Atrocity Crimes. In doing so, it shows that the Neo-Classical View, which opposes the Independence Thesis, can also be applied to theories of MHI.

## V

### Conclusion

The other-defensive conception of MHI endorses the Neo-Classical View of combatant liability. We also saw that the problem of combatant liability is more complex in the context of MHI than in other types of war. It is necessary to distinguish between combatants who are engaged in Atrocity Crimes and ‘regular’ combatants summoned to the defence of the target state. One of the assets of the Neo-Classical View is that the underlying rationale, the justice-based perspective on self/other-defence, assists us in dealing with combatants in both categories. If the above argumentation is sound, intervening combatants hold a right to intervene against combatants in the target state. The correlative duty of this right is a duty of non-resistance. This means that the Independence Thesis, which asserts that JAB is independent from JIB, is invalid for the other-defensive conception of MHI. Generally, the argumentation of this chapter enables us to reconcile corporate and individual levels of analysis.

Having discussed the problem of combatant liability, we must now turn to the problem of non-combatant immunity. Before we can do so, however, let us briefly turn to a general criticism that can be levelled at the Neo-Classical View. Before we conclude this chapter, let us briefly examine a critical argument that can be levelled against the Argument from Derivative Liability in particular and the Neo-Classical View in general.

Military campaigns, defenders of the Independence Thesis could reply, are never conducted entirely justly. For a number of reasons, combatants *intervening\_state* may use unjust methods, if only temporarily. Since *unjust* aggressors are not holders of a right to intervene, they do not fall under the scope of the Neo-Classical View. On the other hand, as soon as they have ceased to use unjust methods, combatants *intervening\_state* regain their right to intervene. This entails that, for the duration of injustice at least, combatants *target\_state* gain, if the Neo-Classical View is correct, a right to target combatants *intervening\_state*. For the sake of efficiency, critics

could argue that we should retain the Independence Thesis. It is impossible and uneconomical to assess every phase, or possibly every act, of a military campaign anew.

Defenders of the Neo-Classical View can reply to this charge as follows. First, the Orthodox View faces the very same problem, albeit to a lesser degree. As we saw above, combatants who carry out military acts that do not fulfil certain criteria are not classifiable as moral equals. Thus, for the Orthodox View, we would still have to assess a large number of military acts. The Orthodox View, like the Neo-Classical View, cannot ignore the dynamics of a military campaign.

Second, we can deal with the problem via the proportionality criterion. In order to show that combatants *intervening\_state* lose their right to intervene, injustices need to be persistent, that is, the actual campaign must be based on a strategy predicated on violations of JIB. However, if injustices occurred sporadically, we must balance their severity against the overall aim of ending Atrocity Crimes. If the resulting harm is not disproportionate to the benefit of halting Atrocity Crimes, we can assume that combatants *intervening\_state* are holders of a right to intervene, notwithstanding the occurrence of some injustices.



## Chapter V

### The problem of non-combatant immunity and the ethics military humanitarian intervention

*'It will be swift, it will be severe, it will be sustained!'*

*'You bomb us!'*

(Exchange between Richard Holbrook and Slobodan Milosevic on the eve of the Kosovo war)<sup>215</sup>

*Individuals have rights, and there are things no person or group might do to them (without violating their rights).*

(Robert Nozick, *Anarchy, State and Utopia*)<sup>216</sup>

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<sup>215</sup> Quoted in: T. Judah, *Kosovo: War and Revenge* (New Haven: Yale University Press, 2000), p. 227.

<sup>216</sup> Nozick, *Anarchy, State and Utopia*, p. ix.

## I

### **The Orthodox View and the innocent**

The preceding chapter offered a critical discussion of the problem of combatant liability. This issue, the chapter argued, can only be solved if one explores the relationship between JIB and JAB. According to one important approach in just war theory, the Orthodox View, JAB and JIB must be considered independently of each other. In a nutshell, just wars can be fought unjustly, while unjust ones can be fought justly. In the context of MHI, however, Chapter IV contended that the Orthodox View must be rejected. As a result, perpetrators of Atrocity Crimes and their accessories lack a liberty to repel intervening combatants. But the Orthodox View does not only govern the relationship between combatants. It also provides a specific outlook on the problem of non-combatant immunity.

In light of the treatment of the ‘right intention’ criterion in Chapter III, a normatively sound solution to the problem of non-combatant immunity is of crucial importance for the success of the other-defensive conception of MHI. Wide-spread failure to adequately protect non-combatants, then, raises doubts over the humanitarian credentials of the intervening state and its combatants.<sup>217</sup>

The question, of course, is whether the Orthodox View’s interpretation of JIB ensures the adequate protection of non-combatants during MHI. The few theorists who address this issue, most prominently Fernando Teson and, in Germany, Wilfried Hinsch and Dieter Janssen, conclude that the Orthodox View, or something closely resembling it, also applies to MHI.<sup>218</sup> But given that the other-defensive conception of MHI rejects the Orthodox View’s approach to the problem of combatant liability, it would be odd to affirm the Orthodox View in the context of the problem of non-combatant immunity. As Chapter I made clear, in order to make sense of the phenomenon of MHI, we must try to work towards a reflective equilibrium of our considered judgements about killing and saving. An affirmation of the Orthodox View here would move us further away from reaching equilibrium. Thus, in this chapter, we will reject the Orthodox View’s proposed solution to the problem of non-combatant immunity.

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<sup>217</sup> For a longer exploration of this point, see Pattison, *Humanitarian Intervention*, especially chapter 4.

<sup>218</sup> Teson, ‘The liberal case for Humanitarian Intervention’; W. Hinsch & D. Janssen, *Menschenrechte Militärisch schützen: Ein Plädoyer für Humanitäre Intervention* [The military protection of human rights: the case for Humanitarian Intervention] (Munich: C.H. Beck, 2006), pp. 99-112.

In order to critically engage with the Orthodox View, we must first gain a better overview of its position on non-combatant immunity. Closely following international humanitarian law, the Orthodox View rests on four assumptions.<sup>219</sup>

1. Non-combatants can be distinguished from combatants in virtue of their material innocence, that is to say, they do not pose a lethal threat.
2. It is permissible to engage in a necessary military act if (and only if) any harm inflicted on non-combatants is foreseen but not intended. To wit, military acts must be consistent with the Doctrine of Double Effect (DDE).
3. Any harm inflicted by the warring parties should not be excessive to the harm prevented. This principle usually also encompasses restrictions on certain weapons and a ban on torture and rape as means of war.
4. Warring parties are allowed to kill non-combatants on the opposing side regardless of their cause, provided they observe 2 & 3.

Worrying that the Orthodox View is too permissive, Michael Walzer urges us to add a fifth criterion to it.<sup>220</sup>

5. Warring parties must ensure that (otherwise permissible) attacks on non-combatants are kept to a minimum, even at the expense of combatant lives. Walzer calls this the Due Care criterion.

Subsequent references to the Orthodox View incorporate Walzer's revision. In what follows, we shall not attend to (4), as we have already rejected the Independence Thesis in the preceding chapters. If the combatants of the target state are not even permitted to target intervening combatants, they cannot be allowed to inflict any harm, intentionally or non-intentionally, on non-combatants in the intervening state. In what follows, Part II engages with (1), while Part III examines (2). Part IV looks at (3) & (5).

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<sup>219</sup> For representative examples, see Walzer, *Just and Unjust Wars*; O. O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2002); L. May, *War Crimes and the Just War* (Cambridge: Cambridge University Press, 2006); I. Primoratz, 'Civilian Immunity in War: its grounds, scope and weight', in: I. Primoratz (ed.), *Civilian Immunity in War* (Oxford: Oxford University Press, 2007), pp. 21-41.

<sup>220</sup> Walzer, *Just and Unjust Wars*, pp. 155-156.

## II

### **Combatants and non-combatants: some doubts about the Orthodox View**

For just war theory, we must draw a line between those who are liable to attack and those who are not. In other words, warring parties must adopt a discriminatory approach to the use of force during the conduct of hostilities. As Larry May points out, any theoretical account of the resulting ‘discrimination criterion’ has a conceptual and normative component.<sup>221</sup> The former clarifies why someone should belong to one group of individuals rather than another, whereas the latter justifies certain behaviour towards members of the respective group. For the Orthodox View, those who are materially innocent, i.e. non-threatening, are non-combatants (conceptual). As such, they enjoy immunity from intentional attack (normative).<sup>222</sup> Although its simplicity is intuitively appealing, the Orthodox View can be rejected relatively easily. All one needs to show is that material innocence is not sufficient in order to be classifiable as a non-combatant.

Indeed, there are three reasons for why a simple distinction between those who are threatening and those who aren’t is untenable. First, according to the laws of war, combatants are usually permitted to attack their adversaries even though the latter do not pose a material threat. In the literature on the just war, these types of combatants are known as ‘naked soldiers’. They may be injured, resting, or being loaded onto trucks.<sup>223</sup> Conceptually speaking, naked soldiers do not seem much different from non-combatants. Both groups are materially innocent. To be sure, some naked soldiers are, arguably, equivalent to potential attackers. For instance, a well-trained army unit can be mobilised within minutes, if not seconds. Second, it might be impossible to stop a naked soldier once he has returned to fighting. In both cases the launch of a pre-emptive strike can be permissible. But notwithstanding these two points, the fact that the laws of war consider naked soldiers liable to attack raises doubts over the role of causal innocence in establishing non-combatant immunity.<sup>224</sup>

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<sup>221</sup> L. May, *War Crimes*, p. 96. For the view that discriminatory approach to killing in war is merely a useful convention to prevent war from turning into mass slaughter, G. Mavrodes, ‘Conventions and the Morality of War’, *Philosophy & Public Affairs*, Vol. 4/No. 2 (1975), pp. 117-131.

<sup>222</sup> For the clearest statement of this view, see R.K. Fullinwider, ‘War and Innocence’, *Philosophy & Public Affairs*, Vol. 1/No. 5 (1975), pp. 90-97.

<sup>223</sup> Rodin, *War and Self-Defence*, pp. 127-128.

<sup>224</sup> Larry May argues that additional considerations of humaneness and mercy prohibit the killing of a wounded or utterly defenceless soldier. The laws of war, he suggests, should be reformed accordingly.

Second, in political society, individuals are organised in complex social institutions that confer on them varying degrees of authority over others. The idea that the state is a legal system supports this observation. Legal systems are hierarchical and grant individuals role-specific powers over others. The Orthodox View, due to its narrow emphasis on material non-innocence, overlooks this. It is plainly wrong to suggest that politicians guilty of ordering an aggressive war or authorising Atrocity Crimes should go unharmed because they are materially innocent. In light of our treatment of the proportionality criterion in Chapter IV, it would, in fact, be disproportionate not to target them. For example, on the eve of the Kosovo conflict one NATO general, rightly, argued that one should ‘aim for the head of the snake first’ by directly targeting Milosevic and his political party.<sup>225</sup> Although Milosevic and the most senior members of his government were not posing material threats, they were liable to attack because they had authorised policies that led to Atrocity Crimes. According to what we can refer to as the Chain of Command Argument, materially non-innocent individuals incur liabilities to attack if they occupy positions of authority within the chain of command of the target state.<sup>226</sup>

Third, the Orthodox View is put under pressure by the well-known case of munitions workers. As Walzer, the major contemporary exponent of the Orthodox View, concedes, it is permissible to intentionally target munitions workers, despite the fact that, unlike combatants, they are not posing a direct material threat. This is so because they contribute more to the war effort than any other group.<sup>227</sup> Likewise, political theologian Oliver O’Donovan opines that a missile aimed at a group of army technicians would not hit a single non-combatant.<sup>228</sup> Material innocence, then, cannot account for the conceptual difference between combatants and non-combatants. Ultimately, in order to establish non-combatant immunity, advocates of the Orthodox View must appeal to a different criterion.

In response to the last criticism, just war theorists have offered two arguments. On the one hand, O’Donovan maintains that army doctors and chefs are engaged in activities they would also pursue during peacetime. War does not affect the

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Intuitively, it is normatively sound to award non-combatant status to those naked soldiers who are incapable of posing a threat in the near future; see May, *War Crimes*, pp. 108-112.

<sup>225</sup> Judah, *Kosovo*, p. 257.

<sup>226</sup> For some further thoughts on the Chain of Command Argument, see Hinsch & Janssen, *Menschenrechte militärisch schützen*, p. 106.

<sup>227</sup> Walzer, *Just and Unjust Wars*, pp. 145-147.

<sup>228</sup> O’Donovan, *The Just War Revisited*, p. 38.

performance of their roles.<sup>229</sup> But because munitions workers and technicians do not do anything they would not also do during peacetime, this argument fails. A more interesting reply involves a distinction between the rendering of military and non-military assistance. Accordingly, materially innocent individuals incur liabilities to attack if (and only if) they render military assistance. Those individuals who do not render military assistance remain immune to attack.

In what follows, let us focus on the distinction between military and non-military assistance. In particular, we must assess its relevance in the context of Atrocity Crimes. The latter are collectively perpetrated. Perpetrators render support to each other, but they also often receive (non-military) support from those who harbour sympathies for their aims. As was indicated in earlier chapters, since individuals can slip in and out of different roles during intrastate conflicts, it is difficult to draw a clear distinction between perpetrators and bystanders. Civilian populations can be implicated in the work of perpetrators in a number of ways. Further, while, for the Argument from Derivative Liability at least, the rendering of (military) assistance in support of an unjust war is likely to be a violation of duties not to support large scale wrongdoing, the rendering of assistance in support of grave moral evils like Atrocity Crimes is even worse. For this reason alone a rigid distinction between military and non-military assistance is dubious.<sup>230</sup>

In order to explore this point further, we must return to the Argument from Derivative Liability introduced in Chapter IV. Its underlying notion of complicity shows that those who do not directly order Atrocity Crimes and are not engaged in them incur derivative liabilities to attack if (and only if) they render assistance to perpetrators of Atrocity Crimes. To recapitulate, two conditions need to be satisfied for someone to be complicit in a wrongdoing. First, the criterion of *actus reus* demands that there is an identifiable act through which the accessory aids, counsels or abets the principal actor. Second, the criterion of *mens rea* sets out the mental preconditions necessary to be considered complicit in a crime. It requires that the accessory knows something about the principal actor's plans. Interestingly, for the Argument from Derivative Liability, it is irrelevant whether an accessory renders

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<sup>229</sup> (ibid.), pp. 39-40.

<sup>230</sup> For another critique of the distinction between military and non-military assistance, see C. Fabre, 'Guns, Food and Liability to Attack in War', *Ethics*, Vol. 120/No. 1 (2009), pp. 36-63.

militarily or non-military assistance. The point is that the accessory puts the principal perpetrator into a position where he can carry out/participate in Atrocity Crimes.

A good example of civilian complicity in Atrocity Crimes is provided by the case of *Radio-Television Libre des Mille Collines* (RTLM), a semi-private radio station linked to Hutu hardliners, whose broadcasts served as a background to the killings during the Rwandan genocide.<sup>231</sup> RTLM presenters told (potential) perpetrators of mass murder to go to a particular village because there ‘weren’t enough dead bodies in the street’. Crucially, RTLM’s causal link to mass murder did not only consist in encouraging the killers but also in supplying them with (precise) information about the location of potential victims (*actus reus*). From what we know, it is certain that RTLM workers were fully conscious of the intentions of their fellow Hutus and were not coerced into broadcasting hate speech (*mens rea*). According to the Argument from Derivative Liability, RTLM workers would have been legitimate targets had an intervention occurred, notwithstanding the fact that, strictly speaking, they did not render military assistance to Hutu extremists.

It is necessary to stress, though, that the scope of the Argument from Derivative Liability does not encompass all forms of ideological agitation. The mere expression of offensive opinions does not make someone complicit in resulting Atrocity Crimes. Someone who wholeheartedly expresses his support for the regime’s policies, hangs the president’s picture on his kitchen wall or attends a mass rally does not necessarily provide any causal, material support to mass murderers. Of course, at a more abstract level, the person who supports a regime may contribute to the continued existence of certain social attitudes that are instrumental to Atrocity Crimes.<sup>232</sup> But one must not forget that individuals in the target state do not forfeit their rights to freedom of expression. As long as they do not provide direct information about the whereabouts of victims, offensive views do not fall under the Argument from Derivative Liability.

That said, the status of incitement of (racial) hatred is a more difficult. RTLM broadcasts, for instance, customarily referred to Tutsis as ‘cockroaches’ that had to

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<sup>231</sup> For an account of the role of RTLM in the Rwandan genocide, see D. Li, ‘Echoes of Violence’, in: N. Mills & K. Brunner (eds.), *The New Killing Fields: Massacre and the Politics of Intervention* (New York: Basic Books, 2002), pp. 117-128.

<sup>232</sup> For an interesting exploration of this theme, see L. May, *Sharing Responsibility* (Chicago: Chicago University Press, 1992).

be crushed by 'Hutu Power'. Incitement falls between the rendering of assistance and the expression of offensive opinions. On the one hand, it is not quite the same as giving precise information on the whereabouts of potential victims. On the other hand, unlike those who hold offensive opinions, inciters intend to create an atmosphere in which Atrocity Crimes can be perpetrated.

To solve this problem, we must distinguish between institutionalised and non-institutionalised ways of inciting hatred. In regard to the former, institutions that are specifically charged with creating the necessary 'background' for the perpetration of Atrocity Crimes should not be immune from attack. In regard to the latter, the incitement of hatred arises from the context of a specific situation. John Stuart Mill's observations on the incitement of hatred provide a useful point of orientation. In *On Liberty*, Mill, one of the staunchest defenders of free speech, contends that an agitator whipping up a crowd in front of a corn dealer's house is not protected by free speech.<sup>233</sup> By analogy, a local villager who encourages perpetrators to kill his neighbour falls under the Argument for Derivative Liability. However, a villager who encourages perpetrators hours or days before they move into battle is protected by free speech. Here the connection between killing and agitation is not as immediate as in the case involving the neighbour.

Nevertheless, the Argument from Derivative Liability gives rise to a weighty problem. In cases where agents of the state are perpetrators of Atrocity Crimes, taxation implicates nearly every (adult) member of the target state is, to a greater or lesser extent, implicated in the large scale violations of basic rights and natural duties. The danger, obviously, is that the Argument from Derivative Liability breaks down the (conceptual) distinction between combatants and non-combatants altogether. If it did, the idea of just war theory would undoubtedly become redundant. It would fail to act as a constraint on the use of force.

But there are good reasons to exempt taxation from the Argument from Derivative Liability. Taxes, even if raised by an illegitimate state for an illegitimate cause, fulfil a complex role in society. They are never solely aimed at one particular project. Schools, hospitals, courts, emergency services, universities, and law enforcement agencies are all financed via taxation. These institutions perform important functions without which no societies can exist. Although some social institutions are used to

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<sup>233</sup> J.-S. Mill, *On Liberty and other essays*, edited by John Gray (Oxford: Oxford University Press, 1991).



perpetrate Atrocity Crimes, members of a society have legitimate claims to undertake steps ensuring their continued *social* existence.

Put differently, taxation, even if some of its proceeds go towards illegitimate projects, maintains the social vitality of a political community. It would be irreconcilable with a commitment to humanitarianism to expect societies, even if some of their policies are responsible for grave moral evils, to commit what one may term ‘social suicide’. The social death of a community is always an evil, and if just war theorists required the target state to cease all of its social and political activities, we would merely replace one evil with another. As we saw in Chapter III, the purpose of MHI is to re-establish decent, law-governed relations between members, not to bring about the social death of a society. The problems that interveners confront do not arise from the existence of a ‘perpetrator’ society as such, but from some of its policies.<sup>234</sup> The Argument from Derivative Liability merely maintains that *some* institutions and individuals are more deeply implicated in Atrocity Crimes than others. On this basis, it prompts us to *re-think* the distinction between combatants and non-combatants. It does not seek to abolish it.

That said, the Chain of Command Argument and the Argument from Derivative Liability do restrict the scope of non-combatant immunity. The status of a non-combatant is only held by those who are neither directly responsible for ordering Atrocity Crimes nor otherwise complicit in their perpetration. To avoid conceptual confusion, the term ‘non-combatant’ is not normatively equivalent to the term ‘civilian’, though both are often used in the same breath in political discourse. When drawing a line between those who are and those who are not liable to attack, both arguments urge us to take into account that many who occupy civilian functions can share a high degree of (derivative) moral responsibility for Atrocity Crimes. This means that the interveners have a right to target these kinds of civilians, who, like perpetrators of Atrocity Crimes, are prohibited from using self-defensive force.

In general, the Argument from Derivative Liability, like the Chain of Command Argument, upholds the central claim of (contemporary) just war theory that individuals can never be liable to attack for ‘who they are’, but only for ‘what they do’. In the difficult circumstances often encountered by interveners, both arguments provide a more differentiated picture of ‘what individuals do’ than the Orthodox

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<sup>234</sup> The argument follows O’Donovan, *The Just War Revisited*, p. 39.

View. We must now engage with a much graver issue, namely the question whether the killing of non-combatants is morally permissible.

### III

#### **Killing non-combatants in the course of military humanitarian intervention**

##### *A. Anti-interventionism and Double Effect*

In what follows, we examine whether interveners can sometimes be permitted to kill non-combatants in the course of MHI. It is hard to overestimate the importance of this issue for the ethics of MHI. Considering that MHI is justified as the protection of the innocent, it appears contradictory if its pursuit harms or even kills the very people in whose name war is being waged. German legal philosopher Reinhardt Merkel, an outspoken critic of MHI, thinks that the conduct of MHI will always undermine its justification.<sup>235</sup> Likewise, in his response to the Kosovo campaign, German moral philosopher Rüdiger Bittner argues that it is impermissible for ‘Mr. Clinton [to] order Mr. Clark to kill Mrs. Petrovic, although she has nothing to do with her government’s policies against ethnic Kosovo Albanians’.<sup>236</sup> More generally, Alan Gewirth argues that innocent individuals have an absolute right not to be part of any homicidal design.<sup>237</sup>

On the other hand, those theorists of MHI who have written on the conduct of MHI, most notably Fernando Teson, cite DDE as a solution to the problem. As we saw in Chapter I, DDE forms an important, though not uncontroversial, part of non-consequentialist moral theory. While its defenders do not deny the moral weight of consequences, they reject the (act) consequentialist claim that these are the sole determinants of rightness or wrongness. Thus, even if two acts led to consequentially similar results, this would not automatically mean that they were both equally permissible. This is so because DDE holds that the intentions of the agents who are about to perform these two acts may make a moral difference. As we saw in the last chapter, DDE claims that, if a particular act has good and bad consequences, the

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<sup>235</sup> R. Merkel, ‘Das Elend der Beschützten: Rechtsethische Grundlagen der Humanitären Intervention’ [The Misery of the Rescued: the Legal-Ethical foundations of Humanitarian Intervention], in: R. Merkel (ed.), *Der Kosovo Krieg und das Völkerrecht* [The Kosovo War and International Law](Frankfurt a.M.: Suhrkamp, 2000), pp. 66-98.

<sup>236</sup> R. Bittner quoted in: Hinsch & Janssen, *Menschenrechte militärisch schützen*, p. 6.

<sup>237</sup> A. Gewirth, ‘Are there any absolute rights?’, in: J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984).

latter must not be intended by the agent but solely foreseen. More precisely, the following three criteria decide on the permissibility of a particular act:<sup>238</sup>

- (1) *The basic act is, when considered independently of its evil effect, not wrong or at least morally indifferent.* This criterion merely rules out that the following two criteria are applied to (intrinsically) bad acts that have good and bad side effects.<sup>239</sup>
- (2) *The agent does not intend the evil effect as an end itself or as a means to an end.* This criterion forms the core of DDE because it demands that the bad effect must be solely foreseen. To ascertain that the agent did not intend the bad effect, DDE offers us the so-called Counterfactual Test, which asks whether the agent would have performed the basic act if the bad effect had not occurred. If the answer is positive, the agent did not intend the bad effect.
- (3) *The agent has proportionately grave reasons for acting.* Proportionality demands that the foreseen bad effect is not excessive to the intended good effect. Moreover, it requires that, amongst a variety of options that lead to the desired good effect, the least harmful is chosen by the agent. (Let us leave the problem of proportionality until Part IV).

The importance of DDE for just war theory is illustrated by the famous distinction between strategic bombing and terror bombing.

*Terror Bomber: Tim, a bomber pilot, tries to end a war by dropping a bomb on a non-combatant settlement, believing that the large number of non-combatant deaths will scare the enemy into surrender.*

*Strategic Bomber: Tim's comrade, Seth, seeks to end the war by dropping a bomb on a munitions plant that is closely situated to another non-combatant settlement. However, Seth is fully aware that the blast resulting from the destruction of the factory will also kill non-combatants from the adjacent settlement.*

DDE maintains that Tim acts impermissibly because he intends non-combatant deaths. This is confirmed by the Counterfactual Test. Tim fails the test, as his design

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<sup>238</sup> The account of DDE follows T.A. Cavanaugh here. In some formulations of DDE there is a fourth criterion according to which the good effect must not be caused by the bad effect. However, when read in conjunction with the second criterion, it appears superfluous. See T.A. Cavanaugh, *Double Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Oxford University Press, 2006), p. 36.

<sup>239</sup> See, (ibid), pp. 26-27.

is pointless without the occurrence of non-combatant deaths. By contrast, Seth passes the Counterfactual Test because he would have continued with the attack if no civilians had been present. Seth is, therefore, a strategic bomber because he merely foresees the harm he inflicts on his victims.

