

Humanitarian Intervention, the Responsibility to Protect and *jus in bello**

James Pattison

University of the West of England, Bristol

Abstract

This article assesses the moral importance of a humanitarian intervener's fidelity to the principles of international humanitarian law or *jus in bello* (principles of just conduct in war). I begin by outlining the particular principles of *jus in bello* that an intervener should follow when discharging the responsibility to protect, drawing on Jeff McMahan's recent work. The second section considers more broadly the moral underpinnings of these principles. I claim that consequentialist justifications of these principles cannot fully grasp their moral significance and, in particular, the difference between *doing* and *allowing*. Overall, I argue that these principles are (i) more important and (ii) more stringent in the context of humanitarian intervention.

Keywords

humanitarian intervention; *jus in bello*; the Responsibility to Protect, doing and allowing; the Doctrine of Double Effect

Introduction

The problematic conduct of those undertaking humanitarian intervention has often been documented. In Somalia in 1992, for example, the Canadian airborne division was subject to allegations of torture, murder, and racist behaviour. Similarly, NATO's use of cluster bombs and its targeting of Serbian infrastructure during its intervention in Kosovo were heavily criticised. More

* This article is based on material from James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford, Oxford University Press, forthcoming). Earlier versions of this article were presented at the University of Southampton, Newcastle University, and the University of Wales, Newport, as well as the British International Studies Association's Annual Conference. I would like to thank, in particular, Chris Armstrong, Derek Bell, Nick Buttle, Simon Caney, Darryl Howlett, Peter Jones, Graham Long, Andrew Mason, Jocelyn Mawdsley, Enzo Rossi, Steve Smith, and two anonymous referees for their helpful comments.

recently, UN personnel on peace operations in Burundi, the Democratic Republic of Congo, Haiti, the Ivory Coast, and Liberia have been subject to allegations of serious sexual abuse. Accordingly, an intervener's conduct is often mentioned as an important consideration in its justifiability.¹ For example, the UN's 'Capstone Doctrine', which outlines principles and guidelines for UN peace operations, asserts that participating troops should observe the principles and rules of international humanitarian law (IHL).² Others frame this requirement in terms of Just War Theory (JWT) and, in particular, with reference to the principles of *jus in bello*, principles of just conduct in war.³

Yet interveners' conduct – the '*in bello*' issue – rarely receives detailed and systematic attention in the literature on the ethics of humanitarian intervention.⁴ Instead, the focus has largely been on '*ad bellum*' issues, that is, the conditions that must be met before an intervener can justifiably engage in humanitarian intervention (e.g., just cause, reasonable prospect of success, right intention, and legitimate authority). The recent shift in the debate away from the notion of 'humanitarian intervention' towards a 'responsibility to protect' (R2P) has, if anything, exacerbated the focus on *ad bellum* issues. Contemporary legal and political discussions have concentrated on legitimate authority (e.g., whether Security Council authorisation is necessary for intervention) and just cause (e.g., how serious the humanitarian crisis has to be in order for military intervention to be appropriate).⁵ By contrast, JWT does

¹ See, for instance, Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (Cambridge: Polity Press, 1996), p. 226.

² UN, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: Department of Peacekeeping Operations, 2008).

³ See, for example, Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005), pp. 254–255.

⁴ The exceptions include Daniel Bloch, 'The Fog of UN Peacekeeping: Ethical Issues regarding the Use of Force to Protect Civilians in UN Operations', *Journal of Military Ethics*, 5/3: 201–213 (2006); Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000); Andrew Ladley, 'Peacekeeping Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations', *Politics and Ethics Review*, 1/1: 81–90 (2005); George Lucas Jr, 'From *jus ad bellum* to *jus ad pacem*: Re-Thinking Just-War Criteria for the Use of Military Force for Humanitarian Ends' in Deen K. Chatterjee and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003); and Tony Pfaff, 'Peacekeeping and the Just War Tradition', Strategic Studies Institute, U.S. Army War College, 2000.

⁵ For useful surveys of these discussions, see Alex Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', *International Affairs*, 84/4: 615–639 (2008) and Adèle Brown, 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect', House of Commons Research Paper 08/55, 17 June 2008.

consider in detail *jus in bello*, but this is seldom, if ever, specifically in relation to humanitarian intervention.

This article attempts to fill this lacuna. It draws on contemporary JWT to delineate the principles that should be followed by those discharging the R2P, before considering more broadly the moral underpinnings of these principles. More specifically, the article proceeds as follows. I start by outlining the principles of ‘external’ and ‘internal’ *jus in bello* that an intervener should follow. These principles, I claim, should be more restrictive than those found in both traditional and recent JWT. The next section considers the underlying justifications of the significance of an intervener’s fidelity to the principles of external and internal *jus in bello*. I argue that consequentialist attempts to justify the importance of these principles fail, partly because these attempts do not distinguish between ‘doing’ and ‘allowing’. Section V examines what I call the ‘Absolutist Challenge’ – that the principles of *jus in bello* defended are *too* important and consequently render humanitarian intervention impermissible. After rejecting the Doctrine of Double Effect as a solution to this challenge, I invoke a scalar account of justifiability to show that this objection can be circumvented.

Before beginning, four points of clarification are necessary. First, strictly speaking, an intervener’s fidelity to the principles of *jus in bello* affects its justifiability only *during* intervention. But we can also include the importance of an intervener’s following these principles as an *ad bellum* consideration. We can consider whether, at the time that the decision to intervene is being made, we can *reasonably expect* an intervener to follow these principles.⁶ Second, the aim is to use moral and political philosophy to identify which principles of *jus in bello* an intervener should follow and why. Space precludes a detailed analysis of more practical political and legal obstacles to the immediate implication of these principles (such as the reticence of certain states to agree to them). Third, I focus on the conduct of those undertaking humanitarian intervention rather than peacekeeping (traditionally conceived).⁷ Fourth, it is important to note that although the focus of this article is on humanitarian intervention,

⁶ We can make this judgment by considering, firstly, the intervener’s track record of fidelity to the principles of *jus in bello* in previous interventions and, secondly, its institutional characteristics (such as whether it is constituted of low-paid, ill-disciplined troops or highly-trained, specialised forces with much experience in dealing with civilians).

⁷ I define humanitarian intervention as ‘forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life’. This may include more robust peace-keeping operations, that is, those which involve peace enforcement.

this is only one aspect of the R2P. According to the International Commission on Intervention and State Sovereignty (ICISS), the R2P encompasses the ‘responsibility to prevent’ and the ‘responsibility to rebuild’, as well as the ‘responsibility to react’ (which includes humanitarian intervention).⁸

Principles of External *jus in bello*

Following Brian Orend, we can distinguish between two sorts of principles of *jus in bello*: principles of (i) ‘external *jus in bello*’ and (ii) ‘internal *jus in bello*’.⁹ Principles of external *jus in bello*, which I consider first, concern the rules that an agent should follow in connection with the opposition’s soldiers and civilians. This is what we normally think about when discussing *jus in bello* (i.e., principles of discrimination, proportionality, and so on). Principles of ‘internal *jus in bello*’, by contrast, concern the rules that an agent should follow in connection with its own soldiers and citizens. I consider these in section III.

There are four central principles of external *jus in bello* according to traditional JWT.

1. A two-part principle of ‘discrimination’. Those using force must not do so indiscriminately. Instead, they should distinguish between (i) legitimate targets (i.e., military objects) and (ii) illegitimate targets (i.e., civilian objects).
 - (i) The ‘moral equality of soldiers’. Combatants are legitimate targets, regardless of the justice of the war that they are prosecuting.
 - (ii) ‘Noncombatant immunity’. Intentionally targeting civilians or civilian objects is prohibited.
2. A principle of ‘proportionality’. The use of force must be proportionate to the military advantage gained. The excessive use of force against combatants is prohibited.
3. A prohibition on the use of certain weapons and methods, such as biological warfare and anti-personnel mines.
4. The humane treatment of civilians, persons *hors de combat*, and prisoners of war.

