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## **The Rights and Duties of Humanitarian Intervention: Who Should Intervene? A Reply to Two Critics**

*By James Pattison<sup>1</sup>*

Graham Long and David Miller present careful analyses of my book, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* In doing so, they offer some thoughtful criticisms of my Moderate Instrumentalist Approach. In what follows, I will defend this approach against their objections and highlight points where I think that it is in fact in agreement with their analyses.

### **Rights-Consequentialism and the Moderate Instrumentalist Approach**

On the Moderate Instrumentalist Approach, the enjoyment of human rights is the measure of whether an intervener is effective. Effectiveness is the primary factor in the legitimacy of an intervener, but there are also morally important, noninstrumental factors, most notably (i) fidelity to the principles of *jus in bello* and (ii) (internal and local external) representativeness. Long suggests that these two noninstrumentalist factors could also be framed in terms of human rights. If they could, then all of the main moral values of the Moderate Instrumentalist Approach may be seen in human rights terms. Accordingly, Long is worried that is unclear what sorts of rights trade-offs this approach would sanction. For, I argue that, unlike absolutism, the Moderate Instrumentalist Approach does not prohibit trade-offs and, unlike consequentialism, it does not sanction all trade-offs when overall rights compliance would be increased. But if all the values that I am concerned with can be framed in terms of human rights, how can I make this move and avoid one of the two extremes of absolutism or pure rights consequentialism?

To answer this, it helps to consider in turn the two central types of noninstrumentalist value that I defend. First, the central reason why the fidelity to the principles of *jus in bello* does not collapse into either absolutism or consequentialism is the difference between ‘doing’ and ‘allowing’ (see pp. 115–17). This difference largely grounds the import of the fidelity to the principles of *jus in bello* and, in particular, the principle of noncombatant immunity. That is, it is important that an intervener avoids *doing* harm itself (e.g., by killing innocent civilians), even if it were to *allow* more harm in the long run (perhaps by being less effective). The difference between doing and allowing is not absolute, however. It can *sometimes* be permissible to *do* harm oneself rather than allowing a greater harm—and, in particular, when

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extremely beneficial consequences (in terms of the mass violation of basic human rights) are likely. This nonabsolute difference between doing and allowing goes some way to explain why I can adopt a midway approach that sanctions some, but not all, trade-offs between rights. To put it in terms of rights, it is sometimes better that an intervener *does not* violate rights to X, even if this will *allow* more rights violations of X overall. But when there would otherwise be a *much larger* number of rights violations of X, it is preferable that the intervener does infringe the rights to X.

The importance of representativeness might seem to be more easily captured by a purely rights-consequentialist approach. On such an approach, the right to individual self-government (which, to some extent, underlies the value of representativeness) is one right to be maximised, along with the right to life, the right not to be tortured, and so on. (The values captured by the ‘Resources Argument’ and the ‘Burdens Argument’ would also need to be put in terms of rights.)

However, this may have little practical import. My aim in the defence of the noninstrumental importance of representativeness is to show that the value of individual self-government (as well as the values captured by the Resources and Burdens Arguments) should be taken into account in the morality of intervention (representativeness has often been overlooked). Even if this value is conceived of in terms of rights and included in the overall rights calculus, it will still play the same role in the morality of humanitarian intervention. That is, any potential intervener would need to take into account the rights of individual self-government, in addition to the effects on other rights, such as the right to life. Suppose, for instance, intervention by France in Togo (in response to a hypothetical crisis) would not be legitimate because it would violate a much larger number of the rights to self-government of the French and Togolese citizens than the number of lives that it would save. If we *include* the value of representativeness within the rights calculus, France would not be effective at promoting the overall enjoyment of human rights and so would be likely to be illegitimate. Likewise, if we *exclude* the value of representativeness from the rights calculus, France would not be representative and so would be likely to be illegitimate.

### ***Jus in Bello* and Humanitarian Intervention**

Long questions my claim that the principles of *jus in bello* should be more restrictive than the traditional accounts of these principles. He suggests that one of the arguments that I present for this view—that humanitarian intervention should be more limited in scope than wars—is purely contingent because wars can also be limited in scope. More generally, he suggests that since just wars are ultimately justified in terms of rights, there is little to demarcate them from humanitarian intervention. Both should follow the stricter account of the principles of *jus in bello* that I endorse.

