

# Review of International Studies

<http://journals.cambridge.org/RIS>

Additional services for *Review of International Studies*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



---

## The ultimate sacrifice and the ethics of humanitarian intervention

DANIEL BAER

Review of International Studies / Volume 37 / Issue 01 / January 2011, pp 301 - 326

DOI: 10.1017/S0260210510000963, Published online: 01 September 2010

**Link to this article:** [http://journals.cambridge.org/abstract\\_S0260210510000963](http://journals.cambridge.org/abstract_S0260210510000963)

### How to cite this article:

DANIEL BAER (2011). The ultimate sacrifice and the ethics of humanitarian intervention. *Review of International Studies*, 37, pp 301-326 doi:10.1017/S0260210510000963

**Request Permissions :** [Click here](#)

# The ultimate sacrifice and the ethics of humanitarian intervention

DANIEL BAER

**Abstract.** The discourse about the morality of humanitarian intervention – though undeniably well- (over-?) trodden in recent years – has two critical gaps. First, despite its central moral concern with the rights and lives of individuals living under massively oppressive states or terrible conditions, and despite its powerful attacks on traditional notions of state sovereignty, the discourse remains statist. Humanitarian intervention understood as something that states do, and if there is a right or responsibility to intervene it is a right or responsibility held by states. The second gap in the discourse follows from the first: because we think of humanitarian intervention as something that states do, the role of the individual soldiers who make up the intervening force – their rights and responsibilities – has been undertheorised.

This article argues that a reconsideration of the role of individuals in the context of humanitarian intervention not only helps us to ensure that interventions are carried out in a manner consistent with their own justice claims, but also to recapture the moral heroism of those individuals who willingly sacrifice for the rights and lives of others. Although the moral issues raised here may demand a more constrained politics of humanitarian intervention, they also ultimately have an emancipating effect.

**Daniel Baer** was, until November 2009, Assistant Professor of Strategy, Economics, Ethics and Public Policy at Georgetown University's McDonough School of Business. He had previously been a Faculty Fellow at the Edmond J. Safra Foundation Center for Ethics at Harvard University.

## Introduction

Humanitarian intervention is, as one commentator has aptly put it, more talked about than done.<sup>1</sup> Debates about the legality, morality, practice, and politics of humanitarian intervention have become the largest cottage industry in International Relations scholarship in recent years. In this discussion of humanitarian intervention, I am primarily concerned with a subset of the actions that have commonly been considered to fall in that category.<sup>2</sup> When I use the term

<sup>1</sup> Tom J. Farer, 'Humanitarian Intervention before and after 9/11: Legality and Legitimacy', in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), p. 55.

<sup>2</sup> Two recent anthologies on the subject employ broader definitions of humanitarian intervention, incorporating the threat of force (Holzgrefe) as well as other non-military forms of coercive interference (Welsh). See J. L. Holzgrefe, 'The Humanitarian Intervention Debate', in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2004), p. 18; Jennifer Welsh, 'Introduction', in Jennifer

‘humanitarian intervention’ I mean: military action by the soldiers of a state or group of states within the borders of another state without its permission and with the immediate aim of preventing or ending massive violations of human rights or widespread human suffering.

This article is predicated upon two sets of claims about the morality of war that I assert here at the outset, but will not have space to rigorously defend – they are my jumping off point. First, I contend that thinking about the morality of war necessitates thinking about not only the justice of killing but also about the moral reasonableness of dying – of risking or making what I term ‘the ultimate sacrifice’ – and that the lack of moral consideration for the ultimate sacrifice constitutes a gap in just war thought. This first set of claims is more or less agnostic in respect to substantive assertions about proper moral ends. Though it may be seen to take as a premise the fact that human lives have at least some moral importance (enough to merit our concern with understanding the moral issues surrounding their loss), the central argument in this set is simply that the current discourse about the morality of war is incomplete: any time we face the possibility that a human life will be sacrificed a moral discussion must be had.

The second set of arguments underlying what follows here includes more substantive moral claims and ethical principles. My two main (related) assertions in this respect are that the defence of human lives and basic human rights / well-being are the only moral ends that can justify the ultimate sacrifice, and that individuals rightfully retain agency in terms of the ultimate sacrifice and ought not be forced to risk their lives in war, even for a good cause.<sup>3</sup> The second claim, in my view, follows from the first: any serious commitment to human autonomy must respect the freedom of individuals to decide when and whether to give up their lives. This view grounds a general objection to conscription, but also has implications for how volunteer forces are used, as I hope to demonstrate below.<sup>4</sup>

Accepting – for the moment – my claims above, the central problem that consideration of the ultimate sacrifice raises in the context of arguments about humanitarian intervention is this: while humanitarian reasons are sound moral ends that can justify an individual’s ultimate sacrifice, those same moral ends prevent us from treating would-be interveners as means to pursue humanitarian objectives. Just as the human rights claims of inhabitants of oppressive states have caused us to reassess sovereignty claims of *those* states, the individuals who are participating under the auspices of the *intervening* state must also be considered, and they too ought to be rights holders in our ethical world-view. In short, the moral concern for human life that underlies the good moral reasons for making the ultimate sacrifice also raises the bar for justifications of it.

Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), p. 3. Martha Finnemore does not count interventions against natural disasters, but does count invited interventions. See, Martha Finnemore, *The Purpose of Intervention : Changing Beliefs About the Use of Force*, Cornell Studies in Security Affairs (Ithaca: Cornell University Press, 2003), p. 55.

<sup>3</sup> By basic human rights / well being I mean, roughly, those conditions that comprise the necessary prerequisites for a life that we would recognise as potentially autonomous. Though it is not my purpose to define those conditions precisely here, it seems clear that basic physical security and subsistence, for example, would be among such conditions.

<sup>4</sup> In this respect it is important to note that although I have said the defence of human lives and rights is the only end that can *morally justify* the ultimate sacrifice, it may be the case that – so long as human lives and rights are at stake – we *permit* persons to volunteer for other reasons, even if we don’t think those reasons would, on their own, justify the ultimate sacrifice. (See footnote 5 below.)

In my view, the discourse about the morality of humanitarian intervention has overlooked two critical facets. First of all, despite its central moral concern with the rights and lives of individuals living under massively oppressive states or terrible conditions, the discussion of humanitarian intervention has nonetheless continued to promote a conception of it as an issue to be decided by states and as an action to be taken by states. For all its liberal motivations and despite its powerful attacks on traditional notions of state sovereignty, the discourse remains statist in its orientation. Humanitarian intervention is understood as something that states do, and if there is a right or responsibility to intervene to save individuals it is a right or responsibility held by states. The second wrinkle in humanitarian intervention discourse follows from the first: because we think of humanitarian intervention as something that states do, the role of the individual soldiers who make up the intervening force – their rights and responsibilities – has been under theorised.

These two gaps raise two main questions or sets of questions about humanitarian intervention.

- 1) If humanitarian intervention is a duty or a right, is it a duty or right held by states or by individuals? More to the point: may a state force its soldiers to intervene?
- 2) What is the moral personality of intervening soldiers? Are they properly considered as ordinary combatants? What are their obligations *vis-à-vis* civilians in the country intervened into?

As I will show, a reconsideration of the ultimate sacrifice in the context of humanitarian intervention not only helps us to ensure that interventions are carried out in a manner consistent with their own justice claims, but also to recapture the moral heroism of those individuals who willingly sacrifice for the rights and lives of others. Although the moral issues raised here may be seen as demanding a more constrained politics of humanitarian intervention, they also ultimately have, I believe, an emancipating effect.

I have already stated my theoretical point of departure, but before continuing the investigation, I should explain the origin and intentions of the argument that follows. The argument presented here is meant as an exploration of what I perceive as a tension at the intersection of three common liberal positions (and I recognise that those who don't agree with these are unlikely to perceive a similar tension.) The first is the illegitimacy of military conscription (without a realistic alternative for conscientious objectors). The second is the presumptive legitimacy of wars of national self-defence, which is accompanied by an understanding of national military forces as intended for national defence. The third holds that, in addition to national defence against aggression, defence of foreign persons in the form of humanitarian intervention is now taken to be a legitimate war aim (although arguably one that, for practical reasons, often cannot be pursued justly).

The tension arises because if we care about soldiers' consent in a meaningful way – if that is part of our definition of 'moral soldiering' – then it seems to me that these new, humanitarian, war aims ought to be part of that consent.<sup>5</sup>

<sup>5</sup> I subscribe to the view that a liberal concern for consent must be interested not only with the act of consent but also with the considerations upon which that consent might be based. When people are agreeing to risk their lives in war, liberals should care not only that they have agreed to do so,

Humanitarian intervention has for some time now been seen as demanding a rethinking of historical legal and moral commitments to the institution of sovereignty and to the legitimate ends of war. In the exploration that follows, I hope to suggest that it similarly challenges a rethinking of the paradigms through which we understand military forces and the soldiers who make them up.