⁸ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

⁹ Brian Orend, *The Morality of War* (Ontario: Broadview Press, 2006), pp. 127–137.

The ensuing discussion focuses on the first two of these principles, that is, discrimination and proportionality. The other two principles are relatively uncontroversial and I shall assume that all parties, including interveners, should follow them.

Traditional JWT treats the principles of discrimination and proportionality as distinct from *jus ad bellum*. That is to say, the principles apply both to those fighting a just war – a war that meets the requirements of *jus ad bellum* – and to those fighting an unjust war – a war that does not meet these requirements. In the context of the R2P, they apply to both those undertaking justifiable humanitarian intervention and those who unjustly oppose the intervener, such as local militia.¹⁰ In addition, for the most part, these principles do not take into account combatants' moral responsibility for their part in the war. For instance, conscripts who are forced to fight an unjust war are as liable to attack as volunteer soldiers who consent to do so.

These principles are part of what can be called the 'conventional rules of war'. They are drawn from existing legal rules and norms governing the use of force and designed to reflect a number of pragmatic considerations. Michael Walzer's *Just and Unjust Wars*, for instance, can be viewed largely as a defence and interpretation of the conventional rules of war.¹¹ Recent work in JWT, however, has raised doubts about the adequacy of the moral underpinnings of the traditional, convention-based JWT. Most notably, Jeff McMahan offers what he calls an account of the 'deep morality' of the rules of war.¹² This is less concerned with existing conventions and pragmatic considerations; the focus instead is on offering an account of the principles of *jus in bello* which better reflect underlying moral principles and, in particular, individual rights. And, on this 'deep' view, both the separation of *jus in bello* from *jus ad bellum* and the exclusion of individual moral responsibility are mistaken.

¹⁰ Despite previous ambiguity, these principles apply to UN forces. They also apply to both those involved in international and non-international armed conflicts (such as rebel groups). See Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', *American Journal of International Law*, 94/2: 406-412 (2000) and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: Cambridge University Press, 2005), pp. 3-24.

¹¹ Michael Walzer, *Just and Unjust Wars*, Fourth Edition (USA: BasicBooks, 2006).

¹² See Jeff McMahan, 'The Ethics of Killing in War', *Ethics*, 114/4: 693-733 (2004) and Jeff McMahan, 'The Morality of War and the Law of War' in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Legal and Moral Status of Soldiers* (Oxford: Clarendon Press, 2008).

This can be most clearly seen for the moral equality of soldiers. Traditional JWT asserts that, regardless of the justice of the war that they are prosecuting, soldiers are legitimate targets because, in Walzer's terminology, they are dangerous men.¹³ The problem with this view, McMahan asserts, is that it is not clear why soldiers prosecuting *just* wars – wars that meet the requirements of *jus ad bellum* – should be legitimate targets.¹⁴ He suggests that individual liability to attack in war is 'by virtue of being morally responsible for a wrong that is sufficiently serious to constitute a just cause for war or by being morally responsible for an unjust threat in the conduct of war'.¹⁵ Thus, in prosecuting a just war, just combatants do nothing wrong. They do nothing to forgo their right not to be killed. It also follows that it is not clear why those who are *not* morally responsible for prosecuting an unjust war (e.g., conscripts and child soldiers) should be liable to attack. Since they are not morally responsible, they also do not seem to do anything wrong and, likewise, are not legitimate targets. The requirements of *jus in bello* seem to depend, then, both on *jus ad bellum* and individual moral responsibility. Thus, although they may be 'engaged in harm', both those prosecuting a just war and those with little choice but to fight can be said to be 'morally-innocent' combatants: they are not responsible for unjust aggression and should therefore not be liable to attack.

This rejection of the separation of *jus in bello* and *jus ad bellum* and the inclusion of individual moral responsibility has important implications for those undertaking humanitarian intervention. If an intervener's action is just according to *jus ad bellum* criteria (applied to humanitarian intervention), it is not permissible to target its soldiers.¹⁶ Those facing a just humanitarian intervention cannot legitimately use force against the intervener. For instance, it seems right that a murderous rebel faction cannot legitimately target those working for a UN multi-national force attempting to secure a peaceful resolution to the humanitarian crisis.¹⁷

¹³ Walzer, *Just and Unjust Warriors*, p. 145.

¹⁴ McMahan, 'The Ethics of Killing in War'.

¹⁵ McMahan, 'The Morality of War', p. 22.

¹⁶ The leading example of the application of *jus ad bellum* to humanitarian intervention is ICISS, *The Responsibility to Protect*, p. XII, who argue that intervention should have 'legitimate authority', meet the 'just cause threshold', as well as four 'precautionary principles' (right intention, last resort, proportional means, and reasonable prospects).

¹⁷ It can sometimes be justifiable for unjust combatants to use force against those conducting a just intervention: namely, when the intervening forces themselves violate *jus in bello*. McMahan gives the example of an unjust combatant discovering a just combatant who is preparing to rape a woman in an occupied village. It would be permissible in this case for the unjust combatant to

How do these revisions affect the means that an intervener can use to tackle the humanitarian crisis? To start with, it is important to note here that these revisions do not mean that interveners can legitimately target civilians who are morally responsible for the unjust aggression, such as politicians and media figures who whip up genocidal hatred. In other words, the principle of non-combatant immunity should *not* be amended to take into account individual moral responsibility or *jus ad bellum*. As McMahan notes, there are epistemic and consequentialist reasons for maintaining the general prohibition on targeting civilians.¹⁸ For instance, given the difficulties of determining moral responsibility, a rule that would allow an intervener to target morally-responsible civilians may be dangerous since it could lead to the mistaken targeting of morally-innocent civilians. On the contrary, I argue below that it is even more important that an intervener follow the principle of non-combatant immunity when engaged in humanitarian intervention. In fact, rather than removing a restriction on warfare by weakening non-combatant immunity, the revisions I propose to, first, the moral equality of soldiers and, second, proportionality provide *additional* restrictions on the use of force. As such, if one side mistakenly perceives that it is fighting a just war or targets morally-innocent combatants, the result may be regrettable. But such soldiers could have been legitimately targeted anyway under the conventional account of these principles.¹⁹

So, if the intervener's action is unjust (if, for instance, it lacks just cause and a reasonable prospect of success) and if opposing the intervention is just, then the intervener cannot legitimately target enemy combatants fighting against it. Even if the intervener's action is just, there are still limits on which enemy combatants it can target. More specifically, it may be prohibited from targeting enemy combatants who are not morally responsible for their unjust resistance. For instance, it may be illegitimate to target conscripts who have little choice but to defend their tyrannical ruler against the intervener, since such soldiers are not culpable for the threat that they pose.²⁰ Similarly, child soldiers

use force against the just combatant. McMahan, 'The Ethics of Killing in War', p. 710. Such incidents, however, do not mean that other just combatants, who are not involved in the abuses, are acceptable targets.

¹⁸ See *ibid.* and McMahan, 'The Morality of War'.

¹⁹ There may also be epistemic and consequentialist reasons for maintaining the traditional principles of the moral equality of soldiers and proportionality. I consider some of these below.

²⁰ To be sure, a number of conscripts may still, to a certain extent, be morally responsible for their participation in an unjust war and this may make them morally liable to attack. The conscription may not have been against their will, there may have been reasonable alternatives apart from conscription, the duress may have been only very weak, and there may be reasonable

do not have sufficient moral capacity to be morally responsible for their actions, and therefore should not be liable to attack.

