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Is There a Duty to Militarily Intervene to Stop a Genocide?

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In 2001, the International Commission on Intervention and State Sovereignty (ICISS) formulated a doctrine that came to be known as the “responsibility to protect,” often abbreviated as R2P or RtoP. In 2005, the UN World Summit confined the scope of this alleged responsibility to genocide, crimes against humanity, ethnic cleansing, and war crimes and confirmed that “the international community” does indeed have the “responsibility” to prevent or stop such crimes if “national authorities are manifestly failing to protect their populations” from them (UN General Assembly, A/RES/60/1).

International diplomatic declarations are one thing, however, and sound philosophical argument another; and as a presumed embodiment of the latter the two documents just mentioned might be found wanting. George R. Lucas Jr., for example, explicitly noting his “exasperation,” finds “RtoP, as finally formulated in the UN Security Council resolution of 2006 [...] profoundly flawed and deficient” (Lucas 2014: 37). One of the reasons he gives for this assessment is that it “seeks to impose RtoP [...] as what Kant termed a ‘strict duty’ (of justice), even though lacking a clear procedural specification of the obligor, or of the precise means and methods for fulfilling that obligation on the part of (undefined) obligees. These latter difficulties, however, are fundamental features of imperfect duties, which [...] ultimately render them inappropriate and unsuited to law or regulation [...]” (ibid.).

In this chapter, however, I am not so much concerned with the possibility of legally implementing the alleged “responsibility to protect,” but with the question whether there is a *moral* obligation to militarily intervene in another state to stop a genocide from happening (if this can be done with proportionate force – since this proviso should go without saying, I will not mention it again). To anticipate, my answer is that under *exceptional* circumstances a state or even a non-state actor might be obliged to intervene to stop a genocide, but under most circumstances there is no such obligation. To wit, if a group of mercenaries of state A signs a contract with a minority group in state B specifying that they will militarily intervene in case B tries to commit a genocide against this minority group, then the

mercenaries have a duty *towards* that group to intervene if the group indeed is faced with genocide. This does not mean that they also have an *all things considered* obligation. If intervention would come at the cost of not intervening in another conflict where far more lives are at stake and where the mercenaries also have contractual obligations, then these opportunity costs might *override* (but not cancel) the duty towards the minority group. That the special duty towards the minority group is only overridden but not cancelled is shown by the fact that in case of non-intervention the mercenaries would owe the minority group compensation at least for their renegeing on the contract. However, the point of this chapter is that the mercenaries, “humanity,” and states do not have an obligation to make such promises in the first place or to create institutions that would impose a legal obligation of intervention upon them. Nor do states or persons or humanity “collectively” have – originally, without specifically creating such duties by contracts or promises – any *pro tanto* or special duties to save strangers at considerable cost to themselves or their own citizens (including their soldiers). That is, these costs do not merely *override* a duty to intervene, but rather there is no such duty to begin with – as shown by the fact that in such cases of non-intervention agents would *not* owe those they let die any compensation: if I do not save someone’s life because saving him would have cost me my arm or would have come with a high risk of losing my own life, I do *not* owe this person compensation. Thus the point of this chapter is that there is no “natural” or “general” or “original” duty to militarily intervene (or to create a legal obligation) to stop a genocide. Why this is the case can be seen by considering the severe shortcomings of arguments to the contrary. I shall turn to these arguments now.

1. Are All Permissible Humanitarian Interventions Also Obligatory? On Pattison, Tan, and Lango¹

James Pattison succinctly puts his position as follows:

“To summarize, I claimed that the existence of a general, unassigned duty to undertake humanitarian intervention is the following: intuitively compelling; can be defended on the basis solely of negative duties; is a logical corollary of the right to intervene; is a logical corollary of basic human rights; and stems from the moral obligation to respect humanity and, more specifically, the duty to prevent human suffering. ... it is not necessary to generate the duty to intervene since this duty *already* exists. ... Rather, we are looking for the *most appropriate way of assigning this duty*” (Pattison 2010: 193).

Let us take this step by step. In support of his claim that it is “intuitively compelling,” Pattison contents himself with inviting the reader to consider “the alternative in which there is no such duty and inaction in the face of extreme human suffering is acceptable. If this were the case, states did nothing wrong, for example, by failing to tackle the genocide in Rwanda” (ibid.: 16). However, the issue is *military* intervention (Pattison explicitly defines “humanitarian intervention” as a sort of military intervention, see ibid.: 24-30). Refusing to militarily intervene, however, is quite compatible with trying other means to tackle the problem, and therefore Pattison is conjuring up a false dichotomy. Moreover, even if only military means promised success, it is not at all counter-intuitive to think that states are not required to militarily intervene if the costs of intervening would be very high, for example in terms of the number of dead soldiers on the side

1 There is also a recent attempt by Kieran Oberman (2015) to argue that all permissible (state) wars are obligatory. His position relies on what he calls the “Cost Principle,” according to which one must not impose more costs on people than they are obliged to bear (ibid.: 261). Yet, he does not address the obvious counter-example to this alleged principle: a tactical bomber can justifiably kill (and thus impose costs on) innocent bystanders in the course of his attack on a military target if these costs are outweighed by the moral importance of the mission, but the civilians are *not* obliged to bear the costs – they are permitted to defend themselves. If Oberman disagrees, he should at least address the issue. I addressed it in Uwe Steinhoff, “Shalom on the Impermissibility of Self-Defense against the Tactical Bomber” unpublished ms., available at <http://philpapers.org/rec/STESOT-9>, and in Steinhoff (2012b: section 4.3; 2014a; 2016b).

of the intervening state (I will return to the low-cost proviso of the duty to help others in a moment).