### I. Rethinking a statist debate

If we want to examine the justice of intervention, we have to consider not only the justice of attacking allegedly criminal, negligent, or incapable states (and their soldiers), but also the justice of risking the lives of intervening soldiers. This moral consideration is obstructed by the current discourse on humanitarian intervention, both because it focuses largely on resolving the apparent conflict between the legal rights of the state subjected to intervention and the moral rights of that state's citizens, and because it continues to tacitly promote a view of humanitarian intervention as an action that is taken exclusively by states.

Michael Walzer has argued explicitly that humanitarian intervention is an issue that is not only politically but also morally the concern of states. '[T]he "who" who can and should [intervene] is only the state, not any particular man or woman', he writes.<sup>6</sup> Other scholars are less explicit but no less consistent in seeing humanitarian intervention as essentially an interaction between states, even if it is justified by a concern for the human rights of civilians. For example, Martha Finnemore, in discussing the non-intervention in Rwanda in 1994, argues that

while the Rwandan case can be viewed pessimistically as a case where ethics were ignored and *states* did what was convenient, it also reveals that *states* understood and publicly acknowledged a set of obligations that certainly did not exist in the nineteenth century and probably not during most of the Cold War. *States* understood that they had not just a right but a duty to intervene in this case.<sup>7</sup>

There is an obvious explanation for this statist predilection in discussions of humanitarian intervention: One of the key problems of humanitarian intervention is the *legality* of the actions taken by intervening states because they are bound by the UN Charter to refrain from transgressions of sovereignty when another state has not made an externally aggressive attack, (unless the UN Security Council deems such action necessary in order to preserve peace and stability and sanctions it under Chapter VII). From the standpoint of international law, then, it is the actions of states in humanitarian interventions that are seen as most problematic.<sup>8</sup>

but also, because we respect them as persons, that there exist good reasons for doing so. We cannot really claim that our respect for consent is grounded in respect for persons if we are apathetic about the reasons why individuals may consent. This does not mean that we necessarily police the motivations of volunteers – we may, because of well-reasoned practical and moral considerations, admit volunteers for a justifiable cause whether they are motivated by good reasons or not. But we should care that good reasons are available and applicable in the case in question, and that we don't condescend to pretend that there is no difference between good reasons and bad.

<sup>6</sup> Michael Walzer, 'The Argument About Humanitarian Intervention', *Dissent*, 49:1 (2002).

<sup>7</sup> Finnemore, *The Purpose of Intervention*, p. 80. Emphasis added.

<sup>8</sup> Another reason for the focus on states is the practical requirement that any effective intervention will have to be organised by states – individuals cannot be reasonably believed to be in a position to be effective on their own. However, this practical consideration does not obviate the possibility (or

Though many interventionists point out that international law takes individuals as objects (as rights holders under the International Covenant on Civil and Political Rights), states are the principal subjects of international law (although, for example, Chapter IV of the Genocide Convention provides for prosecution of private individuals).

In response to these legal obstacles to humanitarian intervention, scholars and international lawyers have provided a diverse array of opinions about what should be done in cases when intervention appears to be morally desirable.<sup>9</sup> It is not my present purpose to expand on this well-covered aspect of the humanitarian intervention debate. Instead, what I want to point out is that because the goal of many of the ethical discussions of humanitarian intervention has been to provide arguments that morally exonerate action by intervening states and eviscerate the sovereignty claims of repressive states, such discussions have tended to overlook moral issues that do not contribute directly to these aims.

In particular, there has been a dearth of discussion about the ethical ties between the individuals who make up intervening forces and *their* states, and between the intervening soldiers and the foreign citizens whose lives they seek to protect through military action. We have been so concerned to show why humanitarian intervention is not wrong that we have paid less attention to the question of why it is right for the agents who carry it out to do so. Not only that, but as I argued above, we have continued to see the agents who intervene as states, often failing to consider the obvious fact that when a state intervenes its soldiers must do the fighting.

### *Justifying the role of intervening soldiers: tackling 'internal legitimacy'*

In his well-known article, 'The Internal Legitimacy of Humanitarian Intervention', Allen Buchanan examines the legitimacy of domestic constraints upon would-be intervening states.<sup>10</sup> Buchanan's aim is to delineate a moral world-view in which

need) for a broader moral discussion that includes individuals. I am grateful to Kristi Olsen for this observation.

<sup>9</sup> Two general camps can be discerned: some argue for a morality-informed revision of international law to narrow the apparent chasm between law and morality, others have argued that the stability provided by current international law is morally valuable itself, and that humanitarian intervention should remain illegal with the onus of retroactive justification falling upon its practitioners in exceptional cases. There are variations within as well as across the two groups. For distinct examples of legal revisionists see Fernando R. Tesón, 'The Liberal Case for Humanitarian Intervention', in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Thomas M. Franck, 'Interpretation and Change in the Law of Humanitarian Intervention', in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003). For the more conservative position see, Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Michael Byers and Simon Chesterman, 'Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

<sup>10</sup> Allen Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', *The Journal of Political Philosophy*, 7:1 (1999).

states could conceivably have an obligation to intervene in humanitarian disasters, and as a precondition for doing this he must first free states of an obligation to act only in the clear and direct interest of their own citizens. '[U]nless humanitarian intervention is internally legitimate', he writes 'the imposition of a duty of humanitarian intervention would itself be a moral wrong.'<sup>11</sup> Because states have, at least in the liberal West, traditionally been conceived as mutual benefit associations formed around a social contract, the dedication of state resources to the interests of non-participants can be seen as a transgression of the constitutive purpose of states to which their citizens have explicitly or tacitly agreed.<sup>12</sup>

For Buchanan, the internal legitimacy of a state's participation in humanitarian intervention is resolved by positing that such interventions constitute a legitimate manifestation of the citizens' 'natural duty of justice' – a duty to attempt to ensure that all human beings live under just conditions. States can participate in humanitarian actions because their citizens have a natural duty to help non-citizens, which means that states are properly viewed as instruments of justice, which means that the state is not morally prohibited from expending state resources on non-citizens.

However, a supposed duty of states to intervene does not follow, without argument, from a natural duty of justice that obtains among individuals. Furthermore, it is one thing to assert the *general principle* that people have a duty to attempt to ensure that others live under conditions of justice; the assertion that each person must be ready to give his life in the course of such attempts is a far more demanding claim. Humanitarian intervention need not always be military, but its accepted definitions certainly include military interventions, and for most people such interventions constitute the 'hard case' worthy of moral, legal, and political justification.<sup>13</sup>

As Buchanan himself rightly and repeatedly acknowledges, the natural duty of justice which he proposes is qualified by an excessive cost proviso.<sup>14</sup> He writes that: '[T]here are limits on the costs that the citizens of one state must bear to protect the rights of other persons'.<sup>15</sup> Obviously, a great deal of the moral weight of this natural duty to help rests upon how one defines excessive costs. However, without attempting to specify exactly where this limit on the costs that the citizen must bear lies, it seems reasonable to expect that it falls somewhere short of demanding that he be willing to make the ultimate sacrifice.

If a state has a duty to intervene militarily to save foreigners, then the state has the duty to provide the soldiers needed to carry out that task, some of whom might be expected to die. If the state could not provide those soldiers in a voluntary

<sup>11</sup> Ibid., pp. 72–3.

<sup>12</sup> Buchanan allows the possible exception of a democratic populace unanimously authorising humanitarian efforts.

<sup>13</sup> Fernando Tesón makes a similar point arguing that Buchanan's argument needs to be supplemented in order to cover the use of military resources. Tesón, 'The Liberal Case for Humanitarian Intervention', p. 124.

<sup>14</sup> Terry Nardin, among others, offers a similar formulation of a natural duty to help qualified by a limitation on costs. Terry Nardin, 'Ethical Traditions in International Affairs', in Terry Nardin and David R. Mapel (eds), *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), p. 10.

<sup>15</sup> Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', p. 86. I would suggest a formulation that leaves out the citizen/non-citizen distinction: there are limits on the costs that individuals must bear in order to help others.



army, its duty to intervene would imply that it should conscript to do so. Therefore, for a state to acknowledge or endorse a duty of humanitarian intervention would be internally illegitimate in that it would constitute forcing unjustifiably excessive costs upon its own citizens. Acceptance of a generally obtaining natural duty of justice among human beings of the sort that Buchanan proposes does not establish the moral legitimacy of the state's taking actions that would put its soldiers at lethal risk. Not only is it wrong to impose upon states a positive *duty* to intervene militarily, states also cannot legitimately intervene *voluntarily*, except in the case where the soldiers participating have enlisted with the willingness to risk and make the ultimate sacrifice in the course of a humanitarian operation.