Here we face a potential problem, however. Since it would not be permitted to target morally-innocent conscripts and child soldiers, an intervener may be severely limited in any operation that involves fighting against these soldiers. This could make prosecuting the intervention extremely difficult, and perhaps practically impossible, and, as a result, the victims of the humanitarian crisis may be left to suffer.

One response is to argue that such soldiers can be targeted because they are *causally*, if not *morally*, responsible for the humanitarian crisis that prompts intervention, such as the mass violation of human rights. Perhaps this answer is the only plausible justification for the legitimate targeting of morally-innocent soldiers. McMahan calls this the ‘lesser evil justification’: targeting those who are morally innocent is necessary to avoid a much greater evil (i.e., the mass violation of human rights).²¹

But even granting that such an instrumentalist logic may sometimes take over, the requirement to avoid harming morally-innocent agents still seems to impose a number of restraints on interveners, including a stricter principle of proportionality.²² First, the targeting of morally-innocent combatants should be avoided where possible. Second, other means apart from lethal force should be pursued first. Third, morally-responsible combatants, such as volunteer, genocidal forces, should be the primary targets of any military action by an intervener. The targeting of morally-innocent combatants should be the last resort. Fourth, interveners may be required to accept greater risk to themselves (and their soldiers) to minimise harm to morally-innocent combatants. Suppose, for instance, that an intervener is to conduct an aerial bombing campaign against an enemy commander, with child soldiers nearby. If it would increase accuracy, the intervener may be required to conduct this campaign at low altitude, at greater risk to its pilots, in order to decrease the likelihood of injuring the child soldiers.

Thus far, I have been largely concerned with the deep morality of the rules of war and have suggested some revisions to the principles of *jus in bello*

opportunities (which they do not pursue) to desert. In addition, the conscripts may fulfill their role with vigour and to the best of their ability, rather than trying to negatively affect the prosecution of their unjust war by attempting sabotage or being inefficient.

²¹ McMahan, ‘The Morality of War’, p. 23.

²² A similar list of requirements is presented by McMahan in his thoughtful discussion of JWT and child soldiers. Jeff McMahan, ‘Child Soldiers: An Ethical Perspective’ in Scott Gates and Simon Reich (eds.), *Building Knowledge about Children in Armed Conflict* (Ford Security Studies Series, forthcoming).

to reflect *jus ad bellum* and individual moral responsibility. Drawing on McMahan's work, we have seen that there is reason to reject the moral equality of soldiers and to limit further proportionality. However, McMahan pulls his punches.²³ He argues that there are a number of pragmatic considerations which mean that we should, in fact, maintain the strict conventional or 'legal' equality of soldiers. He presents a number of reasons for this view, the most relevant of which for our purposes are as follows: (i) there is considerable uncertainty about *jus ad bellum*, meaning that it can be difficult to determine combatants' liability; (ii) combatants may themselves be limited in their ability to assess *jus ad bellum*; and (iii) a rule that prohibits the targeting of just combatants would be ineffective and could protract wars, since unjust combatants who target just combatants will choose to continue to fight rather than face punishment. So, according to McMahan, although we should reject the *moral* equality of soldiers, we should eschew (at least for now) amendments to the *legal* equality of soldiers, until we can develop institutions, such as an impartial international court, to judge *jus ad bellum*.

It is less clear, however, whether the pragmatic considerations that McMahan cites provide reason to reject revisions to the legal equality of soldiers *in the context of undertaking humanitarian intervention*. This particularly applies for the prohibition on targeting intervening soldiers who are pursuing a just intervention. They should not be regarded as *morally* or *legally* acceptable targets.

To start with, determining *jus ad bellum* can sometimes be straightforward in the context of humanitarian intervention. To put it crudely, those hacking off limbs, raping, and pillaging cannot point to the epistemic difficulties of judging *jus ad bellum*. They are clearly committing wrongdoing and therefore patently cannot legitimately target those attempting to prevent their atrocities – the intervening soldiers. Nevertheless, a legal rule prohibiting the targeting of just intervening soldiers may run into difficulties in cases when it is unclear if, first, an intervener is engaged in 'humanitarian intervention' and, second, its action is just. McMahan is correct that new legal rules on *jus ad bellum* and an international court to determine these issues could make such judgments more reliable.²⁴ But we do not have to wait for the development of such an institution to update the existing legal rules on *jus in bello*.

One straightforward, albeit imperfect (and perhaps stopgap), solution would be to amend IHL so it is impermissible to target those conducting an intervention authorised by the UN Security Council. To be sure, this solution

²³ McMahan, 'The Morality of War', pp. 27–30.

²⁴ *Ibid.*, pp. 41–43.

is not ideal: it is by no means certain that a Council-authorized intervention will 'humanitarian' rather than abusive; the Council is far from always being a reliable judge of *jus ad bellum*, so the interventions that it does authorize may not always be just; it often fails to endorse interventions that arguably would be just; and this amendment is limited – an intervener may undertake just intervention without Council-authorization, yet its soldiers could still be targeted under this amendment. In addition, I have argued elsewhere that the procedural problems of the Council mean that its authorization has little intrinsic moral worth.²⁵

Nevertheless, making it impermissible to target those conducting an intervention authorized by the UN Security Council is likely to be an improvement on the *current* legal situation, which permits too much. It might be argued, first, that many of the interventions that the Council *does* authorize largely meet the requirements of *jus ad bellum*. Second, the Council is widely viewed as the only body that can legitimately authorize humanitarian intervention.²⁶ This means it plays central legitimating role – the authorizing of humanitarian intervention in the name of the international community. Given this role, there seems to be extra reason to render it impermissible to target those engaged in Council-authorized force. Those who target the soldiers of Council-authorized interveners, to a certain extent, challenge the centrality of the Council as the authoritative body on these issues and the sanctioning of humanitarian intervention in the international community's name. Indeed, the conventional rules on *jus in bello* already prohibit intentional attacks on Council-authorized peacekeeping operations.²⁷ My suggestion is that this law be extended to those undertaking more coercive humanitarian intervention authorized by the Council as well. This change would, in effect, tie the law on *jus in bello* to the current law on *jus ad bellum*: Council-authorized intervention is legal and therefore those undertaking Council-authorized intervention cannot be legally targeted. Third, to lessen the sense of 'victor's justice', it may be preferable to limit this extension only to interveners that possess the legitimate authority to undertake humanitarian intervention (i.e., possess Council authorization).

²⁵ James Pattison, 'Humanitarian Intervention and International Law: The Moral Significance of an Intervener's Legal Status', *Critical Review of International Social and Political Philosophy*, 10/3: 301–319 (2007).

²⁶ See *ibid.*

²⁷ Current international law prohibits attacks on peacekeepers (who are considered civilians) on UN and regional organisation operations, but excludes those engaged in peace enforcement operations (who are considered combatants). Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, p. 114.

In addition, amending the legal equality of soldiers may, despite the perverse incentives to protract wars that McMahan cites, have a deterrent effect. Prosecution of those who target troops of an African Union multinational force, for instance, may reduce the likelihood of future attacks on the force. Besides, any additional prosecution for targeting intervening troops would be unlikely to *further* entrench the position of unjust combatants. They may already be significantly entrenched in their position because of a prosecution by the International Criminal Court or another criminal tribunal for the violation of civilians' rights (noncombatant immunity).