As regards the negative duties defense, Pattison merely alludes to Thomas Pogge's claim that "we are all, to a certain extent, implicated in the imposition of a global institutional scheme that leads to severe humanitarian crises" from which it allegedly "follows that we possess a duty to tackle the human rights violations produced by the existing international institutional scheme" (Pattison 2010: 16). Unfortunately, Pattison entirely ignores the criticisms of Pogge's dubious empirical assumption that "the international order" "harms" the global poor (see for example Risse 2005) as well as of his sweeping and implausible account of collective responsibility, according to which citizens seem to be automatically responsible for the actions of their states, and of his unwarranted claim that mere "implication" in wrongs or harms produces remedial duties (see Steinhoff 2012a, also for further references). Thus, there is simply no reason to accept the Poggean claims that Pattison relies on.

Indeed, Pattison seems to realize himself that some might find "these causal claims" – that is, the reliance on Pogge – "unpersuasive" (Pattison 2010: 16). (Again, the problem lies not only with the causal claims, but also with implausible assumptions about collective responsibility.) This brings him then, moving on, to the claim that the duty to intervene "seems to be a logical corollary of the right to intervene" (ibid.: 16). Here he relies on Kok-Chor Tan (2006) and John Lango (2001). He quotes Tan saying: "If rights violations are severe enough to *override* the sovereignty of the offending state, which is a cornerstone *ideal* in international affairs, the severity of the situation should also impose an obligation on other states to end the violation" (Tan 2006: 90, the first emphasis is mine). Yet in the paragraph preceding this statement, Tan actually states that the offending state "*forfeits* its claim to sovereignty" (ibid.: 90, my emphasis). However, you cannot have it both ways. Either a right is overridden, or it is forfeited. This can be illustrated with the difference between a self-defense justification and a necessity or lesser evil justification. If a culpable murderous aggressor can only be stopped by breaking his arm, he has forfeited his right that his arm not be broken. This is shown by the fact that the defender would not owe the aggressor any compensation for breaking his arm. This is different if you break the arm of an innocent, non-threatening person in order to save the lives of 10 other persons. This might well be justified under a lesser evil or necessity justification, but it would involve the in-

fringement of the innocent person's right; this is shown in the fact that in this case compensation *would* be due to the innocent person.²

Perhaps one might be tempted to claim here that Tan's argument would also work in the case of forfeiture: if rights violations are severe enough that the offending state even *forfeits* his right against intervention, then they should be severe enough to generate an obligation to intervene. Yet, the argument is as unsound in the case of forfeiture as in the case of overriding or outweighing.

Tan himself acknowledges a severe problem for his argument, namely that there is "an obvious difference between an offending state and a neutral state such that the sovereignty of one may be overridden [or forfeited] but not that of the other" (Tan 2006: 92). Tan suggests that the offending state may *deserve* to forfeit its sovereignty. Yet, I do not think that desert has anything to do with it. An innocent or minimally responsible attacker, for instance, who is about to kill you (perhaps he mistakenly thinks you are about to kill him) does not *deserve* to die, but he still has forfeited his right to life under these circumstances; that is, he would not be wronged if you kill him in necessary self-defense. An innocent bystander, however, *would* be wronged if you used him as a shield or kill him as a side-effect of your self-defensive measures. In any case, given that there is the obvious normative difference between the neutral and the offending state (just as there is a difference between an attacker and a bystander), Tan is forced to deny its importance for the issue at hand. That is, he must deny that it is actually the offense that makes the offending state forfeit its sovereignty, for otherwise the conclusion he is intent on drawing does not follow. Accordingly, he claims that it is not the offense, but "the need to protect human rights that allows for the forfeiture of the offending state" and "compels outsiders to intervene" (Tan 2006: 92-93). Unfortunately, this would then also imply that the neutral state is not being wronged if one *forces* it to intervene in case this should be necessary to protect the innocents who are threatened by the offending state. Tan is aware of the fact that this is counter-intuitive, and tries to escape the unpalatable implication by simply claiming that "there is no such need to attack it [the neutral state]" (Tan 2006: 93). Yet, first, there might well be such a need – that simply depends on the empirical circumstances, and can certainly not be excluded *a*

2 That there is a duty to compensate for justifiable rights infringements is the standard view both in German and Anglo-Saxon law and in moral philosophy. For discussions, see Christie (1999) and Sugarman (2006).