I agree with Long’s argument that just wars may ultimately be justified in terms of rights and, as such, the case for the stricter principles of *jus in bello* would apply to them too. Indeed, I suggest (p. 125 n. 10) that the reason that I offer for the increased stringency and importance of *jus in bello* could apply to other uses of force, especially those that occupy enemy territory. But, although I agree with Long, this view of just war is contentious. Many maintain that war can be justified in response to

values that are not necessarily reducible to individual rights, such as the threat to communal integrity. If one subscribes to such a view, then there are differences between the rights focus of humanitarian intervention and other just wars. My aim is simply to make the case for strict fidelity to the principles of *jus in bello* for humanitarian intervention in particular, in contrast to those who maintain that wars can be justified for reasons not reducible to rights and, consequently, assert less strict principles of *jus in bello* for such wars.

### **The Duty to Intervene**

Long suggests that rather than measuring humanitarian intervention in terms of the promotion of the enjoyment of human rights, it should be measured by duty fulfilment. This is because, on the Moderate Instrumentalist Approach, interveners that fall short in their fulfilment of their duties can nevertheless be viewed as acting permissibly if they make an improvement in the overall enjoyment of basic human rights. What worries Long is that, on my approach, interveners seem to be viewed as acting justifiably, even if they fail to do what they should.

I agree that such interveners are morally required to do more. Indeed, on the Moderate Instrumentalist Approach, an intervener is *fully* legitimate only if it meets *all* the requirements of this approach. So, for instance, (hypothetical) intervention by NATO in Uzbekistan that fails to consider the opinions of the Uzbeks would be morally lacking. Nevertheless, I also want to maintain that interveners that fall short of meeting all the requirements of the Moderate Instrumentalist Approach (which may not always be their fault) can, if they meet enough of them to pass the threshold of legitimacy I identify, still act permissibly in one sense at least, that is, permissibly compared to not intervening. (I call this ‘an adequate degree of legitimacy’.) We should of course prefer to have an intervener that meets all of the requirements of the Moderate Instrumentalist Approach—that is why they are not fully legitimate. The fact that they do not do so is morally problematic.

However, I do not think that Long’s suggestion of measuring the effectiveness of humanitarian intervention in terms of duty compliance would be beneficial. There is a *degree* of consensus (although, of course, not full agreement) surrounding human rights, which is most apparent in the political endorsements of the rights of the Universal Declaration of Human Rights and the defence of this list of rights by human rights theorists.<sup>2</sup> As such, there is likely to be a degree of shared understanding about how to measure whether an intervener will or will not be effective in terms of human rights. The duties that interveners possess, however, are more contested. Many deny that there is a duty to intervene. Since, on this view, there are no relevant duties to be fulfilled by interveners, if effectiveness is measured by duty fulfilment, there could be no measure of effectiveness. Furthermore, even if the duty to intervene is accepted, there are likely to be differences about what is required for duties to be fulfilled and so how to measure effectiveness. This is because amongst those who accept that there exists a duty to intervene, there are widely differing views on its strength and on what

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<sup>2</sup> See, for instance, James Nickel (2007) *Making Sense of Human Rights*, Second Edition (London: Blackwell).

the duty entails.

By contrast, Miller is worried that, by requiring an intervener to possess several factors in order to have an adequate degree of legitimacy, I set the bar too high for the right to intervene. He suggests instead looking to whether an agent has a good prospect of making things better in terms of human rights and little prospect of making them worse (and when it does not pre-empt a more effective intervention by another intervener). Like the ‘Extreme Instrumentalist Approach’ that I consider (pp. 93–4), the problem with such a test is that it disregards the noninstrumental importance of fidelity to the principles of *jus in bello* and representativeness that are also significant for an intervener’s legitimacy and for who has the right to intervene.

Miller also doubts whether exists a duty to intervene. First, he argues that humanitarian intervention, by its very nature, is a response to rights-violating activities and it is unclear whether there exist duties on third parties to halt the violation of others’ human rights. Second, he claims that the duty to intervene is unclear when intervention would be costly. Third, he argues that the state’s duty to its citizens should be seen as primary.