Although current international law should be revised to prohibit attacks on just interveners, it should not be amended to reflect the individual *moral responsibility* of those who oppose the intervener. That is to say, existing IHL should *not* be amended to require interveners to minimise harm to morally-innocent combatants, such as certain conscripts. This is because of the difficulties of assessing combatants' moral responsibility, firstly, by the intervener in the midst of an operation and, secondly, more generally in the ethics of warfare. It would be problematic therefore to prosecute intervening soldiers who fail to minimise harm to morally-innocent combatants (e.g., by not accepting risk to themselves). Nevertheless, the moral responsibility of opposing combatants can still be included in conventional JWT on a less formal basis under military doctrine. Interveners can issue guidelines for engaging enemy combatants that attempt, where possible, to take into account enemy combatants' culpability (e.g., by suggesting that interveners avoid harming child soldiers). For similar reasons, the amendments to the principle of proportionality, which I discuss in the next section, should also be included in military guidelines rather than in strict legal rules of IHL.

Revising Modern JWT

I have suggested, then, that by drawing on recent accounts of JWT it becomes clear that both the principles of discrimination and proportionality should be revised to reflect *jus ad bellum* considerations and individual moral responsibility. These revised principles are more restrictive than traditional accounts of JWT and should not simply remain part of the deep morality of war, but should be reflected immediately in the conventions of *jus in bello*.²⁸

²⁸ So, although *jus ad bellum* and *jus in bello* seem to concern conceptually-distinct issues, *jus ad bellum* affects *jus in bello* by limiting who are permissible targets (and what can be done to them). Conversely, *jus in bello* (when amended to be concerned with future conduct), can affect *jus ad bellum*: the likely use of just means acts as an extra *ad bellum* principle.

Notwithstanding, the rejection of the separation of *jus ad bellum* and *jus in bello* and the inclusion of moral responsibility of opposing combatants can only take us so far. The problem is that these principles are still too permissive because they focus on war in general. Most notably, proportionality is compatible with the use of substantial force against morally-responsible combatants who are prosecuting an unjust war. If this were applied to humanitarian intervention, it could be acceptable for a just intervener to kill a large number of opposing volunteer soldiers (assuming that they are morally responsible) if military necessary. This seems mistaken. When undertaking humanitarian intervention, the principles of external *jus in bello* should be more stringent and more important still.²⁹

Few humanitarian interventions, if any, involve outright war. Instead, many missions tend to take place in response to low-intensity conflicts and are tasked with a mix of monitoring, keeping, building, and enforcing the peace.³⁰ In fact, humanitarian intervention can sometimes be conceived of as closer to domestic law enforcement than outright war. That is to say, an intervener's task is not to defeat an opposing army but to establish and maintain the rule of law against potential spoilers. The analogy with domestic law enforcement gains plausibility if we conceive humanitarian intervention not as a permissible act of war to halt an exceptionable mass violation of human rights in an otherwise Hobbesian international system, but as an obligatory discharging of the R2P in order to uphold the international rule of law. Of course, the analogy is not perfect. Interveners often have to deal with situations where there is little or no law to enforce, and so have to rely on significant, destructive force in order to achieve their humanitarian aim.

This difference in type of operation necessitates more restrictive principles of external *jus in bello*. In particular, it requires less aggressive conduct by intervening forces than permitted under the JWT notion of proportionality. Unlike in regular warfare, attempting to destroy enemy forces using significant force is not appropriate. The intervener's conduct should instead be

²⁹ Although I focus on the principles of discrimination and proportionality, it may also follow, given the arguments that I present, that it is also more important that those undertaking humanitarian intervention follow the other central two principles of external *jus in bello* (the prohibition on certain weapons and the humane treatment of civilians, persons hors de combat, and prisoners of war). In addition, some of the reasons that I offer for the increased stringency and importance of *jus in bello* could apply to other uses of force, especially those that occupy enemy territory.

³⁰ NATO's campaign in Kosovo is a notable exception. Indeed, the problematic use of means by NATO may, in part, have been due to the fact that it was conceived in some quarters as war rather than humanitarian intervention.

driven, like the domestic police, by the objectives of the protection of civilians and the maintenance of the peace. Thus, George Lucas Jr argues that, if ground troops had have been deployed in Kosovo, the mission would not have been to make war upon the Serbian military in a conventional manner.³¹ Rather, it would have been to prevent those forces from firing on Kosovar civilians and to prevent exchanges of fire between the Serbs and Kosovar militia. Of course, it may be that, on occasion, the deliberate targeting of enemy combatants and infrastructure and a clear show of force is necessary to tackle the humanitarian crisis. But, unlike traditional JWT, which obliges soldiers only to consider the most force *permissible*, those engaged in peace operations should consider what is the least force *possible*, and avoid using force as a first resort.³²

The aims of the operation also mean that more stringent principles of external *jus in bello* are necessary. In short, the intervener is conducting intervention for *humanitarian* purposes. This is particularly relevant for the principle of noncombatant immunity. Let me explain. To be engaged in ‘humanitarian intervention’, an intervener needs to possess a humanitarian intention. Without a humanitarian intention, its action could not be classified as ‘humanitarian’.³³ One of the main ways to determine an agent’s intention is to look to its conduct. It is unlikely that an intervener that kills civilians indiscriminately could be said to possess a ‘humanitarian’ intention. Its apparent indifference to civilian casualties counts against its other humanitarian credentials. For instance, NATO’s use of cluster bombs and reliance on aerial bombing in Serbia certainly weakened (if not fatally) the humanitarian credentials of its intervention. What is called for, then, is consistency of means and ends: an intervener should use humanitarian means when attempting to achieve humanitarian ends.³⁴

This is not simply a definitional question. Interveners should follow these principles because part of what makes it permissible to undertake military intervention, in contravention of state sovereignty, is being humanitarian. As Lucas argues,

³¹ Lucas, ‘From *jus ad bellum* to *jus ad pacem*’, p. 77.

³² Pfaff, ‘Peacekeeping and the Just War Tradition’, p. 5. Pfaff’s focus is on traditional peacekeeping, but his arguments can be extended to humanitarian intervention.

³³ A key way we tend to classify actions is by looking at the actor’s intentions. For more on this, see my *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford, Oxford University Press, forthcoming) and Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, Third Edition (New York: Transnational Publishers, 2005), pp. 113–121.

³⁴ Also see Alex Bellamy, ‘Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention’, *Journal of Military Ethics*, 3/3: 216–232 (2004), p. 229; Lucas, ‘From *jus ad bellum* to *jus ad pacem*’; and Heinze, ‘The Moral Limits of Humanitarian Intervention’.

the justification for such acts to begin with, and subsequent prospects for their enduring legitimacy, rest upon understanding the purpose of the intervening forces as primarily the enforcement of justice, the protection of rights and liberties currently in jeopardy, and the restoration of law and order, rather than straightforwardly defeating (let alone destroying) an opposing military force.³⁵

The importance of possessing a humanitarian intention lies then as a *permissible* reason to use military force.³⁶ There is a strong case to maintain a general prohibition on the use of force (e.g., for reasons of global stability), with only a few exceptions. The use of force in order to tackle a serious humanitarian crisis – humanitarian intervention – is generally regarded as one of these exceptions (as defended by the R2P doctrine). And to be such an exception, humanitarian intervention requires a humanitarian intention. Otherwise, it would be a different sort of intervention (e.g., intervention for economic gain) that is *prima facie* morally impermissible because it violates the general prohibition on the use of force (unless it falls under another exception to prohibition on the use of force, such as self-defence in response to aggression). But the humanitarian purposes that (sometimes) permit overriding state sovereignty are compromised if the intervening forces deliberately or inadvertently behave unjustly.³⁷

By analogy, suppose that a concerned neighbour breaks into a house in order to stop an abusive father hurting his children. Since the neighbour knows that she may be attacked by the abusive father too, she uses nerve gas to weaken his strength and to minimise the risk to herself. In doing so, she knowingly harms some of the children. Although her actions ultimately result in more good than harm (e.g., she harms one child but protects five others), there seems to be something deeply problematic about her use of nerve gas. What makes her action permissible, like what makes it permissible for interveners to violate state sovereignty when attempting to tackle a humanitarian crisis, is having a humanitarian purpose. But the humanitarian permission for her entering the house is significantly weakened by her use of nonhumanitarian means.