priori. And second, Tan is missing the point of the objection here. The point is that *even if* it were necessary to force the neutral state to intervene, this would *still* be impermissible and certainly a violation of the rights of the neutral state. Consider a domestic analogy: The offender Jack throws a child into a river, and the child is about to drown. The innocent (neutral) bystanders Jill and Bill are at the scene. The river is quite dangerous, and a rescue attempt could be lethal for the rescuer. Jack and Bill can't swim, but Jill can, and Bill is armed. Under these circumstances it is necessary for the protection of the child that Bill forces Jill to rescue it. But obviously, this would be a violation of Jill's rights. If, on the other hand, Jack could swim too, then it does not seem to violate his rights to force *him* to rescue the child. Jill has *not* forfeited her autonomy (sovereignty), while Jack has. Thus, Tan's assurances to the contrary notwithstanding, it is indeed the *offense* that makes the offending state (or an aggressor) forfeit its right to sovereignty (or autonomy). Accordingly, Tan's argument collapses.

There are further problems with the "permission implies duty" argument. These problems even undermine the duty to engage in *risk-free* interventions (that is, to engage in interventions that involve at least no risk for the life and limbs of the intervener). Consider a further domestic example. Joan does not like Paul's nose and tries to shoot him dead, and the only way to stop Joan would be to kill her. Robert can do so (without any risk to himself), thus saving Paul. In this case, Joan has forfeited her right not to be killed by Robert. Does this mean, as Pattison's and Tan's (and Lango's) argument has it, that Robert now has a *duty* to kill Joan?

It most certainly does not logically or conceptually imply it (which means that Pattison's talk about a *logical* corollary is out of place). In the widely used conceptual framework of Wesley Hohfeld (1919) (if Pattison or Tan use another framework, one would like to know what this framework is), Joan's forfeiture of her claim-right not to be killed by Robert logically and conceptually implies Robert's liberty-right to kill her, but most certainly does *not* imply a duty to kill her (for details, see Steinhoff 2016a: section II).³

3 In Hohfeld's framework your claim-right against me not to be punched by me implies that I have a duty towards you not to punch you. If we both agree to a boxing match, however, then I lose said claim-right against you but gain a liberty-right to punch you, that is, I no longer have the duty not to punch you. This liberty-right to punch you is compatible with your liberty-right to keep me from ex-

However, one might object that even if there is no logical or conceptual correlation, it might still be true for other reasons that under these circumstances Robert is obliged to kill Joan. Yet that is extremely dubious. Many Western states grant people the right to conscientious objection to military service: if someone is absolutely opposed to killing people, then, it is thought, he can be exempted from military service. But then, in the same vein: if Robert is an absolute pacifist, do we really want to say that he is obliged to kill Joan? In fact, why does he need to be an absolute pacifist? Wouldn't it perhaps suffice that he just does not *want* to kill anybody, that he has an aversion to killing people? To be sure, maybe Pattison, Tan, and Lango really do think that under these circumstances Robert is obliged to kill Joan. But then they cannot uphold a right to conscientious objection on grounds of a principled aversion against killing, and they should clearly state this. Those in contrast who do accept such a right or do not find it plausible that Robert is obliged to kill Joan must reject the theory endorsed by the three authors.

Moreover, humanitarian interventions do not only kill culpable aggressors. They also produce what is euphemistically called "collateral damage." In other words, a humanitarian intervention, at least in the real world as opposed to a sanitized ideal world, also kills and mutilates innocent human beings, including, to be blunt, toddlers and babies. Let us adapt our example to this fact. Now Joan is not only trying to kill Paul, but also 20 other innocent people. Robert could stop her with his grenade. However, the explosion of the grenade would also tear Joan's innocent 3-year-old daughter and an innocent bystander into pieces. Is Robert permitted to "militarily intervene" that is, to throw the grenade? Under German law, according to majority opinion, he is not: the self-defense justification applies only to the killing of an aggressor. The killing of innocent bystanders, however, would have to be justified under a justifying emergency justification (*rechtfertigender Notstand*). Here rights are indeed *overridden*. Yet, German law excludes the killing of innocent people from the scope of said justification (Bott 2011). Some other jurisdictions (with their necessity or lesser evil justifications) take the same view. However, there are also jurisdictions that seem to allow the throwing of the grenade, for example those US-American states that have adopted the choice of evils justification of the Model Penal Code, which *is* applicable to the killing of a

ercising my liberty – to wit, you have the liberty to knock me out before I punch you.

smaller number of innocent people for the sake of avoiding the killing of a greater number of innocent people (Hoffheimer 2007-2008). Moreover, just war theory, at least all those versions of it that accept the doctrine of double effect (most forms of just war theory do), clearly allows the killing of innocent people as a side effect of an attack on a legitimate target: it allows it if the constraints of the doctrine are fulfilled, that is, if the “collateral damage” is not disproportionate (in light of the moral good that the attack on the legitimate target achieves) and was not intended as a means to an end or as an end in itself (Steinhoff 2007: 34).⁴ Thus, whatever ratio of innocent lives saved to innocent lives destroyed the defenders of humanitarian intervention like Pattison, Tan, or Lango find acceptable: if this ratio is in fact fulfilled in the case of Joan, Paul, Robert and n other innocents, then Robert must be justified in blowing up Joan, her small daughter, and the innocent bystander. And then, according to the authors under discussion, Robert must also have a *duty* to throw the grenade. That is, he must have a duty to engage in an action that he knows will kill two innocent people.

