Carleton University

**Law is Not Enough:
A Forstian Approach to Military Humanitarian Intervention**

**A Thesis Submitted to the Faculty of Graduate Studies and Research in
partial fulfillment of the requirements for the degree of Master of Arts**

Department of Law

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Abstract

This thesis considers the issue of military humanitarian intervention through an exploration of the moral and legal aspects of human rights. It presents a critique of Jürgen Habermas's discussion of human rights as fundamentally legal, claiming that this excessively displaces their moral aspect, thereby failing to sufficiently thematize duty and the moral resource of conscience. Rainer Forst's 'basic right to justification,' it is argued, provides a means of understanding human rights that is at once moral and capable of addressing Habermas's concerns with a moral understanding of rights. Consideration is given to how the right to justification can be applied practically, paying attention to the moral autonomy of those affected by humanitarian crises while rejecting imperialism. Ultimately, it argues that morality is necessary due to its motivational force while law is necessary to constrain the possibilities for 'moral' responses to military humanitarian intervention, thus attempting to avoid instrumentalization.

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Introduction: The Nature of Human Rights and Military Humanitarian Intervention

One's understanding of the nature of human rights will establish, in large part, one's approach to determining the justifiability of military humanitarian intervention. These two issues are inextricably bound, since the latter represents an attempt at restoring the realization of human rights in a context of catastrophe, where they are no longer being enjoyed. There are at least two ways in which one can conceptualize rights, namely as legal or as moral, and it is these two possible conceptualizations that inform the central discussion of this thesis. Ultimately, these two characterizations of rights are not mutually exclusive. Individuals have duties toward one another in a moral sense. Applied to military humanitarian intervention, the question becomes one of what is owed to distant others in terms of this moral duty. If human rights are understood as fundamentally legal, the addressee of human rights claims becomes the state or supra-state organizations. If rights are understood as moral, each person becomes an addressee of rights claims, which is to say that each person has a moral obligation to each other person. However appeals to morality can be problematic in their own right. Few topics are currently as pressing as the manifold justifications for military humanitarian intervention. In the last five years, Afghanistan and Iraq have been invaded and occupied on the basis of strategic, moral and legal rationales. The moral arguments sought to construct these invasions as legitimate interventions. Yet, deepening violence and popular resistance to United States-led coalitions in Afghanistan and Iraq suggest that these arguments are seriously flawed and mistaken—or misused. Nevertheless, similar rationales inform present debates over potential intervention in Sudan, Iran and other states. Arguably, moral claims are the most common, salient underlying justification for

intervention in these examples. In particular, the United States (and to a lesser extent the First World altogether) is often thought to have a responsibility to liberate oppressed people from dictatorial regimes and enable the emergence of something like liberal democracy. So while a moral understanding of rights is necessary, it poses its own challenges.

Military humanitarian intervention involves taking extreme measures (extreme because violent) to enforce rights claims. Therefore, the way in which we understand rights determines in large part how it is that we approach intervention. If we understand rights as legal, then we insist upon a legal justification for the intervention in question. If we understand rights as moral, then the intervention in question can be justified in terms other than legal ones. Ultimately, the central argument of this thesis is that human rights must be understood as both moral and legal, and while Jürgen Habermas is right that it is necessary to constrain the instrumental abuse of such claims, morality must be more robust than it is in Habermas's account. To understand human rights as fundamentally legal, as does Jürgen Habermas, is to fail to thematize duty and conscience, which are not idealistic concepts, but realities of the interconnectedness of human life. Conversely, to understand rights as moral, without any legal context, risks assenting to possibly unmeasured (ie. arbitrary in terms of both subject and method) responses to large scale humanitarian atrocities.

With a view to establishing the necessity of understanding human rights as moral, the first chapter of this thesis begins with a response to Habermas's legal conception of human rights, which, despite recognizing that human rights have a "dual character" in the sense of being both legal and moral, excessively and unnecessarily displaces the moral

aspect. Four rationales can be found in his work for arguing in favour of the fundamentally legal nature of human rights and for displacing the moral aspect. These are that a moral understanding of rights suffers from both democratic and motivational deficits, and falls prey to being used to justify violence against enemies and to being instrumentalized. Habermas expresses concern that these are the risks of an ‘unmediated’ moralization of human rights. He sees law as mediating morality, but does not pay enough attention to morality in this process.

While the displacement is unnecessary, it is also problematic because it fails to thematize duty and conscience. In response to this, I suggest that Rainer Forst’s ‘basic right to justification’ is an ideal alternative to Habermas’s displacement of morality. It is a moral benchmark for intervention that is at once mediated by virtue of the fact that it is ‘ethically thin’ and also accounts for the moral aspect of rights, meaning that duty and conscience are thematized appropriately. Finally, chapter one details the ways in which the basic right to justification addresses each of Habermas’s four concerns regarding unmediated morality without conceding that rights are fundamentally legal.

Chapter two explores the practical implications of realizing the basic right to justification as a moral benchmark for military humanitarian intervention, suggesting first that sovereignty must be understood relationally, following both Iris Marion Young and Jean L. Cohen in identifying contemporary sovereignty as meaning that external respect for a state is dependent upon the internal acceptance of those subject to the state in question. A second presupposition that can be assumed from the basic right to justification is that it must be realized or addressed in stages. In this regard, it is important to note that military humanitarian intervention should be a response to severe

failure on the part of the state (ie. lack of legitimacy), characterized by large scale loss of life and coupled with an unwillingness to remedy the situation in a way that restores legitimacy. At the same time, the determination of whether outside help is needed or appropriate at any of these stages must be made, as much as possible, by those who are directly affected by the crisis which is imminent or occurring. Therefore, chapter two considers how one might determine how voices from the grassroots come to be heard, and indeed how to distinguish legitimate from illegitimate voices

The question of voice leads to the suggestion that it is unwise to view cultures or political groupings (such as citizens of a state) as monolithic or homogenous. This is ill-advised first because assuming homogeneity risks also assuming that practices or policies seen as problematic on the outside are not problematic on the inside, thus failing to hear the voices of those possibly oppressed within that group. Second, paying attention to the voice of one segment of the group over another risks either paying attention to elites at the expense of other groups, or focusing on oppressed groups instrumentally so as to use them as 'proxies' (Mamdani 2006) for one's own parochial interests. Ultimately I suggest a method of paying attention to voices at the grassroots ('participatory intervention'), involving Non-governmental organizations (NGOs). These NGOs will be composed of and speak with people at the grassroots level (ie. those affected by the crisis in question), then will communicate with each other, and ultimately with the international community in their capacity as a mouthpiece for those affected in order to express the need, or lack thereof, of intervention. In this way, calls for military humanitarian intervention originate at the grassroots, reach the international community, and attract

assistance in a kind of 'boomerang' pattern that can bypass the state if need be (Keck and Sikkink 1998).

While these practical considerations are necessary in terms of assessing the possibilities for implementing the basic right to justification as a moral benchmark for intervention, the issue of voice reveals one important point. Even the basic right to justification can be abused—by privileging one or more sets of voices instrumentally in a way that allows for an intervention based on external interests. Chapter three, therefore, returns to the question of law and legality, conceding the importance of law, even if the basic right to justification addresses Habermas's four concerns with a moral understanding of rights when properly applied. The possibility of abuse must be accounted for. Following Habermas in developing the conception of legality as a resource, as a verifiable category against which state's actions can be judged, the 2003 US-led invasion of Iraq is discussed as an example of the unjust acts of war that can be justified instrumentally in the absence of this verifiable category which directs and channels a moral response and can force power to justify itself. This invasion is informative in the sense that some intellectuals such as Norman Geras, Thomas Franck and Samantha Power, whose commitment to human rights is undoubted, have supported the invasion of Iraq based on primarily moral reasons. It indicates that if unconstrained by law, moral outrage can be used to justify bad-faith interventions, particularly ones based on (American, in this context) imperial ambitions. In large part, this discussion of the importance of legality is aimed at illustrating that the perspective advocated in this thesis is not one that swings too far in a direction parallel to yet opposite of Habermas's

position, namely by discounting the legal aspect of rights and relegating it to the periphery in an attempt to highlight the centrality of the moral.

With this thought in mind, chapter three goes on to argue that not only does power need the constraint of law for the sake of states weaker than the superpower, but for the sake of the superpower itself, as a power that does not abide by law is not seen as legitimate and will invite the creation of coalitions to counter it. In addition to this, empires do not last forever; therefore the superpower with imperial ambitions should also set a precedent for the superpower which succeeds it that will be favourable to it when it is no longer preponderant. However, while law is necessary in its capacity to legitimize and channel moral responses, it is argued that it does not motivate right action as does morality. Here is introduced a discussion of the ‘dynamics of motivation and constraint’ between legality and morality—developed in the context of the current humanitarian crisis in Darfur, Sudan.

The response of both states and international institutions to the crisis in Darfur is used to illustrate two things. The first is a set of claims relating to law: law can have the opposite effect of motivation by leading to complacency and failing to create thresholds that compel states to act in the absence of self-interest. The fact, for example, that use of the word ‘genocide’ is supposed to be a legal basis compelling states to act to stop it does not actually serve its purpose. There has been little action by states and international institutions to act to stop killing in Darfur. At best, the legal terms that would dictate meaningful action are simply avoided or ignored. At the same time, there has been a movement at the grassroots level in the US (and to a lesser extent other Western states) to stop the killing in Darfur, which attributes responsibility in large part to the US. This

movement is problematic because it bolsters a view of the US as a global policeman and falls into a problematic construction of distant others as 'needing help,' and therefore constructing those intervening as 'knights in white armour' (Orford 2003) which involves an unacceptable feminization and racialization of those who would benefit from intervention. At the same time, the movement advocating decisive action in Darfur is positive (even if misdirected) because it is a reflection of grassroots solidarity, and of moral motivation. Here the dynamics become clear: individuals are morally motivated to express solidarity with distant others, however the lack of analysis that can accompany the moral outrage that is the typical response to severe and widespread human rights violations can be used instrumentally or merely ineffectively if not channelled through the verifiable category of legality. Legality sets limits on the possibilities of what can be done under this moral impetus. In this way this final chapter of the thesis, while conceding and even emphasizing the importance of law and legality to the enjoyment of human rights, returns to the necessity of a moral understanding of rights to the realization of solidarity.

Chapter 1: Towards a mediated moralization of human rights

Habermas and the Nature of Human Rights

The work of Jürgen Habermas is exemplary of a theory of human rights in which morality is not accorded enough importance. It is important immediately to note that Habermas does not discount the moral aspect of human rights, and in fact explicitly seeks to look beyond a dichotomy of law and morality. While trying to save the moral aspect of human rights from the fate of being denied due to its “motivational deficit” in the face of a secularized and pluralistic culture, Habermas places it too far into the background of his analysis. In this chapter I argue that a conceptualization of basic rights which thematizes morality more prominently than does Habermas’s work allows for recognition of moral responsibility (ie. duty) and makes better use of the moral resource of conscience. Ultimately, I suggest that Rainer Forst’s concept of the “basic right to justification” is a good example of how such a theory can address Habermas’s concerns about unmediated moralization of human rights while making use of moral resources. In order to discuss Habermas’s relegation of the moral aspect to the periphery of his analysis and the detrimental effects it has on a rich understanding of human rights in general, I will first attempt to explain Habermas’s position on law and morality as they pertain to human rights. I will begin by establishing three important facts of Habermas’s analysis which are necessary to a fair discussion of his position. While Habermas (1) understands morality and law as existing in a complementary relationship, he (2) (deliberately or not) portrays the legal aspect as more fundamental or intrinsic. In his analysis, (3) morality comes from *within* the process, rather than being a reason for entering a process of discourse or argumentation.

Habermas understands human rights and law as existing in a complementary relationship. This is perhaps most clear in his discussion of the internal relation between the rule of law and democracy in Between Facts and Norms. His first task in establishing this internal relationship is to explain why law cannot be subordinated to morality. He does this by explaining that autonomous morality and enacted law stand in a complementary relationship in that moral and legal questions refer to the same problems in different ways, for example how to legitimately order interpersonal relationships and coordinate actions through justified norms. Furthermore, Habermas sees post-traditional morality as representing knowledge while law has, in addition to this, a binding character at the institutional level—law is an action system as well as a symbol (1996: 106-7). Law is, therefore, in some sense too broad to fall under morality. He suggests, then, that instead of being conceived as subordinate to morality, positive actionable law be understood as a functional complement to morality. This “*relieves* the judging and acting person of the considerable cognitive, motivational, and—given the moral division of labour often required to fulfill positive duties—organizational demands of a morality centered on the individual’s conscience” (1996: 452). As we will see below, because Habermas understands human rights as essentially legal, they are complementary to morality in the very same way as law because in his analysis they *are in essence* legal.

Habermas states that the concept of human rights does not have its origins in morality, “rather it bears the imprint of the modern concept of individual liberties and is therefore distinctly juridical in character” (1997: 137). This “imprint” of individual liberties refers to the asymmetrical relationship that lies between duties and entitlements and is at the root of law as it relates to human rights. He means to say that in law

entitlements are “conceptually prior” to duties. Under law duties only result from the protection of entitlements whereas under morality duties and entitlements are symmetrical in importance (1996: 451). Because human rights are a modern concept with their roots in liberties (read here entitlements) and because beginning with Hobbes modern law went from “grounding of duties in deontological morality” to protecting individuals’ freedom (Habermas 1997: 139), Habermas’s connection between law and human rights seems clear. As entitlements, human rights are legal in a very fundamental way. This understanding of human rights as basically legal is important because many of Habermas’s statements relating to the importance of morality to the legitimation of law must be understood as encompassing human rights under law. Hence, for example, when he states that “Reasons that are convenient for the legitimation of law must, on pain of cognitive dissonances, harmonize with the moral principles of universal justice and solidarity” (Habermas 1996: 99) law in this context can be substituted for or understood simultaneously with human rights. Without understanding human rights as having this legal nature, the analysis of law and morality in Between Facts and Norms can appear to bypass human rights in large part. The references to the relationship between morality and law are simultaneously references to the relationship between morality and human rights.

Habermas grants that law and morality exist in a complementary relationship, and because human rights are legal, that morality complements human rights.

Complementarity, however, does not indicate equality. Morality and law do not have equal importance in their relationship to human rights. Law is privileged in the sense that it is understood in his analysis as fundamental or intrinsic, whereas morality is not—at

the very least, law is placed in the foreground of the analysis that deals specifically with human rights, while morality is left in the background. Morality is placed in the background because of a series of concerns given as reasons for denying the *origins* of human rights in morality. Aside from these concerns about according prominence of place to morality, Habermas sees law as coming into the foreground for its own reasons. I begin by explaining Habermas's very good reasons for wanting to avoid a heavy focus on the moral aspect of rights, or an "unmediated moralization" of human rights (Habermas 1999: 268).

The first concern expressed by Habermas is that there is a democratic deficit inherent in understanding rights as moral, and hence as externally given, in some sense. Most modern societies are pluralistic, and many are largely secular. Pluralism challenges the imposition of externally given judgements and positions, as it is a situation in which not all agree on what values and laws are externally given, and may have conflicting ideas. Furthermore, secularism challenges the idea that there is anything "out there" from which a moral rule can issue. Therefore, ideas regarding what is acceptable and unacceptable must be determined in a fashion that is deemed legitimate in a pluralistic society. Democratic procedure is central to Habermas's understanding of legitimacy: "The morally free person must be able to understand himself simultaneously as the author of moral commands to which he is subject as addressee" (Habermas 1998: 30-31; see also 1996: 104). This is the criterion by which members of a pluralistic society can judge the legitimacy of norms—that each has an equal opportunity to contribute in a discursively produced conception of what is right or good through the democratic principle of popular sovereignty. If the legislator treated rights as a pre-given moral fact, the addressees of

law could not see themselves as its authors (Habermas 1996: 454). This first concern, then, deals with an incompatibility between democracy, especially in the context of a pluralistic society, and pre-given moral facts. In essence, free choice is not free if its outcome is determined in advance. This is at the heart of the problem of lack of democratic procedure.

The concern that human rights / law lack legitimacy if they are formulated in a way that precludes their addressees from seeing themselves as the authors is tightly connected to a second concern. Legitimately enacted law is necessary because it serves as a surrogate for the motivational force of the objective moral facts offered by natural law or religion. His second concern, then, is the motivational deficit of morality as a foundation for an understanding of human rights. Because morality has such weak motivating force, it must be supplemented with something that engages actors' motives in another way besides internalization (Habermas 1996: 114). This "other way" is an institutionalized legal system which "displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties" (Habermas 1996: 83). The process of being discursively achieved in turn legitimizes these laws.

While democratic and motivational deficits point to areas where morality fails to accomplish something that is necessary, Habermas's additional two concerns deal with aspects of morality that lead to undesired actions, namely acts of violence and acts of instrumentalizing moral concepts for political or economic gain. In discussing the dangers of violence as a result of a moral understanding of human rights, Habermas follows Carl Schmitt. Habermas interprets the term "military humanism" as the moralizing of

antagonism (Habermas 2004: n.p.)—which seems especially relevant to military humanitarian intervention, as it is a forceful response to action or inaction deemed “wrong,” in some sense. In agreement with Schmitt, Habermas believes that such moralization holds the danger of demonizing opponents and failing to see them as worthy opponents (2004). The end result of this, of course, is violence against these enemies and Schmitt’s claim that “the worst inhumanity is committed in the name of humanity” (Habermas 1997: 136).

The problem of instrumentalizing moral language and a moralized concept of human rights is also very closely linked to the concern, mentioned above, regarding a lack of democratic procedure. If the process of arriving at recognized rights entrenched in law does not have a democratic process to legitimize it but is instead imposed from the outside, there are no criteria for legitimization. Externally imposed criteria have no process or standard of legitimization to which they can be held up. This means that there are dangers of abusing an externally imposed concept, of using it instrumentally in order to present actions which may be merely politically or economically strategic for a particular person, group or state as guided by some transcendent rule:

Policies that are adopted in a manner that does not conform to the conditions for the democratic genesis of law are merely cloaked in juridical form. When this occurs, one also loses the criteria by which these policies can be normatively assessed. In the execution of such programs, standards of effectiveness that govern the deployment of administrative power *take the place* of standards for the legitimacy of legal regulation (Habermas 1996: 429).