This example also indicates that those saving lives should be willing to incur risks to themselves when necessary. This may, for instance, require an intervener to risk casualties amongst its soldiers in order to avoid harming civilians

³⁵ Lucas, 'From *jus ad bellum* to *jus ad pacem*', p. 77.

³⁶ I simplify here for reasons of space. For a more nuanced discussion of the moral relevance (and irrelevance) of an intervener's intentions and motives, see my *Humanitarian Intervention and the Responsibility to Protect*.

³⁷ See Lucas, 'From *jus ad bellum* to *jus ad pacem*', p. 77.

and to use minimum force against other combatants. In response, it might be argued that requiring interveners to incur risks is problematic because it could reduce potential interveners' willingness to intervene, given the fear of casualties. Although this may be a reasonable expectation, it does not mean that the requirements on interveners should be watered down to overcome such fears. If interveners are willing to act only with very high levels of force protection and, as a result, insist on deflecting risk onto the civilian population and enemy combatants, the conclusion should be that the intervention would be morally problematic, rather than that we should weaken the requirements of *jus in bello*.³⁸

Therefore, interveners should adopt the following principles of external *jus in bello*, which should be incorporated not only in the deep morality of warfare but also form part of the conventions of JWT.

1. A two-part principle of 'discrimination'. Those using force must not do so indiscriminately. Instead, they should distinguish between (i) legitimate targets (i.e., military objects) and (ii) illegitimate targets (i.e., civilian objects).
 - (i) Legitimate targets. Combatants prosecuting a *just* intervention cannot be legitimately targeted. For its part, an intervener can legitimately use limited force against *morally-responsible* combatants who are fighting an unjust war. They can also use limited force against *morally-innocent* combatants who are fighting an unjust war, as long as this is unavoidable, is a last resort, and providing that they attempt to minimise the harm to these combatants by accepting risk themselves.

³⁸ According to my account of external *jus in bello*, (i) civilians, (ii) certain enemy combatants, and (iii) intervening soldiers are (typically) all morally innocent and therefore not liable to attack. In this sense, they are all morally equal. The stricter principle of proportionality defended may require intervening soldiers to accept a greater degree of risk to themselves when dealing with other morally-innocent individuals. Such a requirement seems to give greater weight to the lives of civilians and (innocent) enemy combatants, and therefore seems to deny the equal moral worth of intervening soldiers. There are two potential lines of response here. First, in their role as agents of humanitarian intervention, intervening soldiers may be required to accept a greater degree of risk to themselves in order to protect civilians, just as we may think that the police have to accept greater risk to themselves in their role of protectors of society. (In this role, intervening soldiers may not be required, however, to accept greater risk to themselves when facing enemy combatants). Second, any additional risk required of intervening soldiers would, in practice, be limited by instrumental considerations. Given that most interveners face shortages in military personnel, more lives would be saved by protecting, as far as possible, the welfare of intervening soldiers and using them in the most optimal way of protecting civilians, rather than sacrificing a large number of intervening soldiers to protect only a few civilians.

- (ii) Noncombatant immunity. Intentionally targeting civilians or civilian infrastructure is prohibited. Foreseeable civilian casualties are also impermissible, even if unintended. Interveners should accept risks themselves in order to minimise harm to civilians.
2. A principle of 'proportionality'. The use of force against morally-responsible combatants must be limited to the least force possible. The use of force must always be driven by the objectives of the protection of civilians and the maintenance of the peace, rather than defeating the enemy.

Principles of Internal *Jus in Bello*

Let us now consider the principles of 'internal *jus in bello*', which have received much less attention in both JWT and discussions of humanitarian intervention. These principles concern how an intervener should behave towards its own citizens and soldiers. For our purposes, there are two central principles of internal *jus in bello*.

The first restricts the sort of soldiers that an intervener can use to undertake humanitarian intervention. It seems clear that an intervener cannot justifiably employ child soldiers. Likewise, it can be argued that the use of conscripts should be avoided. This is not because of anything objectionable about the use of conscripts for humanitarian intervention in particular. It can be argued that, if conscription were justifiable, it would be as justifiable for humanitarian intervention as for any other purpose (such as self-defence), given that the conscripts would be used to tackle the mass violation of human rights.³⁹ Rather, the problem with the use of conscripts is more general: conscription undermines individual autonomy and freedom of conscience in that it sometimes forces individuals to fight against their will. In addition, the use of private military companies (PMCs) in roles that involve combat should generally be avoided, given the problems caused by the lack of effective national and international regulation of their services (such as the undermining of democratic accountability).⁴⁰ Accordingly, it is only regular, volunteer soldiers that can be justifiably used for humanitarian intervention.

³⁹ For more on this issue, see Tesón, *Humanitarian Intervention*, pp. 132-137 and Richard Vernon, 'Humanitarian Intervention and the Internal Legitimacy Problem', *Journal of Global Ethics*, 4/1: 37-49 (2008), pp. 44-45.

⁴⁰ See James Pattison, 'Just War Theory and the Privatization of Military Force', *Ethics and International Affairs*, 22/2: 145-164 (2008) for an account of these problems.

It may be argued, however, that the use of regular, volunteer soldiers is objectionable as well, since humanitarian intervention contravenes the terms of the implicit soldier-state contract that soldiers agree to when joining. Martin Cook most clearly expresses this concern.⁴¹ He argues that this contract obliges military personnel to accept great risks and engage in morally and personally difficult actions on the understanding that the circumstances under which they will act will be when the nation's defence or vital interests require action. But when using force altruistically for humanitarian purposes, 'the military person may say with moral seriousness, "This isn't what I signed up for"'.⁴² To be sure, Cook asserts that soldiers and citizens may be willing to accept a certain 'threshold of pain' when fighting humanitarian wars, but claims that this will be rather low.

It is important to acknowledge the strength of Cook's objection. If force protection needs to be high in order to minimise casualties amongst the intervenor's soldiers, the result in all but the least risky of missions would be either nonintervention, as intervenors choose not to act, or the deflection of military risk onto those subject to humanitarian intervention (for instance, as intervenors conduct only aerial bombing campaigns from a high altitude). In the latter case, high levels of civilian casualties are likely and humanitarian intervention may therefore be unjustifiable. Accordingly, if the soldier-state contract implies that force protection standards must be high for humanitarian intervention, and if the use of other military personnel apart from volunteer regular soldiers, such as conscripts and PMCs, is objectionable (as I have suggested), there is reason to generally prohibit humanitarian intervention in all but the least risky of cases.

We need not reach this conclusion, however. This is because the soldier-state contract is not limited to defence of a state's vital interests. A soldier can expect when signing up that they will take part in humanitarian and peace operations, given the frequency of such operations. Indeed, some armed forces (such as the British Navy) have expressly used the possibility of conducting humanitarian intervention in their recruitment campaigns. Moreover, as Cook also argues, the U.S. has tended to employ humanitarian and universalising rhetoric to justify their wars, such as advancing human rights, freedom, and democracy and opposing tyranny and despotism, rather than simply national defence (and the point can be extended to a number of other states).⁴³

⁴¹ Martin Cook, "Immaculate War": Constraints on Humanitarian Intervention' in Anthony Lang Jr (ed.), *Just Intervention* (Washington, D.C.: Georgetown University Press, 2003), pp. 150-153.

⁴² *Ibid.*, p. 151.

⁴³ *Ibid.*, p. 146.