Before we can examine the distinction between terror and strategic bombing in more detail, it is necessary to briefly raise a practical point. It is by no means self-evident that strategic bombing, which, by definition, seeks to gain *military* advantage over the enemy by weakening his military strike capacity (bombing military installations, governmental buildings etc.), is a suitable strategy for MHI. It is, for our purposes, useful to draw attention to a much neglected type of ‘non-terror bombing’. So-called relief bombing aims to benefit non-combatants by ending a state of affairs that is detrimental to their basic needs in food, shelter, and security:<sup>240</sup>

*Relief Bomber: Richard wants to end a siege on a city whose population is running out of food and is denied the right to leave. To do so, Richard must bomb enemy army units which have encircled the city and are blocking supply routes. Because these units are very close to the city, Richard, like Seth, will (foreseeably) kill some non-combatants who live in the city.*<sup>241</sup>

It is noteworthy that, firstly, the occurrence of non-combatant deaths is much more problematic for Richard than for Seth. Richard motives are primarily humanitarian, yet he knowingly brings about the foreseeable deaths of the very people he initially set out to benefit. Second, taking into account that bombing is a risky strategy which inevitably endangers non-combatant lives, it requires clarification whether the use of air power during MHI should essentially be restricted to relief bombing or may include strategic bombing to attain broader objectives. But since this last question borders heavily on the problem of proportionality, we better leave it until Part IV.

In general, because DDE has come under fire from across the philosophical spectrum, it remains to be seen whether the distinction between terror- and non-terror bombing policies is defensible. In Section B, we look at the defensibility (or lack thereof) of the conceptual distinction between intended and foreseen effects. In order not to overcomplicate the discussion, we will not examine relief bombing in this context. It suffices to say that, if terror bombing and strategic bombing turn out

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<sup>240</sup> Cavanaugh, *Double Effect Reasoning*, pp. 149-150.

<sup>241</sup> For one of the few treatments of sieges in the just war literature, see Walzer, *Just and Unjust Wars*, chapter 10.

to be conceptually indistinguishable, the same will apply to the relationship between relief- and terror bombing. In Section C, we are going to examine whether there is a normative difference between intentional and non-intentional killings.

*B. Are terror and strategic bombing conceptually separable?*

It is impossible to survey the burgeoning literature on the (conceptual) distinction between intended and foreseen effects. Instead, let us discuss two important issues that arise in the debate. Both are particularly relevant for theories of MHI. To begin, let us turn to Jonathan Bennett's critique of DDE and Warren Quinn's response to it. As was pointed out above, DDE's Counterfactual Test judges whether the bad effect is solely incidental to or an integral part of an agent's design. But Jonathan Bennett raises doubts about its suitability for this task:

*School Case: Tim tries to end a war by bombing a school building during the day. The death of the school children will prompt the enemy government to surrender because it fears that there are going to be similar attacks in the near future.*

Bennett argues that Tim's design only requires that the children *appear* dead until the enemy government has surrendered.<sup>242</sup> In fact, Tim might hope that, due to a miracle, the children became alive again as soon as his side has won the war. If Tim justified his actions in this way, School Case would pass the Counterfactual Test: Tim intends that the children appear dead, but solely foresees that they die as a result of the bombing. If Bennett is right, nothing is gained from the incorporation of DDE to JIB.

There are two potential replies to Bennett's critique. The first draws upon Phillipa Foot's influential work on DDE. It argues that, in School Case, the intended and the foreseen side-effects are too close together, rendering the dropping of the bomb impermissible under DDE.<sup>243</sup> But how close is too close? Foot owes us an answer to this conceptual question.

(2) Another reply to Bennett's claim stresses that the 'miracle defence' does not work. The possibility of a miracle is remote, whereas the death of the children is inevitable. However, this response fails in an important respect. In the Strategic

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<sup>242</sup> J. Bennett, 'Morality and Consequences' *The Tanner Lectures on Human Values* (1980), available at <http://www.tannerlectures.utah.edu/lectures/documents/bennett81.pdf>.

<sup>243</sup> P. Foot, 'The Problem of Abortion and the Doctrine of Double Effect', in: P. Foot, *Virtues and Vices* (Oxford: Clarendon Press, 1978).

Bomber example, Seth, who, according to DDE, acts permissibly when he bombs the munitions plant, also knows that those non-combatants whom he can see from his cockpit window seconds before he drops his deadly load *will* die. Miracles aside, both acts lead to the *inevitable* deaths of non-combatants.

Given the failure of these two arguments, a better way to reassert the conceptual distinction between strategic and terror bombing consists in Warren Quinn's revision of DDE along Kantian lines:<sup>244</sup>

- (4) *The agent is not allowed to involve the victim in his design or somehow benefit from its presence during the execution of his design.* According to Quinn, involving the victim in one's homicidal design and benefiting from its presence is prohibited through the Kantian maxim that we should also treat others as ends in themselves (the end-not-means thesis). As Quinn rightly argues, by involving the children without their consent, Tim takes up a 'distinctive attitude' towards them; that is to say, Tim uses the children as 'strategic material' for *his* purposes. This is incompatible with the ends-not-means thesis.

Of course, what Quinn proposes is a normative solution to a conceptual problem. But nevertheless, his argument is supported by the concept of humanitarianism. The point of MHI is to relieve human suffering caused by Atrocity Crimes. It is incompatible with the demands of humanitarianism to *use* individuals, by inflicting further suffering on them, in order to accomplish this goal. As we see shall in Section C, the halting of Atrocity Crimes justifies the imposition of certain costs on non-combatants in the target state. But while the goal of, say, halting Atrocity Crimes gives rise to a moral permission to non-intentionally harm innocent individuals, it does not justify using them. In addition to the Counterfactual Test, then, it must be determined whether the agent would have been able to achieve the desired effect without the involvement of his victim. From now on all references to DDE incorporate Quinn's Kantian revision.

But while Quinn's revision is a step in the right direction, it does not yet rescue the conceptual distinction between strategy and terror bombing. Imagine that Seth, who happens to be a sadist (sadistic-Seth), flies (strategic) bombing missions because he

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<sup>244</sup> W. S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy & Public Affairs*, Vol. 18/Issue 04 (1989), pp. 334-351.

*enjoys* killing innocent people.<sup>245</sup> Does this mean that he also *intends* to kill them? One response, which roughly follows the rationale of the Chain of Command Argument outlined above, stresses that, because sadistic-Seth is the recipient of an order to bomb the factory, the way he relates to the attack and its side-effects is irrelevant. But, as Frances Kamm objects, the Chain of Command Argument merely shifts the problem to another level for the very simple reason that the person who issues the order might enjoy killing non-combatants.<sup>246</sup> Unless we find someone within the chain of command who does not enjoy killing non-combatants, we cannot solve the problem. For Kamm, this is why, at least in this context, the Chain of Command Argument fails.

To deal with the case of sadistic-Seth, we must draw a distinction between an agent's intentions and his feelings. From the perspective of action theory, the two can be viewed independently from each other.<sup>247</sup> Intentions are *effective* in the sense that they involve a 'special commitment' to a plan of action through which we seek to pursue a good that is rationally desired (doing x to end a war), while feelings are *affective* because they are emotional responses to what we plan to do (feeling abhorred by/happy about doing x). As a result, intent can be paired with different, even conflicting, feelings without undermining the distinction between terror and strategic bombing. For example, even if Tim deeply regretted the death of every child he kills in School Case, this would not make him a strategic bomber. Similarly, the fact that sadistic-Seth enjoys killing innocent people does not mean that he also intends it. We resent sadistic-Seth for how he personally relates to the suffering he inflicts, but this does not render his actions impermissible.

It is doubtful, though, that a true sadist would ever accept any limitations, such as DDE, on his actions. Letting sadistic-Seth fly bombing missions is an incalculable risk and his superiors would be well advised to review whether he should continue to do so. This raises an important general point for the screening and training of soldiers. Soldiers taking part in MHI should be trained to a high standard in order to prevent the infliction of unnecessary suffering on non-combatants. Chapter VI returns to this point. On the other hand, if sadistic-Seth abides by DDE just like a

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<sup>245</sup> This point was raised by J.J. Thomson, 'Physician Assisted Suicide: Two Moral Arguments', *Ethics*, Vol. 109/No. 3 (1999), pp. 497-518.

<sup>246</sup> F.M. Kamm, 'Failures of Just War Theory: Terror, Harm and Justice', *Ethics*, Vol. 114/No. 4 (2004), pp. 650-692, esp. pp. 666-668.

<sup>247</sup> Cavanaugh, *Double Effect Reasoning*, pp. 91-93.

non-sadistic-Seth would, there is no reason for not allowing him to engage in strategic bombing. Sadistic-Seth is a bad person, but bad persons are still capable of performing morally sound acts.

Although the above does not exhaust the (conceptual) discussion of DDE, it indicates some strategies that can be used in its defence. We must now ask whether it matters normatively whether an innocent person is killed intentionally or non-intentionally.

### C. *Double Effect, intervention, and the limits of the ends-not-means thesis*

As was indicated in Chapter I, non-consequentialists defend the *normative* difference between intentional and non-intentional killing via the ends-not-means-thesis.<sup>248</sup> Accordingly, terror bombing is impermissible precisely because it fails to treat non-combatants as ends, while non-terror bombing is permissible because it does not exclusively treat them as means. Uwe Steinhoff objects that this is problematic when the victim loses her life as a foreseen side effect, while Bennett dryly remarks that we should ‘Tell that to the [non-combatant]!’<sup>249</sup> In other words, it is debatable whether not treating someone (exclusively) as a means is sufficient to also respecting that person as an end.

Bennett, for instance, suggests that treating someone as an end requires *a*) not using that person as a means only and *b*) somehow benefiting her. If Bennett is correct, the non-intentional killing of a terminally ill cancer patient by administering a lethal dose of morphine is compatible with the ends-not-means-thesis. The physician administering the morphine benefits the patient by *intending* to relieve his unbearable pain, foreseeing that he will die as a result. Of course, the interveners, especially if they engage in relief bombing, are also trying to benefit those in the target state. It is possible, therefore, to argue that the conduct of MHI is normatively analogous to the morphine relief case.

But unfortunately, the relationship between DDE and the ethics of MHI is not that straightforward. In order to defend the non-intentional killing of non-combatants during MHI, we must first attend to some more general concerns about the normative soundness of DDE. These concerns are particularly pressing in the

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<sup>248</sup> (ibid.), pp. 147-158.

<sup>249</sup> Steinhoff, *On the Ethics of War and Terrorism*, p. 42; J. Bennett, *The Act Itself* (Oxford: Oxford University Press, 1995), p. 218.



context of MHI. Although neither of the two thinkers is entirely dismissive of DDE, Frances Kamm and Philippa Foot think that, at least in some contexts, its results are too permissive.<sup>250</sup>

*Hospital Case: A doctor can save five patients by mixing a special medicine, but the production of the medicine is going to set off lethal fumes that will inevitably escape into the hospital's air conditioning system, killing an immobile patient in an adjacent room.*

*Car Case: Michael is rushing five extremely sick people to the hospital when he sees Toby lying in the middle of the road. Pressed for time, Michael decides against halting the car and runs over Toby.*

Both cases, in principle, satisfy DDE, as neither the immobile patient nor Toby is treated as a means to an end. But Foot and Kamm contend that it is impermissible for Michael and the doctor to proceed. This is so because negative duties not to harm are stronger than positive duties of assistance. This response indicates that the innocent are holders of negative rights *in rem* not to be attacked that 'trump' any positive rights to assistance. Alternatively, it reinforces Gewirth's point that the innocent have an absolute right not to be made part of any homicidal design.

But fortunately, it is possible to rescue DDE for the conceptualisation of MHI as an other-defensive war. This is because the Domestic Analogy contains an important moral consideration that is absent from the Hospital and Car Cases. To find out what this moral consideration might be, it is useful to develop what we can call the Public Goods Argument.<sup>251</sup> It maintains that non-combatants are *not* morally equivalent to mere bystanders, such as Toby or the single patient, because, in their role as *citizens* of a state, they can be expected to bear certain costs associated with the maintenance of a sovereign order. In other words, the Public Goods Argument holds that the state is allowed to impose costs on its citizens in order to repel or prevent threats to sovereign order. As we saw in Chapter III, a sovereign order is necessary to realise interdependent human needs in autonomy and security. In order to develop the Public Goods Argument, we proceed in three steps.

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<sup>250</sup> Foot, 'The Problem of Abortion'; Kamm, 'Failures of Just War Theory', pp. 669-672.

<sup>251</sup> The Public Goods Argument shares some features with Kamm's Liability Argument. The problem with the Liability Argument is that it is not clear in what sense Kamm uses the term 'liability'. As will be explained below, the Public Goods Argument does not consider non-combatants liable to be made part of a homicidal design. While it argues that non-combatants retain their right not to be attacked, it contends that these rights may be permissibly infringed. See, Kamm, 'Failures of Just War Theory', pp. 681-690.

First, the Public Goods Argument assumes that it is legitimate for a state to draft its citizens into the army to resist an *unjust* aggressor. Yet, as Michael Walzer observes, the unjust aggressor might not intend to destroy the sovereign order of the victim state as such.<sup>252</sup> The aggressing state could merely intend to replace, say, the government of the victim state with a different one. Not surprisingly, given our analysis of the Legalist Paradigm in Chapter II, Walzer thinks that the right to self-determination accounts for why citizens may be ‘obliged to die for the state’.<sup>253</sup> We can grant Walzer this point. But since, in the present discussion, we are concerned with Atrocity Crimes, we can reply that states can legitimately draft their citizens into the army in order to resist a *genocidal* aggressor.

Second, the Public Goods Argument raises the problem of mandatory killing introduced in Chapter I. It is not necessary to discuss this issue in its entirety here, not least because we are going to return to it in Chapter VI. For now let us assume that drafting citizens into the army to resist a genocidal aggressor is compatible with a concern for autonomy. This is so because, as we saw in Chapter III, the provision of certain public goods, most notably the rule of law, is a precondition for the exercise of autonomy. Following Rawls’ famous statement that liberty can only be infringed for the sake of liberty, the Public Goods Argument holds that autonomy can only be infringed for the sake of autonomy.

Third, the Public Goods Argument contends that, if a state is allowed to expose its citizens to the mortal dangers arising from confrontations with a genocidal aggressor, it does not seem unreasonable to argue that it is also permitted to endanger their lives in other ways. For the Public Goods Argument, the state is permitted to non-intentionally bring about the deaths of its own citizens if (and only if) doing so is necessary to preserve a sovereign order. To defend this claim, consider the following thought experiment.

Car Chase Case: *A police car is pursuing Timothy, a suicide bomber, who has packed his car with fertiliser-based explosives and aims to blow himself up in the middle of the capital during rush*

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<sup>252</sup> M. Walzer, ‘The Obligation to Die for the State’, in: M. Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge/Mass: Harvard University Press, 1970), pp. 77-98.

<sup>253</sup> This formulation is unfortunate because it suggests that the state holds a right against its citizens to kill them. It is more appropriate to say that the state has a right to expose its citizens to certain dangers in order to repel an unjust aggressor. In doing so, it acquires certain duties of due care towards its citizens. We return to these two points in the remainder of this section and over the course of Part IV. To avoid any confusion, a state that is confronted by a just aggressor is not allowed to draft its citizens into the army. As we saw in Chapter III, it lacks a right to defend itself.

*hour. The police officers are chasing Timothy down a busy road when they approach road works. If the police officers do not slow down, they will be able to catch Timothy before he reaches his target, but, as a side effect, kill some of the workmen and fellow motorists through dangerous driving.*

No doubt these types of suicide attacks can have disastrous consequences for the institutions of the state and general public safety, particularly in societies suffering from internal political tensions.<sup>254</sup> Also, it goes without saying that the policemen should do everything in their powers to avoid endangering the other motorists and workmen. Moreover, considering Walzer's insistence on the importance of due care, agents of the state who are entrusted with the protection of sovereign institutions (e.g. police, army, Special Forces) must accept greater risks for themselves. But, in the Car Chase Case, once all options have been exhausted, the Public Goods Argument justifies the non-intentional killing of the workers and other drivers in the course of averting the attack. Since we are interested in the problem of non-combatant immunity, let us focus on this aspect of The Public Goods Argument. Although it permits the non-intentional killing of non-combatants in the course of protecting a sovereign order, it raises two main problems for theorists of MHI.

First, in the context of MHI, the problem is that the costs for the maintenance of a sovereign order are imposed by another state, i.e. the intervening state. For potential critics of the Public Goods Argument, it is possible to argue that a foreign state is not allowed to non-intentionally harm non-combatants in the target state. In fact, they could contend that the Public Goods Argument prompts us to develop a post-statist conception of MHI, similar to Brock's theory of MHI discussed in Chapter I. But because the idea of a post-statist conception of MHI faces a number of problems, let us try to reconcile the Public Goods Argument with the (statist) conceptualisation of MHI as other-defence.

One intuition underlying the critique of the Public Goods Argument is that local political institutions somehow represent their members. However, even a state that is not a representative of its people can fulfil their collective interest in sovereign institutions. A state that has been taken over by a drug cartel, for instance, may appeal to the Public Goods Argument in order to prevent genocide.<sup>255</sup> Further,

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<sup>254</sup> Though tensions between Hutus and Tutsis had been brewing for a long time, the Rwandan genocide was finally sparked by a single attack, namely the assassination of Rwandan President Juvenal Habyarimana.

<sup>255</sup> The drug cartel case comes from D. Copp, 'The Idea of a Legitimate State'.

because the interest in sovereign institutions is fundamental and universal, it does not seem essential that only a local party secures it. Rather, the formulation of any localised policies demands, be it a demand for self-determination, representation or democracy, will depend on the prior existence of sovereign institutions. Put differently, someone, insider or outsider, needs to preserve the peace and facilitate the development of civic trust amongst members of post-atrocity societies. Without the existence of peace and security more ambitious local political goals will not be realisable. We return to this issue in Chapter VII where we discuss the phenomenon of humanitarian occupation. For now let us note that the Public Goods Argument is compatible with statist conceptions of MHI.

The second problem for the Public Goods Argument has to do with status of non-citizens. As the analogy with the military draft suggests, *citizens* of the target state are liable to bear the costs associated with the maintenance of a sovereign order, but the victims of Atrocity Crimes are not necessarily citizens of the target state: mass murder is often preceded by the withdrawal of citizenship status from future victims, and in some case the victims of mass murder might have never had citizenship in the first place. There are two ways to deal with this issue.

The first maintains that it is neither permissible nor excusable to cause the foreseen deaths of non-citizens. For example, if Richard had to non-intentionally kill non-citizens when ending the siege on the city, he would have to abort the attack. If, in the Relief Bomber example, Richard was able to bomb the army units in such a way that only citizens of the target state were harmed, he should do so.

Alternatively, the scope of the Public Goods Argument could be extended to cover all individuals residing within the territory of the target state. For example, a Turk who comes to Germany as a 'guest-worker' still has the same interest in the sovereign functioning of the German state as a German citizen. Accordingly, residency, rather than citizenship, is a more appropriate foundation for the Public Goods Argument. Admittedly, this revision weakens the analogy with the military draft somewhat, but when proportionality, the theme of Part IV, is brought into play, an intermediate position might be attainable. For instance, interveners would be allowed to inflict a higher degree of foreseeable harm on citizens of the target state than non-citizens. Put simply, the proportionality conditions governing the use of

non-intentional force against non-citizens would be even more demanding than in the case of citizens.

Having defended the Public Goods Argument against potential criticisms, let us add some clarifying comments. The question is whether the Public Good Argument establishes (moral) liability to attack. There are two approaches to this issue. The first assumes that non-combatants are liable to attack, whereas the second denies this.

First, according to the strict interpretation of the Public Goods Argument, non-combatants *qua* private individuals hold a claim-right *in rem* not to be attacked against other private individuals. But *qua* residents of the target state they do not hold such a right against intervening combatants.<sup>256</sup> However, as we already argued in our discussion of child soldiers in Chapter IV, the duty not to kill or otherwise harm the innocent/non-combatants should not simply be defined out of existence. Individuals are liable to attack because of what they do and not because of their membership in a state or nation. For this reason we should reject the strict interpretation of the Public Goods Argument.

Second, the ‘moderate’ interpretation of the Public Goods Argument takes us back to the discussion of the Numbers-Harm Thesis in Chapter IV. The moderate version of the Public Goods Argument contends that, although individual non-combatants are holders of a negative right not to be attacked, intervening combatants are justified in not fulfilling its correlative duty. On this view, the Public Goods Argument ‘tips the balance’ in favour of a justified *infringement* of the right not to be attacked. To support the moderate interpretation, we may draw a parallel between the Public Goods Argument and current legal practice in Western jurisdictions, most notably the US legal system. The US constitution considers the confiscation of private property by the state in the name of public interest as a rights infringement.<sup>257</sup>

Needless to say, because it views the non-intentional killing of non-combatants as a rights infringement, the moderate interpretation of the Public Goods Argument has important implications for the use of self-defensive force. Unlike perpetrators of Atrocities Crimes, the target state’s non-combatants are excused for resisting intervening combatants.

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<sup>256</sup> This argument roughly follows Noam Zohar’s work. N. Zohar, ‘Collective War and Individualistic Ethics: Against the Conscription of Self-Defense’, *Political Theory*, Vol. 21/No. 4 (1993), pp. 606-622.

<sup>257</sup> W.A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), p. 148.

This, of course, raises the question whether intervening combatants are allowed to defend themselves against non-combatants. Again, there are two views on this issue.

First, as was already indicated in Chapter III, Judith Jarvis Thomson argues that those who threaten a right lose their own right not to be attacked.<sup>258</sup> While Thomson's position had little relevance to the discussion of combatant liability in Chapter IV, it is more interesting in the context of non-combatant immunity. Following Thomson's theory, it is possible to argue that, because Richard, the relief bomber, 'threatens' the rights of non-combatants in the target state, he forfeits his right not to be attacked. It is possible to contend, then, that non-combatants in the target state hold a right to self-defence against Richard. To wit, they hold Richard under a duty *not* to defend himself against their counterattack.

But as Jeff McMahan points out, it is counterintuitive to suppose that posing a *justified* threat leads to the forfeiture of one's rights.<sup>259</sup> In fact, against the background of the Atrocity Paradigm, Thomson's view seems implausible because it blurs the distinction between violations of natural duties and the justified infringement of basic rights. One reason for why principal perpetrators of Atrocity Crimes and their accessories forfeit their rights is that they are engaged in *intolerable* and *inexcusable* forms of *wrongdoing*. But the same cannot be said about Richard. His actions, insofar as they are constrained by the rules of JIB, are not intolerable. Nor, as the Public Goods Argument shows, are they inexcusable. Thomson's approach overlooks that there are different ways to threaten a right. Intuitively, our moral assessment of these types of threats differs.

(2) Instead, it seems, both parties, Richard and his non-combatant victims, are at least excused for harming each other in self-defence. While neither of the two parties forfeits its right not to be attacked, both have an agent-relative excuse for harming each other. In this sense, the present case is analogous to the problem of self/other-defence against non-responsible attackers discussed in the preceding chapter. The same also applies to the status of third parties and special relationships. Given the argumentation of Chapter IV, while an appeal to special relationships does not have greater relevance for the actions of intervening combatants who act in defence of

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<sup>258</sup> J.J. Thomson, 'Self-Defense'.

<sup>259</sup> J. McMahan, 'Self-Defense and the Innocent Attacker', p. 275.

Richard, members of a family, tribe or village can be excused for assisting fellow members who have come under attack from Richard.

In sum, the Public Goods Argument leaves intact one of the central claims of this thesis, namely that the target state and its combatants are under a duty not to repel the interveners. The argument that non-combatants are excused for defending themselves against intervening combatants does not undermine the existence of a right to intervene. Furthermore, the Public Goods Argument is attractive because, unlike the contractualist solutions of the problem of non-combatant immunity discussed in Chapter II, it directly stresses the relevance of the concepts of sovereignty and citizenship for JIB without taking a theoretical detour via a *hypothetical* procedure.

Before we turn the problem of proportionality in Part IV, let us note that the Public Goods Argument has two interesting implications for our thinking about proportionality. First, as was mentioned in Part I, the Orthodox View assumes that the non-intentional killing of non-combatants is permissible, regardless of the justness of a cause. In the literature on the just war, it is well known that the relationship between the Orthodox View's Independence Thesis and DDE is far from harmonious. For DDE, the permission to non-intentionally kill non-combatants is always subject to proportionality.<sup>260</sup> Yet it seems impossible to reach a sound assessment of proportionality without recourse to the justness of the respective causes. How, in other words, are we to judge whether the negative side effect is proportionate to the intended main effect?

Defenders of the Orthodox View must provide a normatively sound answer to this question. If we take the ends-not-means-thesis seriously, we owe the innocent a justification for why they are being put in harm's way. DDE must not be viewed as a moral *carte blanche* for killing the innocent during war. Rather, it needs to be embedded within wider considerations of the justice of respective wars. In the context of MHI, The Public Goods Argument can provide us with the necessary normative background that justifies the imposition of (proportionate) risks on non-

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<sup>260</sup> For the much stronger claim that the non-intentional yet disproportionate killing of non-combatants is morally on a par with terrorism, see D. Rodin, 'Terrorism without Intention', *Ethics*, Vol. 114/No. 4 (2004), 752-771. For a critical response to Rodin, see C.A.J. Coady, 'Collateral damage', in: I. Primoratz (ed.), *Civilian Immunity in War* (Oxford: Oxford University Press, 2007), pp. 136-157, at pp. 141-145.

combatants. Negative duties not to harm the innocent are stringent, but the need to secure the public good of a sovereign order means that it is proportionate to sometimes infringe them.