This concern is particularly prominent in light of the recent invasion of Iraq by the US-led coalition, which indeed seems to be an initiative dominated by US interests. A further problem stemming from this is the fact that future attempts to act in the name of human rights will be viewed with skepticism. This impedes the ability of the

international community to “act with military force if all other options are excluded / exhausted” (Habermas 2002: N.p.) even when such intervention is indeed legitimate.

Habermas’s expression of concerns regarding a moral understanding of human rights, namely the democratic deficit, the motivational deficit, the threat of violence and instrumentalization come together to a clear purpose. Habermas is trying to avoid an *unmediated* moralization of human rights. Law is that which mediates a moralization of human rights, accompanying morality with an established set of legal procedures for resolving disputes: the “institutionalization of legal procedures that will protect the juridically tamed manner of dealing with violations of human rights from a dedifferentiation of law and unmediated moral discrimination against enemies” (Habermas 1999: 268). In attempting to offset these concerns by rejecting an *unmediated* morality and bringing law into the foreground as the *origin* of human rights, Habermas fails to capture the importance of morality to a complete understanding of human rights. His focus on the importance of the legal aspect tends to make morality appear as a secondary matter. Before moving on to discuss this, I will first indicate how, aside from the four concerns with unmediated morality mentioned here, Habermas brings law into the foreground for its own reasons.

Habermas understands law as an alternative to morality, one which avoids the problems of justifiability and validity that plague a moral understanding of human rights. Through discourse theory he is trying to replace an understanding of moral facts as pre-given with something secular and yet at the same time which has the same motivational force as pre-given moral facts:

To the extent that the transmission of culture and processes of specialization become reflexive, there is a gnawing awareness of the logic

of ethical and moral questions. Without the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations can in the final analysis be gained only from action itself...Processes of individual formation and cultural knowledge-systems offer less resistance to this whirlpool of problematization than does the institutional framework (1996: 98).

Positive law fulfills the function of embodying / institutionalizing a practical orientation (only) if it is formulated within a procedure of rational opinion-and will-formation—not a higher ranking moral law (Habermas 1996: 457). This procedure begins with Habermas's discourse principle (D), which applies to morality: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses" (1996: 107). Thus he displaces with something immanent Kant's transcendent categorical imperative and calls this the "intersubjective understanding of the categorical imperative" (Habermas 1998: 34). Law complements this postmetaphysical concept of morality through the principle of democracy, which states that "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996: 110). So the discourse principle as a process of forming morals is complemented by the democratic principle as a process of forming law. For Habermas,

A prospect of finding an equivalent for the traditional, substantive grounding of a normative consensus would exist if the *form of communication* in which joint practical deliberation takes place were such that it makes possible a justification of moral norms convincing to others because of its impartiality. The missing "transcendent good" can be replaced in an "immanent" fashion only by appeal to the intrinsic constitution of the practice of deliberation (1998: 41).

Law, therefore, comes to the fore by virtue of its ability to intertwine motivation and value orientation (Habermas 1996: 114) and to resolve the "cognitive deficit" of morality

by settling the specific issues which stem from the more general (moral) principles upon which most people can agree (Habermas 1996: 114-5).

Aside from its ability to overcome the weaknesses of morality in a modern context, law appears in Habermas's writings to take precedence over morality as an aspect of human rights because the human rights in fact originate in law. He develops this contention in response to Carl Schmitt's pessimistic interpretation of human rights. Habermas's and Schmitt's positions on the desirability of recognizing human rights are vastly different. Schmitt's "Humanity-Bestiality" formulation, according to Habermas, states that the concept of 'just war' in the name of peace and cosmopolitan rights is not a state fighting in the name of humanity, but rather usurping a universal concept in its fight against an enemy, an idea which Schmitt extended to the actions of the League of Nations and the United Nations (Habermas 1997: 136).

In his response to Schmitt's argument, Habermas rejects his first premise, that a concept such as just war lends a moral quality to police actions which creates of one's enemy an inhuman criminal, on the basis that it is untrue (1997: 136). Furthermore, Habermas believes that Schmitt's second premise, that (a) the politics of human rights serves to implement norms that are part of a universalistic morality and (b) negative moral evaluations of an enemy destroy legally institutionalized limitations on military conflict, is based on a false premise regarding the politics of human rights (Habermas 1997: 136-7). In essence, Schmitt's worry is that the supposed moral nature of human rights will allow unjust treatment of those who do not respect human rights. This may seem, at first glance, to be an absurd claim, given the fact that any acts of brutality against perpetrators would make the avengers inhuman as well (note the implications of

this for the U.S. war in Iraq). Habermas's response, however, goes farther by stating that the first part of the premise is wrong because *rather* than having its origins in morality, the notion of human rights has its origins in the modern notion of individual liberties and is therefore distinctly juridical in nature (1997: 137). It is clear from his use of the word "rather" in describing the origins of human rights that he believes that while human rights are both moral and legal in character, since morality and law are complimentary, the *origin* of rights is *either* moral or legal, but not both.

A brief interlude is necessary here to point out a nuance in Habermas's work which is confusing to readers. While he believes that basic rights are fundamentally juridical, "guaranteed in the context of the legal order of the nation state" (1997: 137), this does not preclude a moral aspect. Human rights have a "double character" in the sense that they have positive validity in law but in the sense that they are attributed to each human being they have suprapositive (or moral) validity as well (1997: 137). The fact that moral justifications are sufficient for basic human rights points to their "remarkable status" (1997: 138) because other norms cannot be justified only on moral grounds. Yet Habermas's insistence on the fact that basic rights are fundamentally legal rather than moral overshadows his claim that they have a double character because he fails to distinguish clearly between the origins and the character of basic rights. This confusion manifests itself in the writings of scholars who have studied this aspect of Habermas's work. Jeffrey Flynn, for example, says of Habermas's interpretation of human rights that "This account of the complementary relation between law and morality demonstrates to some extent what is at stake in his claim that human rights are legal norms *rather than* moral norms" (2003: 435, emphasis added). Likewise, Ciarin Cronin,

in explaining his own position on human rights, states that it “holds that the assumption that human rights should be understood exclusively either as moral (Shue) or as juridical (Habermas) rests on a false dichotomy and suggests instead that whether we should view them in one way or the other is a matter of theoretical perspective” (Cronin n.d.: 1-2). The fact that his denial of the moral origins of human rights is easily misinterpreted by other scholars as a complete denial of the moral *character* of human rights is an indication that morality is quite peripheral in his analysis. That is to say that Habermas, because of the worries associated with an unmediated moralization of human rights, is so intent on proving that human rights do not *originate* in morality and that they in fact originate in law, that his denial of these moral origins eclipses his claims that (despite the fact that they do not originate in morality) rights *do* have a double character. One side of this character is morality.

To say that morality appears as a peripheral aspect of human rights in Habermas’s analysis signifies that morality is clearly recognized, yet in the process of attempting to avoid an unmediated moralization of human rights which is problematic, Habermas protests too much, in some sense, and thereby fails to capture the importance of an understanding of human rights that is simultaneously strongly moral and strongly juridical. Consistent with an interpretation of human rights as fundamentally legal in origin, morality comes from *within* the process of forming law / human rights in his analysis. Moral and other types of reasons “flow into the justification of relevant norm-making activities and in this way into law itself” through democratic procedure (1997: 148). Jeffrey Flynn’s interpretation of Habermas’s work on rights attributes to Habermas a stronger emphasis on the use of moral arguments than what is actually to be found in

his work. Flynn understands moral arguments as being necessary to the process of justifying human rights (Flynn 2003: 440), “What citizens do in reality, when discursively justifying a particular interpretation of the system of rights, is make moral arguments, claiming that legal enactment of particular rights to life, liberty, property and so on are morally valid and “equally in the interest of all””(Flynn 2003: 440-441). The dual character of human rights is clear in Habermas’s claim that they have positive and supra-positive validity (in being applied to people as people) and that basic rights can be justified with the same arguments as are used for moral rights. That positive law has moral content by virtue of the fact that moral arguments flow into the justification process does not, however, necessarily lead to the conclusion that moral arguments *must* flow into the process. The overall impression from Habermas’s treatment of rights is that moral arguments are sufficient, but not necessary—or at least that Habermas must be more clear on this point.

At this point it is clear that morality is peripheral to Habermas’s understanding of rights. The moral aspect is relegated to peripheral status as a reaction on Habermas’s part to the worries about an unmediated moralization of human rights because he sees law as being better suited to the task of upholding basic rights than is mere morality. Morality is also peripheral in this analysis because Habermas’s central thesis is the equiprimordiality of human rights and democracy which, clearly, cannot rely heavily on morality. Because he develops the centrality of law in distinction to that of morality, he does so at the *expense* of morality, despite claims regarding the dual character of basic rights. That they have a remarkable status in that moral justification suffices for them does not, in any apparent way, make that moral justification necessary. As will be seen in the following

section, the consequence of this under-emphasis of morality is a failure to stress the importance of the moral concepts of duty and obligation and the resource of conscience.

On the Insufficiencies of a Primarily Legal Understanding of Human Rights

As has been discussed above, while Habermas does not discount morality, he relies on legality at the expense of morality, and is therefore left with an inadequate account of the benefits of morality to human rights. While he has a conception of morality and justice, morality is insufficiently present within his conception of human rights. The bulk of Habermas's discussion of morality expresses worries about the abuse that can arise from an unmediated moralization of human rights (unmediated by law). His concern about the misuse of morality obscures the benefits of its proper use. This is particularly unfortunate in the case of Habermas's work, as a close reading of it (some of it between the lines) reveals an understanding of human rights as in part moral and sympathy with genuine initiatives at improving the enjoyment of human rights. This section outlines what is wrong with an over-reliance on legality, or alternatively, the benefits of emphasizing a strong moral understanding of human rights—which amount to the same issue. This over-reliance on legality fails to thematize duty and underplays the resource of conscience.

The failure to thematize duty is particularly important because human solidarity flows from duty. International law distinguishes between that which is permitted and that which is forbidden, but does not specify any responsibility, in the sense of obligation towards others, on the part of the individual. In describing modern law, Ulrich Beck tells us that "With the introduction of subjective liberties, modern law, in contrast to traditional legal systems, endorses Hobbes' principle by which everything is permitted

which is not explicitly forbidden. Hence, law and morality diverge” (Beck 2000: 84). While a moral code posits duties, he continues, law establishes rights without reciprocal obligations. Understanding human rights as primarily or fundamentally legal, then, means understanding them as entitlements and stressing entitlements without moral duty. This is inconsistent with the realities of human existence in the sense that as humans, we are connected to one another in ways that make individual entitlement insufficient. As a global community sharing natural resources (the global commons), connected by international trade, media and increased migration, for example, all people are related in myriad concrete ways, in addition to which is a less concrete sense of a human bond.

The concrete interconnections among people, which indicate that the human race will ultimately either fail together or succeed together on this earth, are clarified by Zygmunt Baumann through his discussion of “mutually assured survival”:

Whether or not we recognize and willingly *assume* responsibility for each other, we already *bear* it, and there is little or nothing at all we can do to shake it off our shoulders. Five per cent of the planet’s population may emit forty five per cent of the planet’s pollutants and use/waste half or more of the planet’s resources, and they may resort to military and financial blackmail to defend tooth and nail their right to go on doing so...And yet responsibility is theirs – not just in any abstractly philosophical, metaphysical or ethical sense but in the down to earth, mundane, straightforward, causal (ontological, if you wish) meaning of the word (2003: 141-2).

Here Baumann provides an eloquent clarification of how it is that one is not merely a citizen of one’s country, but of the world taken as a whole, and therefore, one must act as a global citizen. Of course Habermas agrees with this sense of global moral responsibility, but his emphasis on law as unburdening the individual overshadows this recognition of morality in relation to human rights. Solidarity entails being cognizant of the effects and possible effects one’s actions have on others. Similar to this concept of

mutually assured survival, Ulrich Beck discusses “the socialization of shared risks or shared risk definitions,” which creates risk communities. These communities are created by shared risks and threats, which create “a shared space for values, responsibilities and actions that transcends all national boundaries and divisions” and which “can create active solidarity among strangers and foreigners” (2000: 95). While these shared risks are indeed practical, particularly in Beck’s analysis, the sense of responsibility for one another has a clear moral sense to it, since there is a duty to act with the well-being of others in mind.

While the above discussion focuses on a moral duty to those who are affected or possibly affected by one’s own actions, it is important to note that human solidarity goes beyond a strict attention only to those to whom one is causally connected. Law can only go as far as punishing those who are perpetrators, those who engage in activity which is forbidden as such. Law cannot regulate the behaviour of bystanders because it governs the realm of the prohibited and the forbidden. Duty, as mentioned above, does not fall into either of these categories, but it is recognition of duty, not law—and solidarity as a specific form of duty—that will prevent individuals from contributing to a world order that does immeasurable harm to the many for the benefit of the few.

In addition to law’s lack of prescription of responsibilities, that is to say, duties toward others, an understanding of human rights as fundamentally legal overlooks the possibility of individuals as addressees of rights claims. The question of the proper addressee of rights claims is, in the case of a legal understanding of rights, settled by making the state (or possibly an international authority such as the United Nations) responsible for assuring the enjoyment of rights. Habermas cites this as one of the virtues

of a legal understanding of basic rights. As cited above, Habermas claims that an institutionalized legal system “displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties” (1996: 83). While it is true that human rights enforcement must not rely *merely* on the good will of citizens, this unburdening of the individual is in fact not ideal. Habermas is correct in suggesting that assuming human rights will be sufficiently upheld by motivated individuals leaves too much to chance. Law is dependable in a way that individual (moral) motivation is not. However, individual citizens must not be complacent, but must be vigilant in ensuring that existing laws are observed. Thomas Pogge makes an argument for an institutional understanding of rights in response to other understandings of human rights which he perceives to be insufficient.

Pogge takes Habermas’s legal understanding of rights as exemplary of one of the conceptualizations of rights which he criticizes. He summarizes it as a category “according to which human rights are basic or constitutional rights as each state ought to set them forth in its fundamental legal texts and ought to make them effective through appropriate institutions and policies” (Pogge 2000: 49). Pogge criticizes this understanding as excessively unburdening agents with respect to human rights fulfillment abroad:

[O]ur task as private citizens or government officials is to ensure that human rights are juridified and fulfilled in our own society and also observed by our government abroad. We have no human-rights based duties to promote the fulfillment of human rights in other countries or to help suppress human rights violations by foreign governments... (Pogge 2000: 51).

An alternative to this is Pogge’s institutional understanding of rights, based on article 28 of the Universal Declaration of Human Rights, according to which he claims that

“postulating a human right to *X* is tantamount to declaring that every society (and comparable social system) ought to be so organized that all its members enjoy secure access to *X*” (Pogge 2000: 52). Honouring these claims entails that citizens ensure that their own government respects these rights and that limitations on and violations of them on the part of other persons are deterred and prevented (Pogge 2000: 53). While Habermas does promote the protection of human rights, his under-emphasis of morality tends to obscure this. All this is to say that individuals must be “burdened” at least to the extent that they feel responsible enough to promote societies, at home and abroad, that institutionalize respect for human rights. Conceiving of states and international organizations as the entities against which claims are made does not just unburden the individual, it disempowers him / her or at least detracts from the responsibility of the individual in creating their society both nationally and globally. While Habermas does have a theory of justice and morality, it is not developed in relation to human rights, which is unfortunate, because as seen above, morality is itself motivational.

An under-thematization of morality also underplays the resource of conscience, which is linked to solidarity in the sense that regardless of any causal links between those who suffer unjustly and other people, those who fail to assist are often pricked by conscience. There is a distinct feeling that silence and inaction in the face of egregious violations of human rights, though it should not be taken for acquiescence, is tantamount to complicity, since we are, quite literally, “letting it happen.” Bystanding cannot be forbidden by law, since most people would be prosecuted. Prosecution of bystanders might be a philosopher’s justice, however it is neither practical or practicable. A legal approach to human rights makes it possible to prosecute those who are involved in

wrongdoing in the capacity of perpetrators, however a moral understanding of rights addresses the guilt of those who did nothing. “Whatever may be wrong about the passive witness or the bystander’s stance is different from the wrong that results from the perpetrator’s actions, and it is the presence or absence of legal prohibition that makes the difference” (Baumann 2003: 137). While it is illegal to be a perpetrator and legal to be a silent witness, the failure to assist incurs moral guilt. Focusing on individual moral responsibility in this sense is necessary to ensuring the enjoyment of human rights by encouraging an understanding in which people do not see themselves as helpless, or as having no choice (frequently used as a defense by Nazi war criminals).

Zygmunt Baumann describes bystanding as the other side of the evil act, whether one is a direct cause or not. This is because the perpetrator’s action of abusing human rights is contingent upon the inaction of non-perpetrators. Baumann is not the first to realize this. Hannah Arendt’s work on the spread of evil, specifically with reference to the trial of Adolf Eichmann, leads her to suggest that the primary cause of it is “ubiquitous complicity” (Arendt 1994: 18). Arendt claims that there are few ‘monsters’ in the world, and that the only reason that evil is capable of spreading as it does is due to the complicity of unthinking masses of people:

The greatest evildoers are those who don’t remember because they have never given thought to the matter, and, without remembrance, nothing can hold them back. For human beings, thinking of past matters means moving in the dimension of depth, striking roots and thus stabilizing themselves, so as not to be swept away by whatever may occur—the *Zeitgeist* or History or simple temptation. The greatest evil is not radical, it has no roots, and because it has no roots it has no limitations, it can go to unthinkable extremes and sweep over the whole world (2003: 95).