Such rhetoric is likely to have an impact on individuals signing up: they can expect that their state will engage in a variety of military operations, including sometimes humanitarian intervention, for the benefit of those beyond the borders of their state.

Let me now turn to a second principle of internal *jus in bello*. Although interveners may be required to accept risks themselves, and therefore should avoid maintaining high standards of force protection at the expense of civilians and enemy combatants, they should still attempt to minimise casualties amongst their own soldiers. Thus, the second principle of internal *jus in bello* asserts that an intervener possesses a responsibility of care for those fighting on its behalf. Those in the military profession put their lives on the line and, in doing so, sacrifice many political and civil rights and other liberties. In return, an intervener owes its soldiers special treatment, for instance, to look after their families if they are injured in action and to provide its soldiers with the equipment (such as flak jackets, radio systems, and working rifles) necessary to be able to undertake humanitarian intervention without putting their lives in needless danger.⁴⁴

This is not to claim that an intervener should never put its soldiers' lives at risk. On the contrary, the intervener may be required to put at risk its soldiers' lives in order to avoid harming civilians and sometimes enemy combatants. In other words, interveners have a responsibility of care for their soldiers, although this does not mean that they should maximise force protection at the expense of violating the principles of external *jus in bello*. Rather, the point is to insist that the intervener has a duty to ensure that those fighting for it are not subject to *avoidable* harm by, for instance, providing them with the right equipment and sufficient back-up. Although soldiers may willingly agree to be placed in combat situations that are dangerous, such individuals do not forgo their human rights. Their lives should still be cherished.

Consequentialism and Doing and Allowing

We have seen, then, that those undertaking humanitarian intervention should follow a number of principles of external and internal *jus in bello*. Although I have considered the justification of particular principles, it may be asked at this point why it is that an intervener should follow these principles *more*

⁴⁴ See, further, Orend, *The Morality of War*, pp. 133–136, who lists a number of soldiers' rights.

generally. Indeed, one major argument against requiring an intervener to follow these principles is that they could reduce the effectiveness of its attempt to halt the mass violation of human rights. Insisting on a strict principle of proportionality, for instance, may make it more difficult for an intervener to use robust military force against those perpetrating the mass violation of human rights. More strongly, an extreme consequentialist might argue that all that is important is the successful tackling of the humanitarian crisis and an intervener should not be restricted in its use of means to achieve this goal.

These objections are unconvincing. To see this, let us consider the possible justifications of the importance of an intervener's fidelity to *jus in bello*. The first is also consequentialist. It asserts that an intervener should follow these principles because doing so will, in fact, maximise the chances of achieving a successful outcome to the humanitarian crisis. More specifically, the response is an 'indirect consequentialist' argument, and runs as follows.⁴⁵ An intervener should follow these principles because this is likely to maximise its effectiveness at tackling the humanitarian crisis overall, even if on particular occasions it will not. As is widely recognised, perceived legitimacy is a vital factor in an intervener's effectiveness. An intervener that is willing to kill civilians (even unintentionally), it might be claimed, will quickly stop being legitimate in the eyes of those in the political community that is subject to its intervention. This will increase resistance and hostility to the intervener, and severely hamper its effectiveness. Likewise, the argument runs, an intervener that is more careful and limited in its use of force against enemy combatants (for instance, by attempting to secure their surrender before using lethal force) is more likely to be able to disarm, co-opt, and rehabilitate these soldiers in the long-run (rather than entrenching their position). Moreover, when using a more restrictive principle of proportionality – although still using force robustly when required – it sends a message that the rule of law is being re-established (or established for the first time), rather than the continuation of the conflict. This can help to improve the intervener's chances of long-term success as the

⁴⁵ As a general theory, indirect consequentialism (specifically indirect act consequentialism) holds that, rather than attempting to maximise the good directly, agents should adopt decision-making procedures, such as dispositions, traditions, and rules of thumb, which maximise the good overall. The principles of *jus in bello* could arguably also be justified by rule consequentialism. That is, interveners should follow rules of *jus in bello* because these rules, when sufficiently complied with, maximise the good – the enjoyment of human rights. There is an inherent problem, however, with rule consequentialism: it collapses into act consequentialism. For a classic statement of this objection, see J. J. C. Smart, 'An Outline of a System of Utilitarian Ethics' in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), pp. 10–11.

intervener is not seen as an enemy occupier prolonging the conflict, but as a facilitator of the peace.

A similar defence can be made of the principles of internal *jus in bello*. It might be argued that an intervener that uses child soldiers, PMCs, or conscripts is less likely to be effective because using these sorts of soldiers will erode the confidence of those in the political community in which it intervenes (and therefore undermine its perceived legitimacy). Likewise, an intervener that fails to fulfil the duty of care to its soldiers will find that its force quickly becomes demotivated and less effective.

This indirect consequentialist argument provides a plausible instrumental justification of the principles of *jus in bello* and therefore helps to respond to the objection that fidelity to these principles undermines an intervener's likely success. Yet it leaves untouched the stronger, extreme consequentialist objection that the successful tackling of the humanitarian crisis is all that matters. That is to say, it leaves the justification of these principles contingent solely on their expected effectiveness, which is a risky strategy. Despite the indirect consequentialist response, the link between an intervener's effectiveness and its fidelity to these principles may not be strong enough to guarantee that following these principles will *always* increase effectiveness overall. There may be occasions when an intervener will be likely to be more effective by abandoning these principles by, for example, using significant force against enemy combatants.⁴⁶

Moreover, limiting the importance of an intervener's following these principles to their effectiveness misses something morally important. That is to say, there is something more to the importance of an intervener's expected fidelity to the principles of *jus in bello* than simply whether this improves its effectiveness. To see this, consider the following scenario by Philippa Foot, which has been adapted by Warren Quinn:

In Rescue I, we can save either five people in danger of drowning in one place or a single person in danger of drowning somewhere else. We cannot save all six. In Rescue II, we can save the five only by driving over and thereby killing someone who (for an unspecified reason) is trapped on the road. If we do not undertake the rescue, the trapped person can later be freed.⁴⁷

⁴⁶ Likewise, PMCs can improve the effectiveness of an intervener. Most notably, in 1995, the government of Sierra Leone employed Executive Outcomes, who, because of their military superiority, were able to successfully end the murderous Revolutionary United Front's siege of Freetown. For more on this incident, see Herbert Howe, 'Private Security Forces and African Stability: The Case of Executive Outcomes', [*Journal of Modern African Studies*, 36/2: 307-331 \(1998\)](#).

⁴⁷ Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing', [*The Philosophical Review*, 98/3: 287-312 \(1989\)](#), p. 290.

For the consequentialist, we should act in both cases. Yet this seems troublesome. Although in Rescue I it is justifiable to save the lives of five even though one will drown, it is not clear that we should act in Rescue II. What this example relies on is a distinction between *doing* and *allowing*. That is, there is a morally relevant distinction between what one does oneself and what one allows.⁴⁸ Thus, there is a significant difference between the killing of the trapped person in Rescue II and the letting of a single person elsewhere die in Rescue I. Rescue I seems permissible because we are not doing harm ourselves. But in Rescue II, it seems that we should not run over the trapped person because we should not do *harm* ourselves. It seems morally better if we *allowed* the other five to die.

The same reasoning can be applied to an intervener's fidelity to the principles of *jus in bello*. In addition to any instrumental justification, a reason why an intervener's likelihood of following the principles of *jus in bello* is important is that an intervener should not itself do harm (specifically, harm that is impermissible according to these principles).⁴⁹ It would, to a certain degree, be better if an intervener were to *allow harm*, perhaps thereby being less effective, than for it to target civilians, use indiscriminate weapons, and so on.