However, these three considerations do not undermine the case for the existence of a duty to intervene. First, there is no conceptual or principled reason to insist that ‘humanitarian intervention’ can occur only in response to the active *violations* of human rights. On the contrary, humanitarian intervention can be undertaken—both conceptually and justifiably—in response to situations where individuals’ human rights are going *unfulfilled*. It seems to me that a state whose population are starving or the subject of a natural disaster could be subject to ‘humanitarian intervention’, if their state is unwilling or unable to act, even if it is not originally responsible for the plight of its people. Indeed, there was a sizable public debate about whether there should be humanitarian intervention in response to the failure of the Burmese Junta to allow assistance to its people in the wake of Cyclone Nargis. (To be sure, intervention in response to a natural disaster would be unlikely to be included under the ‘responsibility to protect’ umbrella as this doctrine has developed since the UN World Summit in 2005). As such, even if one holds that third parties do not have duties to halt *violations* of others’ human rights, it might still be the case that there exist duties to respond to situations where individuals’ basic human rights are going unmet, such as in natural disasters.

Moreover, I think that third parties *do* have duties to halt the violations of others’ human rights. When this is of little cost, the existence of this duty seems patent. Suppose that Alan uses a knife to attack Bob, who is innocent. Without the risk of harm to himself, Chris could disarm Alan (say that Chris has a gun). It seems to me that Chris has a duty to disarm Alan, given that he can prevent an egregious violation of Alan’s rights without risk to himself. Just as we should save a child *drowning* in a pond when the costs are insignificant, so too we should save a child *being drowned* in a pond when the costs are insignificant. Of course, the existence of this duty becomes more complex when there *are* potentially significant costs involved. If Alan also has a gun, we may think differently about whether Chris has a duty to intervene. To that extent, I agree with Miller when I argue (p. 17) that when it is excessively costly to potential interveners, humanitarian intervention is *not* a duty and, on the contrary, is impermissible.

I also agree with Miller that the state's duty to its citizens should be seen as *primary*. Indeed, I accept (pp. 17–19, 132–3) that states have fiduciary obligations to promote their citizens' interests. However, we can admit this point and still assert that humanitarian intervention is a duty. First, humanitarian intervention may be of very little cost and of much benefit to the state, so does not contravene fiduciary obligations. Second, although a state's duty to its citizens may be *primary*, this is not to say that it should occupy itself *exclusively* with the interests of its citizens. When fiduciary obligations are seen as primary, rather than exclusive, a state can still have certain obligations to those beyond its borders, such as to provide humanitarian aid and, on occasion, to intervene militarily in response to a serious humanitarian crisis. But when intervention will be costly or the crisis is less serious, the fiduciary obligations that states owe to their citizens may outweigh the duty to intervene.

### **Assigning the Duties of Intervention**

Miller argues that I am too quick in my rejections of the importance of historical responsibility for the crisis and communal bonds in the assessment of the alternative ways of assigning the duties of intervention (pp. 191–4). These alternatives, he suggests, may be determined on occasions (e.g., Muslims may prefer intervention by an Islamic state) and potentially more easily determined than effectiveness. Miller may be correct about this. The potential indeterminateness of historical responsibility and communal bonds might not provide a strong reason to favour effectiveness as the central way of assigning the duty to intervene. But nor is the potential indeterminateness of effectiveness a strong reason to prefer the other alternatives. This is because there can be a stronger sense of an intervener's likely effectiveness than is often assumed. A series of potential factors (e.g., sufficient military and nonmilitary resources, a suitable strategy, and international support) are likely to influence significantly the success of any intervention. The absence or presence of these factors will provide us with a good sense of the likely effectiveness of a particular intervener, in addition to looking at past cases and assessing the circumstances in the political community subject to the intervention.

Beyond the issue of determinateness, there is a strong reason for rejecting historical responsibility and communal bonds as alternative ways of assigning the duties of intervention. When using the potentially blunt tool of military force to end the mass violation of basic human rights, what matters most is that the intervention tackles this violation. In the context of large-scale human suffering, an intervener's making up for its past misdeeds or its assisting those with which it has bonds seems to be far less important. Thus, when deciding who should intervene, we should primarily look to the intervener that will be effective at tackling the mass violation of basic human rights.