Is such a stance really plausible? It does not seem so. Consider, for example, the much discussed trolley case. Yes, it might be permissible to divert a runaway trolley away from five trapped and innocent people who would be killed by it in the direction of just one innocent person who will then be killed instead (the option that nobody will be killed is not given). But is this *obligatory*? After all, many philosophers make a distinction between killing and letting die and think that the former is morally worse than the latter (Howard-Snyder 2011). By not turning the trolley one lets the five just die; by turning it, however, one kills the one. The person who turns the trolley is the cause of the one innocent person’s death, while he is not the cause of the death of the five persons if he does *not* turn the trolley. Likewise, if Robert does not throw the grenade, he lets the n innocent people die; by throwing the grenade, however, he *kills* two innocent people. Is Robert really *obliged* to do that?

Pattison’s, Tan’s, and Lango’s view implies that he is. Penal law in Western jurisdictions disagrees. Virtually all Western jurisdictions acknowledge that there can be a necessity or lesser evil justification for overriding rights, but not one Western jurisdiction accepts or as much as

4 I myself reject the doctrine, see Steinhoff (2007: 33-52). I do accept, however, that the harming of innocent bystanders can be justified by a necessity or lesser evil justification.

suggests that there is also a lesser evil *obligation*. Pattison, Tan, and Lango, in contrast, boldly convert mere lesser evil justifications into full-blown obligations, and Pattison and Lango even go so far as to claim that the “burden of proof” lies with those who *deny* that the right to engage in a humanitarian intervention is accompanied by a duty to engage in the intervention (Pattison 2010: 17; Lango 2001: 183). In the light of the legal realities, however, which are probably an indicator of widely shared moral intuitions, such a claim has no foundation.

As regards Pattison’s claim that the duty to intervene is “a logically corollary [...] of basic human rights,” all Pattison offers is a passing reference to Henry Shue, who “argues that basic rights imply correlative duties to enforce these rights” (Pattison 2010: 19). Even if Shue were correct about this,⁵ however, the problem of the low cost proviso remains: I do not have the duty to protect others’ rights at the expense of mine.

Exactly the same problem arises, finally, with regard to Pattison’s claim that the alleged duty to intervene “stems from the moral obligation to respect humanity and, more specifically, the duty to prevent human suffering” (Pattison 2010: 19). It would not appear that a soldier’s humanity is respected if he is used as a means and forced to risk his life to save others. As the very same Henry Shue whom, as we just saw, Pattison enlists for his own purposes notes:

“A requirement that someone sacrifice the enjoyment of his or her own basic rights in order that someone else’s basic rights be enjoyed would, obviously, be a degrading inequality. No such transfer could possibly be required” (Shue 1980: 114).

2. The Low Cost Proviso vs. the “General Duty to Intervene”

Let us now turn to the low cost proviso of the duty of beneficence in more detail. This will also shed light on Pattison’s claim that “it is not necessary to generate the duty to intervene since this duty *already* exists” (Pattison

5 I do not think he is, but for reasons of space I will not argue this point here. For what it is worth, however, I would like to point out that the claim that there is such a “correlative duty” seems to be entirely question-begging in the context of an argument that tries to establish a duty to protect in the first place. For a criticism of Shue, see Narveson (1985).

2010: 193). Given that he is explicitly referring to a *general* duty (ibid.), the statement just quoted, however, seems to contradict what Pattison says elsewhere:

“[T]here is a duty to intervene, which may apply to states and other agents on occasion. Like the duty to rescue (e.g., in cases of a child drowning in a pond), the carrying out of this duty may require that *reasonable* costs be borne [...]” (Pattison 2014: 117).

Obviously, there is a big difference between a “general” duty and a duty that people “may” have “on occasion.” Moreover, where the reasonable cost proviso is not satisfied, people will have *no* duty to intervene: a person is not required to save the drowning child if there is a significant risk that he may drown himself in the attempt to rescue the child. This at least is the legal take on the issue in those jurisdictions that have Samaritan laws, and it also seems to be the correct stance from a moral point of view.

This low cost proviso is also applicable to humanitarian intervention, undermining the alleged duty to intervene. Pattison duly notes the argument “that in almost all actual cases the cost of intervention would be unreasonable for the intervening soldiers. They would be asked to bear too much in order to save the lives of foreigners, such as the risk of death and injury” (Pattison 2014: 122).⁶ Yet he entirely underestimates its force. In reply, he simply states that “as we have seen, intervening soldiers may have role-based duties to undertake humanitarian intervention, and this means that even very risky actions can sometimes reasonably be required of them” (ibid.: 123).