Second, recall the aforementioned objection that it would be immoral for Mr. Clinton to order Mr. Clark to kill Mrs. Petrovic. Indeed, such an order would constitute nothing but an assassination attempt! But considered within the overall context of the intervention, the Public Goods Argument gives interveners the permission to impose, say, a 1:10000 risk on Red's residents of falling victim to a non-intentional attack during MHI. The value of proportionality demands that this risk is balanced against the risks arising from mass murder. If there was, say, a 1:100 or even a 1:10 chance of falling victim to Atrocity Crimes, the imposition of the 1:10000 risk to be non-intentionally killed by intervening combatants seems justified.

#### IV

#### **The problem of proportionality and the conduct of military humanitarian intervention**

##### *A. Counting Harm: proportionality, necessity and responsibility*

It is perhaps not surprising that the problem of non-combatant immunity first surfaces in the academic literature on MHI after NATO's intervention in Kosovo, which almost exclusively relied on air power. NATO also heavily targeted non-military infrastructure during the campaign. But notwithstanding the wide-spread misgivings about the allegedly disproportionate nature of NATO's conduct, the application of the proportionality is difficult. As one commentator succinctly puts it, although everyone agrees that proportionality is an important value, the real challenge consists in its correct application.<sup>261</sup> Though it will be difficult to give precise recommendations in terms of military strategy, this section seeks to draw out the implications of proportionality for the conduct of MHI.

In order to shed light on the issue, let us begin with some reflections on the structure of proportionality-based assessments of military acts. Following Larry May, when determining whether a specific military act is proportionate, it needs to be assessed whether

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<sup>261</sup> May, *War Crimes*, p. 226.



1. there is serious harm that should be prevented;
2. the harm is likely to occur or, indeed, imminent;
3. there is another, less problematic way to prevent the harm;
4. the proposed means cause less harm than is prevented.<sup>262</sup>

These four points illustrate the close relationship between necessity and proportionality. In particular, the second and third criteria demand that alternative options need to have been exhausted before the intervening party is permitted to engage in a specific military act. If there is an alternative act that achieves similar results but causes less harm, it is obligatory for the intervening party to perform it instead. By contrast, the first and fourth criteria ask us to identify and balance relevant goods and harms against each other. In doing so, they give rise to two questions. First, what should be considered as relevant goods and harms? Second, how are goods and harms to be balanced?

In regard to the first question, the relevant goods consist in (1) the protection of victims of Atrocity Crimes and (2) the re-establishment of a sovereign order in the target state. The list of harms is broader but essentially involves three types of costs: (1) loss of life (all parties); (2) other strategic and economic costs to the interveners; (3) other costs to individuals in the target state, including *a*) destruction of private property; *b*) destruction of cultural objects; *c*) damage to civilian infrastructure. It is difficult to answer, though, how these different items should be balanced against each other. First, it demands clarification whether interveners are only obliged to count the harms for which they are responsible. Second, it must be determined whether all *relevant* harms should be counted equally or differentially. Of course, while the second point is, first and foremost, relevant for the question how different lives are to be weighed against each other. But it must also be considered to what extent lives and, say, economic costs are to be balanced against each other.

It is easier, however, to begin with the question whether the interveners are only obliged to count those harms for which they are responsible. To recapitulate some of the arguments from Chapter III, imagine that if the victim threatens the attacker with defensive force, the latter is going to vent his frustration on the bystander.<sup>263</sup> In

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<sup>262</sup> (ibid.) p. 205

<sup>263</sup> Hurka, 'Proportionality in the Morality of War', pp. 46-47.

defending herself, the victim is allowed to primarily attend to her own interests and cannot be expected to sacrifice herself so the bystander is spared. It would be equally odd if the victim was considered causally or morally responsible for the bystanders' death. It is, after all, the attacker who decides to harm the bystander. This is not to say that the victim should not give the bystander's interests any weight; for example, if the victim had the choice between two (roughly) equally costly options,  $y1$  (the victim is saved and the attacker is not able to attack the bystander) and  $y2$  (the victim is saved but the attacker is able to attack the bystander), the victim should choose  $y1$ . Nonetheless, it is reasonable to assume that victims of unjust aggression are obliged to ensure that their *own* use of force is not disproportionate.

By contrast, as we argued in Chapter III, unlike the victim, the rescuer's life is not threatened by the attacker. Thus the rescuer must carefully assess the impact of his other-defensive use of force on the bystander. By analogy, it cannot be the case, then, that interveners should only concentrate on the proportionality of those harms they are going to cause. When deciding on their strategies intervening parties must keep the overall security situation in the target state in mind and assess the impact of their actions on it, regardless of whether they are responsible for certain harms or not. Strategies that undermine the security of those in the target state are almost always disproportionate. It remains a moot point, though, whether interveners should give harm for which they are not responsible *exactly* the same weight as harm for which they are responsible. This might be overdemanding. Arguably, interveners should be allowed to give those harms for which they are not responsible slightly less weight.

To give an example, Operation Horseshoe was an intense ethnic cleansing campaign perpetrated by Serbian paramilitaries against ethnic Kosovo Albanians that peaked during NATO's bombardment of Serbia. It has often been alleged that NATO's action against Serbia sparked off or at least contributed to the intensification of Operation Horseshoe. If this was true, NATO's bombing campaign would have been highly disproportionate, regardless the fact that responsibility for Operation Horseshoe rested with Milosevic and Serbian (para-) military leaders. However, as Alex Bellamy points out, there are indicators that Operation Horseshoe could have

started up to a week prior to the bombings.<sup>264</sup> Now, if *that* was the case, NATO's bombing campaign *might* have been disproportionate because it was ineffective. Those defending NATO's action could argue that NATO's leadership could not have known in advance whether the strategy was going to work. But a commitment to proportionality demands that regular reviews of one's strategy and its effectiveness are undertaken. In any case, it would have been wrong for NATO not to take into account the possible effects of its actions on the security situation in Kosovo.

Note that the above discussion relied on implicit value judgments about how to weigh lives against each other. We assumed that interveners should primarily take into account the harm that they or another party is going to inflict on non-combatants in the target state. But, in reality, the application of the proportionality criterion to military conflict is much more complex. Part B discusses how different lives should be weighed.

#### B. *Weighing lives and choosing tactics*

Any treatment of proportionality must include an account of how lives are to be balanced against each other. This can be done in two ways. First, most of the literature on just war theory concentrates on how one should balance harm between different categories of individuals. Let us call this kind of reasoning *inter-proportionality*. Second, given the arguments in the previous chapter, the Neo-Classical View requires that we balance the lives of individuals who fall into the same category against each other. Let us call this *intra-proportionality*. One of the Orthodox View's shortcomings is that it offers a rather monolithic account of different categories, especially with regard to combatants. This is so because the Orthodox View mostly relies on judgements about inter-proportionality. In what follows, we will readjust the balance between intra- and inter-proportionality assessments somewhat, thereby lending further support to the Neo-Classical View.

The idea of intra-proportionality stresses that, in order to make sound judgements about proportionality, we must take into account an agent's moral responsibility and culpability for a forced choice between lives. For instance, as was observed in Chapter IV, it is permissible to inflict a higher degree of harm on culpable

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<sup>264</sup> See, A. Bellamy, *Just Wars*, pp. 214-219. For a critical discussion of the circumstances of Operation Horseshoe, see Judah, *Kosovo*, pp. 240-241. For a critique of Judah's interpretation, see James Gow's excellent account of the conflicts in ex-Yugoslavia. J. Gow, *The Serbian Project and its Adversaries: A strategy of war crimes* (London: C. Hurst, 2003), especially pp. 205-215 (on Operation Horseshoe).

perpetrators of Atrocity Crimes than on those perpetrators who act under duress. Similarly, the Chain of Command Argument contends that it may be preferable to attack the political leadership of the target state rather than young conscripts. The general rule is that judgements of proportionality become more permissive when an agent has a high degree of moral agency. On the other hand, if the moral agency of the potential target is severely restrained, criteria of proportionality become more restrictive.

Now, some just war theorists hold that a (just) party is allowed to bring about almost unlimited numbers of enemy combatant casualties in the pursuit of its cause.<sup>265</sup> In conjunction with the Neo-Classical View, the idea of intra-proportionality challenges this type of reasoning by maintaining that we must distinguish between different types of enemy combatants. For instance, it is not proportionate to kill *any* number of young and inexperienced conscripts when a swift strike against their *culpable* commanders would bring the war to a close.

To be fair, the argument that it is permissible to bring about any number of enemy casualties is usually made in the context of inter-proportionality assessments between one's own combatants and enemy combatants. While an intervening state cannot expect to eradicate all risks for its troops, the number of enemy combatants its soldiers are allowed to kill will be fairly high. First, as Chapter IV showed, many perpetrators of Atrocity Crimes are culpable for their acts. There is no limitation on the number of culpable attackers one may kill in self- or other-defence. Second, it is, one should stress, the responsibility of the leadership of the target state not to waste the lives of its soldiers through unjust resistance.<sup>266</sup>

A graver challenge is posed by child soldiers and other types of non-responsible attackers. But although intervening soldiers should accept slightly greater risks when confronting non-responsible attackers, the problem should be dealt with via the idea of intra-proportionality. Killing a non-responsible attacker is a last resort once killing his commander(s) has failed.

Having focused on proportionality assessments amongst combatants, the more interesting aspect of the debate about proportionality concerns the status of non-

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<sup>265</sup> Hurka, 'Proportionality in the Morality of War', pp. 57- 58.

<sup>266</sup> A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p. 221.

combatants in the target state. We must ask how to balance the lives of non-combatants against each other (intra-proportionality) and against those of the intervening soldiers (inter-proportionality).

Starting with intra-proportionality, as the Public Goods Argument's analogy with the military draft indicates, it is permissible for intervening combatants to inflict a slightly higher degree of harm on non-combatants *citizens* than non-combatants *non-citizens*. Although it is difficult to offer a precise ratio according to which citizens and non-citizens should be balanced against each other, the demands of proportionality are stricter in the case of non-combatants *non-citizens*.

Second, the idea of intra-proportionality has ramifications for what we can refer to as 'contextual' and 'background' assessments of proportionality. Suppose that Richard's attack on the army units would end the siege but bring about the foreseeable deaths of fifty non-combatants in the city (call this Rescue Bomber I). Considering that thousands of people in the city would be saved from starvation, foreseeably causing the fifty non-combatants deaths in the city is proportionate in that context (contextual proportionality). But now suppose that, in a slightly different scenario, Richard could use more powerful bombs and destroy almost all of the army units around the city (Rescue Bombing II). This meant that the target state would be significantly weakened in carrying out its campaign of Atrocity Crimes. However, in Rescue Bombing II, as a side effect of foreseeable side of Richard's actions, two hundred non-combatants in the city are going to die.

Within the context of the situation ('the siege') it may seem excessive if Richard, by embarking on Rescue Bombing II, brings about four times more non-combatants casualties than in Rescue Bombing I (contextual proportionality). But when viewed against the background of the intervention as a whole, Rescue Bombing II could be proportionate (background proportionality). Acts that seem disproportionate in a specific context, then, can still be proportionate when placed within the overall context of the campaign. Consequently, assessments of intra-proportionality (not to mention inter-proportionality) require that the death of the higher number of non-combatants in Rescue Bombing II should be balanced against the number of potential non-combatant deaths that may follow from a continuation of the campaign. Since background proportionality relies on estimates about the number of

*potential* victims, the lives of those non-combatants who are (definitely) going to die in Rescue Bombing II should be given slightly more weight.

One of the most difficult and controversial issues for theories of MHI involves inter-proportionality assessments between the lives of intervening soldiers and non-combatants in the target state. Walzer's criterion of 'due care' demands that combatants incur greater risks, but it is difficult to put any precise numbers on the ratio at which non-combatant and combatant lives should be weighed. For example, Hurka suggests a 1:1 ratio with regard to self-defensive wars, but this will almost certainly be subject to dispute.<sup>267</sup> Intervening governments are confronted with the following problem. On the one hand, the intervening government is under a special duty to protect its soldiers from harm. For instance, it has been said numerous times that this was the reason for why NATO opted for a bombing strategy in the Kosovo war, though, as we shall see below, this was not the only consideration.<sup>268</sup> On the other hand, since non-combatants in the target state are in an extremely vulnerable position, they also deserve protection.

It is difficult to see how these two impulses can be neatly reconciled. Perhaps we can solve the problem by reflecting on the broader strategies that interveners should use. First, as we will see in more detail in Chapter VI, intervening states should not rely on conscripts, but rather use professional soldiers with experience. Second, the value of proportionality demands that intervening states do everything to prevent an escalation of the conflict. This is in the interest of all parties, for any escalation will not only unnecessarily endanger the lives of soldiers but also those of non-combatants. This was also one of the considerations behind the bombing strategy in Kosovo.<sup>269</sup> The early deployment of ground troops could have led to an escalation of the conflict, including a possible intervention by Russia, where non-combatants would have been caught between the two fronts, not to mention a high death toll amongst the intervening troops.

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<sup>267</sup> Hurka, 'Proportionality in the Morality of War', p. 64.

<sup>268</sup> See, Bellamy, *Just Wars*. Many critics have attributed great (moral) importance to the fact that NATO planes were ordered to fly at 15000 ft. But this was largely due to the type of weapons that were used because the computer guided warheads needed to travel a certain distance before they could log onto their targets. Flying below 15000ft would have possibly undermined the operation of these systems, leading to all sorts of errors. The real issue is whether the use of air power was permissible in the first place.

<sup>269</sup> (ibid.).

This leads us back to the earlier debate about strategic and relief bombing. The former is probably best understood as a response to a specific situation (e.g. a siege), whereas the latter, as its name suggests, seeks to accomplish broader aims within the conflict as a whole. In addition to relief bombing, it can be proportionate for interveners to adopt a policy of strategic bombing. The latter potentially protects the lives of the intervening soldiers and may prevent the escalation of conflict that could result in a far higher non-combatant death toll. In this respect, NATO's campaign in Kosovo could be considered as proportionate.

This is not to say, though, that ground troops should never be used. To the contrary, they will play an important role at some stage of the intervention because, once air supremacy has been established, there are some goals, such as the provision of basic security for victims of Atrocity Crimes, the return of refugees, and the separation of hostile ethnic groups, that cannot be accomplished via air power. A prolonged presence of ground troops might, therefore, be important and necessary if the renewed outbreak of Atrocity Crimes (possibly for revenge) is to be prevented.

If this sound, there is a strong case for gaining air supremacy before deploying ground troops in order to minimise the risk for foot soldiers to come under attack. Ideally, this would entail the adoption of the 'head-of-the-snake-first' approach mentioned in Part II. Moreover, once the situation on the ground has been made more secure, ground troops would be enabled to devote greater resources into the provision of humanitarian assistance to those in need. Of course, it is naïve to suggest that air supremacy can eradicate all risks for ground troops. Indeed, intervening states cannot expect to keep the number of their own casualties to zero, for this would mean that all costs would have to be borne by those who are the most vulnerable. This cannot be right. That said, intervening states are under a duty to minimise the risks for their own soldiers and a campaign of strategic bombing, at least in the initial phase of the intervention, may play an important part in doing so.

Let us briefly return to NATO's apparent inability to stop Operation Horseshoe. To assess whether the bombing of Serbia was proportionate, we would have to compare its effects with the possible consequences of a ground invasion. If the latter would have been far less costly in terms of lives and more effective in stopping the ethnic cleansing, the bombing would have been disproportionate. Still, the problem remains that more intervening soldiers would have died in a ground invasion than during the

bombing. Perhaps a middle position is possible. NATO should have gained air supremacy first and then dispatched some of its ground troops. This was discussed by Prime Minister Blair and President Clinton towards the end of the campaign. Fortunately Milosevic suddenly and unexpectedly surrendered before the issue could have been taken further.<sup>270</sup> At the time of writing, however, NATO still has a strong ground presence in Kosovo, which was dispatched after the surrender.

Although it may raise an eyebrow or two, considerations of (inter-) proportionality can sometimes be favourable towards the use of strategic bombing in order to prevent an escalation of the conflict and minimise risks to intervening soldiers, provided the strategy acts as a precursor to the deployment of ground troops in order to address some of the wider humanitarian problems. But note that NATO's intervention campaign was also controversial because of its heavy bombardment of Serbia's (civilian) infrastructure. Part C tackles this problem.

### *C. Property and Infrastructural Damage*

The last issue we face is how to weigh lives against harms that arise from the destruction of private property or cultural objects. Both are important. Private property may be essential to the realisation of a conception of the good life, while certain cultural objects, such as churches, monuments or other historic buildings, often symbolise what communities value in their collective existence.<sup>271</sup> While it would be wrong for interveners not to take this into account, the protection of property and cultural objects must always be subordinate to the protection of life, either of non-combatants in the target state or intervening soldiers.

To illustrate the point, imagine that Sergei, a sniper, is hiding in a church tower in order to fire at a long stream of refugees passing by. Roger could fire a missile into the church, thereby disabling Sergei from continuing his attack. The fact that the church is an important cultural object is no reason not to fire the missile. The same would hold if the intervening soldiers themselves were under attack.

However, a much graver problem arises when civilian infrastructure is implicated in the perpetration of Atrocity Crimes. Suppose that the interveners would have to destroy the main road that is simultaneously used to transport food to the capital and

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<sup>270</sup> Judah, *Kosovo*.

<sup>271</sup> J. Thompson, 'War and the Protection of Property', in: I. Primoratz (ed.) op. cit., pp. 238-256.



deport victims to extermination camps by truck. According to contemporary just war terminology, the main road is a 'dual infrastructure target', as it serves civilian *and* military purposes. Its destruction would be an important and seemingly proportionate step to end Atrocity Crimes, but since food supplies are disrupted, would cause misery to non-combatants in the capital. Although the issue has hardly received any attention in the literature, there are three possible solutions to the problem of dual infrastructure targets.

The first urges us to distinguish between dispensable and indispensable infrastructure. But any distinction along these lines is arbitrary. For example, not being able to use the phone for a month might be annoying because Amy will not be able to talk to my friends (dispensable). On the other hand, if Ben suffers a heart attack and has to call an ambulance, a phone does not seem that dispensable anymore. Moreover, indispensable infrastructure, such as hospitals, will often depend on what may count as dispensable infrastructure (roads). If this is sound, the first solution must be rejected.

The second approach, which is formulated by Henry Shue, appeals to DDE. It is permissible, writes Shue, to destroy dual infrastructure targets if (and only if) the agent intends to destroy its military component, foreseeing the destruction of its non-military component.<sup>272</sup> But this argument rests on the misapplication of DDE. If Smith destroys a power plant, he intends to destroy it as an object with a single function (generating electricity) that just happens to be used in different ways. It is hard to see how one can normatively and conceptually distinguish between the removal of a resource from perpetrators of Atrocity Crimes and the non-intentional infliction of harm on non-combatants whose homes are connected to the power station. In this way, the destruction of the power plant differs from the destruction of the weapons factory in the strategic bombing example mentioned earlier. Destroying the function of the weapons factory (producing weapons) is entirely unrelated to the (foreseen) harm caused to non-combatants in the nearby settlement. For this reason it is not clear that DDE can be applied to dual infrastructure targets.

This leaves us with the third approach, which appeals to the concept of a rights infringement. Non-combatants do not forfeit their subsistence rights and, therefore,

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<sup>272</sup> H. Shue, 'Bombing to rescue?: NATO's 1999 bombing of Serbia', in: D.K. Chatterjee & D.E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), pp. 97-117.

continue to hold other parties under a duty not to deprive them of their means of subsistence. If military necessity dictates that these (correlative) duties must be overridden, this does not mean that they miraculously disappear. The intervening party acquires some positive duties of assistance to help those whose rights are being infringed. Needless to say, these duties of assistance cannot be too demanding. Interveners cannot be expected to divert enormous resources into providing non-combatants with services. This would be disproportionate and impractical because it is bound to undermine the actual aims of the intervention.

Fortunately there are two ways to deal with the issue of costs. First, interveners are only under a duty to provide some goods that are of high importance (food, medication, tents), which can be delivered via aircraft in the initial phase of intervention. Depending on the situation, they may also have to dispatch small numbers of ground troops to assist with the distribution of goods. Second, especially in cases where the dispatch of ground troops is either not possible or severely restricted, interveners should cooperate closely with humanitarian organisations. Unlike international humanitarian law, contemporary just war theory does not pay much attention to humanitarian organisations. The other-defensive conception of MHI assumes that interveners are under a positive duty to offer some logistical assistance to humanitarian organisations (e.g. airlifting doctors to a particular area) and protect them from attack. Interveners will also be under a strong negative duty to avoid tactics that may undermine the operational capacity of humanitarian organisations in the target state.

Of course, for these considerations to be relevant it must be shown that a certain aspect of the infrastructure can be identified as a dual-infrastructure target, serving civilian as well as military purposes. To use a real life example, there are doubts that this was the case with all the infrastructural targets (factories and airports) that NATO attacked in Serbia during the Kosovo campaign. Rather, it seems that NATO's bombing campaign was designed to increase the pressure on Milosevic to surrender or possibly stir up unrest amongst the Serbs to dispose of their government.<sup>273</sup> This does not seem to fall within the area of legitimate infrastructure-targeting and NATO's response might have well been disproportionate here.

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<sup>273</sup> Judah, *Kosovo*.

In sum, the proposed solution to the problem of dual infrastructure targets constitutes an important departure from how JIB-specific moral duties have traditionally been conceived. As Gary J. Bass points out, just war theory usually stresses the importance of negative duties, i.e. the duty not to torture prisoners of war, the duty not to use intentional force against non-combatants, the duty not to use banned weapons etc.<sup>274</sup> However, the above arguments indicates that, at least in the context of MHI, interveners also acquire positive duties of assistance towards non-combatants in the target state. From a humanitarian perspective, it would do an awful lot of good to extend the argument beyond MHI and, more specifically, the issue of dual infrastructure targets. Surely, in any type of war, the innocent would benefit from humanitarian assistance. Though warring parties might have few resources to spare, providing some logistical assistance to humanitarian organisations could potentially make an enormous difference. JIB should be revised accordingly.

## V

### Conclusion

This chapter sought to delineate principles for the conduct of MHI by critically engaging with the Orthodox View. It rejected the latter for three reasons. First, the Orthodox View cannot account for the conceptual distinction between combatants and non-combatants. A better foundation is provided by the Neo-Classical View which maintains that moral responsibility, rather than material responsibility, should determine who counts as a non-combatant. The resulting Chain of Command Argument, together with the Argument from Derivative Liability, broadens the scope of the category of combatants, while restricting the category of non-combatants.

Second, the chapter presented an argument in favour of the infliction of foreseeable harms on non-combatants during MHI. Contrary to the Orthodox View, it showed that the non-intentional killing of non-combatants cannot be justified independently of the just cause criterion. Appealing to the Public Goods Argument, the chapter defended the moral permission to non-intentionally kill non-combatants. But it also contended that the latter are excused for defending themselves.

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<sup>274</sup> G. J. Bass, 'Jus Post Bellum', *Philosophy & Public Affairs*, Vol. 32/Issue 4 (2004), pp. 385-412, at p. 401.

Lastly, the chapter provided a critical ‘neo-classical’ perspective on the problem of proportionality. It offered a more differentiated picture of inter- and intra-proportionality assessments than the Orthodox View. In order to determine whether a particular act is excessive, interveners must take into account different levels of moral responsibility. Yet, controversially, the chapter argued that interveners are allowed to use strategic bombing as part of their strategy. But contrary to the almost exclusive emphasis on negative duties in JIB, the interveners have positive duties to assist humanitarian organisations and/or deliver some basic humanitarian aid themselves during such a bombing campaign.

Somewhat paradoxically, one can describe the arguments as relaxing and restricting some of JIB’s central assumptions. On the one hand, the chapter relaxes the narrow conceptual distinction between combatants and non-combatants. On the other hand, from a normative perspective, it restricts what can be permissibly done to non-combatants during a military campaign. If anything, this illustrates the complexity of JIB.

Having offered a philosophical treatment of what should count as ‘just conduct’ in MHI, we have, in conjunction with the arguments from the preceding two chapters, established the permissibility of MHI. We must find out whether, as R2P assumes, MHI is also obligatory. That is the task of the next chapter.

## Chapter VI

### *Remedial responsibility for Atrocity Crimes*

*It is morally unjustifiable and politically indefensible that members of the armed forces should be killed to prevent Somalis from killing each other.*

(Samuel P. Huntington on the US intervention in Somalia)<sup>275</sup>

*As citizens we must prevent wrong-doing since the world we all share, wrong-doer, wrong-sufferer and spectator, is at stake.*

(Hannah Arendt).<sup>276</sup>

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<sup>275</sup> M. Smith, 'Humanitarian Intervention: An overview of the ethical issues', *Ethics and International Affairs*, Vol. 12/Issue 1 (1998), pp. 63-79; at p. 63.

<sup>276</sup> H. Arendt; quoted in: L. May, *Sharing responsibility*, p. xi.

## The right to be rescued

Previous chapters have largely been concerned with the assignment of what David Miller calls outcome responsibility for Atrocity Crimes and its implications for establishing liability to attack.<sup>277</sup> This chapter, on the other hand, is interested in what Miller calls ‘remedial responsibility’. In other words, its purpose is to inquire who is responsible for halting mass killing via military force. As was stressed in preceding chapters, the other-defensive conception of MHI can be seen as a philosophical attempt to make sense of R2P. The latter, obviously, emphasises that MHI is not only morally permissible, but also obligatory. Further, as was observed in Chapter I, one important task for political philosophers is to specify our duties towards those threatened by Atrocity Crimes.