My position here does not prohibit the state from making other, non-military, contributions to a given intervention. Buchanan's argument does clear the moral ground for a state's expending financial and technological resources on behalf of non-citizens. At the very least, it is plausible that a democratic populace could select leaders who promote policies that provide the economic resources necessary for an intervention, in the same way that they promote general policies of foreign aid, without violating criteria of internal legitimacy. Indeed, even those who support strong patriotic biases for the expenditure of state resources often observe that there are moral limits to such biases.<sup>16</sup> But once again, we can draw a distinction between forcing some citizens to unwillingly give tax revenues to provide for the basic needs of foreigners and forcing citizens to risk their lives for foreigners (or for anyone at all). The ultimate sacrifice ought not be coerced, and for a state to accept a duty of military intervention, or to embark on such an intervention with a military that does not consist of soldiers who have volunteered knowing that they may be asked to risk their lives for humanitarian ends, is morally illegitimate.<sup>17</sup>

If one accepts this position, then the search for a perfect duty of military intervention – possessed by individuals or states – is futile. It is simply not true that we each must be willing to give our lives at any point when there is another person in need. It may be that we have a duty to aid in other ways, that we have a duty not to be indifferent to the plight of other human beings, but we do not owe it to each other to give up our lives, no matter how valorous it is for us to do so. Advocates of humanitarian intervention very clearly see the lives and rights of human beings as the end worth saving; we must attempt to see equally clearly that the lives of human beings will be risked by engaging in military humanitarian intervention. The choice of an individual to risk his life in order to defend the life and basic human rights of another may be so obviously good as to be beyond objection, and yet it must still be his.

<sup>16</sup> See, *inter alia*, David Miller, *On Nationality*, Oxford Political Theory (Oxford: Clarendon Press, 1995); Richard W. Miller, 'Cosmopolitan Respect and Patriotic Concern', *Philosophy and Public Affairs*, 27:3 (1998).

<sup>17</sup> In a later book Buchanan does briefly acknowledge the concerns raised here. He admits that violent death may be considered an excessive cost, and that therefore those who bear that cost must do so voluntarily. However, Buchanan does not integrate these concerns into a broader consideration of the ethics of humanitarian intervention, nor does he consider the implications of the moral requirement that humanitarian interventions be carried out by volunteers. Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), pp. 468–71.



*Forcing people to do good*

The conclusion that there exists no general obligation to risk one's life in defence of humanitarian aims is a frustrating one for liberal interventionists. Fernando Tesón, near the end of an impressive moral argument in favour of humanitarian intervention which holds the rights and lives of oppressed peoples as paramount to state sovereignty, rejects arguments such as mine, which he labels (wrongly, I think) as libertarian.<sup>18</sup> Tesón asserts that: 'If libertarians are right, humanitarian intervention is wrong, not because dictators are or should be protected by international law, but because governments cannot validly force people to fight in foreign wars.'<sup>19</sup> But here Tesón mistakes a rejection of means for a rejection of ends. My view does not hold that humanitarian intervention is wrong, quite the contrary it holds that it is (potentially) morally endorsable, and for the same reasons that forcing someone to sacrifice her life is wrong: because liberal morality holds that individual human life, including the capacity to live an autonomous and ethical life, is the highest moral end.

In truth, though Tesón claims to reject the 'libertarian' view, he ends up accepting a weak form of its insight, suggesting that governments ought to use voluntary soldiers before conscripting anyone to participate in an intervention.<sup>20</sup> Tesón justifies conscription as a necessity by appealing to an economic model that suggests that foreign intervention, like national-defence, might turn out to be an under-produced good if left to voluntary action. Thus, 'the power of the government to draft soldiers for humanitarian intervention is necessary in order to block opportunistic moves *ex post*.'<sup>21</sup> In brief, such a view permits the use of human lives as a means, and allows the members of a society in which a generally applicable imperfect duty to aid others exists to transform that imperfect duty into a perfect and absolute one for some among them. This, in my opinion, consists of forcing people to do more than their duty. Moreover, Tesón's characterising of those who choose not to give their lives for a humanitarian cause as 'opportunistic' seems to imply that there are no good moral reasons for a person's caring about self-preservation. In contrast, I argue that self-preservation must be seen as a moral right, grounded in the same end that leads to our moral desire to save other people from death.

<sup>18</sup> It does not follow from my commitment to respect an individual's choice about when and for what to risk his life that I also accept the traditional tenets of conventional libertarianism. As I said above, I accept Buchanan's position that states may act as instruments of justice, and I perceive a robust duty to aid those in need far beyond that which libertarians typically endorse. Moreover, libertarians are typically seen to be concerned with reducing constraints on self-directed individual action, and therefore the act of consent, as an example of voluntary action, has profound moral significance in and of itself in their view. Instead my view of consent is more instrumental, and my moral concern is not only with consent as a marker of autonomy but also with the moral reasonableness of an individual's risking his life. The main question here is whether or not liberal principles require us to protect individuals' rights to make life or death decisions in particular. If I am right, then Tesón's claim to represent the liberal position is not sustainable, if Tesón is right, then my claim to represent the liberal position may be flawed. In any case, much more would have to be said to characterise my position as libertarian.

<sup>19</sup> Tesón, 'The Liberal Case for Humanitarian Intervention', p. 126.

<sup>20</sup> *Ibid.*, p. 128. However, Tesón doesn't specify what the volunteers have volunteered for. My argument would obviously entail the qualification that the standing army could only be used if it was raised voluntarily *and* with the acceptance of humanitarian missions as an end.

<sup>21</sup> *Ibid.*, p. 126.

Soldiers who voluntarily enlist knowing that they may be ordered to engage in combat for a variety of causes may be rightfully ordered to do so, (so long as the causes themselves are not obviously at odds with justifiable moral ends of war). Where I cannot meet with Tesón is in his claim that if people do not voluntarily agree to give up their lives to save others, they ought to be forced to do so. And this objection holds whether the others in question are compatriots or not.

Like Buchanan's, Tesón's argument is incomplete because he wants to find a way for a state (or group of states) to legitimately send its military – its whole military – into humanitarian missions without first establishing criteria for the just raising of a military force, criteria that would protect the rights of citizens of the intervening state(s). Tesón is concerned to assert the legitimacy of state action. But his task, like that of Buchanan, would be better served by taking the starting point implied by his fundamental moral commitment to human rights: the individual. In order to get a complete moral picture of humanitarian intervention, humanitarian intervention needs to be reconceived as an action that is taken not only by states, but also by individuals.

### *Reconceiving humanitarian intervention*

For as long as we see humanitarian intervention as something that is done exclusively by states rather than as a morally relevant action taken by individual soldiers and coordinated by a just state or group of states, we must continually ask the question 'even if it is a worthwhile cause, why is this just state or group of states allowed to intervene and thereby risk its own soldiers?' However, if we reconceptualise humanitarian intervention as, in part, *action taken by individuals who agree to risk the ultimate sacrifice on behalf of the human rights and lives of others*, then we can avoid the constant burden of justifying the state's action in terms of its obligations to its soldiers. Not only that, our focus is more appropriately centred on the moral heroism of those soldiers, mirroring the attention that we give to the oppressed persons in the intervened country.

Solidarists and pluralists are both likely to have misgivings about such a reconceptualisation.<sup>22</sup> On the one hand, pluralists are likely to question the thickness of the moral relationship between individuals divided by geography, culture, language, and history. To see humanitarian intervention as a manifestation of a moral relationship between the savers and the saved is to see a thicker sort of moral connection than many pluralists (even those with solidarist hopes for the world) think empirically possible, and perhaps a thicker sort of relationship than pluralist particularists think morally ideal.

For solidarists, for those who believe in a future with universally acknowledged human rights protected by a powerful and reliable coercive force, to relinquish humanitarian intervention to the bonds between individuals is to relegate the task

<sup>22</sup> I borrow these terms from the English School of International Relations theorists to characterise those who believe that only minimal common norms can develop in international society to facilitate coexistence (pluralists) and those who see the potential for more robust regimes of common norms and shared institutions. See, for example Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edition (New York: Columbia University Press, 1995).

of defending human rights to the fickle nature of individuals' own perceptions of moral relationships across borders. For those who want to defend not just a right but also a duty to intervene (or, as Walzer does, something between the two), my reconceptualisation may be seen as threatening the potential role of states in ensuring that such duties are effectively and promptly fulfilled. Indeed, Buchanan's eventual forward-looking suggestion of international legal institutions that would assign responsibility for specific interventions to specific states, thereby transforming imperfect duties into perfect ones, would be subject to serious questions about moral legitimacy if one adopted my view.<sup>23</sup> Similarly, to Nicholas Wheeler's claim that '[a] solidarist conception of ethical statecraft requires state leaders in exceptional cases of supreme humanitarian emergency to risk, and if necessary lose, soldiers' lives', one would have to respond that the decision to risk soldiers' lives is not within the scope of legitimate action available to leaders, be they solidarist or not.<sup>24</sup>

My moral argument does not preclude political and legal solutions to the key problems surrounding humanitarian intervention – questions of who can intervene, when, where, why, and how – that assign a role, perhaps even a principal role, to states. I do not argue that we should see humanitarian intervention as *only* an action that turns on the relationships between individuals across borders. There remains a role for states to play. For example, states are responsible for organising and coordinating military force, for building the international institutions in which the legality and legitimacy of potential interventions is debated, for providing the intelligence upon which assessments of probability of success are grounded, and indeed, for authorising the use of force, either directly or indirectly through institutions. However, the roles that states can play ought to be constrained by the moral insight that humanitarian interventions are a form of targeted violence in which human lives are risked and sacrificed for the sake of defending human lives and rights. At its core, humanitarian intervention is not a case where one state is allowed to ignore the sovereign rights of another, but where individuals along with their states are allowed to reassert the priority of basic human rights over state sovereignty, and the dependence of the value of the latter upon the protection of the former. Moral thinking about humanitarian intervention has suffered because humanitarian intervention has been viewed through the paradigm of interstate war. Humanitarian intervention is seen as an exception to the dictum that states may not prosecute aggressive wars against each other. But the proper way to see humanitarian intervention is not as a war by one state (or group of states) against another, but rather as a war of international society, including both states and individuals, against international villains.