This quotation illustrates the degree to which the majority of people who are inactive in opposing injustice make possible the designs of a minority of evil-intentioned people who

otherwise could not realize egregious and large scale rights violations. Baumann offers an even stronger indictment of those who fail to follow the dictates of conscience:

Refraining from acting carries a causal load not much lighter than acting, while the certainty (or high probability) of general non-resistance by the non-lookers may carry a heavier responsibility for the ill-actions and their effects than the mere presence of a number of ill-intentioned villains. Last but by no account least: no *legally* proper and binding verdict of innocence has the power to absolve, let alone redeem the defendant from *moral* guilt (Baumann 2003: 140-1).

One can become part of a *causal* chain leading to the demise of others through the inaction that enables human rights violations.

As an important counterpoint to this discussion, it is necessary to address the fact that while the call is made here for an alert world citizenry that exercises moral conscience against systemic human rights abuses, it is equally a call for the same vigilance in the face of abuses of moral language which mask strategic interests. It is beholden upon world citizens to act accordingly in these instances—first because it is wrong for a state to ignore the dignity and best interests of the inhabitants of another state for its own benefit. Secondly, bad-faith interventions into the affairs of other states can create cynicism about all interventions, even those which are legitimate and carried out in good faith. As Ken Roth points out, such cynicism can have disastrous effects for those needing rescue in the future (Roth 2004). Despite Habermas's support for the 1999 NATO intervention in Kosovo which was not sanctioned by the U.N. Security Council, it is this very worry that prevents Habermas from focusing too heavily on the moral aspect of human rights and prompts him to claim so insistently that morality must be mediated by law. This concern has been especially salient since the U.S.-led invasion of Iraq which was heavily bolstered with human rights rhetoric and therefore so traumatic to true proponents of human rights enforcement. Habermas's support for the intervention in

Kosovo was founded partly on the Europeans' justification of their actions, which was based on the claim that the military action was intended to promote the transition from soft international law to a fully implemented human rights regime (Habermas: 2002). This reflects recognition of a moral demand to provide emergency aid, even in the absence of law. Moreover, he notes that Continental European countries participated in the Kosovo intervention expecting an eventual ratification of the intervention by the Security Council, thus understanding "this intervention as an "anticipation" of an effective law of world citizenship" (Habermas: 2004, n.p.). The U.S. invasion of Iraq, by contrast, has had no such bases of legitimacy. Habermas describes the delicate situation as such: "Because innocent lives are always at stake in humanitarian interventions, such force as may be required must be so finely regulated that the declared motives of a world-police action will lose the odour of pretext, and as such, be capable of winning worldwide acceptance" (2004). The vigilant world citizen must be aware of and resist both the instrumental use of moral language for imperial purposes, on the one hand, and the failure to act to stop atrocities, on the other. Fuyuki Kurasawa states, rather effectively, that the political left is currently between the shadows of Iraq and Rwanda (Kurasawa 2006: 308-9). Awareness of this is half the battle.

In any case, while at this point the benefits of law have been made clear, the point remains that legal reform is necessary at the international level, especially with regard to human rights enforcement. What, however, is to be done about genocide which occurs in the interim between the present state of affairs and legal reform? Rights can and must be promoted (in good faith) in the absence of law, lest we fail the dictates of conscience and this requires a conception of moral rights. I have undertaken to make it clear that

Habermas supports the protection of human rights, however the fact that he stresses the legal aspect at the expense of the moral has led to those working in the Habermasian tradition (see Cohen 2004) to argue for no intervention without a law of humanitarian intervention. This is a problematic extreme to which Habermas's worry about moralization might go.

While it is contestable, to say the least, that there exists a conscience which "speaks with an identical voice to all men" (Kohn 2003: xviii), the decades which have passed since the cold war have been characterized by feelings of a guilty conscience among world citizens. Reaction to the Holocaust created a resolve, at least on paper, that such a thing would not happen again. That the same guilty conscience and renewed vows have recurred with failure to assist effectively, or mere inaction in the case of the Rwandan genocide in 1994, and in Bosnia in 1995, for example, demonstrates that while conscience may not tell people what to do, widespread guilt is an indication of what people should not do or let happen (Arendt, 2003: 105). The tragedy of the Holocaust and repeated human rights catastrophes since have demonstrated the need for a theory of humanitarian intervention (and by implication of human rights) that thematizes morality and the moral basis of human rights. This is because the most pressing calls for human rights enforcement are raised in situations where law has failed.

Forst's "Basic Right to Justification": A Strong But Mediated Morality

It is possible to conceptualize human rights in a manner that thematizes morality and which at the same time avoids the pitfalls of military humanism with which Habermas is so rightly concerned. I argue here that Rainer Forst's theories of multicultural justice and transnational justice provide a good example of this possibility

by giving prominence of place to morality while at the same time addressing Habermas's concerns about it. Although Habermas recognizes the need to act even lacking a legal benchmark, which he refers to as "the dilemma of having to act as though there were already a fully institutionalized global civil society" (1999: 271), for the reasons mentioned above he is reluctant to rely on a moral benchmark—a reluctance which has understandably increased since the US invasion of Iraq in 2003 which truly reflected an unmediated use of morality. Forst provides a moral understanding of the most basic right, and therefore a moral benchmark for the duty to intervene. Ultimately, this allows for military humanitarian intervention even where no legal framework has been established to require it. He understands the most basic right as "the basic right to justification," stating that any justifiable claims to cultural recognition must conform to the criteria that they are "not reasonable to reject" and "equally acceptable to all citizens" (Forst 1997: 63). This leads him to the conclusion that "moral autonomy," which is people's autonomy "in the sense that they are morally independent addressees and authors of intersubjective claims" (Forst 1997: 65) is the minimal basis of autonomy that must be accepted by any society (not reasonable to reject) (Forst 1997: 65, 70). Forst's basic right to justification, then, states that since individuals are morally autonomous, acceptable reasons must be given to them for the ways in which they are treated (Forst 1999: 40); and they can decide for themselves what reasons are acceptable. Under this understanding, culture is a context of identity. The basis of a culture or community's claim to integrity is its ability to adequately represent the self-understanding of its members, "the claim for communal integrity depends on the plausibility of claiming that its communal structure is willingly supported by its members and not forced upon them.

There is thus an internal criterion of legitimacy and acceptability built into this defense of communal and political autonomy” (Forst 2001: 179). This basic right to justification was initially developed by Forst as a means of judging claims to cultural recognition in multicultural societies, however he applies it in his theory of transnational justice as well, claiming that a domestic project of justice is not possible without a transnational one (Forst 2001: 182). This understanding of human rights as fundamentally moral retains contact with Habermasian concerns but allows for a fuller thematization of duty and conscience in the context of moral rights.

One must note, first and foremost, that Forst objects directly to Habermas’s understanding of human rights. This objection identifies at least three aspects of Habermas’s approach from which Forst departs. These are the “equiprimordiality” of human rights and popular sovereignty, the distinction between the form and the content of rights, and the understanding of private autonomy. Forst agrees with Habermas that human rights and popular sovereignty are “equiprimordial,” however Forst’s understanding of this term differs from that of Habermas. According to Habermas, these two concepts do not exist in tension, as they are equally presupposed by the legal institutionalization of a “democratic political order in which citizens are simultaneously authors and addressees of the law” (1999: 49-50). In Forst’s analysis, these two concepts are equiprimordial in the sense that “Even if the content of human rights requires interpretation and they must be legally enacted to achieve positive validity as legally binding rights, they retain their moral justification and are thus moral and juridical rights at one and the same time” (Forst 1999: 50). He feels that the level of moral constructivism, which shows that moral persons must grant each other certain rights

which they owe one another in a moral sense, must be given close attention. Second, by distinguishing the form from the content of human rights, Forst seeks to stress that while human rights are of a juridical nature in form and their positive legal sense, the core content is of a moral nature since demands for human rights are moral demands justified with moral reasons. Returning to the concept of equiprimordiality, however, he notes that though content is moral, it is not prior to political justice in the sense of natural rights. Finally, Forst critiques Habermas's conception of "private autonomy" as the freedom to refuse to communicate as underestimating the value of the rights that protect personal autonomy. It would appear that the problem, as Forst sees it, is that this understanding of political autonomy is negative in the sense of being free to abstain from communication rather than being positive, which would entail freedom to demand and the right to be given reasons as a morally autonomous person. The emphasis on the moral content of rights is pervasive here, and rightly stresses the aspect of "owing" rights to one another, which thematizes duty. This will become a central theme below.

Before proceeding to discuss how it is that Forst's theory extends beyond the scope of Habermas's by allowing for a thematization of duty and conscience, it is important to discuss how this moral understanding of the most basic right informs decisions regarding military humanitarian intervention. First, I discuss the expansion of the use of the basic right to justification as a benchmark for judging the integrity of claims to recognition within a multicultural state to judging, specifically, calls for military humanitarian intervention. This is not a stretch, since Forst himself has discussed international human rights and the extent to which the world as a whole is a context of justice (Forst 2001). In developing the basic right to justification in the

context of transnational justice, he states that “the argument for *external respect* proposes *internal acceptance*” (Forst 1999: 38; 2001: 179). Just as people determine for themselves, then, whether their culture represents them adequately, so citizens of states decide whether their government represents them adequately—ie. whether their government has integrity. It is important to note also that when actions, rules and structures come into question internally, moral persons discuss the adequacy of the reasons that are offered as justification in dialogue with others (Forst 1999: 40). Forst suggests that this basic right to justification should be institutionalized transnationally (Forst 2001: 178) as the minimal basis of transnational justice (Forst 2001: 181). It is a small step from this ideal of a transnational institutionalization of the basic right to justification to using citizens’ (or any other group which is subject to imposition which they question) satisfaction with the reasons they are given to determine the need for intervention. The input of those who appear to be victimized would serve as the primary consideration in the decision-making process. In some cases it is clear to all onlookers that the right to justification is not being met. In China, for example, during the 1989 Tiananmen Square Massacre of protestors demanding civil and political rights, it was clear that there were large-scale demands for justification of the status quo. That the government’s response was to massacre citizens was an unmistakable sign that reasons were not offered for consideration by those who were being, or at least felt, victimized. In cases where the citizens of a country are not able to clearly voice their discontent to the international community, a good-faith attempt to at least undertake to represent their views is possible if a situation appears particularly dire.

A word concerning the moral nature of the basic right to justification is in order here. As mentioned above, morality posits duties. Not only is the basic right to justification a moral right because it is founded upon the moral autonomy of the individual, but because, as Forst explains, it creates reciprocal duties. No moral person can justifiably or with good reasons deny others the right to basic moral respect, whatever their notion of the good life may be (Forst 1997: 65). The basic right to justification creates a moral duty on the part of others to ensure that this right is enjoyed:

To break the vicious circle of multiple, internal and external domination and to establish *political autonomy both within particular states and within the international system*, a principle of *minimal transnational justice* is called for. According to this principle, members of societies of multiple domination have a legitimate claim to the resources necessary to establish a (minimally) justified democratic order with their political community *and* that this community be a participant of (roughly) equal standing in the global economic and political system. And citizens of the societies benefiting from the present global system do have a collective “duty of assistance,” to use Rawls’s term, to provide those necessary resources (ranging from food, housing, and medical care to a basic education, information, the possibility of effective participation, and so on) to attain self-government (Forst 2001: 183).

Rather than unburdening the individual, as does Habermas’s reliance on legality, this actually creates a concrete duty of assistance, even on the part of individuals, to those who call for it, particularly on the part of those who benefit from inequalities. This moral duty also supports morally required military intervention when and where there is no legal framework in place to which those who are victimized can turn because it places a duty on other individuals when there are no effective institutions to serve as addressees of rights claims.

In a world which has witnessed the horror of the Holocaust and has since suffered the pangs of conscience in the aftermath of several human rights catastrophes, a theory of humanitarian intervention that thematizes morality and the moral basis of human rights is

necessary. For this reason, Forst's conceptualization of human rights (at least the most basic right) appears to be more attuned to the realities of a humanity that is unalterably connected. In addition to this, it provides the possibility of a mediated moralization of human rights which does not render morality a secondary matter because of concerns over the possibility of its abuse, (in contrast to Habermas's version of mediated morality, which underplays the significance of morality). By addressing Habermas's four concerns regarding the unmediated moralization of human rights, it will be demonstrated that an understanding of (at least some) rights as fundamentally moral captures the benefits of the moral aspect of rights (namely duty and conscience) while addressing Habermas's concerns.

The basic right to justification as a foundation for judging calls for military humanitarian intervention avoids a situation in which the democratic basis of law is called into question (i.e. it avoids the democratic deficit). That is to say, because it is based on moral respect for the individual and his / her ability to decide for him / herself what are adequate reasons justifying the rules, actions and structures to which (s)he is subject, it promotes an order under which the addressees of law do indeed see themselves as its authors. It is when those who represent them create a system, including laws, that does not represent them, that they declare it illegitimate. Forst is clear in stating that rights are not derived from an authoritative source (1999: 49). The basic right to justification is an ideal middle ground between law based on an externally imposed ideal, which does indeed create a democratic dilemma, and law which is the result of rational consensus, which is Habermas's ideal.

In political discourses citizens are participants in a cooperative, historically-situated enterprise of setting up a justified social structure; they are not beings who, having

been born in a moral heaven, descend on the world in order to form it according to an ideal. Rather, they are engaged in a multiplicity of conflicts and struggles over the cases of especially grave conflict that they assume their role as moral persons and assert basic human rights which no one can reject, whether for the sake of legal fairness, political equality, or social inclusion (Forst 1999: 48-49).

Habermas “specifies that the kind of agreement arrived at by the participants in a rational discourse is a ‘rational consensus’ achieved when all participants are convinced by the force of *the* better argument” (Abdel-Nour 2004: 78). This is no more acceptable than an externally imposed rule, since law based on rational consensus is not meaningful to those who do not see their ends as revisable, although they may have other reasons for judging the reasons they are given to be adequate (see Abdel-Nour 2004: 77-9; Forst 1997: 68-9). In any case, specifying that reasons must be “adequate” as long as they meet the requirements of generality and reciprocity allows even more space for addressees of law to see themselves as its authors since it does not specify what constitutes an adequate reason, beyond ensuring that those who are represented are satisfied with the reasons they are given. Because all people have *moral autonomy*, each person has a responsibility to ensure that this right is being met for themselves and for others.

By connecting internal acceptance to external respect to solve the problem of the possible democratic deficit engendered by a moral understanding of rights, Forst simultaneously addresses the worry concerning imperialism and the imposition of Western rights on others. This concern is twofold. It entails the willingness of states with imperial interests to use moral language instrumentally to argue for a duty to intervene when the primary goal is not to assist but to gain a strategic foothold in a given area. In addition to this is the awareness of the possibility that interventions may sometimes be justified based on western standards, thereby imposing a western

understanding of rights on others. In response to the first aspect of this concern, the basic right to justification as a standard for intervention mitigates against the imposition of western values, since it is a “thin” notion of morality (Forst 2001: 180). Mutuality—the insistence that individuals be respected as morally autonomous, as both giving and demanding reasons—is not a hallmark of western culture since it arises wherever privileges are examined, nor does it mean that the whole culture is called into question (Forst 1999: 42). This tendency to demand reasons cannot seriously be associated strictly with western culture, or indeed with any one culture. Protests against the detrimental presence of U.S. military bases in Southeast Asia, particularly in Japan and South Korea; Chinese dissent against oppression by the Chinese Communist Party and calls for assistance from within Darfur, Sudan, are but a few examples of demands for the recognition of the moral autonomy of the individual—the right to be given adequate reasons—which cross cultural boundaries.

The threat of imperialism is much more serious than a good faith but naïve attempt to impose western values on others because it is less easily corrected. Therefore, the strongest element of the basic right to justification as a moral benchmark for intervention is that it situates the primary decision-making power at the grassroots level. Intervention would be based upon a manifest *internal* dissatisfaction with the status quo and dissatisfaction with responses to it. “[A]s soon as, for example, human rights are claimed from *within* such a culture, they can no longer be seen as an external intrusion but are a challenge to the claim of integrity” (Forst 2001: 179). Because of this, the resolution favoring intervention comes largely from within a community, or from a disinterested attempt at determining what those within the community might say in the

face of human rights catastrophes, were they allowed to express it. This disinterested attempt at interpreting a people's wishes cannot come from one state or a coalition led by one state, as the likelihood of being disinterested is not strong. Such groups as NGOs, which are more connected to and familiar with the affected parties, are more appropriate actors in this regard. Furthermore, intervention would be rare, because mere questioning does not call into question the integrity of a community, it is how the given authorities respond to questioning—ie. with reasons and dialogue or with force—that determines intervention.

Habermas's reticence at focusing heavily on the moral aspect of rights and therefore a moral benchmark for intervention is also based partly on Schmitt's claim that a moralization of conflict leads to conceiving of one's enemy as inhuman or somehow monstrous. Because of the grassroots element of Forst's theory, however, and because the most basic right in his conception is a moral one, and based on what individuals owe to one another, intervention is a reflection of human solidarity. It is based upon the recognition that the individuals within the state in question are no longer adequately represented by their government and that therefore, the government can no longer be said to have integrity. The moralization of antagonisms, then, loses any sense of legitimacy.

The motivational deficit, finally, is Habermas's strongest critique of an over reliance on a moral understanding of human rights. It may be true that in the absence of widespread belief in an afterlife or some form of cosmic retribution, which has strong motivational power and seeks to ensure morally right behaviour, individuals are unlikely to do what is morally required in assisting others, particularly those who do not share bonds such as citizenship or nationality. Forst does not fall into the trap of relying on a

moral understanding of human rights at the expense of law. He is careful to note that moral construction can lead to a general list of rights, but that these rights “can only be concretely justified, interpreted, institutionalized and realized in social contexts, that is to say, only within a legally constituted political order” (Forst 1999: 48). Obviously, this should be extended to the transnational level, where the right to justification should be entrenched in law. By insisting that the basic right to justification is a moral right arising in a political context (Forst 2001: 180), Forst maintains that people have responsibilities towards one another, even if they are not motivated to fulfill them (which is necessary to acknowledge in cases where adequate laws have not been put in place) and simultaneously agrees with Habermas in recognizing that law is necessary to make these moral rights meaningful and realizable.