Since the other-defensive conception of MHI is statist in orientation, the chapter argues that states are bearers of remedial responsibilities for Atrocity Crimes.<sup>278</sup> Continuing our search for reflective equilibrium, it draws an analogy between the duty to intervene in international society and what Cecile Fabre calls mandatory rescue killings in domestic society.<sup>279</sup> Put simply, just as individuals are under an obligation to kill an attacker on behalf of a victim, states are obliged to declare an other-defensive war to aid non-citizens threatened by Atrocity Crimes. In a nutshell, Fabre’s argument in defence of (domestic) mandatory rescue killings has a fourfold structure, encompassing what we can call the Assistance Condition, Resource-Service Condition, Use of Force Condition, and Violation Conclusion. Each of these conditions is qualified by what we can call the Autonomy Constraint:

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<sup>277</sup> Miller, *National responsibility and global justice*, chapter IV.

<sup>278</sup> The duty to intervene, Kok-Chor Tan opines, should be assigned to a specific global body, i.e. something approximating Gillian Brock’s Vital Interest Protection Organisation discussed in Chapter II. Because the conception of MHI as an other-defensive war is critical of the enforcement conception of MHI, we shall not consider Tan’s views here. See, K-C. Tan, ‘The duty to protect’, in: M. Williams & T. Nardin (eds.), *Humanitarian Intervention*, NOMOS VOL 47 (New York: New York University Press, pp. 286-289). For two recent philosophical defences of the duty to intervene, see A. Buchanan, ‘The internal legitimacy of humanitarian intervention’, *Journal of Political Philosophy*, Vol. 7/Issue 1 (1999), pp. 71-87; reprinted in A. Buchanan, *Human rights, legitimacy and the use of force* (Oxford: Oxford University Press, 2010), pp. 201-217 & R. Vernon, *Cosmopolitan Regard: Political membership and global justice* (Cambridge: Cambridge University Press, 2010), chapter 5; J Davidovic, ‘Are Humanitarian Military Interventions Obligatory?’, *Journal of Applied Philosophy*, Vol. 25/No.2 (2008), pp.134-144.

<sup>279</sup> C. Fabre, ‘Mandatory rescue killings’, *Journal of Political Philosophy*, Vol. 15/Issue 4 (2007), pp. 363-384.

1. *The Assistance Condition*: Individuals in possession of relevant resources owe positive duties of (non-lethal) assistance to the needy, provided the rendering of aid does not deprive them of the opportunity for a minimally decent life (Autonomy Constraint). In Hohfeldian terms, needy individuals hold a claim to life-saving resources against individuals in a position to help, subject to the Autonomy Constraint.
2. *The Resource-Service Condition*: If 1) obtains, individuals in possession of relevant personal capacities are obliged to render personal services to the needy, provided that doing so does not deprive them of the opportunity for a minimally decent life. In Hohfeldian terms, the needy hold a claim to personal services against those with the personal capacity to help, subject to the Autonomy Constraint.
3. *The Use of Force Condition*: If 1) and 2) obtain, individuals are under a positive duty to render 'lethal assistance' to defenceless victims of an attacker by killing the latter (subject to necessity and proportionality), provided that doing so does not deprive them of the opportunity for a minimally decent life. In Hohfeldian terms, victims hold a claim to be defended against an attacker against potential rescuers, subject to the Autonomy Constraint.
4. *The Rights Violation Argument*: If 1), 2), and 3) obtain, failures to kill the attacker amount to a violation of V's *right* to be rescued, subject to the Autonomy Constraint.

This chapter applies this mode of reasoning to MHI. It does not, however, provide a detailed defence of the Assistance Condition. In addition to considerations of space, it has now been well established by participants in the global justice debate that the well-off are under a duty to assist the needy, regardless of where they reside. It is open to dispute how extensive these obligations are. But generally, it is uncontested that absolute deprivation warrants assistance.

One of the most interesting aspects of Fabre's argument is that the victim is the holder of a right to be rescued against a potential third party. The other-defensive conception of MHI follows this claim by arguing that those threatened by Atrocity Crimes also have a right to be rescued.<sup>280</sup> Before we can outline a defence of remedial

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<sup>280</sup> As we saw in Chapter II, Michael Walzer maintains that MHI is mandatory because domestic conflicts undermine the security of the international community. This argument is not only empirically dubious, but also, from a normative perspective, emphasises the interests of members of the

responsibility for Atrocity Crimes, let us first note a number of preliminary points about the right to be rescued.

First, based on our earlier discussion of basic rights and natural duties, individuals threatened by Atrocity Crimes have strong interests not to be subjected to *intolerable* harm. Following the interest theory of rights, these interests are sufficiently weighty to hold potential rescuers under a duty to intervene. But for the other-defensive conception of MHI, our individual interests not to be subjected to intolerable harm do not exhaust the justification of the right to be rescued. As Chapter III argued, the liberal legalist view that sovereignty is an enabling condition reflects that those in the target state have collective interests in sovereign institutions. Thus, while the right to be rescued can be understood as an individual right held by individual victims of Atrocity Crimes against potential interveners, it is also a collective right held by the residents of the target state against third parties capable of stabilising the target state.

Second, unlike the collective right to be rescued, the notion of an individual right to be rescued from Atrocity Crimes raises an important problem. No matter how quickly and carefully potential interveners respond to Atrocity Crimes, it will never be possible to rescue every single victim. Suppose Blue has the choice of rescuing victims *village* and victims *town*. Because it is easier for Blue to reach the village via helicopter, it opts in favour of rescuing victims *village*. The question is whether victims *town*'s rights to be rescued have been violated by Blue's actions. This is not the case because it is a commonplace that 'ought' implies 'can'. While individual victims of Atrocity Crimes have rights to be rescued, the intervening state is not under a duty to rescue any particular individual. Unless specific victims have entered into 'rescue contracts' with specific rescuers, rescuers are only obliged to rescue as many victims as they 'can' rescue.

Third, in the case of domestic mandatory rescue killings, the Autonomy Constraint limits the costs potential rescuers are morally required to incur when assisting others. Since the other-defensive conception of MHI supposes that states are duty bearers, it is necessary to clarify how the Autonomy Constraint must be understood in the context of MHI. Following our discussion of proportionality in Chapter III, potential intervening states are not obliged to intervene if MHI made it impossible for the

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intervening state. If the crisis in the target state led to the destabilisation of neighbouring states, the latter are indeed obliged to protect their citizens. But we are not going to pursue this point further here.



state to maintain its own sovereign domestic order. As we said in Chapter III, the duty to protect rights abroad must not come at the expense of protecting them at home.

With these three preliminary comments out of the way, we need to tackle four further issues. First, it needs to be shown how far states can be bearers of rights. Second, in addition to the interest theory of rights, we must offer a more precise account of the justification of the duty to intervene. Third, we need to engage with the problem of mandatory killing introduced in Chapter I. This is so because states cannot discharge their duties without the assistance of individuals.

Part II starts by offering a general examination of whether it is possible to assign duties of assistance to states. Part III then examines the link between the Assistance and Use of Force Conditions by developing the Egalitarian Argument, while Part IV develops the Argument from Shared Outcome Responsibility. Part V turns to the problem of mandatory killing identified in Chapter I.

## II

### **Meeting claims of assistance together**

In this part of the chapter, let us discuss how far it is desirable and possible to assign duties of assistance to states. According to David Miller, for instance, states should not be the prime bearers of remedial responsibility. His first concern is that the assignment of remedial responsibility to states neglects the status and responsibilities of non-state actors in politics.<sup>281</sup> Moreover, if (remedial) responsibility rests with states, the costs of state action cannot be distributed amongst individuals. The solution to these two problems, Miller argues, is to assign remedial responsibilities to nations, independently of states. This is possible because fellow nationals *a)* contribute to collective activities via a shared mindset and *b)* benefit from shared national practices. Insofar as states enter into the debate, they are ‘secondary’ bearers of remedial responsibility, as they exercise power on behalf of nations.

The other-defensive conception of MHI also treats states as secondary rather than ‘primary’, bearers of remedial responsibility. First, the Domestic Analogy maintains that states do not hold any rights independently of those under their rule. As was

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<sup>281</sup> Miller, *National responsibility and global justice*.

argued in Chapter III, MHI is nothing more than the coordinated mass exercise of rights to engage in other-defence. Second and directly related to the preceding point, natural duties usually govern relations between individuals, regardless of communal affiliation. Crucially natural duties do not merely include duties not to harm; they also include duties to render humanitarian assistance to the needy. For these two reasons it is logical that any account of the state-held duty to intervene is founded upon individual duties.

Interestingly, as Christopher Kutz observes, obligations of assistance (or natural justice), especially if they are owed to the *distant* needy, must be met *together* if they are to be met at all.<sup>282</sup> This reflects our use of language, as the (distant) needy usually make claims on a ‘rescuer group’, rather than any individual rescuer. Indeed, there is little individual rescuers can do to halt Atrocity Crimes without assistance from others. As a result, individual duties of assistance do not simply lead to a *vertical* relationship between rescuers and the needy. Instead, individuals owe some duties towards those with whom they are engaged in a rescue operation. That is, some duties are owed *horizontally* between members of the collective charged with remedial responsibility. Vertical relationships, by contrast, obtain between the rescuer group and the needy.

If Kutz is right, the relations between members of the rescuer group are important for the assignment of remedial responsibility. Groups can only be identified as moral agents bearing remedial responsibility if, in addition to holding resources in common that make the rescue of the needy possible, their individual members share a common life. In this light, Miller’s invocation of nationalism seems sensible. But whatever one may think about the enthusiasm for nationalism amongst some liberal philosophers, liberal nationalists are generally too optimistic about the congruence between nations and potential intervening states. On the one hand, considering the case of Germany after World War II, states can divide nations.<sup>283</sup> On the other hand, many alleged ‘nation states’ are, in fact, home to different nations.

Liberal legalism may act as a normatively more attractive alternative to nationalism. Liberal legalists maintain that being subject to the coercive institutions of the law puts members of a legal system into special relationships with each other. Unlike

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<sup>282</sup> C. Kutz, ‘The collective work of citizenship’, *Legal Theory*, 8 (2002), pp. 471-494. .

<sup>283</sup> See, J.T Levy, ‘Nationalist and Statist Responsibility’, *Critical Review of International Social and Political Philosophy*, 11/4 (2008), pp. 485-499.

liberal nationalism, liberal legalism rests on the recognition that, as was observed in Chapter III, individuals have interdependent needs, especially with regard to autonomy and physical security. Liberal legalists, then, do not need to invoke claims about the (alleged) importance of national identity. Neither do they need to maintain that rescue obligations should only be assigned to *nation* states.

Furthermore, unlike liberal nationalism, the idea of a legal or political community of citizens united by the law can assist us in tackling four issues that arise in the context of collective rescue projects.

First, since our role in a collective rescue operation depends on what others do, the law provides a solution to the problem of coordination. If we tried to discharge our natural duties independently of each other, no one would get rescued.

Second, our submission to the law overcomes what Kutz calls the problem of marginal contributions.<sup>284</sup> Simply put, we must, as considerations of fairness surely demand, do ‘our bit’ in a successful rescue operation. By submitting themselves to the law, citizens enter into relations of reciprocity.<sup>285</sup> Those who submit to the law can expect others to do the same. Compliance with the law, in fact, is the most basic burden *and* benefit of citizenship. The coercive function of the law, then, ensures that we make our full contribution to the rescue operation.

Third, the law enables us to form collective intentions, which are necessary for the ascription of collective agency and responsibility to groups. In brief, Kutz’s model rests on what he calls participatory intentions, which are aimed at the fulfilment of a common goal.<sup>286</sup> These intentions account for some of our individual actions that would be incomprehensible without reference to a collective project. In the case of rescue operations, Kutz points out that our participatory intentions stem from the (individual) realisation that we hold resources in common to which those in need have a reasonable claim. If intentions within the rescuer group sufficiently overlap, they give rise to collective intentions.

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<sup>284</sup> Kutz, ‘The Collective Work of Citizenship’.

<sup>285</sup> Sangiovanni, ‘Global justice, reciprocity and the state’.

<sup>286</sup> This is a condensed version of Kutz’s view; see ‘The Collective Work of Citizenship’, especially pp. 585-487. For a longer version of the argument, see Kutz, *Complicity: Ethics and Law for a Collective Age*, chapter III.

Thomas Nagel's argument that citizens occupy a dual role within the legal system of the state reinforces the idea of a community with shared intentions. On the one hand, they are subjects to the law, which they are required to obey for reasons of reciprocity. On the other hand, for Nagel, they are also the authors of the law because political power is exercised in their name.<sup>287</sup> Wars are usually not only declared in the name of the state only but with reference to the people. Indeed, citizens feel what Joel Feinberg calls 'vicarious pride and shame' when political power is exercised, for better or worse, in their name.<sup>288</sup> Citizens *identify* with their group not only via the benefits and security it provides them with, but also in terms of the common projects they pursue, which may be reaffirmed or thwarted by the way in which political power is exercised.<sup>289</sup>

Fourth, Nagel's thoughts on the author/subject dualism also indicate on what basis the benefits and burdens of state action can be distributed amongst citizens. First, considerations of fairness and reciprocity demand that citizens contribute their fair share to common projects. If the law, as was argued above, helps us to shape our collective intentions, then we share in these projects and can be expected to bear some of their costs. Secondly, because political power *originates* within the interdependent needs of citizens and is exercised in their name, the latter must bear some of the costs arising from state action. Of course, this may not apply to *all* costs communities and states may incur. As we shall see in Part IV, Feinberg acknowledges that some costs assigned to (political/legal) communities are not distributable amongst individual group members. But citizens must at least bear some of the costs of state action.

Before we return to the duty to intervene in more detail, let us quickly take stock. We began our analysis by noting Miller's point that it is undesirable to assign duties directly to states. The rationale of the Domestic Analogy and the idea of natural duties both indicate that the duties of states are derived from the duties of those under their rule. Thus, any account of remedial responsibility for Atrocity Crimes is ultimately based on individual duties to assist the needy. Yet, following Kutz's work,

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<sup>287</sup> T. Nagel, 'The problem of global justice'.

<sup>288</sup> J. Feinberg, 'Collective Responsibility (another defense)', in: L. May & S. Hoffman (eds.), *Collective Responsibility: five decades of debate in theoretical and applied ethics* (Lanham/MD: Rowman and Littlefield Publishers, 1991), pp. 53-76.

<sup>289</sup> For a longer version of this argument, see H. McGary, 'Morality and Collective Liability', in: L. May & S. Hoffman (eds.), *op. cit.*, pp. 77-88.

rescue operations, though based on individual duties of assistance, are always collective undertakings. First and foremost, they require that individuals coordinate their actions and contribute their fair share of resources. Furthermore, in order to be able to act, groups of rescuers must be able to form collective intentions.

To solve the issues identified by Kutz, we appealed to the liberal legalist idea that the operation of the law establishes special relations amongst members of a state. The law enables us to coordinate our actions and, through its coercive function, ensures that individuals contribute their fair share to a rescue operation. As we orient our behaviour to the law, the latter also enables us to form collective intentions. As a result, while the state's duty to intervene is derived from individual duties to offer assistance to the needy, the institutions of the legal system make the discharge of these individual duties possible in the first place. Finally, since states act on behalf of their citizens, costs accruing from state action can be distributed amongst them, subject to further restrictions.

Bearing these points in mind, let us assume that duties to intervene can and should be assigned to states. We can now provide two justifications of the duty to intervene.

### III

#### **The Egalitarian Argument for mandatory intervention**

In order to clarify the normative basis of the duty to intervene, let us return to Fabre's argument in favour of mandatory rescue killings. It contends that if one accepts the Assistance Condition, one must also accept the Use of Force Condition. In what follows, let us try to render this link more precise via what we can call the Egalitarian Argument. It demands that individuals should not be worse off through no fault of their own. To illustrate how the Egalitarian Argument works, let us use the following thought experiment.

*Break a Leg: Jen stumbles into a shadowy alleyway and breaks her leg. Minutes later, however, Amy is dragged into the same alleyway by a murderous mugger. Fortunately Richard is at the scene and could rescue both. However, while Richard can simply carry Jen to his nearby car to drive her to the hospital, he would have to use other-defensive force against the murderous mugger in order to rescue Amy. Richard is a retired policeman who has been trained how to shoot. He has a gun in his car.*

Jen is lucky that she only broke her leg, whereas Amy is worse off, in absolute terms, because she faces a threat to her life. If we separated the Assistance Condition from the Use of Force Condition, Richard would only be *obliged* to assist Jen but not Amy. In other words, Jen holds a right against Richard to be carried to his car, whereas Amy lacks a right to be rescued because Richard would have to use force on her behalf.

For the sake of the argument, let us assume that the rendering of lethal assistance does not undermine Richard's own prospect for a minimally decent life. If so, any separation between the Assistance Condition and Use of Force Condition would be arbitrary, if not absurd. It implies that those who face grave threats to their life are not entitled to receive necessary assistance, while those with relatively minor inconveniences are entitled to help. In fact, Richard's refusal to use other-defensive force on behalf of Amy reinforces her sense of victimhood. This is so because Amy is worse off *precisely because* of the nature of the threat she faces. In order to avoid this, a commitment to the Assistance Condition must entail the acceptance of the Use of Force Condition. Accordingly, Amy holds a moral right against Richard to be rescued.

By analogy, imagine Orange experiences an earthquake and citizens of Violet are under a duty to assist members of Orange. Just as Richard has a gun in his car, Violet has an extremely experienced army. In this case, it does not seem unreasonable to hold that Violet is obliged to dispatch its troops so they can render humanitarian aid. Orange's citizens have a right to receive aid. But now suppose that Red perpetrates Atrocity Crimes against its members. If we separate the Assistance Condition from the Use of Force Condition, sufferers of an earthquake are entitled to aid, whereas victims of Atrocity Crimes aren't. Again, members of Red are worse off for entirely arbitrary reasons. To avoid such a skewed view of morality, military intervention must be obligatory.

Interestingly, compared to Break a Leg, the case for making the declaration of an other-defensive *war* mandatory is strengthened by Claudia Card's Atrocity Paradigm. As we saw in Chapter III, Atrocity Crimes are morally distinctive not only because they cause large-scale suffering. Rather, unlike a single murderous mugger or natural disasters, Atrocity Crimes are distinctive moral *evils*. This is one of the reasons for why combating evils enjoys some priority over realising justice. Now, if, according to

many egalitarians, the realisation of justice already demands that we assist the needy, the case for positive assistance is much stronger when it comes to combating evils. If this is sound, Fabre's link between the Assistance and the Use of Force Conditions is defensible, especially in the context of MHI.

However, the egalitarian intuition that individuals should not be worse off through no fault of their own has been accused of leading to morally perverse results.<sup>290</sup> To explain, we supposed that, compared to Orange, members of Red are worse off through no fault of their own. Yet, as we saw in Chapter III, Card's conception of evil and Atrocity Crimes stresses the central role of human agency. For instance, mass killings can arise from provocations, which lead to a cycle of violence. Hence it may be argued that, in the case of Atrocity Crimes, the appeal to egalitarianism undermines, rather than reinforces, the link between the Assistance and Use of Force Conditions. As a result, while members of Orange remain entitled to assistance because an earthquake is truly beyond their control, members of Red forfeit their right to be rescued because they are (outcome) responsible for their predicament.

There are two solutions to this problem. First, even if we hold groups collectively responsible for (ethnic) violence, it is by no means the case that *all* group members engage in killing and provocation. There are always large numbers of innocent individuals who get caught up in the crossfire. It would be cruel to refuse them our assistance, not least because, from the perspective of egalitarianism, individuals do not have control over their place of birth. If groups fail to protect the interdependent needs of their members, the plight of individuals is all that matters for the duty to intervene.<sup>291</sup> Even if uninvolved group members must bear some of the costs of Atrocity Crimes, e.g. they could be taxed to pay reparations to members of the enemy collective, this does not mean that they 'forfeit' their right to be rescued. Thus, the Egalitarian Argument underlines the importance of a duty to intervene. Anything else constitutes a gross misapplication of the concept of collective responsibility.

Second, the egalitarian logic is constrained by a baseline commitment to humanitarianism. As Card makes clear, even though evil presupposes agency, there

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<sup>290</sup> E. Anderson, 'What is the point of equality?', *Ethics*, Vol. 109/No. 2 (1999), pp. 287-337.

<sup>291</sup> See, C. Fabre, 'Global Egalitarianism: an indefensible theory of justice?', in: D. A. Bell & A. De-Shalit (eds.), *Forms of Justice: critical perspective on David Miller's political philosophy* (Lanham: Rowman & Littlefield Publishers, 2003), pp 315-330.

are brutal and degrading acts that not even the worst evildoers should suffer.<sup>292</sup> Some opponents of the death penalty, for instance, do not maintain that murderers should not be punished for their crimes. Instead, they contend that the death penalty is a cruel and degrading form of punishment. Likewise, no human being, even if culpably responsible for horrific wrongs, can ever be liable to being hacked to death, raped, or arbitrarily and indefinitely detained. As has been stressed throughout the thesis, in order to avoid Manichean thinking, we must recognise that perpetrators can become victims and vice versa. For humanitarian reasons, it is obligatory to protect someone who participated in Atrocity Crimes in the past from an angry mob that wants to exact bloody revenge. Insofar as individuals are not immediately engaged in unjust aggression, they are entitled to protection in case they become victims of Atrocity Crimes.

The egalitarian claim that individuals should not be worse off through no fault of their own provides a powerful defence of the duty to intervene. It also indicates how advocates of MHI can respond to those who resist the idea of a duty to intervene in conflicts where groups inflict violence on each other. Group membership, for egalitarians, is arbitrary from a moral point of view. The rendering of assistance becomes obligatory if communities fail to meet the basic interdependent needs of their members.

Undoubtedly the Egalitarian Argument is restricted by the Autonomy Constraint. If, in *Break a Leg*, Richard was not a trained police officer in possession of a gun, we may question whether he was obliged to use other-defensive force on Amy's behalf. In particular, we would have to show that ordinary members of society would have to undergo special firearms training so they can carry out rescue killings. We return to this point further below. By analogy, as we noted at the beginning of the chapter, the protection of rights abroad must not come at the expense of basic rights at home. In order to prevent the dissolution of civic relations, individual citizens in the target state must remain subjects of the law. If Violet was not able to uphold the rule of law within its own jurisdiction, Violet cannot be under a duty to declare an other-defensive war.

The Egalitarian Argument for Mandatory Killing implicitly introduces a further consideration into the debate. In order to be effective, remedial responsibility needs

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<sup>292</sup> Card, *The Atrocity Paradigm*, p 13.



to be distributed amongst potential rescuers. According to the Egalitarian Argument, one important criterion for the assignment of a duty to intervene is the capacity to sustain a military campaign without compromising the protection of basic rights at home or relinquishing state independence. But while capacity is clearly necessary for the assignment of duties to intervene to states, it is not clear whether it is also sufficient. Bearing in mind the nature of Atrocity Crimes, there are good reasons to also consider ‘capacity’ as sufficient. Because Atrocity Crimes represent what is morally intolerable, those who *can* intervene are obliged to do so. If this is sound, victims of Atrocity Crimes hold a right to be rescued against powerful states capable of carrying out military intervention.

But the criterion of capacity does not exhaust the spectrum of considerations for the assignment of remedial responsibility for Atrocity Crimes. Indeed, the flaw of the Egalitarian Argument is that it does not pay attention to the wider context in which Atrocity Crimes take place. This is understandable because Atrocity Crimes are always (moral) emergencies that require a swift response. But failure to attend to the broader context does expose the duty to intervene to the popular criticism that ‘their’ problems are not ‘ours’. By developing the Argument from Shared Outcome Responsibility, Part IV seeks to challenge this view.

## IV

### **The Argument from Shared Outcome Responsibility**

#### *A. The nature of the contribution*

One popular misconception of our times is that mass killing takes place as an isolated phenomenon. This myth has the comforting function of absolving outsiders from any (outcome) responsibility for Atrocity Crimes. Indeed, it seems scandalous that we should be obliged to sacrifice ‘our’ resources for rectifying ‘their’ mess. Although the Egalitarian Argument already rejects this kind of reasoning, this section shows that it is also empirically mistaken. Neither do societies suddenly ‘go mad’, nor can mass killing be divorced from wider dynamics of international society. Atrocity Crimes occurs for a variety of reasons, some of which may be internal to a society, whereas others are external. To illustrate the point, there are four prominent cases in which external actors have impacted on locally perpetrated Atrocity Crimes.