### *Whose rights, whose responsibilities?*

This reconceptualisation has a bearing upon the first major set of questions that I raised in the introduction about whether humanitarian intervention is a right or

<sup>23</sup> Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', p. 87. See also Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 468–71.

<sup>24</sup> Wheeler, *Saving Strangers*, p. 300.

a duty, and whether it belongs to states or to individuals. The right to intervene, to transgress the supposed-sovereignty of a state governed by a tyrannical regime arises out of a general, imperfect duty to aid those in need. Another way of saying this is that it arises out of the human rights of the oppressed, for believing in their human rights entails believing that they also have a right to have those rights defended if a willing defender is available. (Believing in their rights may also entail a commitment to do all that is morally possible to see that they are in fact defended). The *moral* right to intervene is grounded simply in the moral relationship among persons that logically follows from the humanistic moral values at the centre of liberalism. The moral right to intervene, that is, the right to disrespect sovereignty claims in the case of humanitarian disaster, therefore, can be seen as being held by international society in general, where international society is seen to include individuals and states, and even, I am inclined to think, non-state actors. It is a general right to protect the basic human rights of those in need of such protection.

However, the right to commit individual soldiers to the risky business of intervention is a right that lies with the soldiers themselves. Therefore the right of a state to order its military into a humanitarian mission is grounded in its citizens' willingness to risk the ultimate sacrifice for such ends. The leaders of a state, knowing that there is a situation that merits humanitarian intervention, may have a moral obligation to attempt to persuade their citizens to volunteer to carry out such an intervention. The citizens themselves may be seen as having a similar duty to attempt to persuade each other that the proposed intervention is an end worthy of risking the ultimate sacrifice. But there is no enforceable duty that requires citizens to enlist for humanitarian missions.

Now, to allow *any* agent to exercise at its discretion the right of humanitarian intervention not only risks having agents make bad decisions about which interventions really will do more good than harm, but is itself a threat to the current system of ensuring international political order and protecting the lives of those who live under it. Thus, for international law to declare that legitimate interventions must take place under the auspices of a state or international organisation is morally desirable. Humanitarian intervention is rightfully seen, then, to be *legally* a kind of state action. However, morally it remains an action of international society as a whole, and the legally-sanctioned, state-organised practice of humanitarian intervention only remains morally legitimate so long as it does not betray the implications of this fact.

## II. Implications for the ethics of humanitarian intervention

One of the implications of my argument that a moral examination of humanitarian intervention needs to consider the practice as more than an action by states is that because we have misconceived the nature of humanitarian intervention we may have also misconceived the ethics which ought to govern the execution of such military actions. I contend that there is a fundamental connection between the just means of raising an army for a military intervention and ensuring that the

intervention itself is carried out according to the highest standard of just means, and thereby in a manner consistent with its ends.

Michael Walzer has argued that '[t]he same rules apply [in humanitarian intervention] as in war generally: non-combatants are immune from direct attack and have to be protected as far as possible from "collateral damage"; soldiers have to accept risks to themselves in order to avoid imposing risks on the civilian population.'<sup>25</sup> I am unconvinced that this claim is necessarily true.

Unless the soldiers participating in an intervention are 'humanitarian soldiers', in the sense that they have agreed to participate in humanitarian wars, they are themselves non-combatants of a sort: they are not parties to the conflict at hand, they are outsiders in a war between a state and its own people, a war that is not their own. Until they commit themselves to humanitarian intervention, as only they themselves may do, soldiers of outside forces are neither the perpetrators nor the victims of tyranny – they are bystanders to a horror. As mere bystanders we can require that they not be indifferent to the horror, and that they do what they can to alleviate it, but we cannot require that they risk their lives to stop it. Of course, we can still say that, like any bystander, the soldiers should certainly do no intentional harm to innocents, including those that they are attempting to save, and that if they cannot help in a way that does not produce more good than harm, then they should not attempt to help at all.

At the same time, the oppressed civilians are not really entirely civilians – they have been made combatants (unjustly, to be sure) because their state or some other entity has attacked them, and their lives and rights are already at risk. They are hardly bystanders: they are not innocent in the literal sense of being uninvolved in the fighting, no matter how morally innocent they are.

Some will reject my claims here: soldiers are soldiers, no matter what the situation, they will argue, and they are bound by the same rules no matter what. If an intervening country uses its military, then its soldiers become combatants with all of the moral constraints on their means that apply to any soldier. My point is that the intervening country can only really legitimately use its military for a humanitarian war if it has enlisted its soldiers justly, if they have made the commitment that they are willing to make the ultimate sacrifice for humanitarian ends. If this is not the case, then the leaders cannot rightly force their soldiers to intervene in ways that would put their lives at risk, they are limited to intervention tactics, in a sense, from afar.

One crucial benefit of raising an army in a morally defensible way is that the members of that army can then be unequivocally held to moral standards of just combat as veritable soldiers. By signing up for humanitarian intervention, the soldiers make such action *their war* – they are *not* just bystanders attempting to save persons who have been unjustly attacked, they are committed to the end of fighting the tyrannical state and those who oppress the civilians, and to doing so with an eye toward double-effect and double-intention.<sup>26</sup> This is why it is so important that the forces used in humanitarian interventions be raised in a morally

<sup>25</sup> Walzer, 'Humanitarian Intervention'.

<sup>26</sup> Double effect and double intention are discussed in more detail in the section below. Also see Michael Walzer, *Just and Unjust Wars*, 3rd edition (New York: Basic, 2000), pp. 152–9.

legitimate way, for only then will there be the possibility of legitimately engaging in risky operations for humanitarian ends.

It may be helpful, rather than pursuing the argument further in the abstract, to try to substantiate these claims by briefly examining the discourse surrounding the Kosovo intervention that (re-)raised many of these issues.

### *Good and bad critiques of Kosovo*

In the wake of the NATO intervention in Kosovo in 1999, many commentators who were willing to endorse the NATO intervention itself as technically illegal but (morally) legitimate, nonetheless went on to criticise the way in which NATO went about intervening: NATO's all-air assault, it is claimed, was inadequately discriminate and therefore the means with which that humanitarian war was fought undermined its ends.<sup>27</sup> Such criticisms lead to the question: 'Does not humanitarian intervention entail a responsibility to ensure that the methods used are appropriate for the achievement of the objectives sought?'<sup>28</sup> I do not want here to dispute the facts of the Kosovo case. Instead, I want to consider what certain lines of moral critique and certain strategic choices must assume in order to be consistent with good moral reasoning about the ethics of war.

One of the main sources of controversy over the ethics of the means of humanitarian intervention has been the tendency of intervening forces to adopt strategies of 'casualty aversion' and 'force protection'. In general, such strategies can be defined as strategies of war-fighting selected by military leaders, at least in part, for their potential to limit casualties suffered by their own troops. A prominent set of arguments against NATO's aerial attack on Serbian forces in Kosovo is that it constituted a strategy of casualty aversion that was pursued at immense moral cost in the form of unnecessary and indiscriminate killing of Kosovar and Serb civilians.

It is worth quoting one version of Michael Walzer's critique of NATO action in Kosovo at length.

We are ready, apparently, to kill Serbian soldiers; we are ready to risk what is euphemistically called 'collateral damage' to Serbian, and also Kosovar, civilians. But we are not ready to send American soldiers into battle. Well, I have no love of battles, and I fully accept the obligation of democratically elected leaders to safeguard the lives of their own people, all of them. But this is not a possible moral position. *You can't kill unless you are prepared to die.* No doubt that's a hard sentence – especially so because its two pronouns don't have the same reference (as they did when Albert Camus first made this argument, writing about assassination): the first 'you' refers to the leaders of NATO, the second to the children of ordinary citizens. Still, these political leaders cannot launch a campaign aimed to kill Serbian soldiers, and sure to kill others too, unless they are prepared to risk the lives of their own soldiers. They can try, they ought to try, to reduce those risks as much as they can. But they cannot claim – we cannot accept – that those lives are expendable, and these not.<sup>29</sup>

<sup>27</sup> Wheeler, *Saving Strangers*, p. 284.

<sup>28</sup> Christine M. Chinkin, 'Kosovo: A "Good" Or "Bad" War?', *The American Journal of International Law*, 93:4 (1999), p. 844.