Where, exactly, have we seen that? Well, a few pages earlier Pattison explains that “the claim that soldiers do not consent to perform armed humanitarian interventions is erroneous, since such operations can now clearly be expected by soldiers when they enlist” (ibid.: 119). Yet, first, whether that can be “clearly expected” depends on what is stipulated in the actual contract. Consider, for example, a Mexican actor who has the habit of asking his body-guards to constantly intervene on behalf of innocent bystanders in Mexican gang fights. The life expectancy of his body-

6 Tan claims: “[W]ere the limited view of the soldier’s duty accepted, it would also follow that there can be no permissible intervention” (2006: 108, see also 109). Actually, that would not follow at all: the soldiers are free to consent to engage in humanitarian intervention.

guards, at least of those who follow his orders, is accordingly low. One day he again orders his new bodyguard to interfere in a shoot-out to save some innocent bystanders. The bodyguard refuses, pointing out that he didn't sign up for that. The actor points out that the bodyguard knew about his, the actor's, altruistic tendency to risk other people's lives (not his own, God forbid) for the benefit of strangers. The bodyguard replies that the actor, conversely, knew that contracts are made precisely in order to lay down the rights and obligations of the contracting parties; thus if the actor wanted him, the bodyguard, to risk his life for strangers, he should have put this in the contract. He didn't. This seems to be an entirely fair reply.⁷

Moreover, second, even if we are only talking about "expectations" as opposed to actual contracts, it is simply wrong that "soldiers" – all soldiers – are "clearly expected" to perform in such operations when they enlist. Soldiers whose states in the past did not engage in such operations can of course justly complain when their states suddenly change their minds.

Furthermore, just as there is, as I pointed out, an obvious difference between a *general* duty and a duty people have "on occasion," there is also an obvious difference between a general duty and a *role-based duty*. In other words, even if Pattison were right that soldiers have a role-based duty to intervene, that does nothing to establish that there is a general duty to intervene, as he claims. So far he has in fact not provided any argument that would support the latter claim.

The situation is even worse. After all, the role-based duty is not really a role-based duty *to intervene*, but a role-based duty *to follow orders*. To wit, President Clinton would probably not have been amused if American soldiers had intervened in Rwanda without orders. In all likelihood, he would have court-martialed such interveners precisely to remind them of their role-based duty to obey orders. In other words, as long as they do not receive orders to intervene, soldiers do not have a role-based duty to intervene but rather a role-based duty *not* to intervene.⁸ Thus, while Pattison

7 Of course, one could put this into a new contract. However, as long as it isn't in the contract, the bodyguard (or the soldier) does *not* have the duty to save strangers at high cost to himself. Moreover, there is, for the reasons given, no duty for actors or state leaders to put it into the contract, nor is there a duty for potential bodyguards or soldiers to sign such revised contracts.

8 Moreover, there is an additional complication, noted by Pattison himself, namely that "soldiers may [...] not necessarily have duties to obey their leaders" (ibid. 2014: 119). I will ignore this complication here.

claims that “it is not necessary to generate the duty to intervene since this duty *already* exists,” it actually *is* necessary to generate it, at least as far as the soldiers are concerned: the leaders would have to generate it by an order.

What about the leaders themselves? Do they have a duty to intervene, in the form of a duty to *give* the order and see to its execution? Pattison answers in the affirmative; more precisely, he claims that “the leaders of the intervener [...] may have *duties* to order their soldiers to take on greater costs, even if it is the case that one holds that their soldiers do not have duties to do so” (Pattison 2014: 119). In support of this claim, Pattison envisions a potential intervention in Angola and a scenario where the American President faces a choice between a tactic that condemns ten American soldiers to likely death but avoids the collateral death of 1,000 Angolans and a tactic that avoids any risk to American soldiers but leads to the collateral death of 1,000 Angolans. Pattison thinks that the President should choose the first option (ibid.: 119). I agree: if these are *the only options*. However, there is an obvious third option: not to intervene at all. In other words, answering the question as to which of the two options of intervention are morally preferable does not at all answer the question as to whether there is a duty to intervene in the first place.

So let us face this latter question. Does the leader in Pattison’s example actually have a duty to intervene (by ordering the soldiers “to go in”)? Let us illuminate the question by going back to the bodyguard example. Let us even suppose that the bodyguard did sign a contract that allows his employer to order him to risk his life on behalf of innocent third parties. Suppose now that confronted with another shooting, the bodyguard implores his employer not to order him to intervene and risk his life for the sake of, let’s say, five innocent bystanders. Is the employer really under a *duty* to order the bodyguard to intervene against the bodyguard’s express wishes? Vary the example: there are five bodyguards and 25 innocent bystanders to save. However, an intervention would definitely cost one of the bodyguards his life. Is the employer under a duty to order intervention?

I doubt it, in both cases. I think that in both cases the employer has a *justification*, namely a necessity or lesser evil justification, to order the bodyguards to intervene, but, as already pointed out above, one does not get from a justification to an obligation as quickly and easily as Pattison, Lango and Tan assume. Moreover, I have not even factored in the problem of collateral damage in the examples. Let us do so now. Imagine the 25 innocent bystanders can only be saved by the bodyguards if the bodyguards also collaterally kill two or three innocent bystanders. Is the leader

(or the state) still *obliged* to order intervention, and thus to order a course of action where he will not only be responsible for the saving of innocent people but also, through his very agents, for the killing of innocent people? In the light of the discussion above of the case of Joan, Paul, Robert and the n other innocents, it does not seem so. At least, Pattison has not provided an argument to the contrary, nor, as far as I can see, has anyone else.