1. Ben Kiernan and David Chandler argue that the heavy bombardment of Cambodia by the US Air Force during the Vietnam War drove the Cambodian peasant population into the arms of the Khmer Rouge.<sup>293</sup> During its subsequent reign the Khmer Rouge was responsible for up to two million Cambodian deaths.
2. In the aftermath of World War I, the League of Nations gave Belgium the western provinces of German East Africa. In Rwanda, Belgian rulers disrupted the old structure of kingship central to political life, introduced money, put in place a system of forced labour, and reinforced the division between the Hutu majority and Tutsi minority. In 1994, Hutus reacted against the powerful Tutsis minority, sparking retaliatory attacks. Within one hundred days up to one million people were killed.<sup>294</sup>
3. Susan Woodward points out that the infamous ‘economic shock therapies’ prescribed by the International Monetary Fund (IMF) to ex-members of the communist bloc after the fall of the Iron Curtain led to radically altered political arrangements in ex-Yugoslavia.<sup>295</sup> As the federal government, which was supportive of the policies, lost its legitimacy in the eyes of many of its subjects, nationalist leaders, most notably Slobodan Milosevic, rose to prominence and gained power. As a response to economic crisis and secessionist movements, the rise of radical (Serb) ethnic nationalism led to various civil wars. In Bosnia, mass rape was used as a weapon against Muslim Bosnian women, while Bosnian men were involuntarily detained in large-scale camps where they were starved and assaulted.<sup>296</sup> The massacre of Srebrenica was the worst atrocity on European soil since World War II. In Kosovo, it is estimated that up to 800000 Albanians were ethnically cleansed by Serbian forces.

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<sup>293</sup> B. Kiernan, *How Pol Pot came to power: colonialism, nationalism and communism in Cambodia 1930-1975*, 2<sup>nd</sup> ed. (New Haven: Yale University Press, 2004) & D.P. Chandler, *A History of Cambodia*, 4<sup>th</sup> ed. (Boulder/Col: Westview Press, 2008).

<sup>294</sup> L. Melvern, *Conspiracy to Murder: The Rwandan Genocide*, revised edition (London: Verso, 2006).

<sup>295</sup> S.L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington D.C: Brookings Institution, 1995). Economic shock therapy includes the sudden privatization of state owned industries, the immediate liberalization of trade, and the release of pricing and currency controls. Shock therapy is strongly criticized by Joseph Stiglitz, see his *Globalization and its Discontents* (London: Penguin Books, 2003). For a useful account of the civil wars in ex-Yugoslavia, see J. Gow, *The Serbian project and its adversaries*.

<sup>296</sup> For a philosophical discussion of the strategy of enforced impregnation during civil conflict, see Card, *Confronting Evils*, chapter 10.

4. Anne Orford points out that Western governments and international institutions (the IMF and World Bank), industry and arms manufacturers supported the oppression of the East Timorese at the hands of the Indonesian military.<sup>297</sup> East Timor's attempt to gain independence at the turn of the Millennium was met with bloody looting and pillaging by Indonesian militias.

To respond to cases like these, let us develop the Argument from Shared Outcome Responsibility. In brief, the Argument from Shared Outcome Responsibility connects outcome responsibility with remedial responsibility by contending that states and the political communities under their rule incur *special* duties of assistance if foreign policies carried out in their name causally contributed to Atrocity Crimes.

To begin, let us use the above examples as a guide in order to make six preliminary observations about the nature of causal contributions to Atrocity Crimes. First, the relevant causal contributions to Atrocity Crimes are the outcome of state action. Only states are able to order bombings or administer colonial territories.<sup>298</sup> At first sight, this seems to pose a problem because it reverses the relationship between community and state. In Part II, we argued that statist duties are reducible to obligations of citizens. But since, in the above cases, state action is central to an assessment of (shared) outcome responsibility, the Argument from Shared Outcome Responsibility casts doubt over the Domestic Analogy. Indeed, it seems that states *qua* states incur duties of assistance. This might mean that these duties cannot be distributed amongst their citizens.

But this reversal is not entirely unjustified. We emphasised that states perform important functions for (political) communities via the enforcement of the law. If we recall Nagel's argument about representation, members of a state are liable to bear some of the costs arising from state action, though it remains to be seen to what extent these can be distributed amongst individual citizens. Moreover, as was noted in Chapter I, because states are defined as *animated* legal systems, they depend on the resources citizens offer them. Arguably, this is the strongest link between state and

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<sup>297</sup> A. Orford, *Reading Humanitarian Intervention: Human rights and the use of force* (Cambridge: Cambridge University Press, 2003), chapter I.

<sup>298</sup> On the different types of colonial administrations, see L. Ypi, R.E. Goodin & C. Barry, 'Associative Duties, Global Justice and the Colonies', *Philosophy & Public Affairs*, Vol. 37/No. 2 (2009), pp. 103-135.

citizen, even in the absence of democratic institutions. Lastly, political communities must be held collectively responsible for state action because foreign policies are usually undertaken in the name of citizen. Amongst other things, a sound foreign policy aims to preserve the internal governing functions of a state by securing its standing in the international realm.

Second, as the cases of ex-Yugoslavia and Indonesia indicate, some causal contributions point to the involvement of international institutions. The status of international institutions is contested. In particular, it is not clear that they can have the necessary agency to act. Because the chapter cannot offer a detailed discussion of these issues here, we should proceed on the following assumption.<sup>299</sup> International institutions exist so states can pursue their national interests in less harmful ways than in a purely unregulated international realm. Thus, even if certain policies are recommended in the name of an institution, shared outcome responsibility should be assigned to individual member states rather than the institution itself.

Third, foreign states are not *solely* causally responsible for the local perpetration of Atrocity Crimes. They play *some* role in the causal chain that caused these horrific crimes, but, unlike local actors, the foreign states in the above examples neither ordered Atrocity Crimes nor participated in them. Consequently, one question is what weight one should attach to different causal contributions.

In this respect, it is noteworthy that, although outcome responsibility for Atrocity Crimes does not rest with a single agent, it must not be equated with complicity. Complicity is usually a sufficient condition for shared outcome responsibility, but the reverse does not hold. Imagine that George gives Chris a gun, knowing that the latter will use it to kill Kate, while Gavin loses his gun and Carl uses it to kill Carol. George is derivatively liable for Kate's murder because he fulfils the *actus reus* and *mens rea* conditions introduced in Chapter IV. Gavin, by contrast, is neither complicit in Carol's murder nor necessarily morally blameworthy for the loss of his gun, as it could have occurred non-negligently. But nevertheless, it is *his* gun that is being used to perpetrate a crime, and, intuitively Gavin has stronger obligations to engage in a rescue killing on behalf of Carol than an uninvolved party. In any case, we must bear in mind that shared outcome responsibility can come about through an unfortunate

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<sup>299</sup> For a wide-ranging exploration of these issues, see the essays collected in T. Erskine (ed). *Can institutions have responsibilities: collective moral agency and international relations* (London: Palgrave, 2003).

entanglement of different strands of actions. The Argument from Shared Outcome Responsibility, then, does not require that a foreign state abets or aids the perpetrators of Atrocity Crimes.

Fourth, the above examples have different temporal dimensions because state action occurred at different points in history. The US bombing of Cambodia and the prescription of economic shock therapies had contemporary effects on their respective countries. But German engagement in Rwanda preceded the genocide by exactly seventy-six years, whereas Belgium released the country into independence thirty-two years before mass killing occurred. Anyone familiar with the discussion of historical injustice in contemporary political philosophy will know that the establishment of a normative and causal relationship between past and present is highly problematic. It must be clarified, then, to what extent past and present actions are part of the same causal chain.

Fifth, causal contributions can involve moral wrongs, rights violations, or even moral evils. Colonialism is a rights violation because it fails to respect the collective claim of members of the colony to be recognised as a self-determining entity.<sup>300</sup> From a historical and moral perspective, the American bombing campaign of Cambodia is more complex. Initially, the Cambodian head of state, King Sihanouk, had tried to remain neutral in the Vietnam conflict. Even the non-intentional infliction of harms on neutral countries is impermissible because it violates stringent negative duties against harming. Yet, as is well known, Sihanouk's actual policies were far from neutral. In 1965, he allowed North Vietnamese forces to set up bases in Cambodia and later tried to counterbalance this policy by allowing South Vietnam and the US to pursue the Vietcong within Cambodian territory. But even if we assume that bombing was permissible, the conduct of the campaign may still be classifiable as (at least) a moral wrong because of doubts over its proportionality. Figures on deaths may vary but up to 200000 Cambodians were internally displaced by the bombing campaign.<sup>301</sup>

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<sup>300</sup> This is not entirely correct because colonial powers, in theory, accepted that colonial subjects were holders of a group right to collective self-determination. Yet they argued that indigenous populations were incapable of exercising it. The burden of proof, though, rests with the colonial power. Given that they had existed for hundreds or thousands of years, the view that colonial cultures were 'lesser civilisations' incapable of governing themselves fails to withstand critical scrutiny.

<sup>301</sup> For a more detailed account, see the works by Chandler and Kiernan cited above.

Sixth, causal contributions can also involve permissible or morally neutral actions. For instance, to show that the IMF acted wrongly in ex-Yugoslavia, it must be proven that it was under a duty not to recommend ‘shock therapies’. Again, this is a complex question, and we can only offer some brief observations on it here. On the one hand, one must distinguish between recommendation and implementation. Local governments are usually responsible for implementing the recommendations of the IMF, though they are liable to sanctions if they fail to do so. Further, the prescription of shock therapy may have occurred in good faith because some of its measures had been successfully applied in West Germany after World War II.<sup>302</sup> Perhaps reformers in the early 1990s had *reasonable* expectations that the same policies could also work in different contexts. If this was the case, it is hard to see how their recommendations violated negative duties against harming. But given their disastrous results, the recommendation of the same economic policies nowadays may be negligent.

If the above is sound, the Argument from Shared Outcome Responsibility must accomplish the following. Firstly and more generally, since outcome responsibility is shared between different actors, it must clarify whether mere involvement in the causal chain is a necessary *and* sufficient condition for the assignment of the duty to intervene to any particular outside actors. Second, it must show that those who contributed to Atrocity Crimes via contemporary rights violations or otherwise morally wrong acts incur duties to intervene. Third and directly related to the preceding point, it must also account for past wrongs in this respect. Fourth, it must discuss whether those states that acted permissibly towards the target state become remedially responsible for Atrocity Crimes. The next section tries to provide answers to these challenges.

#### B. *Wrongs, non-wrongs and duties of assistance*

We are now in a position to develop the Argument from Shared Outcome Responsibility. To do so, let us discuss the following three cases: *a*) present causal contributions as moral wrongs, *b*) past causal contributions as moral wrongs, *c*) present contributions as moral non-wrongs. For reasons that will become apparent

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<sup>302</sup> Ludwig Erhardt, who became Minister for the Economy in Konrad Adenauer’s conservative government and later succeeded Adenauer as chancellor of West Germany, was instrumental here. Initially, he recommended the abolition of pricing controls to kick start the West German economy, despite worries by the Allied Forces.

shortly, we do not need to attend to past causal contributions that result from moral non-wrongs.

*Causal contributions as wrongs* [present]: Let us now assess whether political communities and their states incur duties of assistance in cases where they actively inflict harm on those who are subsequently threatened by Atrocity Crimes. Two arguments suggest that they do.

First, acts that involve moral wrongs, rights violations and evils weaken the ability of their victims to defend themselves against even greater threats. Because basic rights protect vital human interests, their violation goes hand in hand with a loss of power for the right holder. This is one of the reasons for why we typically speak of the need to ‘empower’ victims of crime. Cambodian peasants who have just been bombed out by the US Air Force will find it difficult to resist heavily armed Khmer Rouge guerrillas. To use an equally pressing example, women who have been forcibly expelled from their village during (alleged) counterterrorism operations are left in a seriously weakened position where they become particularly vulnerable to male violence.

Second, the concept of a rights violation suggests that a foreign state did not comply with negative duties not to harm those in the target state. Put differently, the outside party was under stringent duties *not* to become part of the causal chain that led to Atrocity Crimes. Obviously, given our arguments about the nature of complicity in Chapter IV, this is true when an outside agent aids or abets a local party. But the argument also applies in situations where an outside party pursues its own interests without aiding a principal actor. Intuitively, if the outside party was under a stringent duty not to become involved, the magnitude or decisiveness of the contributing act becomes less relevant. If the Khmer Rouge had come to power without the bombing campaign, America would have still incurred remedial responsibilities for its *wrongful* involvement in internal Cambodian affairs.

In light of these two arguments, there are good reasons to assume that wrongful causal contributions are sufficient conditions for the assignment of remedial responsibilities for Atrocity Crimes.

If this is sound, contemporary wrongful involvement in the causal chain that led to mass killings amounts to *the* paradigmatic case for the Argument from Shared

Outcome Responsibility. We must now find out whether the same holds for past wrongs.

*Causal contributions as wrongs* [past]: As should be apparent, past wrongs are not always clearly relatable to present Atrocity Crimes in the way contemporary events are. It is difficult to pick out relevant causal contributions because, through the ages, we are faced with myriad of interactions between societies, cultures and states, some of which involve wrongs, while some are non-wrongs. Wrongs are at least more easily identifiable than non-wrongs, and it would be futile to try and base the duty to intervene on the latter. The Argument from Shared Outcome Responsibility focuses on one particular wrong, namely colonialism. Not only is the historical dimension of colonialism well known, but many ex-colonial powers are, even in the present day and age, powerful states that potentially have the capacity to intervene without compromising their governing capacities. Let us explore, then, what is morally distinctive about colonialism and why it triggers contemporary duties to intervene.

Unlike other types of rights violations, the distinctive feature of colonialism is that it brings its victims under the legal system of another state. In doing so, colonisers and colonised enter into a special relationship with each other. To be sure, colonial subjects do not have the same equal standing before the law that citizens of the colonial power typically enjoy. But this does not change the fact that both groups are subject to the same coercively imposed set of legal rules.<sup>303</sup> If, as liberal legalism assumes, members of a legal system stand in a special relationship to each other, this relationship must also include members of the colony. Of course, since colonial subjects are not (strong) authors of the law, they are not bound by obligations of reciprocity and retain a moral right to withdraw from the association on unilateral terms. But nevertheless, some duties must apply between citizens and colonial subjects, at least as long as they share the common bond of the law.

Now, the problem is that, in the contemporary world, colonies have separated from their colonial powers. But there are two solutions to this problem. First, one can continue to share duties resulting from a common project even if one's legal standing has changed. For instance, after divorce ex-spouses often retain some legal obligations towards each other, which are not, strictly speaking, reducible to duties of

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<sup>303</sup> L. Ypi, R.E. Goodin & C. Barry, 'Associative Duties, Global Justice and the Colonies'.



reparation.<sup>304</sup> By analogy, since colonies have contributed to the wealth and standing of the colonial power, ex-coloniser and ex-colonised continue to owe each other ‘robust duties of distributive justice’. Hence it is also sound to assume that duties to intervene are also owed in times of humanitarian crisis.

Second and directly related to the preceding point, colonial powers incur duties to intervene because they shaped the political system of the colony at crucial points in history. Often the way in which political power is exercised after independence is attributable to the methods through which it was exercised during colonial reign. Once set on certain course of institutional development, it is very difficult for decision-makers to change a political system.<sup>305</sup> In Rwanda, the Belgian colonists reinforced the distinction between the Hutu majority and Tutsi minority by using members of the latter as colonial administrators, thereby laying one of the foundations of the Rwandan genocide. Local actors were not able to address the resulting imbalance in power between the two ethnic groups after Belgian rule had ended. Moreover, decolonisation processes often reinforced the economic dependency of the ex-colony. Since there is an asymmetry of power between the colonial power and colony, the former can dictate the terms of divorce.<sup>306</sup>

If the above observations about the moral distinctiveness of colonial rule are correct, it is difficult not to consider colonialism as another paradigmatic case for the Argument from Shared Outcome Responsibility. Although colonialism constitutes a *past* wrong, its moral legacy extends into the present. Colonial powers retain important duties of assistance towards their ex-colonies, not least because they shaped their institutions at crucial points in history. As a result, ex-colonial powers also incur duties to intervene if the institutions they helped put in place fail to preserve the peace. The special relationship between (ex-) colonisers and (ex-) colonised is a sufficient ground for remedial responsibility for Atrocity Crimes.

*Causal contributions as non-wrongs:* Having looked at wrongful causal contributions to Atrocity Crimes, we must now turn to non-wrongful contributions. For reasons outlined above, the Argument from Shared Outcome Responsibility focuses on *contemporary* non-wrongful interactions that led to Atrocity Crimes. Suppose that Blue non-negligently renders economic assistance to agrarian Red, helping the latter to

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<sup>304</sup> (ibid.), pp. 126-127.

<sup>305</sup> (ibid.), pp. 127-130.

<sup>306</sup> (ibid.), p. 118 & pp. 130-131.

modernise and industrialise its economy. However, in combination with unforeseen bad harvests, the industrialisation strategy leads to serious food shortages, which result in tensions between two ethnic groups. Although Blue acted permissibly, there is at least one argument for why it incurs duties towards Red.

Whenever we act non-negligently in the social world around us, we are forced to take certain risks. Some of these are minute. For instance the risk that one turns into a human missile by going for a walk on a windy day is extremely small. But arguably, there are many risks that are greater, even if reasonable care has been taken. Participation in traffic, for instance, always creates risks for others. Even if Michael drove a reasonably well-maintained car, an unforeseen failure of his breaks could create a threat for others. Even though, in a freak accident, he is not morally culpable for the threat he poses, Michael is still outcome responsible for resulting harms. On this basis, he incurs duties to assist those whom he has harmed. Suppose Michael hits a pedestrian. Under the circumstances, Michael, rather than an uninvolved third party, should take her to the hospital, provided that doing so is not unreasonably risky due to the state of his car.

By analogy, policies always entail risks that need to be balanced. In politics, uncontroversial and non-risky solutions to a problem are rare. Policy making always rests on selecting amongst different options, some of which may, with hindsight, turn out to be wrong. What differentiates most of our ordinary, everyday risks from policy making, however, is the magnitude of their respective repercussions. The choice of nuclear power as an energy policy, for instance, has potentially more widespread and dangerous effects than driving a reasonably well maintained car. Because of the scale of harms created by non-negligently applied policies, responsible actors incur duties of assistance to those adversely affected. In case of a radioactive leak, for example, we can expect those who create the energy policy to assist with the cleanup costs. Suppose one of Yellow's nuclear reactors leaks and nuclear material enters into a river that flows through Violet. It is not unreasonable to argue that Yellow incurs duties to assist Violet.

The question remains whether non-negligent outcome responsibility gives rise to duties to intervene. On the one hand, unlike in the case of a nuclear policy, outcome responsibility for Atrocity Crimes is shared. Further, unlike in cases where shared outcome responsibility arises from a moral wrong, a non-negligent foreign policy did

not violate negative duties not to get involved with the target state. It seems, then, that non-negligent outcome responsibility is necessary but not sufficient to justify duties to kill. Roughly, when considering causal contributions that involve non-wrongs, it depends on the magnitude of the contribution whether the duty to assist translates into a duty to intervene militarily. If non-negligent external factors play a fundamental role in the development of Atrocity Crimes, those responsible for them incur a duty to intervene.

### *C. Conclusion*

This part of the chapter tried to dispel the myth that mass killing takes place for purely indigenous reasons. As we saw above, foreign states often have an impact on events in the target state, albeit in different ways and at different times in history. The Argument from Shared Outcome Responsibility contends that causal contributions to Atrocity Crimes are sufficient to trigger duties to intervene in two paradigmatic cases. First, if present causal contributions amount to moral wrongs, states incur duties to defend those whom they have previously harmed against a new aggressor. Second, since colonial powers incur special responsibilities towards ex-colonies, they are remedially responsible for intervening in their internal affairs to halt Atrocity Crimes. However, the case of those states whose contribution to Atrocity Crimes was the outcome of a morally permissible course of action is less straightforward. The states in question incur duties of assistance, but whether the latter give to duties to intervene militarily depends on the magnitude of the contribution.

Having outlined two arguments in defence of the duty to intervene, we can now turn to the final question, namely, whether the duty to intervene can be distributed amongst individual members of potential intervening states.

## V

### **The problem of mandatory killing**

As we saw in Chapter I, military campaigns contain individual and collective levels of analysis. While it is true that rescue operations originate with the duties of citizens, it is not necessarily the case that individuals are obliged to participate in a military

campaign. To illustrate the point, let us draw on a thought experiment by Joel Feinberg:<sup>307</sup>

*Train Robbery: A train is stopped by a band of robbers. The robbers enter one of the carriages to steal money from the passengers. The passengers qua group are capable of overpowering the robbers, but this would entail that one or two of them die in the scuffle.*

According to Feinberg, since the (potential) sacrifice of one's life for the sake of the group is a heroic act, participation in the scuffle is supererogatory. It would be odd if morality required us to become heroes. According to Feinberg's view, we can criticise the group for not producing a hero, but individuals are exempt from blame for not confronting the robbers. Of course, Train Robbery differs from a mandatory rescue killing, since the threat is faced by the train passengers themselves. But the rationale of Feinberg's argument can be extended to cases where members of one group are asked to kill on behalf of members of another. More precisely, while it can be argued that potential intervening states are under a duty to intervene, individual members of these states are not under a duty to kill on behalf of non-citizens. Let us look at the issue from the perspective of the Egalitarian Argument and the Argument from Shared Outcome Responsibility.

Beginning with the former, the Egalitarian Argument stresses the capacity of potential intervening states to pursue a military campaign. However, the corporate capacity to intervene is not sufficient to prove that the duty to intervene can be distributed amongst individual citizens. To do so, the Egalitarian Argument would have to show that its very own Autonomy Constraint is compatible with the obligation to fight in an other-defensive war. To recapitulate, the Autonomy Constraint demands that mandatory killing must not undermine the rescuer's ability to autonomously choose a conception of the good life. Even if we grant Fabre's point that killing a culpable attacker on behalf of a victim does not hinder our pursuit of the good life, this does not mean that a mandatory rescue killing is entirely analogous to participation in an other-defensive war.<sup>308</sup>

First, while many participants in Atrocity Crimes are culpably responsible for unjust aggression, soldiers of the intervening state would also have to kill non-culpable individuals. On the one hand, as Chapter IV indicated, they may have to kill child

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<sup>307</sup> Feinberg, 'Collective Responsibility (Another defense)', pp. 72-73.

<sup>308</sup> Fabre, 'Mandatory Rescue Killings'.

soldiers during MHI. Further, given the arguments of Chapter V, they will also inflict considerable harms on non-combatants during a strategic bombing campaign. In her treatment of mandatory rescue killings, Fabre does not discuss the killing of innocent individuals and its impact on our capacity to pursue a good life. But it is not unreasonable to assume that the killing of an innocent person weighs (psychologically) more heavily than the killing of a (morally responsible) attacker. Thus potential rescuers can reasonably reject claims to render lethal assistance in case an innocent person would be harmed.

Second, domestic rescuers are not obliged to risk life and limb during a rescue killing. To be sure, if Chapter V is correct, states should minimise the risks to their soldiers during the conduct of MHI. But even this does not mean that participation in an other-defensive war becomes obligatory. For instance, if the intervening state pursues a strategic bombing campaign, it needs to rely on highly trained fighter pilots. Yet it cannot be obligatory for ordinary citizens to undergo extensive training that enables them to operate jet fighters during an other-defensive war.<sup>309</sup> Taxation is compatible with the Autonomy Constraint because it respects freedom of occupation. This is because it leaves individuals a choice over how they earn a living. But highly specialised military training limits our capacity to choose a conception of the good considerably.

The Egalitarian Argument, then, gives rise to a situation that resembles Feinberg's train robbery example. While political communities and states are under a duty to intervene, the latter cannot be distributed amongst citizens of the intervening state.

One potential reply is that, from within the logic of Egalitarian Argument, this conclusion is untenable. The duty to intervene will be assigned to fairly powerful states with large standing armies. The latter will also include highly trained military personnel. But there are reasons to be reluctant to argue that the professional soldiers are obliged to fight in an other-defensive war without giving their consent first. This is so because the main job of professional soldiers is to serve in a self-defensive war. Unless it has been made clear to them that their duties will also include serving in other-defensive wars, their services cannot be used to discharge the duty to intervene.

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<sup>309</sup> (ibid.), pp. 372-373.

Arguably, though, these conclusions may change when we take into account the Argument from Shared Outcome Responsibility. Intuitively, groups can make higher demands on their individual members in situations where they perpetrate wrongs against members of another group or stand in a special relationship to another group. Still, it is difficult to argue that this is sufficient to make the killing of innocent individuals mandatory or that citizens are obliged to acquire highly specialised skills.

Nevertheless, the status of professional soldiers may become more important here. Although professional soldiers usually expect to serve in self-defensive wars, they should be aware that the army is one tool through which states can address problems arising from their foreign policies. Sometimes the army is needed to rectify a wrong that has been committed or to reverse the contemporary effects of a particular policy. If this is correct, the Argument from Shared Outcome Responsibility suggests that the services of professional soldiers can be used without their consent in order to discharge the duty to intervene.

Admittedly, however, the Argument from Shared Outcome Responsibility does not entirely bridge the gap between individualist and collective levels of analysis. For one thing, it does not show that states are allowed to draft their citizens into the army in order to carry out MHI. Ultimately the success of the Argument from Shared Outcome Responsibility depends on the availability of *professional* soldiers who have been trained to very high standards. In practical terms, if we look at some of the most powerful states in international politics, this does not seem to be a problem. But it is important to acknowledge that the argument rests on the historical contingency of professionalised military life.

To conclude, the above points revealed that neither the Egalitarian Argument nor the Argument from Shared Outcome Responsibility entirely bridges the gap between individuals and collectives. In this sense, remedial responsibility for Atrocity Crimes resembles Feinberg's train robbery case. Collectives can be criticised for not developing institutions that make the halting of Atrocity Crimes possible. But unless individuals are highly trained professional soldiers, they cannot be obliged to risk their lives to fight in an other-defensive.