Conclusion

This chapter is connected by an underlying thread, which is the idea that law is necessary but not sufficient to deal with human rights enforcement. While Jürgen Habermas makes the case *par excellence* for the importance of recognizing the legal aspect of human rights, his worries over reliance on an unmediated morality and his emphasis on the benefits of law relegates morality to the periphery. In response to this, I underline the benefits of an emphasis on the moral aspect of human rights, saying particularly that the thematization of duty and conscience is lost if human rights are not seen as having a strong (even fundamental) moral element. This is a significant oversight given the fact that multiple connections among all people make the importance of human solidarity undeniable. Ultimately I suggest extending application of Rainer Forst’s “basic right to justification” from national claims to cultural recognition to international calls for

intervention. This allows for a thematization of duty and conscience while addressing Habermas's concerns regarding democratic and motivational deficits, as well as the possibility of violence and instrumentalization.

Chapter 2: On the Possibilities of a Practical Moral Benchmark for Military Humanitarian Intervention

As I have discussed in the previous chapter, Forst's theory provides a moral benchmark for humanitarian intervention. In this chapter I will consider this claim further, focusing on the complexities involved. I will argue, first, that the basic right to justification presupposes a relational theory of sovereignty along the lines of what has been developed by Jean L. Cohen and Iris Marion Young. Second, the basic right to justification presupposes a theory of stages in terms of level of failure to meet this most basic right and a corresponding appropriate response. In addition to this, use of the basic right to justification as a moral benchmark for intervention raises the issue of voice. The final section of this chapter considers whose voice is heard in determining whether there has been a failure to respond appropriately to the basic right to justification.

Because of a commonly perceived tension between sovereignty and human rights, the question of what constitutes state sovereignty is a prominent one among political and legal theorists, and rightly so. My understanding of relational sovereignty follows the characteristics of contemporary sovereignty which are addressed by Jean L. Cohen, Iris Marion Young, and to some extent Ulrich Beck. John Rawls draws a distinction between the *concept* of justice and the various *conceptions* of justice. The concept of justice is "specified by the role which these different sets of principles, these different conceptions, have in common" (1999: 5). In the same way, there is a distinction here between the concept of sovereignty, of which there are many interpretations, and those specific interpretations themselves. Relational sovereignty is a conception of the concept of sovereignty.

Jean L. Cohen understands sovereignty as changing over time, rather than being monolithic. The classic conception of sovereignty as the “claim to power unrestrained by law and a bulwark against legal, political military action necessary to enforce human rights” (2004: 13-14) is a particular sovereignty regime which has waned, and is not the only possible understanding of sovereignty. Rather than this claim to unrestrained state power, sovereignty should be conceived in some sense as a relationship of recognition between citizens and those that govern them:

Precisely because sovereignty is a relational concept, it cannot be located in any political body—neither in the hands of rulers nor in a particular institution such as parliament or the presidency, nor in a particular group of citizens. Internal sovereignty is thus, in the final analysis, based on the consent of the governed; government is to serve the interests of the citizenry and public purposes generally. It involves a claim to ultimate *authority* within a political community, but it is also a contingent claim, which requires recognition, domestically and internationally (Cohen 2004: 14-15).

In addition to this emphasis on internal and external recognition in the international system, Cohen correctly insists that under this conception of sovereignty, overlapping jurisdictions are possible—a state can be *autonomous* without having *exclusive* authority within its boundaries (2004: 15). This is a significant claim because the implication is that state authorities cannot do whatever they want without interference.

Iris Marion Young makes the similar claim that “self-determining peoples morally cannot do whatever they want without interference from others” (2000: 260). Much like Cohen, she understands self-determination in relational terms as non-domination rather than non-interference. Interference in order to minimize domination, so as to take into account the interests and voices of affected parties is acceptable on this conceptualization (2003: 259-260). That a state is judged according to its behavior is clear in this analysis. In explaining her understanding of the term “relational,” Young states that “a social

group exists and is defined as a specific group in interactive relations with others” (2000: 252-3). Just as a state can interfere with the actions of individuals in order to minimize domination, the same can apply to the actions of collectivities. For Young, the political legitimacy of outcomes depends largely on inclusion—that all are equally included and given equal opportunity to influence outcomes (2000: 52). The recognition of sovereignty is therefore dependent on popular consent, since legitimate political outcomes result from a democratic, inclusive process. Similarly, Ulrich Beck identifies a “second age of modernity,” in which the traditionally tense relationship between human rights and sovereignty has been given a “new twist”: “A government may now forfeit the recognition of its sovereignty under international law by a blatant violation of human rights of its own citizens and on its own territory” (Beck 2000: 82-3). Each of these theorists has identified elements of the kind of relational sovereignty presupposed by Forst’s theory.

Cohen, Young and Beck each are identifying a new conception of sovereignty which entails first, in one way or another, the necessity of *recognition* of the claim to sovereignty both internally (from those represented by the state) and externally (by the society of states). The two forms of recognition are linked in the sense that external recognition is contingent to some extent on internal legitimacy. Second, both Cohen and Young stress some form of state independence, which emphasizes the continuing relevance of external sovereignty.

Max Weber’s famous claim that the monopoly on the legitimate use of physical force characterizes the sovereign state is no longer adequate, given the compelling nature of human rights in the contemporary state system. It is for this reason that Cohen

emphasizes popular sovereignty, pointing out that popular sovereignty is representative government (2004: 14). Young's insistence that inclusion is a criterion of the political legitimacy of outcomes (2000: 52) and, as mentioned above, that all have equal opportunity to affect the decisions that are made, points to the importance of internal legitimacy in a conception of relational sovereignty. External recognition takes its cue from the ability of a government to claim to represent its own people.

Although a state cannot have free reign over its people in the sense of divine right of kings but must meet some tests of legitimacy, neither conception of relational sovereignty here suggests that the state should lose its autonomy. Cohen's distinction between autonomy and non-exclusivity, which involves the claim that overlapping jurisdictions are possible within the state (particularly with respect to human rights) without weakening it is quite similar, if not the same as Young's distinction between non-domination and non-interference, which suggests that though there can be a high threshold for interference in another state's affairs, there is a point at which interference is acceptable to prevent "dominative harm" (2000: 260).

While I have attempted to highlight the commonalities which indicate the important features of relational sovereignty as it is implied in Forst's theory, it remains to be seen why it is that the basic right to justification does indeed presuppose this concept of relational sovereignty. Forst first develops his theory as a theory of multicultural justice, an attempt on some level to reconcile concern for members of other societies and cultures with respect for their capacity to decide for themselves what is and is not acceptable. How does one express this without paternalistically imposing one's values? Because the basic right to justification rests on the moral autonomy of the individual,

there are no preconceived notions of what is justifiable beyond a person's claim to be given acceptable reasons for the way he / she is treated: "Persons are regarded and respected—as autonomous in the sense that they are morally independent addressees and authors of intersubjective claims" (Forst 1997: 65). Because of this, each society can differ from others in any way, provided it can meet internal calls for justification with acceptable reasons. What constitutes "acceptable" is to be determined by members through discourse (1999: 45-6).

It is the rejection of paternalistically imposing a set of rights that necessitates relational sovereignty—external recognition must be based on the internal consent of the governed, the legitimate claim to adequately represent a given group because external standards are so "ethically thin." This is how the integrity, or lack thereof, of a society is defined. The "right to justification lies at the heart of legitimate law as both an *internal* and a *transcendent* standard; rights justified on this basis "exist" only as positive rights in legal orders but they also tell us in a fundamental sense why such orders should exist at all and what the conditions of their legitimacy are" (Forst 1999: 50). It is clear from this statement that the basic right to justification requires a conception of sovereignty that takes as given the fact that a state only exists to represent the interests of its members, and that there is no legitimate purpose in recognizing a state that fails to do so.

As mentioned above, the concepts of relational sovereignty discussed here indicate that the state should retain autonomy / independence. That is to say, neither Cohen nor Young argues that the state has become irrelevant. In fact, both insist that the state retains a necessary political role—thus the emphasis on the contemporary form of sovereignty as relational rather than identifying the end of sovereignty. The basic right to

justification requires the sovereign state as well because it considers “particular political contexts as contexts of justice in their own right and in constructing principles of justice for the establishment of just relations between autonomous political communities” (Forst 2001: 178). The independent state is necessary to the realization of multicultural justice in a way that a world state is not, since it allows different human rights to emerge in different communities as a result of the process of discursive constructivism. As we will now see, not every failure to meet the basic right to justification necessitates military humanitarian intervention.

Stages: Failure and Response

While it is clear that the basic right to justification can be used as a moral benchmark for intervention, it remains to be said that there are, as I see it, varying levels of failure in the duty to meet the basic right to justification. The question then arises as to when and how to determine that it is in fact *military humanitarian intervention* that is appropriate. Because this is an extreme measure it should be approached as such and treated as a last resort, in cases where failure to meet the duty to provide a basic right to justification is blatant and extremely harmful. I propose that in order to apply the basic right to justification as a benchmark for intervention, the application of Forst’s theory also presupposes a theory of stages both of failure to meet the basic right to justification and attendant responses.

While the right to justification is the most basic right, it cannot be *first* in the sense of the order in which rights are enjoyed. By this I mean that it needs a network of rights on which to rest. Forst gives an indication of what some of these rights might be in his theory of transnational justice. He claims that in order to break the cycle of multiple

domination within states and the international system, a principle of minimal transnational justice is called for:

...members of societies of multiple domination have a legitimate claim to the resources necessary to establish a (minimally) justified democratic order within their political community *and* that this community be a participant of (roughly) equal standing in the global economic and political system. And the citizens of the societies benefiting from the present global system do have a collective “duty of assistance,” to use Rawls’s term, to provide those necessary resources (ranging from food, housing, and medical care to a basic education, information, the possibility of effective participation, and so on) to attain self-government (2001: 182-3).

It is important to note that this is Forst’s discussion of transnational justice, and not explicitly the basic right to justification, but it should be understood as applying to support network rights since he is discussing how people can have a voice, can contribute to their own governance, rather than merely accepting domination. Here he is outlining some basic provisions that must be in place in order to ensure a participatory minimum. Furthermore, when explicitly discussing the basic right to justification, Forst states that “there must be legal and political structures that presuppose a procedure of political (and thus always also legal) constructivism” (1999: 47-8). I take this to mean that a foundation for his discursive constructivism in the form of network rights such as those listed above is as necessary as the moral right itself.

Network rights, then, are the rights that must be in place before people are realistically able to exercise the basic right to justification. In Forst’s description of minimal justice, above, these network rights appear primarily to take the form of economic, social and cultural (ESC) rights—housing, medical care, and so on. However, Forst also refers more vaguely to the importance of ensuring the necessary resources to attain self-government, and ‘the possibility of effective participation.’ Because the

demand for justification is a challenge of political (or cultural) representatives, civil and political rights such as the right to assembly and freedom of speech, for example, play a central role in the demand for justification itself. ESC rights play a more prominent role in ensuring the conditions under which people are capable of exercising their right to justification. Civil and political rights relate in a more direct way to the exercise of the right to justification. Therefore, as will be illustrated, ESC rights apply more specifically to early stages of failure to which milder responses are appropriate, while CP rights apply more directly to later stages of failure.

The first stage of failure to meet the basic right to justification involves failure to meet ESC-related support network rights such as food and medical care. It is an indirect failure to meet the basic right to justification, as it applies to those rights that must precede the ability to call for justification. This kind of failure is often unintentional, does not elicit widespread dissent against government, the integrity of which therefore remains relatively intact. It applies to the kind of poverty and inequality often attributed to marginalized African countries.

Corresponding to this first stage of failure there must be an appropriate and proportional response. Although it is a grave deficiency on the part of the state if it does not fulfill its duty to provide these network rights, it is not necessarily deliberate, nor is there necessarily violence occurring. A justified response at this level of failure will be milder (ie. less coercive) than would a response to violence on the part of the state. Having said this, Forst has already provided an appropriate response in the quotation above. There is a duty to provide aid in the forms prescribed above and other similar necessities. In order to avoid paternalism, however, there must be demands for assistance

from within the community. There will undoubtedly be cases where there are some support network rights missing, and yet people are contented enough that there will be no calls for intervention in the form of aid. How to determine what qualifies as a legitimate internal call for intervention will be dealt with below when considering the question of what voices from within a community count, when there are in fact many disparate voices in every community.

In stage two, failure to meet the requirements of support network rights becomes more serious or pressing if it becomes evident that the state in question is unwilling to provide for its citizens or is deliberately withholding support network rights. Failure at this stage also involves a government's ignorance of and / or failure to respond to internal calls for improvement and the attendant blocking of civil and political rights that facilitate dissent. Authoritarian states such as China fall into this second stage of failure. Here it is necessary to explore the importance and significance of internal dissent. Of primary importance is the fact that internal dissent is not synonymous with disintegration—and by disintegration I mean just that, the crumbling of the integrity of a culture. Forst's understanding of a government's legitimate claim to represent its people is based on being "a fully integrated unity full of integrity," meaning that that culture or government is accepted by its own members, whose integrity is not compromised in order to maintain the integrity of the whole (Forst 1999: 38). Only if a government is not able to address and therefore recover from challenges to its integrity will it disintegrate completely. The important point here is that even at a stage in which governmental failure results in internal dissent, the state has not necessarily lost its claim to integrity. Forst tells us that sometimes members will call integrity into question and the culture will

break up internally, however this does not necessitate outside intervention. It means only that the claim to *full* integration and integrity can no longer be maintained (1999: 39).

The basic right to justification assumes a mutuality (ie. an understanding of the individual as a person who both gives and demands reasons) that exists wherever authorities and privileges are challenged, which does not mean that the entire culture is called into question (Forst 1999: 42). However, if internal calls for justification are not being addressed, more intense measures are justified in solidarity with those within the culture.

The appropriate response in tune with the intensifying situation includes such attempts at regulation as international pressure and economic sanctions such as embargoes. Pressure may take such forms as shaming and exclusion on the part of both states and non-governmental institutions. Shaming can take place by invoking the concept of civilization—"civilized people don't do that!" By drawing attention to state actions that contradict rights standards, such as deliberate neglect of basic rights, NGOs and / or governments can embarrass states, causing them to lose face in the international arena. Shaming can also take place by comparing state actions with legal commitments entered into by the signing of the UN Charter (for UN member states). Holding states accountable and highlighting failure can damage a state's pride and international reputation if it appears to have failed to act in accord with its commitments (Keck and Sikkink 1998). Exclusion as a form of pressure can be effective as well. The body of nations that constitutes the UN can deny the legitimacy of a state and thus exclude it from the ranks of recognized states by condemning its actions. After the Tiananmen Square massacre in China for instance, the UN Security Council criticized one of its permanent

members for the first time (Wachman 2001: 267). This is embarrassing for states and can damage prestige.

States can put economic pressure on governments whose citizens request assistance. The linking of privileges such as economic and military assistance with compliance with given human rights standards can be quite effective. The US, for example, has enormous power in international institutions, among them voting power in international financial institutions (Foot 2000: 29) and can therefore attempt to dictate its terms to those in need of its favour. Of course, this form of power can have the opposite effect if violators of rights have economic power and choose to pressure other states to look in the other direction. The US, for example, when attempting to limit China's trading privileges, was met with the threat that their own aerospace businesses would not be the ones to profit from future Chinese aircraft contracts (Foot 2000: 162).

Nevertheless, when the US was considering whether or not to accord Most Favored Nation Status to China in 1990-1, China released 881 political prisoners (some of whom it re-arrested when MFN status and human rights compliance were de-linked) (Wachman 2001: 272-3). Regardless of China's apparent relapse, the example serves to demonstrate that economic pressure can be effective, although in some cases it may have to be maintained in the long term.

Sanctions, if conducted properly, can be a means of influencing the behaviour of governments. Sanctions must be sensitive, however, as the International Commission on Intervention and State Sovereignty (ICISS) has noted they can be "blunt and often indiscriminate." Therefore, *targeted* military, economic and political sanctions (ICISS 2001: 29-30) are necessary to avoid the potential widespread harm of sanctions. In

contrast to targeted sanctions, comprehensive sanctions mean “virtually every aspect of the country’s imports and exports is controlled” (Gordon 2002). This is extremely harmful both for the people subject to sanctions—500,000 Iraqi children under the age of five have died as a result of comprehensive sanctions in Iraq—and all people in general. The purchase of a sewage treatment plant was allowed to Iraq under comprehensive sanctions, but not the purchase of the generator necessary to run it, “this in a country that has been pouring 300,000 tons of raw sewage daily into its rivers” (Gordon 2002). This pollution of the global commons is a threat to every person. The comprehensive sanctions in Iraq have been termed both ‘deadly’ and ‘genocide’ (Halliday 2006: 81, 83), which illustrates the fact that irresponsible sanctions can cause as much harm or more than a military intervention. They must, therefore, be treated with as much caution as military measures.