3. Can the Appeal to Collectives Circumvent the Problems Posed by the Low Cost Proviso?

Before concluding our discussion of the low cost proviso, a rather odd way of trying to circumvent it must be noted. To wit, Lango claims that “[m]embers of an intervening military force can suffer costs that are excessive for them but not for their state – namely, their deaths. [...] Thus we encounter a moral paradox of intervention: even if it is obligatory for (the citizens of) a state (collectively) to intervene, it can still be only supererogatory (individually) for its citizens” (Lango 2001: 186). This is a paradox indeed, and if an argument leads to a paradoxical conclusion, then this is usually a reliable indication that there is something seriously wrong with the argument. As Dobos rightly points out: “to talk of the state’s duty to intervene is somewhat peculiar if the compliance of its people is acknowledged to be optional” (Dobos 2012: 177). The same is true of any other collective’s alleged duty to intervene. Consider for instance Tan’s example of a group of people who see a person drowning (borrowed from Feinberg 1970: 243-44). Tan says that “all parties are to contribute to the rescue in ways commensurate with their ability and the needs of the rescue operation” (Tan 2006: 103). That is simply wrong, however. Even if what the rescue operation needed were that all ten bystanders, let’s say, sacrifice themselves for the drowning person, and even if they were all able to do so, this most certainly does not mean that they are morally *required* to do so.

Let us make the example a little bit less extreme. Suppose the only way to save the drowning person is for one of the ten bystanders to risk his life. However, given the low cost proviso, none of them has the duty to do so. Of course, one of them, A, could draw a gun and force one of the others, B, to swim to the rescue, thereby risking his life. Thus A could help in a way that circumvents the low cost proviso (for him). However, this way –

coercing B – would certainly be impermissible (and therefore not obligatory) and violate the rights of B. In any case, it seems that if these are the only available options for saving the drowning person’s life, then the “collective” of the ten bystanders simply does *not* have the duty to come to the rescue. To simply slap “collectives” with “collective duties” without previously paying attention to whether these alleged duties are translatable into obligatory individual action looks like a sort of philosophical voodoo. If no member of the collective has individual duties that would actually lead to the rescue, then the collective itself has no duty to come to the rescue. To assume the contrary is not only “paradoxical,” it is illogical.

4. Costly and Ineffective Saving By and With Killing vs. Cheap and Effective Saving Without Killing

The case for a duty of intervention that is “already there” can still be further undermined, not least in the light of some of Pattison’s own premises. To wit, Pattison supports his choice in the Angola example by claiming that the President has “a duty to save the greatest number that is not outweighed by her associative duties and role-based duties as president [that is, by her fiduciary duties towards her citizens and soldiers]” (Pattison 2014: 119). But if that is the case, then she should *not* engage in humanitarian military intervention but rather save the starving and poor by providing money, food, medical help, and infrastructure, for example. After all, military interventions are *extremely* costly. Many more lives could be saved if one spent the money, time, and efforts on helping the poor. This is simply a fact of our real world.⁹

9 See on this, also for some interesting numbers, Dobos (2012: 169-70) and Singer (2010). An anonymous reviewer suggested that the “primary negative consequences” of not offering humanitarian aid might be higher than the primary consequences of not intervening, but that the “secondary negative consequences of not intervening” might be much higher still. I assume that the reviewer is referring to deterrence effects here: if one does not intervene, more genocides will take place. First, however, that is pure speculation; second, the number of lives lost in those additional genocides would have to be higher than the lives lost due to not offering humanitarian aid, which is dubious at best; and third, if there are “secondary” effects in terms of deterrence, then there are also “secondary” effects in terms of imitation: by intervening instead of saving much larger numbers with humanitarian help one encourages others to do the same. It would therefore ap-

Moreover, helping the poor does not just give us “more bang for our humanitarian buck” than humanitarian intervention (Dobos 2012: 170); it also allows the state leader to *refrain* from morally problematic acts like endangering the lives of her soldiers and making them engage in operations where some of them will inevitably kill innocent people, including babies and toddlers. It simply seems to be an overall moral win-win situation. The leader here not only helps *more* strangers, she also seems to far better abide by her other duties, both with regard to her own soldiers and citizens and with regard to innocent strangers whose rights she would violate by transforming them into “collateral damage.”

Some might be tempted to object here that the leader can have a duty *both* to help the starving *and* to engage in humanitarian military intervention (a duty, to repeat, that in the real world can only be discharged by also killing innocent people). Yet, first, the low cost proviso stands in the way here. The costs the leader would have to impose upon her citizens in order to save *all* poor people (*and* all ill people whom it is medically possible to save – medical costs can be exorbitant – *and* all people threatened by natural catastrophes, etc.) will in all likelihood exceed the costs the citizens are required to bear. Then, however, a choice has to be made *whom* to save – which brings us back to Pattison’s own statement that one should rather save the larger number. This speaks against humanitarian intervention.