<sup>29</sup> Michael Walzer, 'Kosovo', in William Joseph Buckley (ed.), *Kosovo: Contending Voices on Balkan Interventions* (Grand Rapids, Michigan: William Eerdmans, 2000), p. 334. Note again that Walzer



Walzer's central assertion in this passage is that 'you can't kill unless you are prepared to die'. The false simplicity of this claim is easily overlooked because of the self-evident (but not entirely consequent in the way Walzer would have us believe) point that we should not see certain human lives as expendable while others are held precious.<sup>30</sup> Though he uses the word 'can', Walzer offers his dictum as a moral position, and therefore it might better be understood as 'you may not kill unless you are prepared to die'. Such a claim misses the fact that while the justifications for killing and dying may be connected through a common end, they are not inseparable. Assuming that Milosevic and the Serbs complicit in ethnic cleansing had forsaken their right against attack through their actions, anyone might have been justified in killing them to prevent further wrongs. If it were possible to kill an attacker and thereby save his victim without taking on any risk to oneself, it would certainly be permissible.<sup>31</sup>

The error in Walzer's main claim reflects a similar mistake in many of the critiques of casualty aversion policies. There is nothing wrong, *per se*, with a military commander attempting to protect his troops as long as he can still do this without compromising the success (in all senses) of his mission. Indeed, this is what we would *want* him to do. 'No one would want to be commanded in wartime by an officer who did not value the lives of his soldiers', as Walzer writes elsewhere.<sup>32</sup> Yet arguments like Walzer's above abound, and they seem to have led to some kind of strange fetishisation of military deaths – if soldiers do not die, it seems, then the war was not real, the soldiers were not courageous, their actions were not just. As Charles Dunlap has argued, '[m]any have incorrectly reverse engineered the bloodless outcome to impute an absence of martial virtue.'<sup>33</sup>

There is nothing wrong, in principle, with a military operation in which no soldiers die. If an air attack were the most discriminate, most effective way of fighting, and if such a war would meet the criterion of proportionality, then the fact that one can expect relatively few pilot deaths should be seen as good fortune, not as evidence that this is somehow not a proper military action. And if such a strategy were the best way of attacking, one could, *contra* Walzer, in theory, kill without being willing to die (or at least with a very low threshold for risk).

Thus, while Richard B. Miller writes that '[W]e should note that only two NATO planes were shot down, and no pilots died or were captured behind enemy lines. Hence the phrase "combatant immunity" to mock the priorities of the air

continues to see the intervention as a state/NATO action (they are the ones who *do* the killing) even though he recognises that ordinary soldiers die. NATO leaders may decide to authorise the killing, but they do not do it. Similarly, even though the soldiers die, NATO leaders authorise the action that puts them at risk.

<sup>30</sup> Though he acknowledges the confusion that could arise from the two different 'yous' involved, Walzer does not address the difficulty of his 'hard sentence' – the fact that the 'you' making the decision to go to war is different from the 'you' that must be willing to die. This distinction is at the heart of my argument.

<sup>31</sup> Where Walzer might be right is in the letter rather than the spirit of his claim – and while I think his intended moral claim is clear, he could reply that he has merely asserted a truth of practical ethics: it may be true that it is in fact impossible to achieve the aim of saving people without risking one's own life. This has nothing to do with the justice of killing the guilty. Instead it depends upon the – quite plausible – practical assumption that in many situations of humanitarian intervention it will be impossible to kill the bad guys and save the innocent without engaging in some risk oneself.

<sup>32</sup> Walzer, *Just and Unjust Wars*, p. 155.

<sup>33</sup> Charles Dunlap, 'Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective', *Journal of Legal Studies*, 10 (2000).



campaign.<sup>34</sup> We should *also* note that this fact is only morally significant if one assumes – as Miller does – that the air attack was an immoral act because it failed the *jus in bello* criterion of double effect. (Miller’s condemnation rests also on a failure of double intention or what he calls ‘thick’ intention. I discuss the merits of this criticism below). Double effect could have been violated either if NATO planes specifically targeted civilians, or if the collateral damage, both direct and indirect (indirect collateral damage might be seen in this case as the acceleration of the ethnic cleansing by Serbs), meant that the unintended effects of NATO action made it fail a proportionality test. Casualty aversion policies are not wrong because they prevent deaths to soldiers; *when* they are wrong, they are wrong because they prevent deaths to one group by *unjustly* causing them to others, or because they make the war itself inconsistent with just war standards.

Assuming that the NATO air attack was not indiscriminate and that it did not fail the test of proportionality, (that is, that it did more good than harm), it was not a morally reprehensible action.<sup>35</sup> (Again, I do not want to dispute facts here – it may be that the assumption of discrimination and proportionality does not hold – in which case, we could condemn NATO’s action as a contravention of *jus in bello* principles).<sup>36</sup>

#### *Enabling double intention: casualty aversion and moral constraints*

Even if NATO’s strategy did *not* contravene accepted *jus in bello* principles it does not follow that it constituted the morally preferable means of intervention. We must be very careful to separate out two strands of moral critique of NATO’s action: one strand says that what NATO did was *wrong* because it caused more harm than good and/or that NATO action was negligently indiscriminate; a separate strand argues that NATO’s action was obviously *not the best strategy for intervention* considering the purported humanitarian ends of the military action. In both cases, the criticisms usually point to casualty aversion policies as the explanatory factor for why a morally wrong or morally non-preferable course of action was pursued. However, these are two very different moral claims, each resting on different but related sets of practical assumptions. One of the questions this distinction raises is how far we may say that it is a requirement of morality to choose the morally-best means in war, as opposed to merely choosing means that are not morally proscribed: are armies required to fight not merely without obvious injustice, but also with the utmost valour and virtue?

<sup>34</sup> Richard B. Miller, ‘Legitimation, Justification, and the Politics of Rescue’, in William Joseph Buckley (ed.), *Kosovo: Contending Voices on Balkan Interventions* (Grand Rapids, Michigan: William Eerdmans, 2000), p. 295.

<sup>35</sup> I should note that one of the problems with the muddled debate about Kosovo is an apparent failure to adhere to traditional definitions of discrimination. There has been a tendency to assume that any action that causes collateral damage is indiscriminate. If this were so it would prohibit almost all potentially lethal military action. Discrimination refers to intentions not to outcomes.

<sup>36</sup> Patricia Owens provides a very interesting account of how military leaders, by assigning collateral damage to the category of ‘accidents’, have attempted to thereby exonerate militaries from acts that would have failed just war criteria. See Patricia Owens, ‘Accidents Don’t Just Happen: The Liberal Politics of High-Technology Humanitarian War’, *Millennium Journal of International Studies* 32:3 (2003).

A brief detour is in order here. In what is commonly taken as the foundational text of contemporary just war theory, Walzer argues that the principle of double effect – that non-combatant deaths must not be intended, that any given action must be proportional, and that the proportionality test must take into account both intended and unintended but foreseeable consequences – is not stringent enough. ‘Simply not to intend the death of civilians is too easy’, Walzer argues; soldiers, *qua* soldiers, have a special duty of care to avoid involving non-combatants in their fighting, and this special duty of care means that not only must soldiers not intend to kill non-combatants, they must intend not to kill them.<sup>37</sup> In other words, incumbent upon soldiers is not only a negative duty not to harm but also a positive duty to minimise harm that their actions cause. And, according to Walzer, this positive duty means that soldiers must sometimes take on more risk in order to reduce risks of harm to civilians.<sup>38</sup>

Following from Walzer (and expressing an almost identical position), Richard Miller (who describes it as ‘thick’ rather than ‘double’ intention)<sup>39</sup> explains that:

Such an account is premised on a core feature of noncombatant immunity and the disinterested morality on which it relies: civilians have a right not to have war waged upon them, a right not to be terrorized by the use of force. Soldiers enter a profession in which they (tacitly or expressly) agree to assume risks to themselves in order to provide for the common defense and/or protect others; but civilians enter into no such agreement. War is fought between armies to save civilians’ lives and to restore justice to the conditions of social life, and only combatants have the right intentionally to kill each other for such ends. A robust account of intention would include a soldier’s duty to reduce, as far as reasonably possible, foreseeable risks to civilian life.<sup>40</sup>

Miller’s commentary suggests that one of the reasons why the Walzerian principle of double intention is intuitively appealing is that it links the just means of war to the just cause of war. Without specifying that war should always be fought in defence of human lives and human rights, Walzer’s principle forces us to accept that this end should always be at least *part* of the reason for going to war. In the case of an explicitly humanitarian war, the defence of human rights and lives is, of course, the purported aim of the war. In this case, Walzer’s principle reminds us that each time a non-combatant’s life is lost, a part of the war’s aim is also forfeited.<sup>41</sup> Wars may never be perfect, but the proper ends of war may both justify its prosecution and demand that we always attempt to make it as good as possible. Thus, if we adopt Walzer’s position that merely conforming to the proscriptions of double-effect is not enough, it follows that the means of war must not only be good enough, they must be the best possible means.

One of the things to notice about Walzer’s principle and Miller’s explanation is the way that the moral duty to take on risk in order to save civilians turns upon the moral personality of the soldier. In Miller’s reckoning, it is because certain

<sup>37</sup> Walzer, *Just and Unjust Wars*, p. 155.

<sup>38</sup> *Ibid.*, p. 156.

<sup>39</sup> It is odd that Miller, in apparently seeking to avoid using Walzer’s terminology for this idea, instead borrowed Walzer’s labels from another context.

<sup>40</sup> Miller, ‘Legitimation, Justification, and the Politics of Rescue’, pp. 389–90.