One reason why the doing and allowing distinction matters is because when one does the action, it is *oneself* that is violating the right, whereas when one allows the action, it is *someone else* that is violating the right. There is a difference between the government of state A violating state B's citizens' rights and the government of state A not intervening to stop the government of state B violating its own citizens' rights.⁵⁰

But for the extreme consequentialist, there is *no* moral importance (beyond any instrumental importance) to the distinction between an intervener that does harm, say by killing civilians, and an intervener that fails to prevent harm,

⁴⁸ Samuel Scheffler frames the distinction between doing and allowing in terms of the distinction between primary and secondary manifestations of our agency and claims that 'we operate with an intuitive picture according to which, in general, the norms of individual responsibility attach much greater weight to the primary than to the secondary manifestations'. Samuel Scheffler, 'Doing and Allowing', *Ethics*, 114/1: 215-239 (2004), p. 216. In his view, '[t]here is little doubt that some idea of this sort has an important role to play in ordinary moral thought'. *Ibid.*, p. 215.

⁴⁹ To be sure, some harm is permissible according to the principles of *jus in bello*; the concern is with *impermissible* harm, such as harm that is suffered by civilians.

⁵⁰ Sometimes it is claimed that the difference between doing and allowing ultimately derives from the moral importance of an agent's intention. This is a murky area in moral philosophy. But even if the difference between doing and allowing is a matter of intention, it still provides reason to reject the extreme consequentialist argument.

say by failing to prevent another agent killing civilians. All harm is permissible if it improves effectiveness. Suppose that torturing the young children of the members of an oppressive regime would be effective overall at getting this regime to stop human rights abuses. That it is interveners who do the harm is morally irrelevant. On the contrary, if a particular intervener were to *refrain* from torturing innocent family members, it would be unjustifiable because it would be *allowing* harm. So, on this approach, whether an intervener follows the principles of *jus in bello* is of no independent value. What an intervener does itself is essentially morally equivalent to what it allows. But, as the discussion above demonstrates, this is highly counterintuitive. An intervener's justifiability does seem to depend on what it does itself and, in particular, its fidelity to principles of *jus in bello*.

At this point, however, the argument I have presented faces another serious objection, which I shall call the Absolutist Challenge.

The Absolutist Challenge

The Absolutist Challenge runs as follows. On an absolutist, deontological position according to which the difference between doing and allowing is of absolute moral significance, intervention could never be justifiable because it almost always involves *doing* some harm that is impermissible.⁵¹ That is, since it involves the use of military force, it frequently results in civilian casualties which, according to the strict principle of discrimination outlined above, are impermissible. It follows that humanitarian intervention cannot be justifiable. This challenge therefore poses a significant problem to my use of the difference between doing and allowing to defend the importance of an intervener's fidelity to the principles of *jus in bello*. It seems to show that my defence of these principles is *too* strong.

The Doctrine of Double Effect

One potential response to the Absolutist Challenge that is common in the literature on humanitarian intervention is to adopt the Doctrine of Double Effect.⁵² In short, this doctrine permits collateral damage, such as civilian

⁵¹ This point is made by Tesón, *Humanitarian Intervention*, pp. 137-140.

⁵² See, for instance, Bellamy, 'Motives, Outcomes, Intent', pp. 229-230; Heinze, 'The Moral Limits of Humanitarian Intervention'; Henry Shue, 'Bombing to Rescue?: NATO's 1999

casualties, providing that such damage is not *intended*. More specifically, it asserts that a humanitarian intervention that has both a good effect (such as tackling genocide) and a bad effect (such as civilian casualties) can be morally permissible if the following conditions are met:

- (i) *The good effect is intended.*
- (ii) *The bad effect is unintended.* Although the intervener may *foresee* that the bad effect (e.g., civilian casualties) is likely with its action, it does not *intend* this bad effect. It is a foreseen, but unintentional, side-effect of its action.
- (iii) *The bad effect is not instrumental.* The bad effect (e.g., civilian casualties) must not be a means to achieving the good effect (e.g., the removal of a tyrannical leader). So, for instance, civilian casualties are not used as a means to terrorise a tyrannical leader into submission.
- (iv) *The bad effect is proportionate.* The good effect is sufficiently beneficial that it outweighs the bad effect. For example, although the intervention results in 1,000 unintended civilian casualties, by removing a tyrannical leader it ultimately saves 2,000 lives.

So, an intervener that intentionally targets civilian objects in order to force a tyrannical leader into submission acts *impermissibly*. This is because the civilian deaths are intended. But an intervener that targets military objects in order to force the tyrannical leader into submission, in full *knowledge* that civilian objects will also be damaged collaterally, acts *permissibly*. This is because the civilian casualties are an unintended side-effect of pursuing the good end (assuming that the action is proportionate).

The Doctrine of Double Effect allows room, then, for an intervener to cause collateral damage, including civilian casualties, providing that the damage is unintended, not instrumental to the humanitarian end trying to be achieved, and proportionate. As Fernando Tesón suggests, it can be seen as a midway between deontological and consequentialist approaches.⁵³ It does not hold the absolutist, deontological position that civilian casualties are *always* impermissible. But it is more restrictive than an extreme consequentialist approach that potentially justifies civilian casualties (in violation of *jus in bello*) if this is likely to improve the effectiveness of humanitarian intervention. By contrast, the

Bombing of Serbia' in Deen K. Chatterjee and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003); and Tesón, *Humanitarian Intervention*.

⁵³ Tesón, *Humanitarian Intervention*, p. 104.

Doctrine of Double Effect asserts that civilian casualties that are intended, disproportionate, or instrumental are impermissible.

The Doctrine of Double Effect is not, however, a persuasive response to the Absolutist Challenge. The general validity of this doctrine is a deep and controversial issue in moral philosophy and I cannot pursue it here.⁵⁴ Notwithstanding, there are practical reasons to reject the doctrine as a moral-political principle in the ethics of humanitarian intervention.

The central problem is that it is too permissive since it permits unintended but foreseen civilian casualties. This grants too much in the context of humanitarian intervention. I argued above that those using force for humanitarian purposes must use humanitarian means because what legitimises their use of military force is being humanitarian. If this is correct, then unintended, but foreseeable civilian casualties should be avoided. As Lucas strongly asserts, military personnel engaged in humanitarian intervention are not entitled 'to inflict unintentional collateral damage on non-military targets or personnel by the principle of double effect', but instead must '*avoid even inadvertent commission of the kinds of acts they are intervening to prevent*'.⁵⁵ Likewise, if there is a difference between doing and allowing, then an intervener should avoid causing foreseeable harm to civilians itself, even if unintended.⁵⁶

In fact, Henry Shue admits that, since it permits the killing of uninvolved persons and the destruction of ordinary property, granting the permissibility of the Doctrine of Double Effect constitutes a 'giant concession to the fighting of wars'.⁵⁷ But in defence of the doctrine, he argues that to reject it would be to adopt a pacifist, unrealistic approach. In a similar vein, Tesón argues that,

⁵⁴ One of the most common criticisms of the doctrine is that there is little difference between (i) foreseen, unintentional harm and (ii) intentional harm. Recent repudiations, however, focus on whether the doctrine does any real moral work. See, for instance, Alison McIntyre, 'Doing Away with Double Effect', *Ethics*, 111/2: 219-255 (2001).

⁵⁵ Lucas, 'From *jus ad bellum* to *jus ad pacem*', p. 78.