The final stage of failure to meet the basic right to justification is that of complete failure. It is when a government / culture cannot or will not justify its actions or policies to its people but insists on remaining in power, thus compromising the integrity of the members to ensure the integrity of the whole. In this case the basic right to justification itself (as a political right) is not being met. Calls for justification are violently rebuked and there is large scale loss of life imminent or occurring. A proper response to widespread internal calls for justification would result in appropriate changes being made which would restore the integrity of the whole. In this final stage of failure, these changes are not occurring. There are some cases in which people will be so oppressed that they are not capable of making calls for intervention because they are violently silenced, in which case outsiders may make a good faith and sincere attempt at discerning

whether the individuals affected by the action under consideration *would* call for intervention if they were capable of doing so. Forst has made it clear that any attempt at justification must be subject to two criteria for “acceptable reasons.” These are ‘generality,’ which states that the community of justification must include all those affected by actions or norms and ‘reciprocity,’ which states that the author of normative claims must not demand any rights or privileges that are denied to the addressee (Forst 1999: 44). If outsiders judge the large scale loss of life which is occurring according to these standards, it is true that large scale loss of life such as genocide or ethnic cleansing certainly do not meet the tests of generality and reciprocity. At the same time, it is also possible in this scenario that support network rights, even in the form of international aid, are indeed being withheld or violated and internal demands are made for intervention. Military humanitarian intervention is a last resort corresponding to this final and extreme stage of failure. Military humanitarian intervention is military intervention with a humanitarian purpose, such as the rescue and protection of people in foreign territory from gross violations of their basic human rights, undertaken out of concern to help, not because of strategic interests (Chatterjee and Scheid 2003: 1). It must only be employed with great care, for example if it is the last reasonable option, is guided by a humanitarian purpose, respects international humanitarian law and does more good than harm (Roth 2004).

Before moving on to discuss military humanitarian intervention more closely in light of the definition just offered, it is important to note that the three categories offered above are not airtight, or exclusive. They are intended to give a general idea of the progressive nature of the failure to meet the basic right to justification, the response to

which must also be progressive. For example, the military might be employed in stage one in order to deliver goods related to aid such as food and medicines. The difference between earlier stages and the final stage of complete failure warranting military humanitarian intervention is that the final stage falls back on a coercive approach because the government, according to the concept of relational sovereignty, is no longer legitimate. Earlier stages reflect an attempt to be as cooperative and non-coercive as possible.

Military Humanitarian Intervention: Not War

It can hardly be said that there is consensus on the nature of military humanitarian intervention. Is military humanitarian intervention, even as defined above, an act of war, given the fact that it employs military means? I argue that it is not war, and in making this argument there are three points that I should like to make about the nature of military humanitarian intervention. Arguments which portray military humanitarian intervention as war make three incorrect assumptions: that it is imposed from the outside; that it is unilateral or at the very least the product of a coalition of states acting according to self-interest and that it is based on national interest. These arguments in large part are fallacious in that an argument against improperly conducted military humanitarian intervention is not a good argument against it if properly conducted.

Carl Von Clausewitz defined war as “an act of violence intended to compel our opponent to fulfill our will,” which Paul Robinson takes to mean that all military humanitarian interventions are war (2002: 99). On the understanding of relational sovereignty described earlier in this chapter, however, which is also presupposed by a Forstian analysis, the consent of those governed (or not governed, as the case may be) is

an integral and fundamental consideration for an intervening body. Therefore, while Daniele Archibugi rightly critiques the well-known comparison of a beaten wife with a state in need of intervention, saying that the more important concern should be how to “deal systematically” with the problem of abusive husbands (2004: 3), in the case of relational sovereignty, if the wife has made efforts on her own and has asked for assistance, one ought to give it. Ideally this means connecting her with the proper institution as Archibugi suggests, rather than neighbors. The point is that the (probably correct) understanding of war as portrayed by Von Clausewitz is incongruous with a good faith intervention because it assumes the self-interested imposition of outside interests, which a Forstian approach should reject.

The second claim I want to make is that good-faith military humanitarian interventions are not—or need not be—unilateral. The worries expressed about intervention as war are often based upon the assumption that it is being carried out by one state or a coalition of self-interested states. States supposedly are primarily concerned with victory and will sacrifice humanitarian concerns in order to assure a complete victory (Robinson 2002: 104) or alternatively their past records make the likelihood of humanitarian intent implausible at best (Chomsky 1999). The definition of military humanitarian intervention offered above applies to the ‘rescue and protection of people in foreign territory from gross violations of their basic human rights, *undertaken out of concern to help, not because of strategic interests.*’ This is significant because it rules out the kind of intervention that is undertaken for national interests and is motivated by what members of another country want. The suggestion that roughly fifty of the world’s largest and wealthiest countries contribute one thousand soldiers for peacekeeping

operations, available to the UN secretary-general on standby (Archibugi 2004: 13) would, if adopted, lead to true multilateralism.

The final point I want to make here is about a fundamental difference between war and military humanitarian intervention. War is conducted based on the national interests of the warring parties. This is implied by the fact that one of the two criteria for war is that it must be conducted in self-defense (the other being the approval of the United Nations Security Council—UNSC). So states must have significant and pressing interests at stake if they are to go to war. Military humanitarian intervention, on the other hand, must be free of self-interest, or at least relegate self-interest to secondary status if it is to be justifiable.

Rather than being understood as war, military humanitarian intervention should be conceived as “international policing” (Archibugi 2004: 10; Habermas 2004: n.p.), conducted as “humanely” and with as much proportionality as possible between means and ends, so as to avoid intervention being seen as analogous to promoting truth by lying or going South in order to get North (Dower 2002: 76). So Archibugi is correct that states participating in interventions should indeed be willing to risk the lives of their own soldiers and conform to methods used within their own borders; “It is very unlikely that an escalation of violence within a liberal state—such as those in the Basque region or Northern Ireland—would be addressed by resorting to air strikes; it is certain that different policing methods would be applied” (2004: 11). This type of targeted policing avoids the damage of air strikes, for example, which cause collateral damage and resemble war more than attempts at peace. More fundamental than policing, however, military humanitarian intervention is an act of cosmopolitan solidarity rather than the

pitting of enemies against one another. As Mary Kaldor has pointed out, ideally forces that intervene will be different from regular militaries: “Whereas the soldier, as the legitimate bearer of arms, had to be prepared to die for his country, the international soldier/policeman risks his or her life for humanity” (quoted in Fine 2006: 61)—more specifically, for the segment of humanity at risk.

One Ear, Many Voices

The stages developed above center around the agency of those who are affected by the actions or lack thereof which stimulate discussion of intervention. Because Forst’s concept of justice involves the recognition of cultural differences among communities and communities determine for themselves what are “acceptable” reasons for the ways in which they are organized, I now turn attention to some issues related to voice. As we have already determined, legitimate military humanitarian intervention, according to Forst’s standards, requires a “grassroots” approach, in the sense that the legitimacy of a government or culture rests on its recognition by those it claims to represent as a fully integrated unit full of integrity. That is to say, that, following the conception of relational sovereignty discussed above, external recognition takes its cue from internal recognition. Once this has been determined, however, a more pressing question asserts itself, namely: whose voice is authoritative? This section addresses this question by discussing, first, the important differences both among and *within* cultures. Second, the danger of failure to recognize these differences within cultures or recognizing differences but privileging of one voice is dealt with. Finally, I address the central question posed above: to whom does one listen?

In order to avoid heavy handedly imposing one's own way of life upon others, it is important to recognize the fact that all cultures are different in some way or another. The focus on the differences between cultures, however, such as the common claim that human rights are a western construct, can have the effect of obscuring important differences within cultures. Forst notes that one should not leave the right of cultural self-definition to those in power (paternalists, autocrats) because this is a moral error (1999: 39). He goes on to say that one should not conceive of a society as monocultural in intercultural dialogue. The closer one stands, the more disagreement one will see. Claims of cultural integrity in a monolithic sense "are often the expression of totalizing and idealizing constructions that correspond to specific interests of power and exclusion" (1999: 39). And yet, the apparently sensitive approach to multiculturalism as difference between cultures can make the recognition of rifts within a culture appear almost blasphemous.

Questioning such sentiments is like doubting professions of motherly love: there is something slightly disreputable about it. And yet it is impossible to avoid a whiff of formaldehyde, a hint of the sterility of museum display cases. Impossible to ignore the image of colourful butterflies pinned to black velvet by careful and loving hands all for the greater glory of...the butterflies? (Bissoondath 1994: 42).

When one considers the issue of voice, however, in determining valid internal calls for assistance from the outside, one must not lose sight of these internal differences, for reasons which will be discussed below.

Homogenizing discourses refer to ways of discussing (and indeed of understanding) a culture in a manner that obscures differences among members and groups within that culture. There are two ways in which one can engage in

homogenizing discourse regarding a culture. The first is to ignore, deliberately or not, that cultures are not monolithic, and that therefore there are disagreements within cultures emanating from both individuals and groups. The second is to overcompensate for this first type of oversight by focusing on one or some of these voices at the expense of all other voices. The first oversight, the failure to recognize differences within other cultures, can lead to an understanding of another culture as “naturally” below standards of proper human conduct. The relativistic claim that other cultures are simply different somehow is often raised as a defense against the imposition of western or other external values, upon a culture. While this is a legitimate concern, there are instances where these claims fail to give due credit to the culture in question.

In discussing bad faith protestations against interfering in other cultures, Thomas Pogge provides two excellent examples of this kind of claim: “As when we were told by Ernest Lefèvre, former US President Ronald Reagan’s candidate for Assistant Secretary of State for Human Rights, that torture is an accepted part of Argentinean culture or still are told by other Westerners that child prostitution is essential to the Thai way of life” (2000: 67). Each culture is to be accorded respect. Respect entails a genuine engagement with other cultures, rather than ignoring what from the outside are seen as intractable problems because they are difficult, or because ‘it is none of our business,’ or even because they simply reflect difference, where the claim is that cultures hold incommensurable values. The refusal to engage with issues that are fundamental to justice entails drawing a formidable line between oneself and the other. It opens up spaces for claims that ‘their’ problems are not ‘our’ problems, and causes members of one group to lose sight of the fact that they are connected to members of the other group,

if by nothing else, by a common humanity. Jorge Larraín warns that to dismiss other cultures as simply different involves racism. “The absolute denial of a common truth and of universal values may easily lead to the denial of a shared nature among the participants of incommensurable cultures” (Larraín 1994: 31). To engage with the issues that are contested and contestable between cultures means to take that culture seriously, to take its members as equals, despite perceived differences.

Furthermore, ignoring differences within other cultures can impede a human rights process that is, in fact, desirable to many within a culture. To assume that the rights “we” claim for ourselves are not desirable for others is to ignore the plight of those who are differentially impacted by violations of these standards. It renders unproblematic practices that are viewed differently among members of the culture, depending upon where they are situated. Henry Shue criticizes Michael Walzer’s assumption of this “intra-bloc homogeneity” (2004: 229), claiming that there is little agreement within, for example, the Muslim community, regarding the universality of human rights, despite the fact that there has been much opposition to it from Muslim governments (2004: 230). “Like many forms of relativism, this argument rests on the attribution to “them” of a unanimity that does not in fact exist...These [human rights violations] have victims who generally resent what is done to them...” (T.M. Scanlon, qtd. in Shue 2004: 229). It is therefore important to avoid facile assumptions about other cultures that make the role of abstention and irresponsibility of outsiders too easy, or facilitates regimes of inequality that benefit those outside a culture.¹

¹ See, for example, Thomas Pogge (2000) for a discussion of the integration of internal and external factors in determining injustice within given national contexts. He states that “Explanations in terms of national and global factors do not simply compete with each other. Only their synthesis: *one* explanation that

The second oversight discussed here is the recognition of differences within a culture but the overemphasis of one voice at the expense of others. I suggest that this recognition of one voice at the expense of others is typically an instrumental recognition. The focus on one—real or perceived—internal voice can be, and often is, used to rationalize and justify bad faith interventions. The invasion of Iraq was portrayed by the US administration as an “intervention,” the only voice from within the culture taken into account was that of ex-patriots. For example, the cheering Iraqis famously portrayed attaching a rope and chain to the statue of Saddam Hussein and dancing on his statue, pulled down with American assistance, appear to have been members of Free Iraqi Forces (Knightley 2004: 106-7), the leader of which is Ahmed Chalabi, who then became (for a time) deputy prime minister in Iraq. Chalabi was supported by the Bush administration, favouring “the creation of a U.S.-led consortium to develop Iraq’s [oil] fields” but had little support in Iraq (RUPE 2003: 51-2). The extent to which ex-patriots can even be considered internal is debatable, making the statement “there are Iraqis and there are Iraqis” (Powell 2003) all the more pointed. These strategies, however, served to legitimize the invasion by providing a voice that seemed to represent those who would be affected by the intervention.

Similarly, George W. Bush’s justification of the attacks on Afghanistan post-9/11 made clear use of what appeared to be the “voice” of the women of Afghanistan: “Previously not on the West’s radar screen, Afghan women are now showing up as ‘pregnant’, ‘fleeing’, ‘starving’ and ‘widowed’. All are true...but such adjectives reduce Afghan women to nothing more than the sum of their most desperate parts” (C. Peters,

integrates factors of both kinds, can be a true explanation” (61). See also Rainer Forst’s concept of “multiple domination” (2001).

qtd. in Shepherd 2006: 25). Bush made frequent references to the violence and lack of freedom suffered by women. To speak out against attacks that are justified on these terms is rendered unthinkable. Fuyuki Kurasawa rightly identifies as “intellectual blackmail” invasions which are falsely set up in humanitarian terms in order to make anyone opposed to them look crazy (2006: 302). That is to say, the terms of debate are framed in such a way that one is automatically in favour of violence against women if one does not support a war or an invasion justified on that basis. This approach to justification falls prey to the fallacy of guilt by association, because if one does not support those who claim to be ‘saving’ innocents, one appears to side with those who harm those innocents. And yet, the instrumental nature of this mobilization of women’s rights rhetoric – and of “woman’s voice” – is evident in the fact that rape and violence are still common in Afghanistan, along with the public harassment of women who attempt involvement in politics (Shepherd 2006: 32). The intention of the attack on Afghanistan was not humanitarian, and so neither have been the effects, in large part, for women.

While giving voice, or pretending to give voice, to one specific group within a state or culture can be a way of evoking sympathy and a sense of solidarity, albeit in bad faith, outsiders may also focus on a group and a voice which allows them to vilify the culture as a whole. This focus can encourage feelings of hostility towards a culture, which paints an intervention as unproblematic:

[T]he capacity for a particular risk to be represented in terms of characteristics that are in the community said to be threatened can be an important impetus to an interpretation of danger...the ability to represent things as alien, subversive, dirty, or sick, has been pivotal to the articulation of danger in the American experience (Campbell 1992: 2).

Focusing on terrorist voices, for example the frequent replaying of tapes of Osama Bin Laden in the aftermath of 9/11 leads to a construction of “‘the enemy abroad’ as inferior, backward and uncivilized—and male” (Shepherd 2006: 26). Based on seeds sown by European and American feminist discourse prior to September 11, 2001, George W. Bush used masculinist rhetoric of saving the women of Afghanistan to legitimate his war, which also has the effect of positioning intervenors as protectors of other women rather than as equals. This does not entail a principled way of distancing oneself from paternalistic militarism (Young 2003: 229-30). As Shepherd indicates, the US recognized two groups within Afghanistan in its discourse surrounding the attacks—one as victims and one as brutes. Both of these constructions were deployed instrumentally as blanket characteristics of a people in order to provoke negative feelings towards the people of Afghanistan.

Acknowledging Disparate Voices: Participatory Intervention?

To briefly summarize what has been stated thus far, there are multiple states in the international arena, which are understood in some sense as groups, or blocs, as Shue has put it. Failure to recognize differences among these groups can lead to insensitivity to the particular context of each one, and therefore the imposition of Western values. This reluctance to trample on cultural differences, however, must be mediated by recognition of differences within groups in addition to those differences among them. This is because it is not always accurate to dismiss human rights violations as natural or inherent to a culture—and it risks abandoning the victims of these violations to their distressing fate. In addition, the recognition of some difference to the exclusion of others (ie. the failure to recognize *all* differences) can be employed in bad faith in order to justify

aggression toward the state in question. If it is inappropriate to recognize élites at the expense of the varied people they represent, and if it is inappropriate to recognize only apparently victimized groups or particularly brutal segments of a community, to whom does the international community listen? What constitutes a legitimate internal call for intervention? Here it is helpful to borrow a page from the field of development in which the progression from Women In Development (WID) to Women and Development (WAD) to Gender and Development (GAD) combined with the trend of “participatory development” has encompassed various attempts at attending to multiple expressions of grassroots interests. Although the concern in this literature (particularly WID, WAD and GAD) has typically been about the inclusion of women’s experiences and insights in determining the form of development assistance, it holds lessons that are relevant to military humanitarian intervention.

The comparison between participatory development and military humanitarian intervention is relevant because both relate to some form of assistance (in the case of development, this assistance can take many more forms than might intervention), and this assistance is external. Both fields reflect recognition that input from those affected by the actions or programs in question makes external efforts more legitimate. This has been widely recognized in the field of development while the area of intervention still reflects only a growing awareness of it. Attempts at including women in development have suffered from some of the same issues that are likely to plague (and have already, to some extent plagued) interventions based on grassroots interests. Participatory approaches to development are based on the realization that all stakeholders should be included in the development programs that are put in place to assist them. Some

challenges have become clear in the course of attempts to include women. Women are often consulted and included in the implementation of development programs, but their participation only goes this far and voice does not necessarily lead to influence (Cornwall 2003: 1326, 1329). This is echoed in the US's adoption of women's voice to justify their attacks but failure to sustain this level of "concern" once their goals have been achieved. In addition to this, powerful interests have tended to dictate the outcomes of development, using the label "participatory" as a cloak for other intentions. How information is used depends upon what policymakers want to know (Cornwall 2003: 1336; Chambers 1995: 41). The spread of participatory approaches has also "led to their use by powerful international institutions to lend their prescriptions authenticity and legitimacy, submerging the more radical dimensions of participatory practice" (Cornwall 2003: 1327). This is echoed in the US's use of the voice of Iraqi ex-patriots to justify their invasion as some sort of grassroots based intervention, when in actuality a widespread engagement with the affected parties has not taken place.