<sup>41</sup> It is in this context that Paul Ramsey offered the observation, that ‘[t]he justification of participation in conflict at the same time severely limited war’s conduct. What justified also limited!’, Paul Ramsey, *The Just War: Force and Political Responsibility* (Lanham, Md: Rowman & Littlefield, 2002), p. 143.

individuals *choose* to be soldiers that this moral obligation is assigned to them; it is a positive duty that inheres in a chosen role. Therefore, in order to impose such duties on soldiers we must believe that they are soldiers not just in the sense of being men and women with guns and planes and tanks, but soldiers in this moral sense: that they have accepted the general protection of innocent human life and rights as a positive purpose.

Let's return to the two strands of critique. The argument that NATO's action was not the morally preferable action rests on the practical counterfactual assumption that a ground war would have been more discriminate and would have entailed fewer civilian casualties, thus not only making the war's means more moral but also securing to a higher degree the ends for which the war was fought. If we assume, for the moment, that the air war did not contravene standards of discrimination and proportionality, the argument that NATO still ought to have pursued a ground war rests upon the practical assumption just stated as well as the moral assumption that the positive duty of double-intention was incumbent upon NATO forces, and that policies of force-protection or casualty aversion wrongly kept NATO from selecting the morally preferable (now arguably morally obligatory) strategy.

Many critics, and even some defenders, of NATO's apparent unwillingness to risk the lives of its soldiers have argued that policies of casualty aversion were *politically* motivated positions taken by NATO state leaders.<sup>42</sup> Because the leaders of NATO member countries had determined that their domestic populaces would not tolerate military action that entailed NATO casualties, a failure of political will, it is argued, kept NATO leaders from pursuing the moral course.

It is easy to see how the impetus for political self-preservation would have made casualty aversion an attractive principle to NATO leaders. However, it is worth considering the possibility that the political problem indicates and is connected to a deeper moral problem: if the soldiers in NATO's forces had not agreed to serve in humanitarian missions, then it would have been wrong to put them at risk in such a situation, to force them to risk their lives for a cause to which they had not committed themselves. In other words, rather than viewing casualty aversion policies as a politically motivated policy choice that traded Kosovar and Serb lives for NATO soldiers' lives, casualty aversion might have been depicted as a morally justified constraint upon possible NATO responses. Perhaps the *best* that NATO could do without morally wronging its own troops was to attempt to help from the safety of the air.

There are plenty of reasons to deny that this argument was even available to – much less deployed by – NATO leaders in defence of their chosen course of action. Despite the tenuous applicability of the moral argument, it may still be fair to say that the political pressures NATO leaders felt were somehow related to moral claims of this sort. Were these claims legitimate? Can we evaluate the moral quality of the politics that allegedly kept NATO from furnishing a ground war option? Both Henry Shue and Michael Walzer talk about the need to convince

<sup>42</sup> See, *inter alia*, Chinkin, 'Kosovo', Walzer, 'Kosovo', Dunlap, 'Kosovo, Casualty Aversion, and the American Military Ethos', Wheeler, *Saving Strangers*, p. 284. Charles K. Hyde, 'Casualty Aversion: Implications for Policy Makers and Senior Military Officers', National Defense University, {<http://www.ndu.edu/inss/books/books%20-%202000/Essays2000/HYDE.HTML>}.

mothers and fathers to give up their children for humanitarian causes.<sup>43</sup> It seems to me that, from a moral perspective, the critical conviction must lie with the soldiers themselves.<sup>44</sup> They must be convinced that the cause for which they risk their lives is just and worthy of the ultimate sacrifice. If a soldier has volunteered for humanitarian missions, then convincing his parents to accept that decision may be politically but is not morally requisite, at least in terms of public sanctioning of the war.<sup>45</sup> Nor is convincing his compatriots to let him fight a moral requirement (though it may be a political one). Just as the majority vote of the country cannot legitimately require the soldier to give up his life for something that he is unwilling to sacrifice for, so the majority cannot rightfully keep him from attempting to achieve a worthwhile aim at risk to himself.<sup>46</sup> Therefore, if the NATO soldiers involved were willing to serve as soldiers in humanitarian interventions, then the alleged political unwillingness of NATO populaces to allow their soldiers to engage in life-threatening combat was not a morally justifiable political position (and NATO leaders may be faulted for not making this case). Casualty aversion policies could not be justified by reference to such politics.<sup>47</sup>

However, if the soldiers had been conscripted for such a mission, or had agreed when enlisting to risk their lives for reasons not including humanitarian intervention, then a public demand for casualty aversion policies might have been seen not only as a political expression of collective interests but also as expressive of a justifiable moral claim. Moreover, there may be a similar legitimate political objection to an imperfect or inadequate enlistment programme. If the American populace's resistance to US casualties in humanitarian missions stems from a collective understanding of the military as a tool of national defence, and if that collective understanding shapes the environment in which soldiers enlist, then there may be reasons to entertain arguments that even where soldiers' enlistment contracts do not technically exclude humanitarian missions, the common

<sup>43</sup> Henry Shue, 'Limiting Sovereignty', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford:Oxford University Press, 2004), p. 24, Walzer, 'Kosovo', p. 334.

<sup>44</sup> There is, to me, something old-fashioned in this concern for satisfying parents. I wonder if it derives from reminiscences by these two theorists about the Vietnam War, when many of the young men who were drafted were not able to vote, and thus still children in the eyes of the state.

<sup>45</sup> It may be that a child wrongs his parents by disrespecting their wishes for him not to go fight, but this is a question about the morality of filial duty not public policy. The Israeli state does allow parents a veto over their child's service on the front lines (the parent must sign to permit an only child to go to the front line), but the Israeli army is also a conscripted one.

<sup>46</sup> Of course, the country as a whole must agree to equip, feed, house, and employ him, yet, in the case of Kosovo, this was not a problem, it was not the material but the human costs that domestic populaces would not countenance. Spending money to save Kosovars (or to stabilise south-eastern Europe) was acceptable; spending lives was not. However, what if the populaces of the US, Germany and Britain had refused to fund the NATO intervention, would such a refusal have been just? No – a natural duty to aid those in dire need when it can be done at tolerable expense would require material expenditures to save foreigners from harm. The sanctity of the moral autonomy of individuals keeps us from conscripting lives, however that same sanctity can justify conscripting dollars.

<sup>47</sup> Again, here I am evaluating the moral quality of the politics, not the political legitimacy of a procedure. A requirement for majority consent to war may be desirable in an all-things-considered moral judgment, but it does not follow that we must agree that the majority will always make the (morally) right decision. In pointing out a case where the majority errs, one does not necessarily advocate revolution, but rather reflection. (It should be noted, furthermore, that in this case the subject of evaluation is public opinion – which allegedly shaped the decisions of leaders – rather than any particular act of the majority).

understanding of the purposes for which soldiers volunteer – which might reasonably be seen as part of background beliefs from which soldiers make their choice to enlist – does.

Criticisms of NATO's apparent failure to abide by a principle of double intention often either ignore the moral obligations of NATO countries to their own citizens and soldiers altogether, or they take for granted that the individuals in NATO's military force had been properly enlisted and therefore were soldiers in the full moral sense, and so were morally obligated to employ means that met criteria of both double effect *and* double intention. The critique that NATO paid too much attention to preserving the lives of its own cannot be properly buttressed with an argument that implicitly denies or ignores the rights of those soldiers to have their lives valued at all. Such arguments merely invert the wrong that they purport to declaim.

### *Humanitarian soldiers and the freedom to choose the best means*

Once again, consider the potential claim that NATO leaders might have advanced: the war in Kosovo was a war of the government of Slobodan Milosevic against a segment of its own people. NATO was not a party to the actual war, it was an outside agent, and it was limited to such status by the fact that the soldiers in its participating militaries had not enlisted to save Kosovars. It took the most effective course of action that it could without wronging its own people, and this action met the criterion of double effect. The deaths of Kosovar and Serb civilians caused by the NATO bombing were regrettable, and every attempt, with the exception of a morally prohibited change of strategy that might put NATO soldiers at greater risk, was made to ensure that such 'collateral damage' was minimised. (A constrained form of double intention was thus in force). In essence NATO was acting as a weapon for the Kosovars in their battle against their own state. It may not have been the best weapon imaginable, but it was the only one available. NATO had a choice between taking no action at all and taking the action that it did, and, under the circumstances, the latter was the better option.<sup>48</sup>

As we have seen, such an argument obviously rests on a set of factual interpretations and assumptions. Moreover it clearly raises serious moral questions about the rights of Kosovar and Serb civilians. But the argument is not a ridiculous one. My purpose is not to defend it here, only to recognise that it is an important potential strand of the debate about the justice of NATO's action, and

<sup>48</sup> One possible justification for the NATO action might be found in an ideal consent criterion identified by Tesón: 'One solution is along ideal consent lines: the action is justified if all of the persons involved in the event, that is, those who would be sacrificed and those who would be saved (not knowing whether or not they would have been one or the other), would have agreed in advance that the action would have been appropriate'. This criterion gives room for self-regarding action on the part of the intervener – allowing not just the necessary innocent deaths that would occur with the use of any means, but even innocent deaths that are extra with the result of saving interveners' lives. Tesón does add that '[a] crucial related requirement, of course, is that the intervenor avoid as much as possible collateral deaths and damage, and that, where those collateral deaths are unavoidable, the intervenor abide by the doctrine of double effect'. NATO leaders could have plausibly argued that their action met this moderate requirement of intention as well as the standard of double effect. Tesón, 'The Liberal Case for Humanitarian Intervention', pp. 119, 20.

one that must be considered before we can endorse condemnations of the NATO strategy that included a policy of casualty aversion.