⁵⁶ Walzer recognises that the doctrine is too permissive, and so adds a further condition: not only must the intention of the actor be good, 'aware of the evil involved, he seeks to minimize it, accepting costs to himself', *Just and Unjust Wars*, p. 155. Yet even with this extra restriction, the doctrine is still too permissive. Suppose, for instance, that an intervener cannot avoid hitting a school when using long-range missiles against a military barracks of genocidal soldiers. It cannot use ground troops since there is an early warning system that means that the genocidal soldiers would flee before the intervener's forces could get near (so the intervener cannot minimise the risk any further). Although unintentionally destroying the school would kill hundreds of children, it would help end the conflict, and potentially save many more lives (so would be proportionate). Such a case would be justified according to the Doctrine of Double Effect, but seems deeply problematic.

⁵⁷ Shue, 'Bombing to Rescue?', p. 107.

although the doctrine has problems, rejecting it leads to the result of morally banning all wars.⁵⁸ As we will now see, however, these responses are mistaken. One can reject the Doctrine of Double Effect, endorse the difference between doing and allowing, and yet still avoid the non-interventionist position.⁵⁹

Avoiding the Absolutist Challenge

The Absolutist Challenge can be circumvented without having to invoke the Doctrine of Double Effect. First, we can reject an absolutist, deontological position that rules out humanitarian intervention altogether, yet still endorse the moral importance of the difference between doing and allowing. That is, we do not have to admit that this difference is of *overwhelming* moral significance. Rather, we can say that there is, at least, *some* moral significance in the distinction between doing and allowing. This more moderate position does not necessarily lead to non-interventionism. It matters, *to a certain degree*, that an intervener will not violate *jus in bello* itself, even though this may ultimately allow more rights to be violated. But *sometimes* it is more important to intervene (and *do* harm) than to refrain from intervention (and *allow* much more harm).⁶⁰

Second, it is important to understand the role that fidelity to the principles of *jus in bello* plays in the overall justifiability of an agent's humanitarian intervention. According to a categorical or 'checklist' approach, humanitarian intervention is only acceptable when all the criteria relevant to its justifiability (such as just cause, last resort, reasonable prospect of success, right intention, and fidelity to the principles of *jus in bello*) are met.⁶¹ If it were to fail to meet even one criterion, it could not be justifiable. So, if intervention violates *jus in bello*, it is morally problematic on this approach, even though it may be a proportionate response to a just cause undertaken for the right reasons and with a good chance of success.

⁵⁸ Tesón, *Humanitarian Intervention*, p. 104 n. 12.

⁵⁹ It may be responded that those who endorse the Doctrine of Double Effect do not mean it to be an all-embracing moral principle and, as such, other moral principles, such as the difference between doing and allowing, would rule out many problematic cases. This may be true. But the doctrine is often used by its defenders (if mistakenly) in the ethics of war as a catch-all principle that responds to the Absolutist Challenge. My focus is on responding to their account.

⁶⁰ Indeed, most defenders of the difference between doing and allowing admit that this distinction is not absolute. See, for instance, Quinn, 'Actions, Intentions, and Consequences'.

⁶¹ The most significant example of the checklist approach is ICISS, *The Responsibility to Protect*.

This categorical approach is at odds with commonsense moral thinking on humanitarian intervention and warfare. It seems patent that an intervention can be just overall despite failing to meet a particular criterion. For instance, MONUC, the UN's peace operation in the Democratic Republic of Congo, seems to be an example of a justifiable humanitarian intervention, despite the violation of external *jus in bello* by certain troops.

We should instead adopt a scalar approach to humanitarian intervention that holds that the overall justice of an intervention is a matter of degree. Interventions that fail to meet a number of principles will be lower down the scale; interventions that meet most of the principles will be further up. To be *fully* justifiable, an intervention needs to meet *all* the relevant principles. But an intervention does not need to meet all the relevant principles in order to be justifiable, *all things considered*. An intervention that fails to meet one principle (say by using conscripts) could still be justifiable all things considered, if it can make up this loss of justifiability in other ways by, for instance, being exceptionally effective at tackling a particularly serious humanitarian crisis.⁶²

Adopting this scalar approach avoids the Absolutist Challenge. Humanitarian intervention may sometimes be justifiable all things considered, despite the violation of *jus in bello*. To be sure, endorsing this approach does not deny the importance of fidelity to the principles of *jus in bello*. On the contrary, it gives fidelity to the principles of *jus in bello* their proper moral significance. For the reasons discussed above, this is a highly significant factor in an intervener's justifiability. More specifically, fidelity to the principles of *jus in bello* makes two sorts of constraint on humanitarian intervention. First, the seriousness of the violation determines how difficult it is for an intervener to make up the loss of justifiability. For less serious violations, such as the employment of PMCs in combat roles, it may be easier. This also helps to forestall another objection: requiring interveners to follow the stricter principles of *jus in bello* does not impose unrealistic expectations on their behaviour which will, in practice, mean that intervention will always be unjustifiable. A minor violation of *jus in bello* by an intervener generally, or a major violation by only a few soldiers, is unlikely to render an intervention unjustifiable. But it may be

⁶² Of course, the scalar approach is not new. Another example of this sort of approach in the context of humanitarian intervention can be found in Tesón, *Humanitarian Intervention*, pp. 143–144. For a more detailed account of when exactly an intervener's action can be justified all things considered under the scalar approach, see my *Humanitarian Intervention and the Responsibility to Protect*.

difficult for an intervener to make up the loss of justifiability that comes from systematically contravening the principles of *jus in bello*, such as the intentional targeting of civilians. It may only be in exceptional circumstances (such as the effective prevention of genocide) that an intervener can be justifiable overall when it significantly violates *jus in bello*. Second, even in such circumstances, its intervention would not be *fully* justifiable. A fully justifiable intervener needs to respect fully these principles of just conduct.

Conclusion

I have argued, then, that it is important that those discharging the R2P follow a number of principles of external and internal *jus in bello*. The principles of external *jus in bello* (in particular, the principles of proportionality and discrimination) are both more stringent and important in the context of the R2P, given the type of military operation that humanitarian intervention comprises and the humanitarian aims that it has. The importance of an intervener's fidelity to these principles of *jus in bello* cannot be completely captured by consequentialist thought; it also depends on the difference between doing and allowing. Although the difference between doing and allowing may seem to lead to a problematic absolutist position, we can avoid this position (as well as the problematic Doctrine of Double Effect) by asserting that this difference is not of overwhelming moral significance and by adopting a scalar approach to the justifiability of humanitarian intervention.

Accordingly, it is vital that those undertaking humanitarian intervention and discharging the R2P abide by these principles of external and internal *jus in bello*. It follows that, firstly, interveners are morally required to ensure that they respect these principles. They should monitor closely the behaviour of their troops, investigate allegations of wrongdoing, and discipline those who violate these principles. To help improve standards of conduct, interveners should increase the training and education of troops in *jus in bello*.⁶³ Second, it may be necessary to develop international mechanisms to ensure the just conduct of interveners.⁶⁴ The UN Security Council should also monitor and

⁶³ See Ray Murphy, 'International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience', *International Review of the Red Cross*, 840: 953–968 (2000).

⁶⁴ This point is also made by Daniele Archibugi, 'Cosmopolitan Humanitarian Intervention Is Never Unilateral', *International Relations*, 19/2: 220–224 (2005), p. 224.

ensure the just conduct of the interveners that it authorises.⁶⁵ Third, as recommended by the Independent International Commission on Kosovo, the ICRC (or another appropriate body) should prepare a new legal convention for humanitarian intervention and those discharging the R2P.⁶⁶ This convention would impose more constraints on the use of force than currently embodied in conventional JWT, such as the principles of external and internal *jus in bello* that I have outlined.

⁶⁵ Tom Farer, 'Cosmopolitan Humanitarian Intervention: A Five-part Test', *International Relations*, 19/2: 211-220 (2005), p. 219.

⁶⁶ Independent International Commission on Kosovo, *The Kosovo Report*, p. 184.