Second, and even more importantly, the leader also has to consider her political possibilities. In other words, even if helping everybody would not exceed the low cost proviso, she cannot have a duty to order a humanitarian military intervention if this would undermine her efforts – since her constituency won’t play along – to save a much larger number of people with a non-military intervention.

Let us illustrate the preceding points with another variation of our bodyguard example. The employer can either order his five bodyguards to save the 25 innocent people, foreseeing that in the course of doing so the bodyguards will kill two or three innocent bystanders and also have one of their own killed; or he can order his five bodyguards to save 70 drowning people (or even 500? – as I said: military interventions are *very* expensive), foreseeing that in doing so none of the bodyguards will die, and none of the bodyguards will kill innocent people. If the bodyguards cannot save

pear that the secondary consequences of intervention without humanitarian aid are much worse than the secondary consequences of humanitarian aid without military intervention.

both groups (and indeed, they cannot be in two places at the same time), it would appear that the employer should rather choose the second option. At the very least, he has no *duty* to choose the first option.

This would be correct even if the bodyguards could in fact do both but simply won't. If the employer does not have enough power to make them do both, he should save the larger number, it seems. At the very least, he has no *duty* to choose the first option and save the smaller number, collaterally killing a few innocents. The same applies to presidents.

5. Raising the Value of Intervention? On Evils and Retribution

In my experience, quite a few people (for example at conferences on humanitarian intervention) try to resist this conclusion. They seem to think that the (alleged) duty to prevent genocide is stronger than the (alleged) duty to save the starving. However, what could the explanation for this presumed but rather startling greater stringency possibly be?¹⁰

Perhaps one might think that being killed by aggressors is a greater evil than, for instance, accidental death, so that, all else being equal, a humanitarian military intervention would avert a greater evil than an intervention that saves people from threats that do not come in the form of aggression. Yet it is in fact not very likely that death by aggression is *much* more evil than death by accident or natural forces. Victor Tadros, for instance, invites us to consider a situation where you have to choose between taking a way home where bandits will set their wolves on you and you will be seriously injured, and another way home where a wild pack of wolves will attack you on their own and seriously injure you (Tadros 2011: 105.) He states that this difference might make the second way home preferable to the first one – but only slightly so. “A relatively small reduction in the risk of being harmed can outweigh the interest that we have in others recognizing our moral status” (ibid.: 106). In other words, if the first road home were only slightly safer, we would probably prefer that road. Of course, one might claim that what happens on the first road is still the far greater evil, regardless of what our preferences are. Yet disconnecting the concept

10 David Rodin has recently offered a “tentative proposal” to answer this question (ibid. 2014: 259-60). I cannot discuss this proposal here for the simple reason that I find it unintelligible.

of evil in this way from our actual preferences and aversions seems to amount to little more than a dogmatic and quasi-religious stipulation.

Another potential explanation would appeal to the concept of *retribution*. According to (certain forms of) retributivist theories, proportionately punishing culpable wrongdoers is a value in itself; the fact that someone is a culpable wrongdoer hence provides one with an (of course defeasible) reason to punish him. One might ask what this has to do with humanitarian military intervention, since humanitarian wars are usually strictly distinguished from punishment. In fact, however, just as acts of self-defense will empirically often also be acts of punishment (the defender both wants to defend himself *and* to punish the aggressor) (Steinhoff 2007: 49-50; compare also Fletcher 1989), certain wars will be simultaneously aimed at stopping an aggression *and* punishing it. Moreover, one can also adopt a wider account of retributivism, holding that proportionately *harming* culpable wrongdoers or making them *suffer* is a value in itself, whether this suffering is produced by intentional *punishment* or not. Acts of war will harm their human targets or make them suffer. Thus, the alleged greater stringency of the duty to engage in humanitarian military intervention, compared with the duty to save people from starvation or natural catastrophes, could perhaps be explained by the added value of making culpable wrongdoers suffer.¹¹

Yet while this idea might have *some* traction, it can hardly pull sufficient weight in the present context. After all, we normally say that it is better to let ten guilty people go free than to punish one innocent person. Yet it is not just guilty people who are killed and suffer in a humanitarian military intervention. Innocent people, too, are “collaterally” killed, mutilated, burned, injured. This is not the case in non-military interventions. Moreover, even if making the guilty suffer had *some* value, *some* moral or normative weight, short of succumbing to a vengefulness of Biblical proportions one can hardly deem it *so* important as to claim that it outweighs the deaths of the two, three, or even five or seven times more innocents that one could have saved by opting for non-militarily saving the poor instead.

I conclude that there is no general, already existing duty to militarily intervene in order to save others from mass atrocities or even genocide.