Even those who agree that soldiers should not be conscripted for humanitarian interventions might still disagree with the suggestion that NATO's alleged commitment to casualty aversion could have been thereby excused. Some might argue that, at least in the Kosovo case, the wrong done to civilians trumps the wrong done to soldiers who do not enlist for humanitarian purposes. Or, they might argue that no wrong is done until a greater number of soldiers have died than civilian lives have been saved by the riskier course. While such arguments may have merit, unfortunately they lead us down a path of weighing moral wrongs, perhaps on a case by case basis, a path which, when overlain with the politics of applied ethics, is unlikely to produce any firm or effective rules.

But *there is a way to avoid this problem altogether*, and that is to raise humanitarian armies to fight humanitarian wars. These armies would not be the national defence forces which states have up until now used in interventions. They could not be construed as third parties participating in a conflict of which they are not really a part. The men and women fighting in such conflicts would not be participants in humanitarian interventions, but soldiers in humanitarian wars. For compelling practical reasons their political commitments and chain of command may remain tied to their states, but their moral commitment would be explicitly to mankind as a whole, and the ends for which they are committed to fight and die would not be circumscribed by patriotic limitations but rather by the simple and straightforward cause of the defence of human lives and basic human rights. Such individuals would commit themselves to be soldiers in the moral as well as the material sense, they commit themselves to the principle of double intention and to taking on the increased risk that that principle requires in order to save the lives of non-combatants. The moral architecture of such a soldier's role and identity brings to the fore the fundamental connection between the soldier's rights and her responsibilities.

One overarching moral and political challenge that a situation like Kosovo raises for those committed to defending human rights and lives through intervention when necessary is how to transform national armies into humanitarian ones, and how to transform humanitarian interventions into humanitarian wars. The solution to this challenge arises out of the reconceptualisation of humanitarian intervention that I proposed above. It is only by seeing humanitarian intervention as an act in which not only states but also individuals are participants that we can ensure that such actions are taken according to standards of justice and, simultaneously, remove the constraints that conflicting moral obligations might otherwise impose upon the leaders of would-be intervening states.

More morally commendable interventions would come from a voluntary force that has explicitly committed to humanitarian missions. Absent such a force, casualty aversion strategies may effectively shield intervening states from claims by those of their soldiers who do not wish to risk their lives for strangers, but they also keep soldiers who would be willing to risk their lives from employing more effective (if riskier to themselves) means of rescuing human beings.

Thus, while some might see the claim that states should not send soldiers who have not affirmed a willingness to make the ultimate sacrifice for humanitarian causes into humanitarian missions as a restrictive criterion, I argue that it leads to an ultimately empowering political conclusion. Using an all-volunteer force in



which each soldier has (ideally explicitly) agreed to serve in humanitarian missions, emancipates force commanders from the possibility of wronging their soldiers by exposing them to risks in order to achieve the war's aims. The kind of force that I describe is free of some moral constraints upon its versatility and more likely to effectively achieve the goal of protecting the lives and rights of oppressed people while minimising collateral damage.

Raising volunteer humanitarian armies would enable us to unambiguously and uncontroversially demand that soldiers abide by the dictates of double intention. As stated above, double intention requires that military leaders select means that are not only acceptable according to standards of discrimination and proportionality, but also that they select means that will save the lives of non-combatants, even if this requires additional risks to their own soldiers. As Walzer explains, when 'military planners [. . .] decide that the losses entailed by the attack, even if it is carried out at minimal risk to the attackers, are not disproportionate to the value of the target: then "due care" is an additional requirement.'<sup>49</sup> I have argued that the reason that military commanders can and should impose the additional risks upon soldiers in order to save civilian lives is that the soldiers, by volunteering, have signalled their willingness to make the ultimate sacrifice for precisely that end.

#### *Humanitarian soldiers, double intention, and double effect*

Before concluding, it is worth addressing several potential lingering concerns. In embracing a duty of due care for non-combatant lives, we must be careful not to endorse an inversion of Walzer's accusation about treating some lives as expendable and others as priceless. We should not arrive at a position that soldiers' lives are expendable while civilian lives are not. As Walzer himself argues, 'there is a limit to the risks that we require [. . .] War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.'<sup>50</sup>

From a moral perspective, arguments for non-combatant immunity and for the value of a policy of double intention are grounded in a basic belief about the value of *all* human lives. The fact that soldiers have volunteered to make the ultimate sacrifice if necessary may justify putting their lives at risk, but it does not make their lives less valuable. Dunlap argues that American leaders have a disposition to 'balance potential military losses against expected enemy civilian fatalities'.<sup>51</sup> Though Dunlap is wrong to use the terms 'enemy civilians' and 'enemy noncombatants',<sup>52</sup> there is nothing wrong with noting that even when soldiers have accepted a duty of due care and double intention, this duty is not equivalent to a commitment to automatically risk the ultimate sacrifice no matter how low the odds of its saving someone.

<sup>49</sup> Walzer, *Just and Unjust Wars*, note 156.

<sup>50</sup> *Ibid.*, p. 156.

<sup>51</sup> Dunlap, 'Kosovo, Casualty Aversion, and the American Military Ethos', p. 5.

<sup>52</sup> One of the distinguishing criteria of the category of 'civilians' and 'noncombatants' is that they are *not* the proper enemy in war. Terms like 'enemy civilian' cause even greater complications in the context of humanitarian interventions where the preservation of the lives of at least some of the civilians constitutes a war aim.



So how far should we expect a humanitarian soldier (or a commander) to go in order to protect the lives of non-combatants at the expense of his own? A soldier, in volunteering to fight, agrees to take on risks to his life that reflect an equal valuation of his life and that of a civilian. The humanitarian soldier agrees to give his life to save a civilian life – he agrees that in the case of a military operation where either a civilian will be exposed to severe risk or he will be exposed to severe risk – two cases where proportionality assessments that take each human life as equal are undifferentiated – no wrong is done to him by asking him to make the ultimate sacrifice so that the civilian's life may be preserved.

Casualty aversion and double intention, properly understood, are two sides of the same coin: they are both constraints upon military strategy that arise out of the equal valuation of human lives. To allow casualty aversion to absolutely govern strategy is to unjustifiably push the human costs of war upon non-combatants. To allow the due care that soldiers must show for non-combatants to make soldiers' lives absolutely expendable is to perpetrate a similar moral error. When operating in tandem, the best forms of casualty aversion arguments and the best forms of double intention can help to ensure that no human lives are undervalued and that the superiority of particular means and the proportionality of military actions are measured according to a standard that regards all human lives as morally valuable.

Now, let's return briefly to consider double effect, for the attention the present argument pays to the rights of soldiers may have contributed to a lingering concern about whether the claims here reflect due regard for civilians. In response to my view that soldiers ought not be ordered into lethal combat if they have not agreed to do so, some objectors might wonder (and this is what I think Michael Walzer is getting at when he says that NATO treated lives on the ground as 'expendable') about the moral rights and status of both Kosovar and Serbian civilians. If sending soldiers into lethal risk is wrong unless they have willingly accepted such missions, then how can it be right to choose a military strategy that entails greater civilian losses than absolutely necessary (in order to avoid wronging soldiers) without the consent of those civilians?

Richard Miller has written that: 'Civilians in Yugoslavia do not deserve Slobodan Milosevic, but they did not deserve a NATO intervention that could have been more morally commendable, and perhaps more effective, in its effort to deliver Kosovo from Serbia's nationalism, tyrannical leadership, and ethnic hatred.'<sup>53</sup> Miller's phrasing is telling: the real question is not what Yugoslav civilians did *not* deserve, but rather what they *did* deserve. To deserve something can mean to have a right to it. Did Kosovars and Serbs have a right to a ground invasion even if that would have meant forcing some NATO soldiers to make the ultimate sacrifice? For reasons I have already discussed, I do not think so – I do not think that NATO soldiers had a perfect duty to risk their lives for Yugoslav civilians.

What about the toleration of any civilian casualties at all – don't such unchosen deaths come into tension with my position against conscription? I believe that there is a distinction between conscripting soldiers to fight and die for a cause and the unintended civilian casualties that are an inevitable part of the horribleness of war. To conscript a civilian and make him a soldier is to put him in a position where

<sup>53</sup> Miller, 'Legitimation, Justification, and the Politics of Rescue', p. 396.

it is permissible for the enemy to *intend* to kill him. Civilians, on the other hand, should never intentionally be killed. Soldiers agree to be used as a means to an end, and their choosing to do so is the only thing that makes this permissible while maintaining a position that human beings are to be regarded as ends. Civilians, even when they are killed unintentionally in military conflicts, are not used as means. In order to consider them as being used as a means the risk that their lives undergo would have to be intentional, a part of the strategy for achieving the war's end. Furthermore, in the case of a humanitarian intervention, it seems to me to be significant that the civilian lives, or at least many of them, are *already* threatened by the situation that apparently merits military intervention. In contrast, a conscripted person who was not threatened by the conflict at hand was really a bystander, not just an innocent, and this difference is significant.