What does this mean for the right to be rescued? The answer is that the right to be rescued can sometimes not be fulfilled by states. It is useful to draw an analogy with

the right to food here. The right to food can only be fulfilled if food is available. Likewise, the right to be rescued can only be fulfilled if adequately trained professional soldiers are available who have been told that they will serve in other-defensive wars. It is important, though, to acknowledge that sometimes these soldiers are available. For instance, since Canadian Lieutenant-General Romeo Dallaire, leader of the UN peacekeeping mission in Rwanda, had asked for the permission to halt the Rwandan bloodshed, we can assume that he and his men consented to fighting in an other-defensive war.<sup>310</sup> The lack of political will to order an intervention to halt the Rwandan genocide must count as one of the great moral failures of the 20<sup>th</sup> century.

## VI

### Conclusion

Utilising the Domestic Analogy, the chapter took Fabre's argument in defence of mandatory rescue killings as a starting point for our defence of the duty to intervene. The idea of a mandatory rescue killing rests on the claim that if we accept the existence of duties to assist the needy, we must also accept obligations to render assistance via lethal means, at least insofar as the target of the use of force is a culpable attacker. In this case, V holds a right to be rescued against potential R. Likewise, we assumed that victims of Atrocity Crimes are holders of a right to be rescued. In order to develop the Domestic Analogy, the chapter first discussed how far duties of assistance can and should be assigned to states. We found out that states incur duties on behalf of their citizens. Any rescue operation, even if carried out by states, originates with the duties of individuals.

The chapter then presented two arguments, the Egalitarian Argument and the Argument from Shared Outcome Responsibility, which specify under what circumstances duties to assist can entail duties to declare an other-defensive war. Both arguments offer a strong defence of the duty to intervene. However, the real problem consists in showing that the collective duty to intervene can be distributed amongst citizens of potential intervening states. The chapter argued that individual citizens cannot be obliged to take part in an other-defensive war. While we can criticise political communities for not developing a sound institutional culture to

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<sup>310</sup> See, R. Dallaire, *Shake hands with the devil: the failure of humanity in Rwanda* (London: Arrow Books, 2005).

discharge their responsibilities, we cannot fault individual citizens for not serving in MHI. Regrettably, this means that sometimes the right to be rescued cannot be fulfilled. If that is the case, though, we can assume that those who failed to intervene owe some duties of compensation. Chapter VII examines this issue, amongst others, by providing a theoretical analysis of the phenomenon of humanitarian occupations.



## Chapter VII

### The Ethics of Humanitarian Occupation

*'How do groups who have been killing one another with considerable enthusiasm and success come together to form a common government? How can you work together, politically and economically, with the people who killed your parents, siblings, children, friends, or lovers? On the surface it seems impossible, even grotesque. But in fact we know that it happens all the time.'*

(Roy Licklider)<sup>311</sup>

*The core beliefs of our time are the creations of these anti-colonial struggles: the idea that all human beings are equal, and that each group has a right to rule themselves free of foreign interference. It is ironic that liberal believers in these ideas --- someone like me, for example --- can end up supporting the creation of a new humanitarian empire, a new form of colonial tutelage for the peoples of Kosovo, Bosnia, and Afghanistan. The reason simply is that, however right these principles may be, the political form in which they are realised – the nationalist nation building project – so often fails to deliver them. For every nationalist struggle that succeeds in giving its people self-determination and dignity, there are more that only deliver their people up to a self-immolating slaughter, terror, enforced partition and failure.*

(Michael Ignatieff)<sup>312</sup>

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<sup>311</sup> R. Licklider cited in: F. Cochrane, *Ending Wars* (Cambridge: Polity Press, 2008), p. 5.

<sup>312</sup> Ignatieff, *Empire Lite*, p. 122.

## I

### Before and after intervention

As one academic commentator, Robert Keohane, puts it, the question of what should happen *after* MHI will have an effect on what happens *before* military action is actually undertaken.<sup>313</sup> To illustrate the point, if MHI led to the creation of a failed state, this may raise doubts over its permissibility, not least for reasons of proportionality. Indeed, if what we can call post-atrocity societies, i.e. societies in which Atrocity Crimes have been successfully halted through military measures, were simply left to their own devices, it is to be feared that conflict erupts again. Intuitively, some efforts must be undertaken to stabilize post-atrocity societies. This intuition is reinforced by R2P's demand for a 'responsibility to rebuild' as well as the liberal legalist argument that sovereignty is an enabling condition. Accordingly, the other-defensive conception of MHI stresses that interveners must (re-)build institutions capable of preserving the peace amongst members of the target state.

International lawyers and politicians have responded to the challenges arising from the reconstruction of post-atrocity societies by introducing the concept of humanitarian occupation.<sup>314</sup> According to Gregory Fox, humanitarian occupations are large-scale 'social engineering projects' aimed at the transformation of post-atrocity societies. The key idea is that an external party temporarily assumes the role of local government in order to bring about the desired transition from conflict to peace in the target state. In this sense, a humanitarian occupation is 'government for the people' (of the target state), but it is neither 'government of the people' nor 'government by the people', since authority is exercised by an unelected and external force. Roughly, the concept of humanitarian occupation contains three main building blocks:

*Legitimate External Authority*: International lawyers acknowledge that it is often (legally) necessary (and proportionate) to occupy the target state. In addition to the

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<sup>313</sup> R. Keohane, 'Sovereignty after Intervention', in: J.L. Holzgrefe & R.O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, pp. 275-298.

<sup>314</sup> G. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008). The following account of the key features of humanitarian occupation is based on Fox's work. For further useful contributions to the subject, see S. Chesterman, *You, the People*, new ed. (Oxford: Oxford University Press, 2005); Cochrane, *Ending Wars*. Ignatieff, *Empire Lite*.

appeal to necessity, there are four jointly sufficient conditions that constitute what we can call Legitimate External Authority.

1. *The Temporal Authority Condition*: The rule over the target state's territory is temporarily limited, that is, the exercise of authority must not occur indefinitely.
2. *The Insider Interest Condition*: Although it is undertaken by an external party, a humanitarian occupation is 'government for the people' of the target state. Unlike earlier colonial administrators who ruled in the interest of *outsiders*, 'humanitarian occupiers' rule in the interest of *insiders*, that is, members of post-atrocity societies. Following the interest theory of rights, the chapter understands 'insider interest' in terms of a list of negative and positive claim-rights held individually and collectively by members of post-atrocity societies.
3. *The Consent Condition*: International lawyers stress that the occupation of the target state's territory is legitimate because it occurs consensually.
4. *The Internationalisation Condition*: Although humanitarian occupations can in theory be carried out by a single state, international lawyers argue that the target state's territory should be internationalised. That is to say, the target state's territory should be put under international administration.

*Statism*: As we already saw during our discussion of the Trojan Horse Objection in Chapter III, the practice and theory of humanitarian occupations affirms the centrality of the state unit in international law and politics. Consequently humanitarian occupations *do not* entail the dismantlement of the target state.

1. *The Argument from Political Sovereignty*: The target state should be reconstructed as a *politically sovereign* entity that can assume its equal moral and legal standing under the Principle of Sovereign Equality.
2. *The Argument from Territorial Integrity*: The target state should be preserved as a *territorially unified* entity.

*Good Governance*: Standards of 'Good Governance' and Human Rights Law provide the necessary point of orientation for the internal reconstruction of the target state. As Fox contends, the target state should be socially re-engineered in such a way that it becomes a liberal democracy.

Needless to say, these claims contain highly controversial normative assumptions. In response, this chapter tries to develop a more theoretical perspective on humanitarian occupations. There are two recent developments in just war theory that are highly conducive to this end. First, Darrell Moellendorf stresses the importance of the *jus ex bello* (abbreviated as JEB hereinafter), which governs the termination of conflict.<sup>315</sup> Second, Gary J. Bass and Brian Orend draw attention to the category of *jus post bellum* (abbreviated as JPB hereinafter) in order to develop a normative framework for just post-war relations.<sup>316</sup> In what follows, we can probe the relevance of these two categories for the ethics of humanitarian occupation.

But before we can engage in a more detailed philosophical discussion of the above issues, let us briefly state the following caveat. The chapter assumes the existence of a positive duty to assist members of post-atrocity societies with the reconstruction of their society.

First, given that the use of military force will always have unintended as well as potentially destabilising consequences, the intervening state incurs obligations to support post-conflict reconstruction.<sup>317</sup>

Second, taking into account the arguments from the preceding chapters, we can infer that if *a*) duties to assist can sometimes give rise to the duty to intervene and *b*) Atrocity Crimes represent a class of special crimes whose halting is morally obligatory, there will also be duties to assist members of post-atrocity societies cope with the aftermath of killing.

Third, since MHI is obligatory and those in the target state have a moral right to be rescued, states and political communities that were able to intervene but failed to discharge their duties owe duties of compensation to those in the target state. Those who failed to intervene are, in other words, obliged to contribute to the reconstruction of the target state.

The chapter falls into three main parts. Part II explores the concept of Legitimate External Authority. Part III takes issue with normative commitment to Statism

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<sup>315</sup> D. Moellendorf, 'Jus Ex Bello', *Journal of Political Philosophy*, Vol. 16/No. 2 (2008), pp. 123-136

<sup>316</sup> G.J. Bass, 'Jus Post Bellum' & B. Orend, *War and International Justice: A Kantian Perspective* (Waterloo/Ontario: Wilfrid Laurier University Press, 2000), chapter VII.

<sup>317</sup> A. Gheciu & J. Welsh, 'The Imperative to Rebuild: assessing the normative case for postconflict reconstruction', *Ethics & International Affairs*, Vol. 23/Issue 2 (2009), pp. 121-146, at pp. 124 -126.

underlying current theories of humanitarian occupation. Lastly, Part IV analyses the normative and practical limits of international law's appeal to Good Governance and Human Rights Law.

## II

### Arguing for occupation

#### A. *From negative peace to positive peace.*

Intuitively, the termination of *any* conflict is obligatory once a just cause has been realised. As JAB's Just Cause criterion suggests, the permission to wage war is tied to the protection of particular goods that are threatened, either internally or externally, by the society in question. Conversely, if they have ceased to pose a threat to outsiders or their own members, societies are entitled to a peaceful existence without *forceful* interference from outside, and parties are obliged to terminate hostilities. Let us try and find out when it is obligatory to terminate MHI.

On the one hand, the point of conflict termination, *terminate*, is met as soon as Atrocity Crimes have been halted. Since the other-defensive conception of MHI derives the right to intervene from the individual right to self-defence held by the victims of Atrocity Crimes, the permission to use force ceases to exist once the conditions that necessitated the exercise of individual rights to self/other-defence have been eliminated. In the words of modern conflict theory, *terminate* coincides with the achievement of a 'negative peace' threshold, which is characterised by the absence of atrocious violence.<sup>318</sup>

But bearing in mind the centrality of the idea of sovereignty as an enabling condition for our theory, the mere achievement of the negative peace threshold is a necessary but insufficient condition for *terminate* to obtain. Rather, according to the liberal legalist element of our theory of MHI, *terminate* coincides with the achievement of what conflict theorists call 'positive peace', which is characterized by the removal of the structural preconditions that led to the outbreak of violence.

While this seems to result in two different accounts of *terminate*, they are not mutually exclusive. The 'negative peace' threshold merely specifies the point at which

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<sup>318</sup> For an account of the distinction between negative and positive peace, see R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity, 2002).

the intervening state must *terminate hostilities* with the target state, that is, it defines the point at which the large-scale use of force in pursuit of the aims of MHI becomes impermissible. However, this is not to say that civil and political interventionist measures necessary for the creation of sovereign institutions must also be abandoned. Strictly speaking, once the negative peace threshold has been crossed, the society located in the target state is not yet classifiable as a post-intervention society. Instead, conceptually speaking, it is a post-atrocity society. As such, it is still subject to ongoing interventionist policies.

The positive peace threshold specifies the point at which even civil and political *interventionist* measures must be terminated. It reinforces the Temporary Authority Condition by providing a ‘cut-off’ point for intervention. Conceptually speaking, once the positive peace threshold is met, a post-atrocity society becomes classifiable as a post-intervention society.

Yet there is no unambiguous definition of when the positive peace threshold has been reached. Whereas the negative peace threshold depends on an assessment of whether atrocious killing has (been) stopped, it remains open what kinds of functions post-atrocity societies must be able to perform in order to speak of an ‘enabling’ sovereign order. Roughly, we can expect that the community located within the target state’s borders must be peaceful, self-sustaining and capable of exercising its right to collective self-determination.<sup>319</sup> Admittedly, though, the imprecision of these values renders the positive peace threshold prone to abuse by powerful actors in world politics, thereby threatening the Insider Interest Condition (and reintroducing the Trojan Horse Argument). We return to this problem in a short moment. For the remainder of this section let us focus on the implications of these two thresholds for our understanding of JIB, JEB and JPB.

Starting with JIB, while it appears that the achievement of the negative peace threshold renders any considerations of JIB superfluous, it is certainly too optimistic to assume that, despite the endorsement of civil and political interventionist measures, no further uses of force are necessary to pacify post-atrocity societies. It is questionable, though, whether the use of force during humanitarian occupation is assessable via the same normative criteria as the actual halting of Atrocity Crimes.

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<sup>319</sup> For a similar argument, see S. Reccia, ‘Just and Unjust Post-war Reconstruction: How much external interference can be justified?’, *Ethics & International Affairs*, Vol. 23/Issue 2 (2009), pp. 165-187.

Note that, in a domestic context, the regulatory framework governing the use of force is more restrictive than JIB. For instance, although, as the Car Chase Case in Chapter V implied, the police may sometimes be permitted to non-intentionally harm bystanders, it is not permitted to adopt, say, a policy of strategic bombing. Indeed, given that one of the justifications for the use of strategic bombing (and similar measures) was to *stop* Atrocity Crimes, the ethical framework governing the use of force becomes more restrictive once the negative peace threshold has been crossed. As a result, considerations of JIB have limited relevance for the ethics of humanitarian occupation.

The implications of our thresholds are more complex in the context of JEB and JPB. This is so because we can detect two interpretations of their respective scopes. According to what we may call the ‘broad interpretation’ of JEB, its principles encompass the creation of sovereign institutions. Consequently JEB governs the termination of forcible *and* non-forcible interventionist measures. According to what we can call the narrow interpretation of JEB, its principles merely apply to the termination of forcible interventionist measures. Obviously, the broad interpretation of JEB narrows the scope of JPB to post-intervention societies, while, for the narrow interpretation of JEB, the reconstruction of post-atrocity societies falls into the remit of JPB. Conversely, a broad interpretation of JPB, which maintains that post-atrocity reconstruction is the task of JPB, restricts the scope of JEB. The two categories, then, stand in an inverse relationship to each others. If one is restricted, the other automatically expands.

In what follows, let us adopt the broad interpretation of JEB. The point, for the other-defensive conception of MHI, is that the conflict that engendered MHI is not over until suitable institutions have been created. JEB’s task of formulating principles for the termination of conflict captures this better than JPB. The latter becomes important once sovereign institutions have been created. Chapter VIII, the concluding chapter of this thesis, briefly indicates some prospects for research on JPB, but this chapter focuses on JEB.

Although we have argued that the reconstruction of post-atrocity societies falls into the domain of JEB, the question is whether JEB is superfluous. After all, as Alex Bellamy argues, JAB’s just cause criterion already defines the goals of an other-

defensive war.<sup>320</sup> But this does not establish the redundancy of JEB. The introduction of JEB reflects that different methods are necessary to accomplish the aims of MHI. Classic just war theory, via the categories of JAB and JIB, provides us with normative principles, however problematic, for the use of forcible interventionist measures. By contrast, as the distinction between the negative and positive peace thresholds illustrates, JEB's task is to develop principles for the construction of sovereign institutions once Atrocities Crimes have been militarily halted.

Having established that military hostilities between the target and intervening state should be halted once Atrocity Crimes have been stopped, let us now inquire what the termination process should look like. To do so, Section B probes the Consent Condition inherent in the concept of Legitimate External Authority.

*B. From termination by consent to occupation by consent?*

Although Jeff McMahan and Michael Walzer remind us that the outbreak of war is coercive because it is non-consensual, it appears intuitively desirable to end conflict consensually. The current legal and political practice of terminating hostilities via peace treaties reflects this intuition. Thus, notwithstanding the earlier argument that the *initiation* of MHI does not require the consent of the target state, let us critically assess whether the *termination* of *forcible* interventionist measures requires a peace treaty between the intervening and target states. Generally, peace treaties have a tripartite function.

1. They indicate *how* conflicts should be terminated, namely by consent.
2. While the initial act of aggression usually indicates that a conflict has begun, a signed peace treaty signals that parties have entered into 'post-war' or 'post-atrocity' relations.<sup>321</sup>
3. Peace treaties set out principles that govern post-conflict/post-atrocity relations. For instance, parties might agree to reparations, the return of prisoners of war, or the distribution of territory.

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<sup>320</sup> A.J. Bellamy, 'The responsibilities of victory: Jus Post Bellum and the Just War', *Review of International Studies*, 34 (2008), pp. 601 -625, at p. 624.

<sup>321</sup> International law, of course, treats the signing of a peace treaty as a sufficient condition for the establishment of negative peace. But given the dynamics of contemporary asymmetric conflicts where fighting continues even after the 'official' termination of hostilities, it remains doubtful that a peace treaty can be a sufficient criterion for negative peace.



Our discussion of the role of peace treaties must pay attention to two separate theoretical issues. On the one hand, we must assess whether consent is required to terminate hostilities between the target and intervening states. For simplicity's sake, let us call this idea 'termination by consent'. On the other hand, since we are concerned with humanitarian occupations, we must critically analyse how far consent is required for the occupation of the target state's territory. Let us call this idea 'occupation by consent'; it is, obviously, closely related to the Consent Condition inherent in the concept of Legitimate External Authority. The following four arguments show that neither 'termination by consent' nor 'occupation by consent' can withstand critical scrutiny.

First, from a practical perspective, just as the leadership of the target state is unlikely to agree to the initiation of MHI, it is unlikely to consent to a workable peace treaty. This is so because the concept and practice of humanitarian occupation challenges the authority of the target state's leadership, for it is hard to see how the rule of law could be established if a government guilty of ordering Atrocity Crimes stayed in power. Ultimately, then, the governing elites of the target state would have to consent to measures running contrary to their own interests. Of course, the problems associated with uncooperative elites could be avoided if consent was directly obtained from the people of the target state. But in addition to the problem that it will be practically difficult to devise a reliable mechanism for securing their consent, it is unlikely that those members of the 'people' belonging to the perpetrator group are going to agree to surrender their power.

Second, from a more philosophical perspective, the function of contracts is to transform liberties into duties and vice versa. Now, if one follows the Orthodox View and affirms the moral *equality* of soldiers, a peace treaty would indeed be required in order to transform the equally held liberty to target enemy combatants into a (negative) duty not to do so. But since we rejected the Orthodox View in Chapter IV, combatants<sub>target\_state</sub> are under a negative duty not to use force against combatants<sub>intervening\_state</sub>. Since it merely affirms an *already existing* duty, a peace treaty is as devoid of *moral* substance as a contractual agreement between the Wells Fargo Bank and the James Gang, which obliges the latter not to rob the former. If this is correct, 'termination by consent' must be rejected.

The third argument against peace treaties applies to ‘termination by consent’ and ‘occupation by consent’ in equal measure. As Thomas Hobbes puts it, the defeated party enters into a peace treaty ‘to avoid the stroke of death’.<sup>322</sup> But because most contractualist theories assume a rough symmetry between the contracting parties, a treaty founded on what international lawyers call ‘coerced consent’ cannot be morally valid.<sup>323</sup> If it refused to sign the peace treaty, the target state’s territory would be occupied anyway by a powerful intervening state. After all, we are assuming that the intervening state is victorious, which means that it must be more powerful than its adversary. Just as a ‘signed confession’ elicited under torture cannot count as admissible evidence in court, the target state’s ‘consent’ to the termination of hostilities and the subsequent occupation of its territory is not morally valid.

The fourth argument against peace treaties primarily raises doubts over the normative soundness of ‘occupation by consent’. To explain, since humanitarian occupations are social engineering projects, the occupying party must be at liberty to create the necessary legislation for the creation of new sovereign institutions. The normative challenge is to show that the intervening state possesses the required moral liberty to govern post-atrocity societies. Following the consent tradition of governmental legitimacy, the normatively most acceptable solution to this problem is to argue that the moral liberty to administer the target state’s territory results from a peace treaty. More precisely, one can argue that Legitimate External Authority comes into existence if (and only if) the target state contractually transfers its right to rule, which, as we saw in Chapter II, includes a liberty to enforce and design legislation in/for its territory, to the intervening state.

But this argument runs into two problems. First, although it is uncontroversial that some rights, such as the right to private property, are contractually transferrable, it is by no means obvious that the same applies to the right to rule. Intuitively, there is a difference between a contract through which Amy transfers her right over her bike by selling it to Ben and a contract in which a sovereign entity transfers its right to rule over individuals (no less) to another party.

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<sup>322</sup> T. Hobbes, *Leviathan*, editor: R. Tuck (Cambridge: Cambridge University Press, revised student edition, 1996), chapter XX, at pp. 141 -142. For a more extensive treatment of the problem of coerced consent, see G. Fox, *Humanitarian Occupation*, pp. 177-200.

<sup>323</sup> This does not change anything about the problem of duress discussed in Chapter IV. A person under duress is not excused for committing an act of murder. However, any contract entered into under duress is invalid.

Second, just as Amy cannot enter into a morally valid contract to sell something that does not belong to her, the target state cannot contractually transfer a right it does not hold. As Chapter III pointed out, a state that commits or tolerates Atrocity Crimes is illegitimate. This means that the target state's consent is irrelevant to the question how the 'humanitarian occupier' acquires Legitimate External Authority over post-atrocity societies. For these reasons 'occupation by consent' collapses.

If the above is sound, it becomes apparent that the idea of a peace treaty is of little value in the present context. In fact, given that the target state neglected its duties towards its citizenry, it is permissible for the intervening state to terminate hostilities by unilaterally occupying the target state's territory. In order to strengthen the moral case for non-consensual occupation, the remainder of this section outlines what we can call the Teleological Argument.

The Teleological Argument rests on an analogy between post-atrocity societies and the Hobbesian state of nature. Keohane stresses that, just as the absence of trust in the Hobbesian state of nature leads to an imaginary war of all against all, the absence of 'civic trust' in post-atrocity societies not only acts as an impediment to the creation of sovereign institutions but challenges the existence of society as such.<sup>324</sup> Just as the *possibility* of a war of all against all in the Hobbesian state of nature makes individuals distrust each other; the mere *possibility* of the recurrence of Atrocity Crimes will undermine the social existence of post-atrocity societies. Further, the sheer *legacy* of Atrocity Crimes will make it difficult for members of post-atrocity societies to develop sufficient levels of civic trust to peacefully solve collective action problems.

If the analogy between the Hobbesian state of nature and post-atrocity societies holds, it can serve as the foundation of a *teleological* justification of unilateral occupation. The resulting Teleological Argument replaces the Consent Condition within the concept of Legitimate External Authority. In addition to the establishment of sovereign institutions, the *telos* of humanitarian occupations is nothing less than the preservation of a social and political existence for those in the target state. In other words, non-consensual occupation, though representing a radical step, serves the interests of 'insiders' by enabling them to have a *social* rather than an 'atomistic' existence. If this is correct, the Teleological Argument is compatible with the Insider

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<sup>324</sup> Keohane, 'Sovereignty after Intervention'.

Interest Condition. Admittedly, however, the Teleological Argument has few safeguards against abuse by outsiders. In order to deal with this problem, Section C explores its relationship with the Internationalisation Condition inherent in the concept of Legitimate External Authority.

*C. Insiders & outsiders: some thoughts on the internationalisation of territory*

One defining feature of humanitarian occupations is that it is carried out by outsiders in the service of insiders. Although the Teleological Argument (initially) allows almost any party capable of preserving the peace to occupy the target state, current international legal practice suggests that humanitarian occupations should not be carried out by a single state. Instead, the target state's territory should be 'internationalised'. In practice, this means that the intervening state, once it has occupied the territory of the target state, applies to the UN Security Council in order to transfer authority over the target state's territory to the international community. The Internationalisation Condition holds that Chapter VII of the UN Charter acts as a legal justification for foreign rule.<sup>325</sup> But the Insider Interest Condition demands a more explicit justification of internationalisation that emphasises the interests of insiders. To close this gap, the section outlines two insider-based justifications of internationalisation.

Any normative justification of internationalization must show that the international administration of the target state is a sound mechanism for ensuring that the rights of those in the target state are vindicated. It becomes apparent that the value of internationalisation is largely instrumental, depending on the Security Council's ability to protect the rights of members of post-atrocity societies. If it was possible to outline an alternative arrangement that accomplishes this task better, there is no reason not to abandon internationalisation. Until such an arrangement can be found, though, let us inquire in how far internationalisation can aid the cause of rights.

In regard to negative rights, Bass contends that an occupying power is under a negative duty not to impose its own culture and political system on the vanquished.<sup>326</sup> Undoubtedly the creation of sovereign institutions requires 'social engineering'. But there must be certain limits on the social engineering process. Now, although negotiation and bargaining processes in current international institutions are far from

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<sup>325</sup> Fox, *Humanitarian Occupation*, chapters 3 & 6.

<sup>326</sup> Bass, 'Jus Post Bellum'.

perfect, they limit the potential for abuse of the social engineering process. The necessity for different actors in an international institution to accommodate each other's interest means that no party will have exclusive free reign to reshape the target state according to its own conception of the good. In this way, internationalisation reinforces negative rights. Note that this also enables us to deal with the imprecision of the positive peace threshold. No state is able to indefinitely extend its rule over the target state. The international community must decide together whether or not post-atrocity societies can be released into independence.