11 The last two paragraphs draw on material in Steinhoff (2016a: 205-206).

6. Generating a Duty to Intervene?

If one considers as the sole source of the alleged “duty to intervene” the moral status, the rights, the humanity of the *victims* who are to be saved through the military intervention, then Pattison’s principle that one should save the greatest number appears to be inescapable. However, this undermines the duty to militarily intervene, as I argued, since the opportunity costs in terms of lives not being saved by non-military intervention are simply too high. If one spends one’s resources on helping the poor instead, many more lives could be saved. Discussing the topic of the perhaps particularly great evil of aggression and the potential intrinsic value of retribution, I introduced another source or co-source of the alleged duty: the *perpetrator*. Yet I argued that appeals to the evil of aggression or the value of retribution cannot tip the balance against the victim-centered principle.

Yet there is obviously a third group to consider as well, namely the interveners: the intervening soldiers, their leaders, and their fellow citizens. How could this third group generate a duty to intervene? Well, it is normally assumed that states and their leadership have a special fiduciary duty to their citizens. This does not mean that states, their leadership, and the citizens themselves cannot have duties towards outsiders, but it does mean that the state has certain duties towards its citizens that it does not have to outsiders. For instance, states are expected by their citizenry, quite rightly, it would seem, to spend the resources of the public health services (if there are any) on the citizenry and not on the whole world. Pattison, in fact, accepts that there is this fiduciary duty, but he merely sees it as an obstacle to be overcome in the course of an argument for humanitarian intervention (Pattison 2010: 17-19, 131-34), not as something that could potentially support it.

To allay suspicions, we should note that such fiduciary duties are entirely compatible with the well-known tenet that all persons have “equal moral worth.”¹² Parents who deem themselves justified in caring more for their own children than for the children of others need not think that their children are intrinsically or from an impartial point of view more valuable than the children of other parents. They can (and mostly will) simply think that they have an agent-relative prerogative – and probably even obligation – to care more for their children than for those of others. If they have to save either their own child or an unknown child from drowning, they

12 For both explorations and doubts about this tenet, see Steinhoff (2014b).

will not toss a coin – nor should they. In fact, even someone who as emphatically endorses the equal moral worth of all persons as the “social justice cosmopolitan” Thomas Pogge concedes that human beings “need to have the option, at least, to have special relationships with friends and family that cause their conduct to be at variance with the cosmopolitan requirement of impartiality” (Pogge 2012: 328). Likewise, Cécile Fabre endorses a “principle of fundamental equality whereby individuals have equal moral worth” (Fabre 2012: 20); yet she also permits “patriotic partiality” (ibid.: section 1.3.2) and admits that “individuals are permitted to confer greater weight on their own goals, projects, and attachments” (ibid.: 21). Thus, this latter principle or permission is intuitive and widely accepted, and it stands unrefuted.¹³

Now, how could the fiduciary duty translate – under certain circumstances – into a duty to intervene? The answer is that part of the fiduciary duty is that the leadership must be reasonably responsive to the interests, preferences, and ideals of the citizenry. But then, as Dobos and Coady point out, it could appear that if “the citizens overwhelmingly support intervention [...] it is by *refusing* to intervene that the state might be said to infringe the rights of its people” (Dobos/Coady 2014: 92). While they caution against overstating this argument, given that in a representative democracy “the state is not merely a delegate” but a free agent who must exercise his judgment on behalf of his principal, the people (ibid.: 93), they do in the end admit that “[i]t may be the case that it [military humanitarian intervention] is either obligatory or prohibited when the preferences of the citizens are unequivocal (as in the clear-cut cases of ‘overwhelming support’ or ‘overwhelming rejection’” (ibid.: 94).

Moreover, even if the citizens did not strictly speaking have a *right* that the leader decide to intervene, the leader might still be obliged to intervene. In other words, the fiduciary relation might not only create Hohfeldian right-duty relations between the leader and her constituency, but also “free-floating” duties.¹⁴ To use an analogy: even many people who think that animals do not have rights might claim that a dog owner has a duty to care for his dog and not let him starve to death. This duty would not be based on the dog’s rights but on a general duty to treat even

13 Of course, people could flatly deny that principle, but it seems the burden of proof would then be on them.

14 The expression “free-floating” is taken from Feinberg (1990: 18-20) who applies it to evils. I do not use it in his sense, but in the sense described in the main text above.

animals, in particular one's pets, with a certain minimal respect. Likewise, the leader of the state probably has a duty to see to the common good. Of course, she could come to the conclusion that an intervention, although widely supported, would not serve the common good; but, on the other hand, the common good is certainly not dissociated from the preferences and ideals of the population. Accordingly, when a sufficiently large part of the citizenry supports intervention, then, all else being equal, this would be a strong indication that such an intervention indeed serves the common good.

Thus a state may have a duty to intervene if it has soldiers willing to do so and a citizenry that prefers saving comparatively small numbers of people by bombing aggressors and innocent bystanders, including babies and toddlers, to saving a comparatively large number of people by sending, say, food parcels. It is not entirely clear that one should call this duty "humanitarian," though.

One last point of clarification: the previous paragraph might sound tentative, and the reader might get the impression that I am against humanitarian interventions. That is not correct. My point, rather, is that "we" engage in or call for humanitarian interventions more for us than for "them." That is, *pace* Singer (2010), not necessarily wrong. We do have this prerogative. But at least we should be honest about it.¹⁵

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