In the case of the NATO aerial bombing, the proportional Kosovar deaths can be seen as permissible because these lives were already under threat – if any lives were saved by the bombing, then it was permissible, maybe not morally ideal, but permissible. The lives of Serbian civilians may seem, strangely, to be a tougher case, because these lives were not threatened directly by the Milosevic regime, so they were arguably not under threat already when NATO began its attack. However, Kosovar reprisals had certainly begun to put some Serbian civilian lives under threat, and it is possible that such reprisals would have increased without the NATO bombing. More importantly, the Kosovar people had a right to self-defensive war against the Milosevic regime. To the extent that Serbian civilian casualties were an unavoidable by-product of the exercise of that right to self-defence, then they were regrettable but not morally wrong. If one takes the view that the NATO airstrikes constituted a weapon of self-defence deployed on behalf of the Kosovar people, and that this was the only weapon that was available to the Kosovars (since NATO was unwilling to offer a ground invasion) then the Serbian deaths can be seen as the unfortunate collateral damage caused by the exercise of a Kosovar right of self-defence. The blame for the moral tragedy of the Serbian civilian deaths, like the blame for the moral tragedy in general, lies with the Milosevic regime.

Assuming that a ground war would have been more discriminate and more effective, as well as more proportional, there is no question that such a strategy would have been *better*, (and had an army of humanitarian soldiers been at the ready, it would have been morally permissible with respect to them and therefore morally required with respect to the civilians). However, just because the air strikes were not the best imaginable option does not mean that they were impermissible. A less morally commendable course of action is not necessarily a wrong one. Yugoslav civilians did not deserve Slobodan Milosevic, to be sure, but neither did anyone else in the world deserve the lethal responsibility for tempering his evil.

## Conclusion

In this article I have argued for a moral reconceptualisation of humanitarian intervention, and have attempted to show some of the ethical implications that follow from that rethinking. For those interventionists who want a pragmatic and

agile practical solution, my view may present new obstacles. Many scholars have noted that states have often cloaked humanitarian interventions with the legal legitimacy offered by describing such operations as efforts to protect international peace and stability. This has been seen as a way to carry out humanitarian intervention by using a (not totally unrelated) sort of loophole in international law. In other words, the use of Chapter VII mandates has been seen as a way around the *legality* problems surrounding humanitarian intervention. However, in light of the present discussion, we can see that (re-)describing humanitarian missions as security missions to defend the stability of the international order also may be thought of as a method for bracketing some of the concerns about the *moral* legitimacy of humanitarian intervention. When a state tells its soldiers that they are intervening to defend international order, that is, to prevent a local conflict from becoming a larger one, it can justify the risk to which it subjects them by saying that their actions are for the purpose of defending their own community. Assuming that the soldiers have enlisted with the willingness to make the ultimate sacrifice to defend their compatriots, such missions are apparently morally legitimate.<sup>54</sup> However, if we move to a new era where operations like the US-led intervention in Somalia are no longer couched in security terms, then the soldiers cannot be told that they are risking their lives for their compatriots, they must be asked to be willing to die for the rights and lives of non-compatriots.

My aim here has been to unpack a theoretical puzzle, not to suggest a particular policy. And while the arguments made here, if accepted, would have implications for how we think about policy, I am mindful of Allen Buchanan's related observation that 'one cannot go from a moral argument for the soundness of a particular course of action in a single (usually highly idealized) type of case to a general principle that is suitable for institutionalization.'<sup>55</sup>

Nonetheless, in the most general terms it seems to me that the tension explored in the preceding pages can be resolved in one of two ways: Either states can add to the extant structure of national defence forces a new kind of military force, or national defence forces can be redefined as humanitarian armies whose missions are openly dedicated to the defence of persons, rather than that of states. There are a range of specific policies that might be seen as contributing to or aligning with one or the other of these possible resolutions. None is without potential drawbacks or practical challenges, and again, it is not my present purpose to advocate for a specific policy here.

In the vein of modifying the structure of military forces, practical implications might include the creation of a separate humanitarian force. The Danish *Den Dansk international brigade*, which existed from 1994 to 2005 and was created specifically to provide troops for international missions of the UN, NATO, or

<sup>54</sup> One frustrating aspect of the NATO leaders' responses to Kosovo was that they seemed, at times, to want to have it both ways – justifying the action in some fora as a *security* measure but justifying their reticence to risk troops on the grounds of lack of political will to sacrifice lives for essentially *humanitarian* objectives. Even if it is the case that political leaders will always re-describe a humanitarian mission in terms of security in order to gain political support, the use of humanitarian soldiers would remove the supposed constraints that attach to soldiers who have only volunteered with their nation's security in mind and unambiguously grant the moral option of committing soldiers *qua* soldiers to humanitarian missions.

<sup>55</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 23.

OSCE represents a real world example of this sort of supplementary force.<sup>56</sup> The oft-talked-about creation of a rapidly deployable force affiliated with the UN, (assuming that it was comprised of volunteers rather than conscripts assigned by their governments) could be another way of institutionalising humanitarian armies. Or perhaps the French Foreign Legion provides workable model of an international force attached to a state. A more passive approach to segmenting two different types of soldier would be to permit some form of selective conscientious objection, so that those who were unwilling to risk their lives in humanitarian interventions could opt-out.<sup>57</sup>

Alternatively, if the practical hurdles of maintaining separate forces are too great, then one might simply see the policy implication of my argument as a demand for acknowledgment that we are moving to an era in which soldiers are not just agents of national defence, they are what at least one practitioner-cum-theorist has called 'guardian soldiers'.<sup>58</sup> Practically speaking, such an acknowledgment might manifest itself in the kinds of recruitment messages that are used – since those messages provide a controllable part of the background conditions against which individuals decide to volunteer – and in the more overt acceptance of a cosmopolitan purpose for national military forces in just states.

Some may believe that we've already moved to such an era. But the historical record of interventions (and non-interventions) and the discourses that surround them suggest that there is more work to be done: leaders still feel constrained to practice casualty aversion to a greater degree when protecting foreign persons than when protecting co-nationals, and this distinction is, by and large, expected and accepted. Changing the way in which people understand the purpose of war, the purpose of the military, and the ends for which volunteers agree to risk the ultimate sacrifice is an important step in moving toward a world in which defence of persons is less constrained.

In most societies, it is still more difficult to convince people to risk the ultimate sacrifice for foreigners than it is to convince them to do so for their compatriots. If we wish to respect their right to decide the causes for which they are willing to risk their lives, then we must live with the fact that efforts to muster forces for pure humanitarian interventions must operate within the constraints implied by this right. On the other hand, this method of raising humanitarian armies allows us to treat humanitarian interventions as what they really are or ought to be: humanitarian wars; it therefore allows us to justify true humanitarian action and the risks that it entails. If security concerns only merit containing a conflict, humanitarian ones might justify going further to actually end it.

We do not need the whole world to enlist in a military to defend against gross human rights abuses. What we require from the whole world really is only the carrying out of actions consistent with negative duties not to harm others. But when evil arises, as it inevitably does, we do need a few – and they are relatively only a few – brave and morally committed souls to be willing to risk their lives for

<sup>56</sup> See Peter V. Jakobsen, 'The Danish Approach to UN Peace Operations After the Cold War', *International Peacekeeping*, 5:3 (1998).

<sup>57</sup> Selective conscientious objection obviously raises a set of serious practical issues, as well as concerns about opportunism.

<sup>58</sup> Gustav Daniker, 'Intervention as a Challenge for the Military', in Michael Keren and Donald Sylvan (eds), *International Intervention* (London: Frank Cass, 2002), p. 117.

the rights that we all want to have and that we want all people to have. The rest of us share the benefits of their sacrifice, and we can show our gratitude to these soldiers for the unequal load that they take on through honour and praise, and through material compensation, though none of these is recompense equal to the moral burden they bear on our behalf.

I think that Henry Shue is mistaken when he says that people doing the defending of others need to be convinced that they are doing only their fair share;<sup>59</sup> they are doing manifestly more than that, and there is no way to evenly distribute their deaths. And so the best we can do is to recognise the heroism in what these individuals choose to do, and to acknowledge that with their blood and lives they purchase human rights for the rest of us, they help to create the world that takes human rights seriously. In the end we cannot escape the fact that while participation in an effective humanitarian intervention will always be morally admirable in our view it can never be seen as an enforceable moral duty on the part of the soldiers who risk and make the ultimate sacrifice to save others. In order to enforce such a duty we would have to disrespect the same values upon which we justify the soldiers' action in the first place. The solution then can only be to develop the arsenal of compelling moral arguments that will convince enough soldiers to volunteer to defend and protect the basic human rights that are a constitutive aspect of the world in which we want to live.

<sup>59</sup> Shue, 'Limiting Sovereignty', p. 27.