Yet, while internationalisation may be a sound mechanism for the protection of negative rights, its relationship with positive rights is more ambiguous. As critics of internationalisation can point out, the fulfilment of positive duties does not usually require any specific institutional arrangement. The mere existence of positive 'duty to reconstruct' does not prove that internationalisation constitutes the best way to fulfil it. But there is at least one reason in favour of internationalisation. Let us assume that some duties of reconstruction are owed directly to individual members of post-atrocity societies so they can fulfil their basic rights. It is easier to ensure that individuals receive the assistance they are entitled to if an international institution allocates resources.<sup>327</sup>

Although it is possible to make a theoretical case for internationalisation, the idea may encounter two practical difficulties. First, international institutions may be unwilling to take responsibility for the occupation. But as the development of R2P as well as the legal framework of humanitarian occupation confirm, the international community has been more willing to aid the reconstruction of post-atrocity societies than to engage in the actual halting of Atrocity Crimes. Furthermore, for strategic reasons it seems unlikely that members of the international community would be entirely indifferent to the situation in the target state. If a unilateral occupier is not capable of constructing sovereign institutions for the target state, a resulting 'failed target state' conflicts with the long term security interests of international society. But an unchecked increase in power for the intervening state through successful unilateral humanitarian occupation would not be in the interest of the international community either. Considering these two points, the international community has strong reasons to participate in the reconstruction of the target state.

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<sup>327</sup> This is, roughly, Brock's position discussed in Chapter II. G. Brock, *Global Justice*.

Second, it is not too farfetched to imagine a situation where the intervening state is unwilling to transfer control over the target state's territory to an international institution. However, since the costs resulting from the reengineering of post-atrocity societies are likely to be high, it is questionable whether one party on its own is able to stem them. It is not unreasonable, then, to suppose that the intervening state requires outside support. If it does not, the international community is justified in applying diplomatic and economic pressure in order to gain access to the target state. For reasons of space, we cannot provide an account of these measures here, though they will obviously have to be elaborated.

Last but not least, it is necessary to assess whether the demand for internationalisation undermines the earlier claim, underlying the other-defensive conception of MHI, that *unilateral* MHI is, in principle, permissible. The other-defensive conception of MHI is compatible with the Internationalisation Condition because there are normative differences between the creation of negative peace and 'positive' social engineering.

To illustrate the point, while Norman the Neighbour is justified in stopping members of a criminal gang beating up a rival, he cannot unilaterally formulate and enforce policies that remove the underlying causes of gang related crime in his neighbourhood. First, because his neighbours, like members of the international community, have a stake in the social environment they inhabit, they should be allowed to contribute to the solution of social problems affecting them. Second, since his neighbours, like members of post-atrocity societies, are holders of rights, any policy enacted to tackle gang crime must respect certain 'side constraints'. The multilateral transformation of the neighbourhood, like the multilateral re-engineering of post-atrocity societies, is instrumentally desirable if (and only if) it represents the best scheme for the vindication of rights. If the analogy holds, the intervening state's permission to unilaterally intervene in order to *halt* Atrocity Crimes does not automatically translate into a unilateral permission to reengineer the social structure of post-atrocity societies.

#### D. *Conclusion*

This part of the chapter began by noting that the other-defensive conception of MHI leads to two 'termination points', namely the negative and positive peace thresholds.

The former obtains once Atrocity Crimes have been halted, while the latter is met once sovereign institutions have been reconstructed. It was argued that JEB governs the creation of negative peace and positive peace.

Our subsequent engagement with JEB sheds some light on the constituent elements of the concept of Legitimate External Authority. From a normative perspective, the difficulty consists in showing that an external party can gain legitimate authority over another state's territory. If our observations on the value of peace treaties are sound, the target state's consent cannot account for how Legitimate External Authority comes into being. Due to the failure of the Consent Condition, we face a complex interplay between the Temporary Authority Condition, the Teleological Argument, the Insider Interests Condition and the Internationalisation Condition. Based on the above, we may define the concept of Legitimate External Authority as follows:

*Legitimate External Authority exists if (and only if) members of an international organisation multilaterally and not indefinitely exercise authority over the territory of a post-atrocity society in order to a) fill the power vacuum created by the removal of a government guilty of committing Atrocity Crimes, b) preserve the possibility of a social existence for members of post-atrocity societies, c) vindicate the negative rights of members of post-atrocity societies, d) discharge positive duties to reconstruct post-atrocities in the most efficient and effective way, and e) establish positive peace via the creation of sovereign institutions.*<sup>328</sup>

Having shown how Legitimate External Authority can be acquired, we must investigate how it should be put to use. That is the purpose of Parts III and IV.

### III

#### **When problems become solutions: a qualified defence of the state**

The enthusiasm for statism amongst theorists of humanitarian occupation appears odd. This is so because the perpetration of Atrocity Crimes either occurred at the hands of the target state or resulted from the latter's inability to preserve the peace amongst those under its rule, particularly in situations where two or more hostile groups are located within its territory. In this light, it seems bizarre that theorists of humanitarian occupation recommend the institutions of the *territorially unified target*

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<sup>328</sup> Obviously, the concept of Legitimate External Authority resembles Joseph Raz's theory of state legitimacy. See, J. Raz, *Morality of Freedom*. For a critique, see L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1990).

*state* as a solution to the problems arising from its very existence. Nevertheless, since the other-defensive conception of MHI is statist in orientation, the section outlines three *instrumentalist* defences of the state. As Chapter II emphasised, liberals are united in their refusal to accord the state intrinsic value. The reconstruction of the target state *as a state* is only defensible on instrumental grounds.

However, we will not discuss the issue of territorial integrity here. There are three reasons for why this omission is justified. First, in the philosophical literature on secession, there is a broad consensus that groups which have been victims of Atrocity Crimes are holders of a moral right to secede.<sup>329</sup> Second, sometimes it is practically impossible to separate hostile groups occupying the same territory. Third, especially in cases where killing was not the result of territorial disputes, the question of secession is secondary to the issue of post-atrocity reconstruction. In what follows, let us assume that victims and perpetrators, if this distinction can be neatly cut, must learn to live together.

Now, the first instrumentalist argument in favour of the reconstruction of state institutions stresses that the non-intervention norms attached to state sovereignty are useful insofar as they *a)* offer protection from the global tyranny of a world state and *b)* ensure that communities are capable of pursuing their own conception of the common good. The last point is particularly important when considered against the background of the concept of Legitimate External Authority. The aim of re-establishing *sovereign* state institutions ensures that the humanitarian occupier only temporarily exercises authority over the target state's territory.

Second, as we saw in Chapter III, for the liberal legalist position, state sovereignty is an enabling condition. The function of the state is to preserve the peace amongst individuals and groups who pursue different conceptions of the good life. Moreover, following Thomas Nagel, state institutions are needed to realise justice. Bearing in mind the problems with the post-statist conceptions of MHI identified in Chapter II, it is unlikely that we could construct a non-state unit that can accomplish these tasks as effectively as the territorially bounded state. In particular, as liberal legalists contend, the preservation of peace is only possible via the provision of a number of

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<sup>329</sup> For two of the most prominent philosophical works on secession, see A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder/Col: Westview Press, 1991) & C. Wellman, *A Theory of Secession: the case for political self-determination* (Cambridge: Cambridge University Press, 2005). For a critical legal response to secession, see Fox, *Humanitarian Occupation*.



public goods, most importantly a functioning legal system.<sup>330</sup> While it is true that recent years have witnessed a proliferation of, say, international human rights legislation, the successful implementation and enforcement of the law often relies on domestic legal systems. The same holds true with regard to the provision of many other public goods.

The third instrumentalist argument in favour of the state has to do with the closely related issues of representation and accountability. In regard to the former, let us assume that societies have an interest in entering into relations with other societies. State institutions provide a useful mechanism, though by no means the only one, through which this can be achieved. States, for instance, represent their citizens in international bodies, lobby for their interests, negotiate agreements on their behalf and maintain diplomatic ties with other states.

In regard to the question of accountability, in contemporary political practice we usually hold state officials accountable through the institutions of the state, most notably via national elections and the various subsidiary bodies of the state. In this respect, it is also noteworthy that currently existing models of representative democracy developed against the background of territorially demarcated state institutions. Of course, this argument largely presupposes that the target state should be given some form of representative government, but we shall leave this potentially divisive point until Part IV.

Although these three arguments indicate why state institutions may be instrumentally valuable, they do not yet constitute a successful defence of the state. Especially the invocation of the values of accountability and representation indicate that we cannot divorce the legal commitment to statism from its appeal to Good Governance and Human Rights Law.

Ideally, the target state should be internally reconstructed in such a way that it becomes legitimate, not least because the right to rule would enable it to carry out the above functions. For instance, it would grant the target state (at least) a moral liberty to preserve the peace by enforcing the law against those under its jurisdiction. Also, as Chapter II showed, the right to rule will grant the target state immunity from outside intervention, thereby aiding its task of protecting communal integrity.

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<sup>330</sup> The argumentation follows Fox here, see Fox, *Humanitarian Occupation*, p.148-154.

Furthermore, as Allen Buchanan points out, a legitimate state will guarantee some degree of accountability and representativeness.<sup>331</sup> Finally, following the liberal view of international politics from Kant's *Perpetual Peace* to Rawls' *Law of Peoples*, a morally legitimate regime is less likely to act aggressively towards others.

Because it is of central importance for humanitarian occupation, let us discuss the internal reconstruction of the target state in Part IV.

## IV

### Social engineering and Liberal Democracy

#### A. *Maximal or minimal transformation?*

The idea of humanitarian occupation is remarkably radical. For one thing, theorists of humanitarian occupation deny one of the central claims of Principle of Sovereign Equality outlined in Chapter II, namely that states are at liberty to choose their internal constitution as they wish. For another, humanitarian occupations also challenge the customary understanding of the (legal) powers of an occupying party in international law. It denies that an occupier is allowed to create legislation for the occupied territory if (and only if) it is *militarily* necessary to uphold the occupation. Instead, as Fox contends, the standard for the reconstruction of post-atrocity societies should be nothing less than liberal democratic. Put crudely, the aim of humanitarian occupations is democratisation from above where UN officials download ready-made constitutions from the internet, fund political parties and supervise national elections.

That said, legal critics of humanitarian occupation argue that 'externally imposed models of national governance should be distrusted [...] because they [are] regarded as pre-empting organic national processes of political reform'.<sup>332</sup> According to this view, the reconstruction of post-atrocity societies as liberal societies represents a form of 'western triumphalism' that marginalises more 'indigenous, organic' forms of self-determination. Similarly, some philosophers have doubted the applicability of the liberal democratic model to non-liberal societies. For Bhikhu Parekh, democratisation from above is a hopeless undertaking because non-liberal societies are not necessarily committed to the moral individualism underlying democratic

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<sup>331</sup> See, Buchanan, 'Recognitional Legitimacy and the State System'.

<sup>332</sup> Fox, *Humanitarian Occupation*, pp. 154-155

practice.<sup>333</sup> For Rawls, ‘democratic engineering’ is a deeply illiberal project, since it contravenes the liberal emphasis on toleration. Rawls argues that liberal societies should not impose their model of government on their non-liberal counterparts.

Just war theorists are equally divided on what reconstruction should entail. Some, like Brian Orend, seem to be rather optimistic about the applicability of liberal democracy to post-atrocity scenarios, whereas others, most notably Gary Bass, take a more critical position. To make sense of this debate, Bellamy offers a useful distinction between ‘minimalist’ and ‘maximalist’ interpretations of reconstruction.<sup>334</sup> According to the former, any changes to the social and political environment of a particular post-conflict scenario should be kept to a minimum. Thus, while minimalists are likely to agree with the inherent statism of theories of humanitarian occupations because it preserves the existing system of states, they reject the appeal to Good Governance and Human Rights Law. In particular, as Bellamy points out, they fear that Good Governance imports alien elements of liberal political theory into the ethics of war. Ideally, according to the minimalist position, a post-conflict environment should be returned to the *status quo ante bellum* once hostilities have been terminated.

Let us begin by responding to the minimalist position. First, the claim that a return to the *status quo ante bellum* is desirable should be approached with some caution. Given the development of the concept of humanitarian occupation in international law, it seems that our political and legal reality has already overtaken minimalism. It is widely accepted that the stabilisation of post-atrocity societies requires reconstruction efforts that exceed what minimalists would normally be prepared to permit. Furthermore, since the pre-intervention order in the target state gave rise to Atrocity Crimes, it is hard to see how a return to it could ever be morally desirable. Finally and directly related to the preceding point, the minimalist approach is incompatible with the other-defensive conception of MHI. The latter claims that the establishment of sovereign institutions is a just cause for MHI. This means that, at the level JAB, our theory of MHI is already structured in a way that prepares the later rejection of minimalism

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<sup>333</sup> B. Parekh, ‘The cultural particularity of liberal democracy’, in: D. Held (ed.), *Prospects for Democracy: North, South, East & West* (Cambridge: Polity, 1993), pp. 156-175.

<sup>334</sup> Bellamy, ‘The responsibilities of victory’.

Second, the charge that the appeal to Good Governance and Human Rights Law turns JPB into just another outpost of liberal political theory is a straw man. Arguably, just war theory should not be seen as a fixed body of work but open to revision. Since some of the assumptions of just war theory are deeply problematic, the tools of liberal political theory are useful in trying to develop it further. Moreover, since political theory has always been a pluralistic discipline, the development of liberal versions of humanitarian occupation does not preclude the possibility of developing non-liberal perspectives on it. Finally, because just war theory cannot entirely discard of questions relating to the good (political) life, it is, by definition, not a minimalistic theory. Even those who are committed to minimalism usually rely on certain normative judgments about the value political community, the importance of state sovereignty, the virtue of tolerance, or the desirability of pluralism. It is a legitimate undertaking to approach these questions from a liberal perspective.

If the above points are correct, we are left with the maximalist approach, which appears more hospitable towards the idea of humanitarian occupation than its minimalist counterpart. In a nutshell, maximalists endorse social engineering and reject the claim that a return to the *status quo ante bellum* is possible and desirable.

However, it is necessary to offer a more fine-grained account of maximalism than Bellamy. More precisely, while the insights of liberal political theory usually play an important role in the maximalist camp, we should distinguish between what we can call Strong Maximalism and Moderate Maximalism. Both positions accept that sovereign institutions and the rule of law can only result from considerable social engineering efforts, but differ on the extent to which post-atrocity societies should be transformed in order to achieve this aim. Strong Maximalism maintains that humanitarian occupiers should transform post-atrocity societies into liberal democracies. Moderate Maximalism, by contrast, holds that, although significant changes to the social structure of post-atrocity societies are necessary in order to remove the structural preconditions that led to the outbreak of Atrocity Crimes, social engineering should stop short of creating a liberal society. The moderate position overlaps with Rawls' *Law of Peoples*, whereas the strong position shares greater proximity with a universalistic understanding of liberalism.

The question we face now is whether Strong Maximalism is normatively preferable to Moderate Maximalism. We can answer it by returning to our earlier discussion of Walzer's Millian Argument in Chapter II. To recapitulate, following Mill's observations on non-intervention, Walzer argues that it is impermissible to militarily intervene in another society's internal affairs in order to change its political system. As we argued in Chapter II, the Millian Argument gives rise to two interpretations. According to what we called the Argument from Excessive Harm, which is closer to Mill's utilitarian background, the forcible creation of a new regime is disproportionate because it is likely to be unsuccessful. On the other hand, according to what we called the Argument from Undue Interference, the forcible creation of a new regime, even though it may be proportionate in very rare circumstances, violates the right to collective self-determination of a political community.<sup>335</sup> Let us look at both of these arguments in Sections B and C, respectively.

#### B. *Reconstruction and the limits of philosophy*

Although the problem of proportionality is largely consequentialist in orientation, one of the perennial issues in the just war debate is whether all harms should be, as the utilitarian calculus demands, counted equally. Suppose that the occupying power starts to implement policies which are met with resistance from some sections of the population of post-atrocity societies. Unfortunately, resistance quickly transforms itself into a violent uprising, leading to tensions between different groups in post-atrocity societies or neighbouring territories. While this raises considerable doubts over whether a liberal regime would be able to guarantee the peace, it is possible to maintain that, in order to assess the proportionality of Strong Maximalism, one should only count the harms for which the occupying power is directly responsible, but not those caused by the resistance movement. Intuitively, this appears acceptable because members of the resistance movement are engaged in killing, not the occupying power.<sup>336</sup>

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<sup>335</sup> Of course, there are important differences between Walzer's use of the Millian Argument and the present endeavour. While, for Walzer, the Millian Argument is largely concerned with the permissibility of *the use of force* in order to create a particular type of regime, the current analysis is interested in the permissibility of the use of social engineering in order to create a liberal basic structure. Nevertheless, as we shall see below, the structure of the Millian Argument can serve as a rough analytical template for post-atrocity reconstruction.

<sup>336</sup> This was Prime Minister Tony Blair's reply to the Iraq Inquiry headed by Sir John Chilcot. When pressed on the lack of planning for the stabilization of Iraq after the removal of Saddam Hussein, Blair responded that although the lack of planning was lamentable, insurgents were responsible for

To reply, it is true that the occupying power is not directly responsible for the killing. But it is worthwhile emphasising that it has a duty of care towards those under its control, not least because it has effectively assumed the functions of domestic government. The duty of care obliges an occupying power to consider all the possible harms that may arise from the introduction of a particular policy, even if it is not directly responsible for them. Depending on the circumstances, if a specific policy has become untenable, it must be revoked or sufficiently reformed. Obviously, if the policies necessary to realise Strong Maximalism undermine the peace, the duty of care demands that appropriate alternatives be sought to stop the bloodshed. The following discussion, then, assumes that the debate between Strong and Moderate Maximalism should be assessed in terms of a broad understanding of proportionality where all harms are *roughly* counted on a similar scale.

With these preliminary observations out of the way, we can now examine four ways in which Strong Maximalism may cause disproportionate harms. The first one harks back to what Rawls once called the circumstances of justice. In a nutshell, a society that is plagued by extreme scarcity will not be able to successfully institutionalise liberal democracy. Moreover, for liberal democracy to be possible citizens need to possess a sense of justice that motivates them to cooperate with each other under political institutions.

This is not the place to discuss Rawls' theory in any detail, but the idea of the circumstances of justice may hold a clue as to why the reconstruction of post-atrocity societies along liberal lines may cause disproportionate harm. Post-atrocity societies are likely to be very poor and, given that Atrocity Crimes took place, its members lack the required sense of justice. More generally, post-atrocity societies may not have the moral, religious and political traditions required for a liberal regime. As a result, the creation of a liberal form of government might be resisted by the local population, perhaps, in a worst case scenario, leading to regression from a cold conflict into a hot one.

The first aspect of this argument can be tackled relatively easily. Although it is true that post-atrocity societies are usually amongst the most disadvantaged societies, the duty to reconstruct ensures that its members receive sufficient resources to rebuild

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most of the carnage that followed. While this is true, it can hardly constitute a valid excuse. One cannot assume the functions of government without a plan of what governing a particular country entails.

its institutions. The second aspect of this criticism, however, is more difficult to deal with; for the imposition of a completely alien political system on a specific culture may indeed turn out to be highly problematic. Moreover, if members of post-atrocity societies have no desire to cooperate under liberal institutions, an ambitious social engineering project is unsustainable.

However, there are some steps the occupying power may take in order to make Strong Maximalism more attractive to insiders. First, the occupying power should not adopt a pure ‘top down’ approach to democratisation. Rather, as Michael Walzer suggests, since no culture is a monolithic entity, it should try to gain the support of those groups in post-atrocity societies supportive of the social engineering project.<sup>337</sup> Furthermore, occupiers need to stress the personal benefits for members of post-atrocity societies that follow from the introduction of a liberal political system. The next section shows in what sense liberal institutions are more beneficial than others. If these efforts turn out to be fruitless, it might be necessary to abandon Strong Maximalism.

The second reason for why Strong Maximalism should be rejected on grounds of proportionality can be found in Bass’ work. Echoing Rawls, Bass argues that it is not permissible to impose one’s own political system on another society. Just as war must be conducted with an acceptable measure of restraint, i.e. by discriminating between combatants and non-combatants, any reconstruction efforts undertaken as part of a humanitarian occupation must be similarly restricted.<sup>338</sup> It is not clear, though, why Bass thinks the analogy between discrimination and reconstruction is appropriate. It is only possible to answer this question if we consider the role of discrimination in JIB. Indiscriminate killing, as was pointed out on previous occasions, is not only morally deplorable because it violates the rights of defenceless people. In addition, it is morally objectionable because it undermines the basis of society by destroying the practices and traditions defining social relations between members. It leads, in Claudia Card’s words, to the social death of a society. If Bass is correct, overambitious social engineering must have a similar effect.

But Strong Maximalism is not liable to this criticism. In her work on development, for instance, Martha Nussbaum argues that a list of universal capabilities should

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<sup>337</sup> M. Walzer, ‘On promoting democracy’.

<sup>338</sup> Bass, ‘Jus post Bellum’, p. 386 & pp. 392-393.

underwrite a democratic constitution.<sup>339</sup> But as Nussbaum points out, this does not mean that a non-liberal society should be completely reengineered. Far from it, democratic constitutions can facilitate a dialogue between members of post-atrocity societies through which they can collectively decide on how to solve social problems. Rather than relying on the complete transformation of a non-liberal culture by an external party, Nussbaum's point is that liberal democracy enables members to challenge oppressive traditions or customs themselves. Taking Nussbaum's work as a guide, then, Strong Maximalism does not need to entail a *complete* transformation of post-atrocity societies where an outside party *destroys* a traditional culture. Instead, Strong Maximalism puts institutions in place through which members of post-atrocity societies can communicate their social experiences. If sound, Strong Maximalism enhances what Card called the social vitality of a community.

The third proportionality-based objection to Strong Maximalism maintains that it causes disproportionate harm because it undermines pluralism in international society. But critics who feel inclined to advance this argument need to answer why pluralism should be valuable. Presumably pluralism is normatively desirable because it enables individuals to undertake 'experiment of living'. It is possible to argue that, in case there is less pluralism, the lives of outsiders, i.e. the members of international society, are somehow going to be worse. But even if this was true, it contradicts the Insider Interest Condition inherent in the concept of Legitimate External Authority. Outsider interests are clearly not irrelevant for humanitarian occupations, but the interests of insiders should count more strongly in any assessment of proportionality. If the arrangements proposed by Strong Maximalism considerably benefit insiders without undermining the prospect of a stable international society, any harms arising from a diminution of pluralism become negligible.

Furthermore, it is not clear that the reconstruction of post-atrocity societies along liberal lines will have a negative effect on pluralism. First, there are different models of liberal democracy, featuring diverse institutional mechanisms through which decisions can be made. Second, bearing Nussbaum's remarks on democracy in mind, the creation of liberal regimes does not presuppose the destruction of indigenous forms of life. Finally, as David Miller suggests, the exercise of the right to collective self-determination via democratic institutions is likely to lead to different schemes of

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<sup>339</sup> M. Nussbaum, *Women and Development: the capabilities approach* (Cambridge: Cambridge University Press, 2000).



distributive justice within societies.<sup>340</sup> Unless societies are going to make fairly similar decisions, Strong Maximalism is compatible with a concern for pluralism, albeit in democratic form.

Let us now turn to the fourth and final proportionality-based argument against Strong Maximalism, which is related to Bellamy's charge that the introduction of liberal political theory undermines just war theory. It is possible to use Bellamy's point in order to argue that the introduction of Strong Maximalism leads to a slippery slope because, if it becomes legitimate to bring about a democratic regime *after* war, states might be tempted to use Strong Maximalism in order to justify the declaration of a war aimed at 'regime change'. But this argument would have to be verified empirically. If any increase in the declaration of wars was traceable to the introduction of Strong Maximalism, reconstruction policy must indeed be rethought. But there is no reason to abandon Strong Maximalism until such data is available.

The conclusions of this section are rather mixed. On the one hand, Strong Maximalism can withstand many of the critical charges levelled against it. On the other hand, the violent rejection of Strong Maximalism by those whom it is intended to serve may prompt its abandonment in favour of a form of Moderate Maximalism. The Argument from Excessive Harm points out the limits of philosophy because any assessment of whether Strong Maximalism is likely to fail or succeed in a particular context requires analytical tools outside the scope of philosophical discussion. It necessitates a closer engagement with the fields of political science and conflict studies than is possible here.

But although Strong Maximalism might sometimes fail, it is questionable whether there is a viable non-liberal alternative. Rawls' idea of Decent Hierarchical Peoples, introduced in Chapter II, comes to mind, but for reasons explained in the next section, it is unlikely that it can guarantee the necessary stability required for a reasonably secure basic structure.

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<sup>340</sup> This argument shares some proximity with liberal nationalist perspective on global justice. However, as the preceding chapters showed, I am equally critical of the liberal nationalist as well as the cosmopolitan approaches to global justice. See, D. Miller, 'National Self-Determination and Global Justice', in: D. Miller, *Citizenship and National Identity* (Cambridge: Polity, 2000).