Some suggestions taken from gendered and participatory development perspectives can and should be extended to a participatory approach to determining the necessity of military humanitarian intervention. Following the example of participatory development while avoiding the documented pitfalls is the best starting point for ensuring that relevant voices are heard. Of primary importance here is the work of NGOs. Not all NGOs are created equal; however effective NGOs have the capacity to amplify submerged voices. As indicated above, women's participation in development often involves implementation rather than real decision making. That is to say, often women's participation involves working towards the realization of a project rather than deciding

what should be the purpose, or end of the project. Feminists have suggested that where development planning is occurring, that gender progressive NGOs be present—membership of which would make women more confident and vocal and allow for the creation of alliances (Cornwall 2003: 1330). The presence of NGOs can encourage meaningful participation. Their access to information and ability to inform local people of issues relevant to them also facilitates the voicing of local concerns. This role of informing and encouraging, it should be noted, should not have a patronizing aspect. NGOs must negotiate the complex terrain between disempowerment and maternalism or paternalism. NGOs must not set local agendas, but rather be resource providers, allowing local people to decide how they want to be organized and what they want to achieve and learn. Their presence must reflect solidarity rather than a specific project.

The most important role of NGOs in making minority voices heard in the realm of development has been that of listening to people at the grassroots level and mediating as their agent with both donor governments and donor institutions. In discussing one participatory poverty assessment (PPA), unusual in its effectiveness in being sensitive to women's well-being, Cornwall claims that what made the difference was, in part, that NGOs with longer-term relationships with communities were key actors and the PPA field team "was different in that it included feminist researchers and NGO workers who kept gender on the agenda" (2003: 1337). Applying this to a participatory approach to intervention, this means that local people play the leading role, and only use NGOs as a mouthpiece when necessary. Ideally, local people will be members of the NGOs and can play this role themselves, though due to repression, this is not always possible.

Although it may not be clear thus far, this role for NGOs in including women in participatory development has important implications for the grassroots determination of the need for military humanitarian intervention, which will be explained here. The concern with “voice” issues which I have been expressing so far is based on the fact that a truly grassroots approach to intervention will not only explicitly recognize differences between peoples, and thus will not try to impose external values which are not universal, but also differences within groups, and thus will avoid siding with one segment of a society over others whose views are equally relevant—or using one voice instrumentally. What might be termed “participatory humanitarian intervention” finds its basis in this use of NGOs as intermediaries. In the case of women’s participation, it has been found that the presence of NGOs concerned with women’s well-being and having a long-term relationship with the communities in question ensured that the issues raised by these women were “heard” and had influence so to speak, and were not tokenistic. The question of military humanitarian intervention must include concern for many groups aside from women. People may be defined and affected according to such varied factors as gender, location, occupation, education, income, religion, ethnic identity, political affiliation and socio-economic status to name but a few. These identities are further complicated by the fact that many of them are cross-cutting (distinguishing poor women from rich women; “men of colour” from white men). These various elements can be best heard if, like NGOs with gender-specific agendas, NGOs which are concerned specifically with, for example, the poor, racial minorities, the uneducated, etc.—respectively make themselves present in areas where intervention debates do or are likely to arise. As a first step, these NGOs should make their resources available to those for

whom they are particularly concerned. From close interaction and consultation (NGO workers often live with those they work with / for and share their experiences) (Streeten 1997: 209), NGOs can gain a clear understanding of what their respective groups desire in terms of being assisted in some way or being left alone. As mentioned above, NGOs provide resources and assistance and act as go-betweens when they are requested to, rather than being the primary actors. Decisions are made by and hinge on the people at the grassroots.

Once having determined what level of intervention—if any—is required or requested by those with whom they work, NGOs should take a second step, which is to communicate with one another (membership of the NGO can and must include locals as much as possible) in order to determine what common ground exists and to determine through discourse if military humanitarian intervention is widely desired as a response to rejections of internal calls for the basic right to justification. The goal here is to gain an *overall* picture of the interests and desires of those who are primarily affected by the actions that prompt talk of intervention and of the possible intervention itself.

Once a decision has been reached, the group of NGOs should report the decision of the people to the intervening body—thereby acting as the intermediary through which people whose culture or government may be silencing them, can communicate with the international community and signal its support or lack thereof for a proposed intervention. They may instead make requests that are less extreme than military humanitarian intervention. This need not be a lengthy process if it involves NGOs which

are already known to their relevant groups. Indeed, in a case of state failure, for locals to make use of NGOs as their mouthpieces is likely to be the fastest “bottom-up” process.²

One thing to be considered here is the identification of affected parties—and indeed who is primarily affected; “The question of *who* benefits raises awkward questions for participatory development. The very projects that appear so transformative can turn out to be supportive of a status quo that is highly inequitable for *women*” (Cornwall 2003: 1329). This comment points to the fact that particular attention must be paid to the voices of those whose experience of a proposed intervention will be most immediate in the sense of being directly affected. The degree to which one is likely to be affected should determine one’s status as a primary interlocutor. This aims at preventing reliance on voices that are used instrumentally and may not be directly affected. An example of this is the above-mentioned use of Iraqi ex-patriots to justify the invasion of Iraq, when engagement with those actually in Iraq would, for obvious reasons, have reflected a more grassroots approach and have been more legitimate. It is undeniable that the ex-patriots are in some sense affected parties in that many of them, unless they have severed all ties with Iraq, will be impacted by invasion (eg. danger posed to family members). Being somehow impacted, however, does not automatically impart a right to decision-making power. “If four men propose marriage to a woman, her decision about whom, if any of them, to marry importantly affects each of the lives of these four persons, her own life, and the lives of any other persons wishing to marry one of these four men, and so on” (Robert Nozick, quoted in Streeten 1997: 204) and yet despite this,

² Keck and Sikkink have noted that “When channels between the state and its domestic actors are blocked, the boomerang pattern of influence characteristic of transnational networks may occur: domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside” (1998: 12). The role for NGOs which I have in mind here is similar.

“no one would propose that all these should vote to decide whom she should marry. They could constitute a very large constituency. Certain rights set limits to participation, however important the decision may be for those excluded” (Streeten 1997: 204). The question as to what constitutes a sufficiently affected party, then, requires some debate, however a minimal restriction should be that priority of voice should be given to those who are physically in the area in question, and who are therefore immediately affected by an intervention.

In the preceding pages I have identified the issue of voice as needing special consideration when determining the need for military humanitarian intervention, since the interests of disparate groups must be accounted for. With this end in mind, I have appropriated the language of participatory development and attempted to demonstrate that the lessons and methods of participatory development, and especially of attempts to include women’s voices, or a gendered perspective apply to humanitarian intervention. The role of NGOs emerges as important in making a variety of voices heard. NGOs have been successful in facilitating participatory development as long as they have acted according to an ideal—which is not the norm—but it is something to strive for in the field of intervention. Attempts at participatory intervention will be undoubtedly be flawed, and will necessitate improvement over time. But it is an appropriate starting point. Just as participatory development is the product of over three decades of practice and is still not perfect, so will participatory intervention have to improve over time. Given the fact that many of the relevant lessons can already be gleaned from participatory development, however, the starting point can be quite effective if participatory intervention is

approached with these lessons in mind and the necessary improvements (ideally) only minimal.

Chapter 3: The Dynamics of Motivation and Constraint Between Morality and Legality

In a speech to the British House of Commons, Tony Blair says the following of his desire for a new interpretation of the right to self-defense:

Already, before September 11th the world's view of the justification of military action had been changing. The only clear case in international relations for armed intervention has been self-defense, response to aggression. But the notion of intervening on humanitarian grounds had been gaining currency. I set this out, following the Kosovo war, in a speech in Chicago in 1999, where I called for a doctrine of international community, where in certain clear circumstances we do intervene, even though we are not directly threatened. I said this was not just to correct injustice, but also because in an increasingly interdependent world, our self-interest was allied to the interests of others; and seldom did conflict in one region of the world not contaminate another. We acted in Sierra Leone for similar reasons, though frankly even if that country had become run by gangsters and murderers and its democracy crushed, it would have been a long time before it impacted on us. But we were able to act to help them and we did. So, for me, before September 11th, I was already reaching for a different philosophy in international relations from a traditional one that had held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it and you don't interfere unless it threatens you, or breaches a treaty, or triggers an obligation of alliance. I did not consider Iraq fitted into this philosophy, though I could see the horrible injustice done to its people by Saddam (2005: 343-4).

This statement, offered as part of a larger project of justifying the invasion of Iraq by British and American military forces in March 2003, invokes morality, solidarity, and even a relational conception of sovereignty. By invoking the interconnectedness of all people through his reference to an "increasingly independent world" and the linking of British self-interest with the self-interest of others, implying the need for collective security, Blair makes an argument about the necessity of solidarity among all people. This hearkens back to the claim, in chapter one, that humanity will ultimately succeed or fail *together* due to our interdependence. This claim that the interests of one state are connected to the interests of another is a pragmatic understanding of solidarity—ie.

solidarity which is necessary in order to avoid unpleasant consequences for one's own state. Blair moves beyond this by claiming that even in Sierra Leone, whose situation would hardly have affected the British, they took the initiative to help. This indicates a move beyond pragmatic solidarity to altruism, an indication that intervention in Sierra Leone was morally motivated. In addition to this appeal to solidarity, Blair's reference to "a different philosophy in international relations" is eerily similar to Cohen's relational sovereignty or the ICISS's "responsibility to protect." It suggests that interference in another state can be justified by its mistreatment of its own people. I have already expressed support for such a contemporary interpretation of sovereignty. What is anxiety provoking, then, about this statement? It provokes unease because it makes use of moral concepts to justify not an intervention, but an unjust and indeed illegal invasion.

Blair's comments provide a fitting introduction to this chapter, as they exemplify the very sort of political position that occasions justified concern and therefore elicits a necessary explanation of the views espoused in this thesis. I will first situate Blair's remarks within the context of the realities of the invasion of Iraq, after which I will use the remarks as an illustration of the dangers of "ungloved" moral language, by which I mean moral language that is deployed to justify action unrestrained by law. Discussion of the invasion of Iraq is illuminating as it is the most recent example of the misuse of moral language to justify interference in the affairs of another state. Through identification and discussion of the naïve response to this use of moral language by certain intellectuals, characterized by a failure to insist upon the importance of legality, I wish to distance myself from such naiveté.

The invasion of Iraq, to which Blair refers and which he is defending, was illegal. In March 2003 US and British military forces invaded Iraq under the so-called “Operation Iraqi Freedom” which was justified by the Bush Doctrine of preventive use of force by one country to avoid future attacks by another country (Gray 2004: 175). What is worth noting here is that the Bush Doctrine moves away from preemptive to preventive action.³ The international community of states, however, has proven unwilling to accept this redefinition and to abandon the requirement that an attack should have occurred, be underway, or at least imminent, and indeed the opposition of many states to Operation Iraqi Freedom illustrates that this doctrine has not been accepted as a legitimate legal basis for that action (Gray 2004: 177). The invasion cannot under any serious interpretation be considered legal. In addition to the opposition of many states, support for the invasion was not forthcoming from the UNSC, which aside from preemptive use of force in self-defense, would have been the only other possible legal response.

The illegal nature of this invasion, taken in conjunction with Blair’s comment reproduced above, may at this point already indicate some alarming aspects of the use of moral language to justify anything resembling an intervention—and it is fair to assume based on Blair’s linking of the Sierra Leonian intervention with the Iraqi invasion that he intends to cast the latter as a humanitarian intervention. Jean L. Cohen has claimed that an “overgeneralization of the moral perspective” (2004: 8) so as to think that cosmopolitan right means the end of sovereignty has led to the “risk [of] becoming apologists for imperial projects” (2004: 3). Comparing the cosmopolitan perspective

³ Preemption is an extension of the right to self-defense, permitted only if there is an imminent threat of an unprovoked aggression. Prevention, by contrast, “involves action in response to some putative future rather than immediate threat and is not legitimate” (Brown 2003: 2-3).

with political realism, which overgeneralizes the perspective of strategic interaction,

Cohen argues that:

The moral cosmopolitan focused on global justice and human rights, however, tends to fall prey to a parallel myopia. For reasoning exclusively from the perspective of human rights and what justice requires (overgeneralization of the moral perspective) also leads to contempt for existing international law and a disdain for legal reform through legal means. Like the political realist, the moral cosmopolitan sees sovereignty as a matter of power politics, involving the strategic calculation of national interest and pure *raison d'état*. Unlike the realists, however, the conclusion drawn by human rights fundamentalists is that international law and the discourse of state sovereignty that it is based on must be abandoned in favor of the protection of human rights (2004: 4).

Words such as those offered by Tony Blair for the justification the invasion of Iraq are productive of two things: galvanizing the naïve and further alienating the cynical.⁴ I wish to discuss the naïve reaction of some moral cosmopolitans to the invasion of Iraq, with a view to illustrating that the views expressed in this thesis recognize the danger posed by unmediated morality, and that this thesis does not reflect the parallel myopia that Cohen advises against.

Norman Geras is an example of a naïve believer in intervention. His reaction of the invasion of Iraq has been to encourage a dismissal of international law. Blair appeals to a changing notion of justification for military action on humanitarian grounds. Geras, in turn, appeals to this discourse as something positive, reminding skeptics that the humanitarian motive was clearly articulated by Bush and Blair (2005: 185). Taking his cue from this humanitarian language, then, Geras claims that

An international law—and an international system—according to which a government is free to go on raping, murdering, and torturing its own nationals to the tune of tens upon tens upon tens, of thousands of deaths without anything being done to stop it, so much the worse for this law. It is law that needs to be

⁴ Fuyuki Kurasawa identifies the trend of polarization between 'muscular humanitarians' and 'anti-imperialist absolutists,' which will be further discussed below.

moved forward—which happens in this domain by precedent and custom as well as by transnational treaty and convention (2005: 195).

Clearly, his support for the invasion of Iraq indicates that he has this illegal invasion in mind as a precedent-setting attempt to restore human rights in states where they are not respected. Thomas Franck echoes his support for this bypassing of law with his statement that “any straining to save law’s determinacy by applying it strictly, even when to do so leads to absurd or horrific consequences, is futile and of no benefit to either law or morality” (2006: 144). Statements of this sort reveal two things: a collapsing of morality, which is substantive, with justice, which is procedural; and the idea that there are, as Thomas Pogge expresses it, “humanitarian heroes” (2006: 166).

On the former point, morality and justice must be distinguished. Morality is substantive while justice is procedural. A moral judgment is a judgment regarding rightness or wrongness, simply put. It does not, however, specify what the response should be to immorality. Justice, on the other hand, requires the provision of a specified, measured response, that is to say, it provides a procedure for dealing with actions that are considered wrong or immoral. Habermas hints at this distinction when he critiques the US’s illegal invasion of Iraq:

The comportment of the American administration allows for only one conclusion, that, as they see it, international law is finished *as a medium* for the resolution of conflicts between states, and for the advancement of democracy and human rights. These goals, the world power has made the official centerpiece of a policy that no longer relies on law, but rather on its own ethical values and moral convictions: it has substituted its own normative rationales for prescribed juristic procedures. But the one cannot substitute for the other (2004, n.p.).

What is important to note of the difference between law and morality here is that a response justified purely on moral grounds can excuse apparently any response, as long

as one agrees that what is happening is wrong. That is to say, a moral response can, and often does, lack analysis. The line of reasoning is as such: “if X is wrong, we should respond by doing Y. X is wrong. Therefore, we shall respond by doing Y.” This calculation bypasses the question of why the response should be Y. The concern is primarily with the moral judgment rather than whether the response envisioned is appropriate. Justice requires the “prescribed juristic procedures” that constitute legality in order to channel moral responses to appropriate action. Legality sets limits upon what action can take place.

This understanding of justice as procedural and therefore requiring the prescriptions found in law is rooted in Habermas’s understanding of procedural justice. As has already been determined, however, Habermas understands law and morality as equiprimordial in the sense that law does not embody pre-given moral facts because if this were so, the addressees of law would not see themselves as its authors (Habermas 1996: 454). This means that both morality and legal justice are procedural, justified through discourse. Here it is only the procedural nature of justice that is argued (justice requires legal procedures dictating appropriate responses), not of morality. Also, while in Habermas’s analysis, law compensates for the “functional weakness” of morality (Habermas 1996: 452-3) by taking on the normative expectations that otherwise would burden the individual—this refers to what I have earlier termed his perceived “motivational deficit” of law—I attempt in this chapter to present legality as useful in its ability to constrain, rather than to motivate, action. Habermas’s version implies that the procedural aspect of legality guarantees justice by virtue of its motivating force, that law will guarantee action to protect rights where individuals will not. I argue that justice

requires the procedural aspect of law in the sense that by setting out appropriate responses to violations of rights, for example, law serves to limit the range of possibilities for responses to these situations. An insistence on procedure implies that attempts by strong states to intervene instrumentally cannot be justified by mere moral outrage because it lacks sufficiently nuanced analysis in the sense that there is not enough examination of why intervention (and not an alternative solution) should take place. A more detailed discussion of the lack of analysis of the purely moral response will be offered later in this chapter. The appeal to legality, or law as a medium, is necessary, for the primary problem that arises from the support of Bush and Blair, who use moral language disingenuously, is that it condones the arbitrariness and therefore the probably purely self-interested nature of their actions, to say nothing of the fact that such actions may not be appropriate. Procedure is the antidote to such caprice.

Before moving on it is necessary to draw attention to a distinction being drawn here between law and legality. In the quotation above, Habermas refers both to 'law as a medium' and 'prescribed juristic procedures' as alternatives to subjective ethical values and moral convictions. Here Habermas is referring to the value of legality and the rule of law as a system of rules and institutions which taken together specify things such as rules for behaviour and institutions that can determine breaches of acceptable behaviour and prescribe appropriate punishments for such breaches. This is to say that legality or the rule of law refers to the system of having rules to which all adhere, rather than the content of the rules (laws) themselves.