*C. Always look at the bright side of liberal democracy*

There are two main reasons for why the development of a rights-based perspective on social engineering is important. First, as we saw above, critics of humanitarian occupation contend that 'liberal' social engineering marginalises more 'organic' or 'indigenous' processes of self-determination, perhaps even violating the right to collective self-determination. Needless to say, if this was the case, Strong Maximalism would contradict Legitimate External Authority's Insider Interest and Internationalisation Conditions. Secondly, given the non-consequentialist argument that we must place suitable constraints on consequences, any social engineering project must be subject to a concern for rights, independently of a mere concern for proportionality. In response to these two points, let us scrutinise the relationship between the right to collective self-determination and the concept of humanitarian occupation in general and Strong Maximalism in particular.

From a Hohfeldian perspective, the right to collective self-determination consists of *a*) a liberty to make decisions about the social organisation of a community and *b*) a right correlated to a negative duty obliging outside parties not to interfere with the decision making process. As such, the right to collective self-determination underlies our modern notions of popular sovereignty. Any occupation, even if carried out for benign purposes, gives rise to a fundamental tension between popular sovereignty and the rule of the occupying power. It must, therefore, be clarified *a*) how far the right to collective self-determination gives a political community a liberty to determine the political system through which it subsequently governs itself and *b*) how this liberty can be balanced against the occupier's liberty to administer the target state's territory. In particular, it must be assessed whether, as a matter of right, members of post-atrocity societies may reject the institutions set out by Strong Maximalism in favour of a non-liberal framework. To make progress on these issues, it is worthwhile pointing out that the case of post-atrocity societies poses two practical problems.

First, in light of the above analogy between the Hobbesian state of nature and post-atrocity societies, it is questionable whether members of post-atrocity societies constitute a political community that could be identified as the holder of a right to collective self-determination. On the one hand, following the interest theory of rights, while members of post-atrocity societies have certain collective interests in

public goods necessary for their security, it is questionable whether they have collective interests in those types of public goods, such as a communal identity, that can give rise to a claim to self-determination. On the other hand, even if members of post-atrocity societies shared an identity, the latter might be ‘obnoxious’ because certain aspects of it may have led to mass killing. In both cases, as the term ‘nation building’ suggests, social engineering is required to ‘construct’ a collective identity for members of post-atrocity societies that can give rise to *legitimate*, i.e. non-obnoxious, interests in self-determination. Until this has been accomplished, post-atrocity societies cannot be considered as the *actual* holder of a right to collective self-determination. Instead, post-atrocity societies need to be seen as *potential* right holders.

Second, assuming for the sake of the argument that members of post-atrocity societies are actual holders of a right to collective self-determination, there is no mechanism through which they can exercise it. Because it is difficult to see how local elites could remain in power after Atrocity Crimes have been halted, the unilateral occupation of the target state is likely to lead to the removal of its government. What is needed, then, is an initial decision procedure through which a new political system can be chosen. One possible response to this problem is that communities have certain shared traditions and practices that give a clue as to what political system would be chosen if the community in question was able to exercise its right to collective self-determination. But given what has just been said about the need to construct a new civic identity for post-atrocity societies, the appeal to shared practices is not a reliable guide. Thus, even if members of post-atrocity societies held a right to collective self-determination, they cannot exercise it.

If this is true, it is hard to see how the ‘organic’ processes of self-determination favoured by critics of Strong Maximalism could ever lead to the choice of a political system by members of post-atrocity societies. Instead, the occupying power must lay down an initial decision procedure through which any subsequent decisions about the collective life of a political community can be made. Nevertheless, if the idea of ‘nation building’ is sound, the occupier must view post-atrocity societies as *potential* holders of a right to collective self-determination. Consequently, the construction of an initial decision procedure must not result in institutions that make future exercises of rights by members of post-atrocity societies impossible. In addition to a

commitment to the protection of individual human rights, this is the best interpretation of Legitimate External Authority's Insider Interest Condition. Of course, following the interest theory of rights, the nature of the resulting 'side-constraints' on social engineering depends on how one views the (potential) interests underlying the right to collective self-determination. In what follows, let us outline two accounts of the right to collective self-determination and explore their relationship with Moderate Maximalism and Strong Maximalism, respectively.

In regard to the former, Rawls' idea of Decent Hierarchical Peoples is the best example of a liberal approach to collective self-determination that leads to highly illiberal conclusions. Although Rawls does not treat the right to collective self-determination in greater detail, it is clear that Decent Hierarchical Peoples, which are recognised as equal right holders under Rawls' Law of Peoples, do not view their citizens as free and equal individuals but members of associations.<sup>341</sup> It is hardly surprising, then, that the right to collective self-determination held by Decent Hierarchical Peoples is not analytically reducible to the (collective/aggregate) interests of individuals. Decent Hierarchical Peoples hold their right to collective self-determination *qua* group, which indicates some proximity between Rawls' theory and the corporate interpretation of the interest theory of rights.

Now, for those committed to Moderate Maximalism, this view may be attractive because it reflects that humanitarian occupation is often going to take place in societies that do not have individualistic moral traditions. If this is sound, in order to protect *corporate* interests in self-determination, the occupier should create institutions resembling those of Decent Hierarchical Peoples. This illustrates Moderate Maximalism's assumption that, though social engineering is justified, it should fall short of the creation of a liberal regime.

But it is questionable whether the non-liberal perspective on self-determination is conducive to the creation of a reasonably secure basic structure. For instance, Rawls' idea of a decent consultation hierarchy for Decent Hierarchical Peoples does not give their members an equal voice in decision-making.<sup>342</sup> While the political leadership consults its citizens on matters of public policy, it is not bound by their preferences. Further, although members of Decent Hierarchical Peoples have human rights to be

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<sup>341</sup> Rawls, *The Law of Peoples*, p. 73.

<sup>342</sup> (*ibid*), pp. 71-72.

protected from ethnic cleansing and genocide, they do not have an equal set of civic and political rights. But as has been pointed out on previous occasions, the latter might be instrumentally necessary in order to guarantee the former. Finally, since recent research in political science has shown that equality is an important precondition for the existence of civic trust, the profound inequalities resulting from an illiberal and non-individualistic approach to self-determination undermine the central aim of humanitarian occupation, namely to facilitate the development of civic trust amongst members of post-atrocity societies.<sup>343</sup>

By contrast, a liberal individualist approach to the right to collective self-determination avoids these problems. Following the collective rather than corporate interpretation of the interest theory of rights, it maintains that group interests are analytically reducible to the interests of individuals. Now, if one focuses on the interests of members of post-atrocity societies *qua* individuals, it becomes apparent why the right to collective self-determination should be exercised via democratic institutions. Put simply, since each member has an equal interest in the existence of their political community, everyone should have an equal voice in its decision making process. This idea can be strengthened via an appeal to Thomas Christiano's argument for democratic equality.<sup>344</sup> Christiano, like Andrea Sangiovanni and other liberal legalists, assumes that individuals have interdependent interests in public goods that are key features of their society. Drawing on egalitarian theories of justice, he argues that justice demands that individuals should be given equal resources, understood as equal votes and access to deliberation, to affect political decisions about their common life and the distribution of relevant public goods. Accordingly, the right to self-determination is a right to *democratic* self-determination.

If Christiano is right, it is easy to see why the democratic understanding of political self-determination offers a better interpretation of a secure sovereign order than Moderate Maximalism. This is so because, in addition to facilitating the redevelopment of civic trust, the argument from democratic equality empowers individuals to protect themselves against future attacks by giving them a voice in political decisions. Crucially, liberal democracy enables individuals to pursue their

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<sup>343</sup> See, E.M. Uslaner, *The Moral Foundations of Trust* (Cambridge: Cambridge University Press, 2002).

<sup>344</sup> T. Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder/Co: Westview Press, 1996).

interests in social goods via *peaceful* means. It gives them equal resources in votes *rather than guns*.

Indeed, the endorsement of democratic equality is particularly important in the context of post-atrocity societies. In his monumental study of the reasons for genocide and ethnic cleansing, Michael Mann, the eminent sociologist, argues that Atrocity Crimes occur when the *demos* becomes confused with the *ethnos*. For Mann, this confusion is the (potential) dark side of democracy. The liberal version of democracy avoids this danger. It stresses that everyone is allowed to partake in decision-making process, regardless of ethnic affiliation. It offers an *inclusive* version of the *demos*, abstracting from particular identities. This is the bright side of liberal democracy.

From a rights-based perspective, then, there is no tension between the creation of liberal institutions by the occupier and future exercises of the right to collective self-determination by members of post-atrocity societies. Since the right to collective self-determination should be understood as a right to *democratic* self-determination, humanitarian occupiers are at liberty to bring about a democratic political system in the occupied territory through which members of post-atrocity societies can subsequently make political decisions.<sup>345</sup> The successful implementation of democracy will take post-atrocity societies closer to the positive peace threshold where all interventionist measures must be abandoned.

Because Strong Maximalism, unlike Moderate Maximalism, emphasises the interests of the weakest and most vulnerable members of post-atrocity societies, it is an important step towards the realisation of sovereign institutions. Furthermore, the endorsement of Strong Maximalism assists us in solving the problem of legitimacy identified in Part III of the chapter; for, as indicated above, democratic states, unlike non-democratic ones, are usually thought of possessing a right to rule.

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<sup>345</sup> Critics might reply that the defence of Strong Maximalism renders the Internationalisation Condition superfluous, for it seems that democratic interveners should have a permission to unilaterally transform the culture of the target state. But this criticism misses the point. First, Nussbaum's work shows that democratisation does not give rise to a permission to completely transform all aspects of post-atrocity societies. If Nussbaum is right, democratic regimes may be compatible with different indigenous cultures, depending on the social resources available to them. Second, the issue of abuse still looms large. Unless they are saints, even democratic states might be tempted to extend their reign over post-atrocity societies in inappropriate ways.

#### *D. Conclusion:*

One of the most controversial issues in contemporary world politics is the question how the political and social institutions of post-atrocity societies should be reconstructed. The above showed that there are two main approaches to this problem. While minimalism is neither realistic nor normatively desirable, maximalism gives rise to two main interpretations. Moderate Maximalism holds that extensive social engineering is permissible, but maintains that it should stop short of bringing about a liberal democracy. Strong Maximalism, by contrast, assumes that liberal democracy can be permissibly created as an institutional framework for post-atrocity societies. If the above reflections are correct, Strong Maximalism is a defensible position because it represents the best interpretation of how a peaceful society can be constructed.

But although Strong Maximalism is desirable, we have to balance it against the Argument from Excessive Harm. Even though the aim of creating democratic institutions for post-atrocity societies is a laudable one, it might have to be abandoned if its realisation leads to disproportionate harms. The greatest difficulty consists in showing when this is the case. Unfortunately, there is little political philosophers can do to resolve the inherent tension between rights-based and proportionality-based approaches to internal reconstruction, not least because any attempt to do so requires complex empirical judgements beyond the scope of philosophical inquiry. Nevertheless, philosophical reflection can help us to think more clearly about the aims of humanitarian occupations.

## V

### **Conclusion**

This chapter tried to provide a normative perspective on the phenomenon of humanitarian occupation in contemporary international law and politics. Arguing that the ethics of humanitarian occupation falls into the remit of JEB, the chapter began inquiring how an external party, i.e. the occupying power, can acquire Legitimate External Authority over the target state's territory. Legitimate External Authority can best be understood as involving a Hohfeldian liberty to enforce and create legislation for post-atrocity societies in order to remove the structural preconditions that led to Atrocity Crimes. Contrary to international law, the chapter argued that Legitimate

External Authority can be acquired without the consent of the target state. This means that it is permissible for the intervening state to (non-consensually) occupy the target state by removing its government from power. Nonetheless, to safeguard against abuse, humanitarian occupations should subsequently be conducted by an international body rather than a single state.

The chapter then tried to shed some light on the reconstruction of post-atrocity societies. First, following international law and the liberal legalist idea that sovereignty is an enabling condition, the chapter affirmed the importance of state institutions but denied that the territorial integrity of the target state must be preserved at all cost. Second, it was argued that the reconstructed state unit(s) should be internally democratic, although it depends on the practical circumstances whether this goal is achievable. Lastly, the chapter argued that once the structural preconditions for mass murder have been removed by the introduction of a liberal democratic regime, interventionist measures must be terminated.



## Chapter VIII

### **Concluding Remarks: in defence of liberal interventionism**

We began this thesis by noting the prevalence of large-scale atrocities in human history. Atrocities, as we observed, are a matter of non-ideal theory, as they signal large-scale non-compliance with certain fundamental moral principles. Faced with the challenge posed by atrocities, we argued that political philosophy must tackle three main questions.

First, political philosophers must identify what is distinctive about mass atrocities. Drawing on Claudia Card's Atrocity Paradigm, Chapter III argued that atrocities represent morally distinctive forms of wrongdoing. First and foremost, they must be classified as grave moral evils. Evil, on Card's account, has two dimensions. The 'agency component', which accounts for the non-ideal element within atrocities, maintains that an agent culpably violates moral duties not to cause harm. The 'harm component' indicates that the resulting harm is intolerable. Evil, as Card rightly puts it, tends to ruin lives. But even within the category of evils, mass atrocities, including genocide, mass murder and ethnic cleansing, occupy a distinctive place. This is so because their perpetrators engage in the indiscriminate killing of defenceless individuals. Moreover, the indiscriminate killing of victims is often characterised by gratuitous levels of violence. While evils make life indecent, they also make death undignified. Finally, even if some victims escape the killing, they often suffer a social death. Perpetrators of what we called Atrocity Crimes aim to destroy the cultural and social preconditions that enable individuals to enter into meaningful social relations with others.

Second, political philosophers must develop principles that govern our responses to moral evils. In order to do so, the thesis drew upon two main philosophical resources, namely non-consequentialism and just war theory. Non-consequentialists contend that, even if an agent tries to prevent highly undesirable consequences, he must abide by certain restrictions. In other words, like consequentialists, non-consequentialists think that consequences matter morally. Yet they deny that consequences are the only things that matter. Rights place important side-constraints on our actions, while the distinctions between doing and allowing as well as intending and foreseeing restrict the way in which consequences enter into our moral

reasoning. The justification of these restrictions lies in the view that individuals are capable of autonomously choosing a conception of the good life. The purpose of non-consequentialist reasoning is to protect the status of individuals as ends-in-themselves.

In regard to just war theory, the thesis engaged with the phenomenon of MHI. More precisely, it developed the conception of MHI as an other-defensive war. At a methodological level, the other-defensive conception of MHI is the outcome of an attempt to reconcile our considered judgements about killing and saving in domestic society with the ethics of war. To do so, we drew an analogy between so-called rescue killings in domestic society and MHI. In a rescue killing, a rescuer defends a victim against an attacker. By analogy, the intervening state defends the victims of Atrocity Crimes against those who perpetrate them. Like unjust aggression in domestic circumstances, Atrocity Crimes are the outcome of culpable wrongdoing. In an abstract sense, MHI can be seen as the mass exercise of individual rights to defend victims Atrocity Crimes against those threatening their lives.

But the other-defensive conception of MHI goes further than that. States guilty of perpetrating or tolerating Atrocity Crimes fail to preserve a sovereign order for those under their rule. Following recent liberal legalist writings on the problem of global justice, the other-defensive conception of MHI considers sovereignty as an enabling condition necessary to protect our (interdependent) interests in autonomy and physical security. The other-defensive conception of MHI assumes that the occurrence of Atrocity Crimes signals that a state fails to carry out its sovereign functions appropriately. This view of sovereignty has three major implications.

First, Chapter III argued that, just as culpable attackers forfeit their right not to be attacked in domestic society, 'failed states' forfeit their right against interference and become liable to attack. As a result, the intervening state, provided it meets certain criteria, is not an unjust aggressor. Even though the intervening state has not suffered an attack by the target state, it does not violate any duties not to aggress the target state. The other-defensive conception of MHI, then, urges us to distinguish between just and unjust aggression.

Second, given that the target state is not performing its sovereign functions, Chapter III argued that the intervening state is also the holder of a right to intervene. The

latter obliges the target state not to engage in a self-defensive war against the intervening state. In this respect, the other-defensive conception of MHI closely tracks the ethics of domestic rescue killings. Following a justice-based understanding of the ethics of self-defence, culpable attackers are not at liberty to defend themselves against a rescuer.

Third, the other-defensive conception of MHI is more demanding than previous conceptions. The aims of MHI are not purely negative. They do not merely consist in the halting of certain atrocities. Rather, the positive goal is to establish a sovereign order and secure the rule of law for residents of the target state. This means that the other-defensive conception of MHI aims to accommodate recent legal theories of humanitarian occupations. Chapter VII offered a cautious defence of reconstructing post-atrocity societies along liberal democratic lines. Liberal democracy pursues a politics of inclusion. It considers its members as equal citizens, regardless of their more contingent identities. It is doubtful that there is an alternative to the politics of inclusion. Of course, the usual suspects, who would, rather predictably, accuse the other-defensive conception of MHI of endorsing liberal imperialism, must specify an acceptable alternative to liberal democratic politics. There are reasons to be sceptical whether ‘organic processes of self-determination’ can provide a normatively desirable alternative to contemporary liberalism.

This takes us to the final of the three main questions identified in Chapter I. We argued that political philosophers must specify our obligations towards those threatened by Atrocity Crimes. The other-defensive conception of MHI is a philosophical interpretation of the responsibility to protect (R2P). It contends that MHI is not merely permissible, but also obligatory. In order to defend this claim, Chapter VII drew an analogy between mandatory rescue killings in domestic society and the duty to intervene. In doing so, it maintained that individuals threatened by Atrocity Crimes *qua* individuals and *qua* collective have a right to be rescued. The problem, however, is that it might not always be possible to fulfil this right. While the correlative duty of the right to be rescued is assigned to states, individual citizens cannot be morally required to partake in an other-defensive war. That said, the argument shows that states must put in place institutions through which they can discharge their duties. Certainly we can criticise states for not doing so.

This short summary outlines the rough contours of the other-defensive conception of MHI. In order to conclude this thesis, let us ask *a)* why the other-defensive conception of MHI is normatively attractive, *b)* what future issues it gives rise to, and *c)* whether it can meet the challenge, identified in Chapter I, posed by non-consequentialist anti-interventionism.

The other-defensive conception of MHI is attractive for a number of reasons. First, it is fairly comprehensive. By drawing an analogy with rescue killings, it provides a framework in which we can place all the major issues a normative theory of MHI is expected to tackle. It is fair to say that the debate about MHI has gone through various phases. As Chapter II indicated, the traditional debate about MHI in political theory has largely been concerned with the dispute between broad and narrow interventionists. But this is slowly changing. For instance, issues relating to the conduct of MHI have become more prominent. The same is the case with regard to the duty to intervene. Finally, given the renewed interest in *jus ex bello* and *jus post bellum*, debates about the reconstruction of post-conflict societies are, hopefully, bound to become central to just war thinking. The other-defensive conception of MHI is able to offer a coherent outlook on all these issues. It unites traditional, contemporary and future debates about MHI in a single approach.

Second, Chapter I observed that, partly because theorists of the just war have devoted most of their attention to self-defensive wars, they have not developed a suitable analogue to the crime of aggression for MHI. Indeed, as Chapter II explained, many theorists of MHI leave the nature of a just cause for MHI rather vague. By utilising Card's Atrocity Paradigm, the other-defensive conception of MHI sheds light on the question why certain wrongdoings are morally distinctive. By utilising the justice-based perspective on self-defence, it also accounts for why it is permissible --- in fact obligatory --- to respond to atrocities via military force. In doing so, the other-defensive conception of MHI offers a restrictive reading of *jus ad bellum*'s just cause criterion. Many liberal projects --- the commitment to justice, the endorsement of representative democracy, and the emphasis on civic, political and socio-economic rights --- are laudable and noble ones. But this does not mean that they should be pursued via military force. War can only be an answer to genocide, massacre, mass murder, and ethnic cleansing. In this sense, the other-defensive

conception of MHI tries to counter the excessively permissive interventionism prevalent amongst some liberal theorists.

Third, the other-defensive conception of MHI sheds critical light on some of the assumptions of just war theory. As Chapter IV showed, it is critical of the normative separation of *jus ad bellum* from *jus in bello*. The two cannot be considered independently from each other. As a result, the right to intervene held by the intervening state is also held by its combatants. In this context, one of the most interesting aspects of the other-defensive conception of MHI is that it explicitly engages with the moral status of perpetrators of Atrocity Crimes. This is an issue that contemporary theorists of MHI have overlooked.

Furthermore, as Chapter V illustrated, the other-defensive conception of MHI is also critical of some of the assumptions of *jus in bello*. First, while it upholds the distinction between combatants and non-combatants, it argues that the category of the former must be extended. This gives us a more realistic (moral) picture of contemporary conflict. As was stressed in Chapter I, conflicts often contain 'grey zones'. To respond to these complex circumstances, our treatment of non-combatant immunity provides us with a more flexible and, therefore, appropriate set of principles for the conduct of MHI.

Importantly, however, the other-defensive conception of MHI also restricts what can be permissibly done to non-combatants during MHI. Chapter V emphasised that the Doctrine of Double Effect does not provide a moral blank cheque for the killing of non-combatants. Rather, the doctrine must be suitably restricted. For one thing, it cannot be separated from the overall goals of a war. The argument that non-combatants require special protection is reinforced by the treatment of the proportionality criterion, especially insofar as dual infrastructure targets are concerned. The sociologist Martin Shaw has recently criticised that, in contemporary conflict situations, there is a tendency to almost *absolutely* minimise risks to one's own troops at the expense of non-combatants.<sup>346</sup> While the other-defensive conception of MHI stresses that intervening states must not expose their combatants to unreasonable risks, it also underlines the significance of what Michael Walzer called duties of 'due care' towards non-combatants.

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<sup>346</sup> M. Shaw, *The New Western Way of War* (Cambridge: Polity Press, 2005).

More generally, our treatment of the conduct of MHI identifies some future issues for research. First, we argued that neither perpetrators of Atrocity Crimes nor those combatants summoned to the defence of the target state are at liberty to target intervening combatants. In other words, the use of self-defensive force against intervening combatants constitutes a violation of duties of non-aggression. To be sure, the violation of these moral duties not to kill fellow combatants in war may not mean that unjust combatants (target state) should be liable to punishment. Yet it is not unreasonable to suppose that our rejection of the independence of *jus ad bellum* from *jus in bello* has implications for post-war relations. Should unjust combatants repent what they have done? Do they have moral obligations towards those whom they killed? Should they work towards reconciliation? Should they appear before truth commissions? Should they help construct a new military and political culture in their society? These are not only philosophically interesting questions, they are also politically relevant. It is to be hoped that theorists of the *just post bellum* will take them up in the future.

Note, however, that the issue of post-war obligations does not only affect ‘unjust’ combatants. It is also relevant for those with a just cause. By developing the Public Goods Argument, Chapter V contended that the Doctrine of Double Effect should not be used to make negative duties not to harm disappear. Instead, the infliction of foreseen harms on non-combatants should be considered as a justified infringement of their rights. This suggests that even those with a just cause have *post-bellum* obligations towards non-combatants. In this way, the other-defensive conception of MHI challenges the perception that no duties of reparation are owed to non-combatants or their families. Non-combatants have not been wronged, provided interveners abided by standards of proportionality and due care. But nevertheless, important negative duties have been overridden, albeit justifiable.

Last but not least, let us assess whether the other-defensive conception of MHI withstands the challenge posed by non-consequentialist anti-interventionism. Drawing on the Doctrine of Doing and Allowing, anti-interventionists can argue that it is worse to intervene and kill than not to intervene and let die. The other-defensive conception of MHI raises doubts over this claim.

First, given that Atrocity Crimes are paradigmatic of the gravest evils we know, it is hard to uphold the claim that killing is necessarily worse than letting die.

Second, the doctrine has relatively little force when it comes to the killing of combatants *target\_state* because they are liable to attack. This point is particularly relevant when it comes to the killing of the actual perpetrators of Atrocity Crimes. As Chapter IV showed, perpetrators of Atrocity Crimes are often culpably responsible for gratuitous levels of violence. Hence it would be worse not to defend victims of Atrocity Crimes against their killers. Non-consequentialist anti-interventionism may have greater force when it comes to the killing of non-combatants. But even though some non-combatants may be killed during MHI, these killings are constrained via Double Effect and a relatively restrictive interpretation of the principle of due care. None of this is intended to suggest that the doctrine as such is unsound. But it surely matters for our assessment of a situation ‘how’ and ‘with what justification’ individuals are killed.

Third, the idea that sovereignty is an enabling condition is also important for our rejection of non-consequentialist anti-interventionism. Anti-interventionists must argue that ‘state failure’ is tolerable compared to MHI. But in light of what we know about failed states, this claim is rather dubious. It should be rejected for obvious strategic, political and moral reasons. It is noteworthy that this argument also exposes one of the central dichotomies in the debate about MHI as being overly simplistic. It is sometimes argued that MHI reflects a tension between ‘justice’ and ‘order’ in international affairs. The other-defensive conception of MHI, however, rejects this dichotomy. First and foremost, the purpose of MHI is not to make societies just but to halt certain grave evils. Furthermore, the other-defensive conception of MHI is committed to order. It argues that the target state must be reconstructed as a sovereign entity that can take its equal place in the society of states. Large-scale humanitarian crises and failed states can potentially undermine international peace and security. The other-defensive conception of MHI tries to prevent this.

To conclude, Chapter II observed that almost no contemporary liberal political philosopher rejects MHI. Although its practitioners disagree on many technical issues, contemporary liberal political theory is, by and large, pro-interventionist. While it tries to avoid some of the ‘normative’ excesses found in the liberal intervention debate, the other-defensive conception of MHI reaffirms the importance and normative soundness of liberal interventionism.

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