The procedure that is part and parcel of legality ensures some level of equality in terms of how moral claims are actualized. This equality is manifest in the degree of

moral care which is experienced by those in need of intervention. The indiscriminate application of military humanitarian intervention based solely on moral judgment can have the result of neglecting the most serious and pressing cases of human rights abuse, or those cases where intervention would be of most use. Daniele Archibugi, while citing Michael Mazar to the effect that there are more occasions for intervention than there are actual interventions, comments that “Better institutional design might, hopefully, increase, if not the number, at least the effectiveness of the interventions undertaken” (2004: 2). As we have seen before, making a comparison between a government’s mistreatment of its citizens and domestic abuse, he suggests displacing the question of *whether* to intervene to help a neighbor whose husband beats her with the question of how to deal systematically with the problem of abusive husbands, ie. the creation of a wife rescue service. He refers to this as an institutional (in addition to the already familiar moral) cosmopolitanism (2004: 3, 5).

An institutional cosmopolitan order would insist upon specifying which institutions should judge the relative need for intervention and what legal guidelines both judgment and action should be based upon. It is for this reason that Fuyuki Kurasawa, in trying to decouple humanitarianism from US imperialism through “weak interventionism,” and thus going some way in resolving the tension between anti-imperialist absolutism and muscular humanitarianism, advocates “structural transformations” of the international system (2006: 307). This includes an enforceable body of international law specifying rules for humanitarian intervention and a democratization of inter-governmental decision-making processes inspired by the sort of approach to participatory intervention that I sketched in the previous chapter. Such rules,

specifying things like what kinds of actions are acceptable and when within the context of military humanitarian intervention serve to hold power to account by providing standards for justifying intervention. This would indeed serve to bridge the gap that Kurasawa rightly perceives between the anti-imperial absolutists and muscular humanitarians, because it mitigates the possibilities for self-interest that rightly give pause to skeptics. This creates ground on which military humanitarian intervention might become acceptable even to anti-imperialists. The trappings of legality also include impartial bodies (at least in principle) which will apply these standards. Thomas Pogge suggests instituting an effective judicial organ at the international level for the reason that though God might approve of abstract moral reasons at the end of history, we must question whether it is a criterion that we would want the public using, because through false appeals, abstract moral reason may do more harm than good (2006: 174-5). In other words, legality gives “practical meaning” (Bartholomew 2006: 164) to moral demands.

Legality provides procedures and standards to which every state is subject, as opposed to the arbitrariness of unmediated moral action. Recalling here Habermas’s concern with the unmediated moralization of rights, the importance of law as a medium discussed here clarifies his choice of the word *unmediated*. Insistence on legality, which is distinctly missing from, and actually discouraged in Geras’s analysis (and those, like him, who believe that uninterrogated moral claims are unproblematic bases for coercive action), “is crucial to a critical cosmopolitanism for reasons of impartiality, adequate judgment based on public reason, self-restraint, insight *and* as a means of resistance and ‘democratic hope’” (Bartholomew 2006: 177).

Perhaps the most important aspect of legality's ability to combat the capricious and arbitrary application of both real and false moral claims is the ability of the procedural element of legality to force power to justify itself. Retaining and insisting upon legality means having standards to which powerful states can be held, ensuring that they do not use moral appeals instrumentally. Jean L. Cohen stresses that the perspective of some moral cosmopolitans, which advocates abandoning "the principle of sovereign equality and the present rules of international law for the sake of human rights, [entails] relinquishing an important barrier to the proliferation of imperial projects and regional attempts at *Grossraum* ordering" (2004: 3). That is to say, the rules of international law prevent stronger states from offering any reason off-hand for the invasion of smaller or weaker states, which is precisely what has occurred with British and American justifications for the invasion of Iraq. Recalling Blair's words which introduced this chapter, he stresses the need for "a doctrine of international community, where in certain clear circumstances we do intervene, even though we are not directly threatened." It is clear, however, from US unwillingness to accept such rationalizations from other states⁵ that this is no new legal doctrine, but that "Here, as elsewhere, we see the USA claiming rights for itself that it is unwilling to see exercised by others" (Gray 2004: 190). Ken Roth has pointed out that while states do not like to contemplate uninvited intrusions into their country, some consensus on conditions and promoting appropriate use of humanitarian intervention would help deter abuse of the concept, thus preserving a tool that some of the world's vulnerable victims need (2004: n.p.). A consensus on

⁵ For example, in responding to Russian bombardment of Chechen positions in Georgia in response to Chechen terrorist attacks in Russia, the US stressed the rights of Georgia (Gray 2004: 189).

conditions, entrenched in law, would filter out the false appeals that are so disturbing to those who resist—in this context American—empire.

Wanting to Believe: Problematizing Naïve Belief in Imperial Intervention

The first problem raised by naïve true believers in human rights and moral duty is that they fail to distinguish between morality and justice, leading to support for the arbitrary, and possibly bad faith application of humanitarian justification. Legality holds power to standards of justification and application, and therefore at least attempts to ensure justice through procedure. The second problem that must be identified among naïve true believers in human rights and morality is an unnecessary belief in ‘humanitarian heroes.’ This is precisely why the arbitrariness identified above is problematic. Stanley Hoffman claims that moral behaviour is possible in international affairs, stating that “the claims of ordinary morality, the clamor for a kind of state conduct that does not almost inevitably lead to deceit and violence, cannot be suppressed” (1981: xii). It is not clear, nor is it probable, however, that if states are left to their own resources, those making decisions at the state level will act morally. Geras is not the only naïve believer in this regard. Samantha Power actually calls upon the US to act as a leader in human rights enforcement globally and appears to hold the US solely responsible for failure to act during the Rwandan genocide, for example, thus implying that it is up to this country alone to act as “GloboCop” (Bartholomew and Breakspear 2004: 130). This assessment of the role of the US internationally conflicts with appeals to a more multilateral approach to human rights enforcement at the international level.

Power’s work claims a special place for the US in leading the world in the promotion of rights and indicts the inaction of the US in her impressively detailed work

on US failure to stop genocide throughout the twentieth century. This attention to the US is understandable, as the US appears to be one of the only countries with the power to intervene, and in many cases, the only country (Kurth 2006: 93). Her approach has its uses in terms of mobilizing the population to speak out against genocide when it occurs and to accept responsibility for helping others. The more problematic aspect of this sense of responsibility is her conclusion regarding the role the US should adopt. While acknowledging that in the case of Rwanda, for example, the US should have lobbied to have the Rwandan ambassador expelled from the UN, jammed Rwandan 'Radio Milles Collines,' sent troops, etc. (Power 2003: 335), there is no reason that these efforts need to have been unilateral and it is not clear that the blame is specifically American. All of these efforts could have occurred within the context of UN efforts, which the US could significantly have bolstered by putting its support behind the UN, which it did not. In addition to these statements, she claims that the US should have acted unilaterally if need be, without the blessing of the Security Council (2003: 382-83), "the United States could have led the world" (2003: 383). Thomas McShane adopts the same stance, but explains his position by stating that the US should lead the charge because international organizations often lack the necessary tools (2002: 70-1). This support of unilateral action, and of holding one country especially accountable ("we as a nation let [genocide] happen" (Power 2003: xix), is highly problematic. This is due to the need for a balance between creating an international order that facilitates humanitarian intervention in cases when it is warranted and one that has mechanisms to resist the urge to intervene when it is unwarranted and used instrumentally.

This belief in humanitarian heroes is raised and criticized by Thomas Pogge in response to Thomas Franck's argument that jurying among states is an effective and acceptable mechanism for adjudicating claims of the right to intervene (2006).

Specifically, jurying is introduced by Franck as an alternative to law which falls short of adequately addressing moral failure. Pogge responds that though it might seem logical to set law aside to save victims of humanitarian disasters, it is not the good sense of moral actors such as Thomas Franck or ordinary citizens that will fill the void left by law.

Pogge argues:

Rather, outcomes will then be determined by the "good sense" of those whose humanity *has been* corrupted through their ascent to national office, through their power, and through the adversarial character of their role: by the good sense of people like Clinton, Albright, and Annan, who enabled the genocide in Rwanda; by the good sense of people like George W. Bush, Dick Cheney and Donald Rumsfeld, who use the language of human rights and liberation to justify interventions aimed at enhancing U.S. control of the world's oil reserves (2006: 168-9).

Pogge's examination of the actors to whom we concede unrestrained power when we fail to insist upon international law and institutions makes clear the importance of insisting that law filter out false appeals to morality which in reality often serve to mask power. In addition to this, the implication that the US is solely, or even primarily, responsible for the enforcement of human rights is likely to have unwanted results for the superpower itself. "As with the problem of theodicy—Why does God allow evil in the world?—an imperial America that celebrates its unbounded power is going to get repeatedly the same question" (Hendrickson 2002:6).

Anne Orford has identified a further problem with a naïve belief in humanitarian heroes: The attendant racialization and feminization of those intended 'beneficiaries' of the intervention who are constructed as savage or helpless, needing the help of 'knights in

white armour' (2003: 159-165). In narratives of intervention, the characteristics attributed to these bodies are akin to those given to white male heroes (Orford 2003: 160). By thus contrasting those 'in need' of intervention and those intervening, intervention comes to be constructed as such: "The role of the international community, represented by its 'cops', is to bring calm professionalism, order, peace and security to emotional, fearful and hysterical peoples" (Orford 2003: 167). David C. Gompert, in suggesting that NATO train African Union forces to stop genocide, provides a good example of this paternalistic construction of others, particularly Africans, as in need of the help of the organized and peaceful west: "Although Africans are indeed taking greater responsibility to stop the killing that has plagued their people and harmed development, they need help to create multilateral military capabilities to stop genocide, especially if the West is disinclined to intervene" (2006: 16). Here Gompert is encouraging an alternative to Western intervention, however the fact remains that 'they,' by which he identifies Africans, 'need help' from the West. The problematic construction of helper and helped is obvious. It should be noted that understanding moral duty through the basic right to justification fleshed out in terms of participatory intervention avoids this unacceptable formulation by insisting that the need for intervention be determined by those affected by the crisis in question. In this case, outsiders do not decide, arbitrarily, what is good for those affected, thereby applying their own set of value judgments nor do they appear as knights in white armour. Rather, they respond out of cosmopolitan solidarity on the basis of the demands (voices) of those most affected.

A final point is in order regarding naïve true believers in human rights who are willing to entrust the enforcement of moral judgments to great powers without the

benefits of legality. Bartholomew expresses dismay that “Espousing their humanitarian concern and their sense of cosmopolitan moral solidarity, the human rights hawks also gave sustenance to the project of undermining international and emerging cosmopolitan legality as a mode of regulation” (2006: 163). By doing this, these promoters of human rights and morality are not only diminishing the value accorded to legality. They are making vulnerable to abuse, and therefore diminishing, the very thing they appear to value most: morality. On the one hand, as Bartholomew has identified, they are putting a humanitarian face to grotesque mockeries of moral action (an invasion characterized by such notorious scandals as the abuse of prisoners in Abu Ghraib and an under-reported, yet high, death toll among those being ‘saved’). In doing this, they also help to make morality vulnerable to doubt and evoke cynicism as to the possibility of *any* moral action. Appeals to morality and duty which do not consider the value of legality diminish both law and morality. The policy adopted by those naïve believers such as Geras, Franck and Power, therefore, is not only harmful to law, but by extension is ultimately self-destructive.

Legitimacy as Voluntary Shackles

It has been established that legal procedure is necessary. This has been discussed primarily in the context of the necessity that power justify itself—and an insistence on legal procedure ensures that this occurs. Anti-imperialists and critical cosmopolitans⁶ rightly insist that power be checked to maintain the sovereignty and integrity of those who are less powerful by keeping imperial interests in check. By extension, legal procedure is necessary because it will save legitimate interventions from being always

⁶ Bartholomew and Breakspear contrast “critical cosmopolitanism” with “new liberal” cosmopolitanism which fails to distinguish imperial from egalitarian universalism (2004: 136).

already condemned before they begin. One must note, however, that this necessity is two-sided in the sense that it works in both directions. While adherence to legal procedure on the part of the hegemon protects weaker states, it also protects the hegemon. Power must be restrained, and power *needs* restraint. In what follows, I discuss how failure to follow legal procedure is dangerous directly to the great power in question and dangerous to the world community at large.

Failure to follow legal procedure is dangerous to the superpower who flouts it because it is in the interest of that superpower to retain its status for as long as possible. Regardless of the power a state wields, its ability to remain powerful depends in part upon the acquiescence of other states. The gaining and retaining of trust is achieved by acting in good faith with other states. The illegal use of force will engender resistance because the message relayed by ignoring and defying legal procedure and international law is that cooperation is no longer the desired approach. In this sense, the tired adage that one can “win more flies with honey” is apt, since other states are more likely to accept plans that are cooperative and therefore respect the input of all affected. David C. Hendrickson draws attention to the important difference between power and authority: “The more powerful the state, the more important that it submit to widely held norms and consensual methods. The more it overawes the remainder of the system, the more vital it is that restraints are laid upon that power, either by itself or by others” (2002: 4). One can understand from this statement that there is a burden on super powerful states to prove their goodwill, simply because their power constitutes a serious potential threat. Hendrickson has noted that restraints can be laid upon the power by itself or by others. Therein lays the distinction between power and authority. To have authority implies that

the state is recognized as legitimate—ie. it imposes restraints (shackles) upon itself and therefore does not pose a threat to other states. A superpower that refuses to be restrained by the rule of law such as the US post 9/11 will be the subject of restraint on the part of other states (or possibly non-state actors such as terrorists). Empire, by its very nature seeks absolute security, and as such will reject the legality that characterizes coalitions that form to ensure collective, or relative security. However, “Efforts to create an empire—any sort of empire—are expected to encourage an offsetting reaction. The harder a sovereign fights to expand its dominion and influence, the larger and stronger will be the coalition that forms against it. The pursuit of empire thus tends to be self-defeating” (Rhodes 2003: 147).

In addition to the status of illegitimacy which will rightly befall an imperial power that disregards the rule of law, a power which consistently flouts international institutions and the international rule of law is likely to be met with scepticism even when acting for good reasons. For example, the United States has disregarded the assumption against being the first to use force in international relations, enshrined in the UN Charter and based on such agreements as the 1928 Kellogg-Briand Pact and the 1945 Charter of the International Military Tribunal at Nuremburg (Brown 2003: 3) and has moved beyond pre-emptive to preventive use of force. As a consequence, any future attempts at pre-emption are now likely to be misinterpreted (Hendrickson 2002: 4; Brown 2003: 6) as prevention.

Furthermore, while it may seem that it is logical for a great power to make rules that it does not itself follow, this undermines its ability to reach diplomatic solutions, because, for example, all it can say to a country such as India, fearful in the face of the

development of nuclear weapons in Pakistan, “do as we say, not as we do” (Hendrickson 2002: 9; see also Preuss 2006: 66). It is important that even a very powerful state retain its ability to reach diplomatic solutions, in addition to bolstering the efficacy of international institutions, since its own position is not guaranteed forever, and the succeeding superpower may imitate the undesirable policies of the former power —thus making the original superpower a victim of its own unjust approach. The imperfect international institutions that presently exist will not improve if they are ignored by those with the power to act alone (Brown 2003: 6) but this may haunt these powers in the future: “it is in the interest of the United States of America itself to make the UN capable of action before another, less democratic great power rises to superpower status. Empires come and go” (Habermas 2004: N.p.).

The failure to follow legal procedure is not only dangerous to the great power in question, but to all states in general. The threat that is posed by a superpower that does not follow any rules that are inconvenient is likely to lead to the further militarization of other states because the abandonment of cooperative measures leaves them feeling vulnerable and with little option other than capitulation to the will of the hegemon. Pogge argues that the freer the hand that is given to stronger states, the more threatened smaller states will feel, and therefore they will turn to nuclear weapons and other weapons of mass destruction to protect themselves. For example, he says, the price the world has paid for “victories” in Afghanistan and Iraq has been to accept India and Pakistan as nuclear powers (2006: 169). The US’s disregard for the principle of pre-emption and the general disapproval of prevention provides another example in this regard. Its willingness to invade Iraq under the principle of prevention has made it a

realistic threat to other countries. Coupled with its aggressive rhetoric towards North Korea, this willingness to attack on illegitimate grounds has led to North Korea's proclamation of its nuclear weapons program and its withdrawal in 2003 of the "Nuclear Non-Proliferation Treaty," to which Japan responded that it would take pre-emptive action against North Korea if it feared imminent attack (Gray 2004: 185). The destabilizing effects of the threat created when a powerful state flouts legality is clear here. Not only are other states likely to militarize, but they are likely to themselves abandon international institutions.

Motivation and Constraint

The discussion above is aimed at illustrating the necessity that a limiting force be exerted on powerful states, for the sake of those states weaker than the superpower, for the superpower itself and for the stability of the international system in general. Appeals to morality as justification for intervening in the affairs of other states can be used instrumentally to further the interests of a superpower. Furthermore, because there is the chance that even voices from the grassroots will be co-opted by power under a conception of participatory intervention, the right to justification needs law. This concession to Habermas's insistence on the importance of legality is one aimed largely at illustrating that the perspective advocated in this thesis, which focuses on the moral nature of human rights, does not swing too far in the direction opposite of Habermas and fall prey to the myopia identified by Jean L. Cohen. Law is a necessary instrument in this regard—limiting power and holding it to account. This concession to Habermas's insistence on the centrality of law, however, only goes as far as recognizing this important fact. I will now return to the importance of understanding rights as

fundamentally moral by arguing that while law serves the function of constraining power, it does not serve as a strong motivating force. While Habermas has argued rather persuasively that law replaces the motivational force of morality in a secular society, it can in fact have the opposite effect of motivation by leading to complacency, obscuring the wider goals that led to the creation of law to begin with, and it does not, as some would claim, create “magic words,” which, if used, trigger intervention. Morality, by contrast, serves as an effective motivating force.

Laws can be adopted so as to conceal the reality of otherwise unpleasant situations—or may simply have the unintended effect of doing so. Whether intentional or not, the effect of law can be to give the appearance that all is well, which in fact can contribute to injustice. The foreign military base is a good example of this. The foreign military base is constructed as largely unproblematic and uncontroversial in international legal discourse. Any formal treaty between states governing the use of military bases on the host soil (Status of Forces Agreements) must conform to the *Vienna Convention on the Law of Treaties*, which asserts the necessity of “the sovereign equality and independence of all states” (Vienna Treaty, Preamble). Likewise, the preamble insists on the initial free consent of the host nation. Bases tend to appear unproblematic because they are provided for in law—they are not, therefore, seen as unwanted incursions of one state on the territory of another. Because the treaties appear to fall in line with the relevant legislation, the injustice and abuse of local people that surrounds foreign military bases, predominantly those of the United States in Southeast Asia,⁷ often goes unnoticed and leads to almost universal complacency—the exception being those who live in the

⁷ For example, crimes committed in Okinawa by US military forces from 1972-1995 amount to just under one crime a day (Johnson 2000: 40). South Korea suffers similar problems.

vicinity of bases. The legality of the US presence leads to its being understood as unproblematic despite the myriad problems that surround it. This is a clear example of legal rhetoric obscuring the physicality of law, as seen in the lack of lived sovereignty and the violence created by bases.

Similarly, many have criticized the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNGC) as merely political or as rhetorical rather than juridical, however, “Although this...literature often directs its critique toward the UNGC, one senses that the real gulf is between universal legal definitions and the context-specificity of social science” (Eltringham 2004: 3). The point of this, of course, is to indicate that law cannot possibly account for every scenario that may actually occur, and therefore, due to the complexity of each individual case with which it is confronted, it may be ill-equipped to address many problematic issues. This statement speaks to the way in which law can obscure or “sterilize” (Geertz 1983: 171) the facts of what is occurring.

Finally, law does not create “magic words” which stimulate states into action. This point can best be made by reference to the UNGC. The determination of genocide has typically been the legal criterion on which military humanitarian intervention has been decided. However, even the determination of the “fact” of genocide has failed to yield results. Under the UNGC, the use of the term “genocide” should trigger international intervention to halt violence. Article I of the UNGC states that “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Furthermore, the UNGC, through articles V, VIII and IX provides means for stopping

genocide through national legislation, state governments and competent UN organs. This legislation has the force of customary law and the International Court of Justice has accorded to it the status of *jus cogens* (Mugnarella 2002: 311). More than a decade ago the US acknowledged that confirmation of the occurrence of genocide would commit it to action, and there was general consensus that states would call it by name when it next occurred, yet the US has been labeling as genocide the humanitarian crisis in Darfur, Sudan, since 2004 and no effective action has taken place, indicating that law does not create “magic words” out of terms like “genocide” (Strauss 2005: 123, 129, 131); it does not, at least in cases like this, motivate action. The humanitarian disaster in Darfur is illustrative of some of these trends.

Law and Morality in Context: the Case of Darfur, Sudan

The African country of Sudan has had a troubled history where violence is concerned, particularly in the past fifty years since its independence. While a comprehensive history of violence in Sudan can only be explained satisfactorily as the subject of its own book, and different conflicts characterize different regions, what is relevant to this discussion is the violence taking place in the western region of Darfur since 2003. For several years Sudan has been plagued by a civil war in which Christians in the South have sought more recognition and self-determination. During the signing of a peace agreement between the government and the southern Christians in 2003, Darfuri Muslims, as ignored and neglected as the southern Christians, revolted, fearing that they would be excluded from the power and wealth-sharing agreement being brokered (Prunier 2006: 195). The government has addressed this insurgency by arming and supporting Arab militias known as *janjaweed*, interpreted variously as “evil horsemen”

(Prunier 2006: 196) or “hordes” or “ruffians” (Flint and de Waal 2005: 55). While the *janjaweed* enter villages killing, raping and burning the buildings to the ground, in addition to destroying food storages, water sources and infrastructure (Vehnämäki 2006: 68) they are supported by the government, which arms and gives them air support (Udombana 2005: 1149-50) by dropping crude bombs on villages before the *janjaweed* enter. This “counterinsurgency on the cheap” (Flint and de Waal 2005: 24) has been disingenuously explained by the government as a tribal dispute (Vehnämäki 2006: 70), however it may more accurately be described as “an answer with arms by a racially and culturally dominant group [Arab Muslims] to the insurrection of a racially and culturally subject group [non-Arab Muslims]” (Prunier 2006: 201). The outcome of these attacks has been a high death toll, although estimates are varied and are hard to come by, due to the Government of Sudan’s (GoS) lack of cooperation with humanitarian organizations. Conservative estimates of the death toll as of 2003 are roughly 180,000 (Vehnämäki 2006: 68) to 200,000 (Kurth 2006: 94), with more than one million internally displaced persons (IDPs) (Udombana 2005: 1154).

The response of the international community to the humanitarian disaster in Darfur has been mixed. The reaction of states has been twofold, characterized by a general avoidance of use of the word genocide, and failure to act effectively when the word is indeed used. The international community of states has reacted with much waffling and buck passing. The western states have pushed the UN to act to stop the mass killings in Darfur, however knowing that the UN would have to act if the term genocide was used to describe the situation and yet aware that member states would not commit the necessary resources to stop it, Kofi Annan was unwilling to use the term

genocide (Prunier 2006: 198). At the same time, however, the Report of the UN Commission of Inquiry on Darfur Violence refers to people acting with “genocidal intent” and yet claims that the situation is not genocide, but “war crimes” (Prunier 2006: 199). Ultimately the disaster has been left to the care of the African Union.

Even if the term “genocide” comes to be employed, it is often the case that no action is taken to arrest the progress of the crisis underway. As mentioned above, the “g-word” has been used in reference to the violence in Darfur, on the part of the United States, for the past two years. Despite use of this term, other states have been generally unwilling to violate the sovereignty of the Sudanese government, while others have called for protection of the people of Darfur, however there has been a lack of clarity regarding who should act among the UN, the AU and the GoS (Bellamy and Williams 2006: 151). Furthermore, acting within the UN, the US called for a resolution including an expanded AU force, a no-fly zone for Sudanese military aircraft and targeted sanctions against the ruling elite, but the resolution adopted by the UN was significantly watered down (Bellamy and Williams 2006: 152). The US has much power to influence what other states will accept in the UN, however there are very real limits to what the US will do to stop violence in Darfur. As the GoS has proven itself a valuable source of information in the US “war on terror,” it is not in the interest of the US to exert too much pressure on it (Bellamy and Williams 2006: 155).

What does the case of Darfur reveal about the power of law to motivate states in favour of human rights enforcement? It is clear from the case of Darfur that law does not create magic words, in the first place because when the so-called magic word is used, very little is done to improve the situation. Even as things stand, there is an insufficient

(in terms of both numbers and capabilities) AU peacekeeping mission in Sudan (AMIS), which cannot stop the *janjaweed* and in fact members of AMIS have been abducted and murdered (Gompert 2006: 8). Secondly, it is evident from the UN report on the violence in Darfur that it is only too easy to define the problem out of existence, ignoring the fact that the technical question of whether or not genocide is present is irrelevant to victims of the violence, who have “continued to die without recourse to international legal concepts” (Prunier 2006: 197). That the determination of the relative importance or severity of a humanitarian crisis is based on its conformity with a legal definition is a prime example of legal language obscuring reality, or “sterilizing fact in law,” as discussed above. The fact that hundreds of thousands are being murdered, along with the creation of over a million IDPs, is rendered unproblematic, at least in terms of what action need be taken, because the violence does not conform to a pre-determined legal definition. This in turn illustrates how the existence of given laws can have the opposite effect of that which was envisioned by those seeking to implement the law in the first place, by leading to complacency, allowing states to claim that if it were genocide, they would do something about it.

The reaction of states and international institutions seems to illustrate that the value of law does not lie in its motivational force but rather in its ability to constrain what action is indeed taken. The case of Darfur is also illustrative of the second point of this chapter, namely that while law does not motivate, morality does. Popular reactions to the crisis in Darfur are evidence of this. Just as Samantha Power criticized the US for letting genocide happen, there is now a popular movement underway which aims at calling on

the US to lead the charge this time around.⁸ The “D.C. to Darfur” demonstration (D2D) in Washington D.C. in April 2006 sought to pressure the US to support the African Union in Darfur, calling for “a larger, stronger multinational force to protect civilians from genocide” and “a commitment to stopping the atrocities that both Congress and President Bush have declared to be genocide” (Genocide Intervention Network). This movement is bolstered by celebrities such as actor George Clooney, who spoke at the D2D rally in Washington and Olympian Joey Cheek and public intellectuals such as Samantha Power and Elie Wiesel. In an interview with Wolf Blitzer, Clooney has said that “there’s an opportunity for the people to stand up and say OK, now let’s make this simpler by saying we’re going to make it –we’re going to make this important enough that it’ll make it—could make it easier for the administration to do something” (CNN 2006). Even Amnesty International has been criticized for claiming that the US should exert “greater global leadership in Darfur” (Henderson 2006). Note that these appeals often make reference to some form of multilateral operation—Clooney suggests “if we [the US] can get a bridging force through NATO while we put together something in the U.N., I think that’s our best bet” (CNN 2006), but that this is something for which the US is ultimately responsible. Lest one think that these calls are confined to popular, grassroots movements, there have been similar calls from academe. Bellamy and Williams have claimed, for example, that “in order for cosmopolitan/counter-restrictionist arguments to gain the upper hand,” one of two alternatives which needs to occur is that “states might force the issue by publicly expressing a willingness to act outside the [Security] Council if it fails to reach consensus” (2006: 157). Needless to say, only a militarily and

⁸ Note that Power has praised the Bush administration as the only government which has taken initiative on the Darfur issue, however others criticize this same administration for only placing Darfur on its agenda

financially powerful state (ie. the US) would be capable of successfully accomplishing such a unilateral action.

This grassroots movement is clearly morally motivated—underpinned by the sense that ‘we’ should ‘do something’. While it stands in stark contrast to the reticence of states, this morally motivated response from “the people” is also problematic. It seeks to assign to the US responsibility for world leadership, implying that if something unacceptable such as genocide or mass killing occurs, it is because the US permits it. Giving such power to a state is dangerous, as it is not likely to use that power in the name of justice. Stephen Bronner warns against being taken in by such celebrities who insist that we do “something,” but not saying what, because this lack of analysis can lead to ineffective—or even harmful—actions. For example, Bronner claims that supporting the idea of sending UN troops into Sudan is misguided, since such an action would only aggravate violence, this time involving the UN troops, in the middle of which would be the IDPs whom the UN troops are supposed to protect (Bronner 2006). Or, as Gerard Prunier has stated the case, “The moral outrage that was felt tended to overshadow, if not hide completely, the political nature of the problem” (Prunier 2006: 196). A proper analysis would involve accounting for three facts. The first is that the morally motivated call to ‘do something’ promotes intervention without determining whether this is the best option. Secondly, it empowers empire by suggesting a leading role for the US. Some positive side effects do not change the nature of an imperial project that is highly problematic:

Its imperialism is not a policy, bad and mistaken, but its very nature. This is not to say that it can do no good. It can, for example, distribute aid in the wake of a

during the 2004 election campaign in order to garner votes (see Selfa 2006; Prunier 2006: 198).

tsunami or earthquake. Just like a corporation that contributes to skyrocketing levels of childhood obesity can donate some of its profits to Save the Children (Leupp 2006)

Leupp characterizes the type of thinking that can be found in Geras's and Power's work as the naïve belief that one can use imperialism for good. Some good side-effects do not redeem empire. Third, even a benevolent hegemon cannot intervene unproblematically. As Habermas asks,

Who is to determine, on the supra-national level, if "our" values truly merit universal acceptance, or if we are truly exercising universally recognized principles, or whether we are perceiving a conflict situation truly non-selectively, for example, or whether, instead, we are taking into consideration only what is relevant to us? This is the whole point of inclusive legal procedures which condition supra-national decision-making upon the adoption of reciprocating points of view and consideration of reciprocal interests (2004, N.p.).

With this point, we return to the initial argument of this chapter, that law is necessary to constrain actions motivated (or apparently motivated) by morality. Otherwise, morality could be used to motivate even unjust interventions and moral responses can move in any direction. This is a risk even if employing Forst's basic right to justification as the basis for decision-making regarding intervention, since voices at the grassroots can still be co-opted by powerful interests, and some of those voices come to be used as "proxies" for imperial actors (Mamdani 2006). Law is, according to Habermas, a verifiable category, and as such, sets limits upon the range of possible reactions to humanitarian disasters.

In conclusion, I have argued that while human rights should be understood as fundamentally moral, even in the context of the basic right to justification, the abuse of moral language and arguments is still possible. It is necessary to recognize the importance of the rule of law both for the imperial power itself and other, weaker states. As illustrated by the case of the humanitarian disaster in Darfur, Sudan, however, it

becomes clear that law, while necessary to constrain what can be done under the banner of morality, does not act as a sufficient motivating force. Both individual states and international institutions have found ways of avoiding terminology that will create on their part an obligation to act, and when such terminology became unavoidable, they did not take any meaningful action. At the same time, at the grassroots level in western countries, there exists a movement to pressure the US government to demonstrate leadership in Sudan, illustrating the power of morality and its attendant sense of duty to galvanize individuals and groups to insist upon acts of solidarity with distant others. The lack of analysis which Bronner has identified as characterizing this movement, however, and the uninterrogated recommendations it makes, illustrates the importance of legality in limiting the realm of possible actions.

Conclusion: There and Back Again

In contrast to a primarily legal understanding, this thesis argues for the fundamentally moral nature of human rights. By considering the practical aspect of Rainer Forst's basic right to justification, my argument considers the possibilities of realizing a moral benchmark for rights enforcement through military humanitarian intervention. Despite my emphasis on morality, I concede the importance and necessity of law and legality, particularly in reference to the work of Jürgen Habermas. While chapters one and two address the moral nature of rights and their application to military humanitarian intervention, chapter three emphasizes the necessity of legality. Ultimately, however, I conclude by reasserting the motivational power of a moral understanding of rights.

This thesis has emphasized Rainer Forst's basic right to justification as a moral benchmark for intervention, capable of addressing Habermas's concern with the democratic and motivational deficits of a moral understanding of rights, along with the possibilities of violence and instrumentalization. Returning to the basic right to justification, Forst describes it as "the right to be respected as a moral person who is autonomous at least in the sense that he or she must not be treated in any manner for which adequate reasons cannot be provided" (1999: 40). A fundamental aspect of the moral nature of the basic right to justification is that each person both gives and demands reasons in morally relevant contexts (1999: 42). There is a strong sense of obligation in that not only is each person entitled, in some sense, to acceptable reasons, but must provide reasons to others when called upon to do so. This discussion of the moral nature of human rights and, by extension, of the basic right to justification as a response to Habermas's concerns about morality, appears to place morality and law in tension. The

tension is particularly evident in the discussion of law as unburdening the individual, who has in a secularized society lost the motivation toward right action. This is in contrast with a moral understanding such as Forst's, which seeks to emphasize the burden of duty.

As the discussion progresses, however, and the practical possibilities for the basic right to justification are explored, it becomes increasingly evident that law and morality do not exist in tension. As the basic right to justification is founded upon the moral autonomy of those affected by a given humanitarian crisis, certain measures must be taken to facilitate communication with them in order to ascertain their desire for and reasons for demanding assistance. For example, the presence of NGOs can facilitate participatory intervention by linking people at the grassroots to the international community. Also, sensitivity to differences among those who share a culture or political community can go some way towards ensuring that voices at the grassroots are not used instrumentally. However, it is evident from already existing instrumentalization such as the US's use of Chalabi's voice in justifying the invasion of Iraq that even the basic right to justification can be used in bad faith. All of the ways in which the basic right to justification address Habermas's concerns depend upon the good faith of those employing these measures. And it requires legalization in its own right.

In examining the necessary relationship between law and morality, then, it is important to remember a basic argument from Habermas and Forst, respectively. Recall that Habermas, discussing the problematic democratic deficit of a moral understanding of rights, states that non-democratic processes risk the loss of the criteria by which policies can be normatively assessed (1996: 429). While understanding rights as moral in the way that Forst does can encourage a sense of duty and solidarity even in the absence of law,

Forst himself is careful to state that the basic right to justification should be realized in the context of law: "...these rights can only be *concretely* justified, interpreted, institutionalized, and *realized* in social contexts, that is to say, only within a legally constituted political order" (1999: 48). These two statements both express an insistence upon the role of law in the effective implementation of rights enforcement. In the context of military humanitarian intervention, this means that while the basic right to justification posits a duty of solidarity to assist others if their moral autonomy is disrespected, this duty must exist within a well-developed legal framework, one that is legitimate.

However, because this thesis places a strong emphasis on morality and a moral benchmark for military humanitarian intervention, it risks falling into the mirror opposite tendency for which it expresses criticism of Habermas's legal understanding of rights. That is, emphasizing morality to such an extent that law is relegated to the periphery. Failure to emphasize the importance of a legal framework for intervention risks falling into complicity with bad faith interventions. My argument is therefore distinct from the perspectives of naïve true-believers in morality such as Geras and Power, who unwittingly bolster the imperial ambitions of the US.

In closing, I turn to one of Habermas's prominent critiques of a moral understanding of rights, the motivational deficit. In examining the reactions of both states and supra-state organizations to the humanitarian crisis in Darfur, it is evident that, at least in this case, law may have a greater motivational deficit than morality. States are legally bound to right action through the UN, and yet they have avoided doing anything meaningful in Darfur, even short of intervention. Yet the movement calling for intervention in Darfur, which is not legally obligated, appears to be far more motivated

(even if misdirected) to assist others than are states. This casts doubt on the claim that law has more motivational force than mere morality. In fact, the benefits of legality that have been outlined, along with the need to constrain misguided moral actors, seem to indicate that while morality motivates, the primary benefit of legality is in its power to constrain the possibilities for the instrumental use of morality.

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