

REPLY TO TERRY NARDIN

Of Tyrants and Empires

Fernando R. Tesón

Terry Nardin questions my characterization of the intervention in Iraq as humanitarian in a number of ways. I'll address them in turn.

THE NARROW HUMANITARIAN RATIONALE

I characterize humanitarian intervention as the use of force to end severe tyranny. Nardin accuses me of revising the doctrine of humanitarian intervention because the doctrine is carefully circumscribed as “thwarting specific crimes against humanity”¹ and does not include replacing tyrannical regimes. As a preliminary matter, this dispute seems merely terminological. If Nardin wants to call “humanitarian intervention” only military action to thwart specific crimes against humanity, so be it. I am interested in the substantive issue of whether a military operation to end severe tyranny (short of “specific crimes against humanity”) can be *justified*, not in whether or not we should call it “humanitarian intervention.” Moreover, I am not rewriting the doctrine: while many support a very high threshold for intervention, the question of threshold has long been a matter of debate.²

My view is that the requirement of imminent or ongoing massacres, genocide, or crimes against humanity is too strict.³ As I point out in the article, under that standard, a genocidal regime has an incentive to speed

up the killings. Once it stops it is protected against intervention, since according to Nardin (who adopts a line similar to that of Human Rights Watch) past atrocities are not legitimate grounds for intervention.

There are additional reasons why “severe tyranny” is a better standard. Let us imagine that in a South American country a military junta overthrows the democratic government, suspends all constitutional liberties and imposes martial law. The regime dismisses all suspect judges, replacing them with loyalists, and rigidly controls the media, the schools, and the universities. It targets dissidents for arrest, and tortures and summarily executes the leaders. All in all, the regime kills about two thousand people a year and beats up and tortures many more. The whole population (not just a few members) is subject to surveillance and arrest for disloyalty. This dismal situa-

¹ Terry Nardin, “Humanitarian Imperialism,” *Ethics & International Affairs* 19, no. 2 (2005), p. 21. All in-text citation references are to this article.

² I've held my current view since 1988. See the first edition of my book *Humanitarian Intervention*. See also David Luban, “The Romance of the Nation-State,” *Philosophy & Public Affairs* 9, no. 2 (1980), p. 395; and W. Michael Reisman, “Coercion and Self-Determination,” *American Journal of International Law* 78, no. 3 (1984), p. 642.

³ The “crimes against humanity” standard is less strict than “imminent or ongoing massacres,” as it may include, for example, widespread torture, apartheid, or forced disappearances. This is why Nardin cautiously writes “*specific crimes against humanity*” (emphasis added).

tion is buttressed by relentless ideological propaganda. People abhor the regime, but, alas, the prospects of peaceful or violent return to democracy are nil, as the regime has the weapons. Here, people are not dying in huge numbers, but their lives depend on the whims of a tyrant, who kills enough of them weekly so as to keep them subjugated, yet not enough to cause a massacre (this was, roughly, Hussein's *modus operandi*).⁴

This scenario does not satisfy the stringent standards set by Nardin. There are no massive killings, no extermination camps, no genocide, no ethnic cleansing. Yet it seems to me that in these cases the victims have a right to seek outside help, and that foreign governments may assist them, even by force (assuming acceptable costs). That is why I set severe tyranny as the standard for humanitarian intervention. It includes not only genocidal tyranny, but also the sort of oppressive rule I just described. Nardin and like-minded commentators would protect this tyrant against intervention, even if the victims desperately want to get rid of him, and even if the costs would be acceptable.⁵

Nardin criticizes me for focusing on "the character of the regime to be overthrown," instead of focusing on "thwarting specific crimes . . . or rescuing the victims of those crimes" (p. 21). Yet his distinction is quite artificial. The character of the regime is defined by the crimes it commits, not by something else. I do not support waging war against objectionable regimes (say, John Rawls's decent hierarchical regimes). I support the permissibility of war, under certain conditions, to end severe tyranny. Saying that the military operation is aimed at freeing people from a severely tyrannical regime is the same as saying that the operation is aimed at thwarting the crimes of that regime.

THE GRAND HUMANITARIAN RATIONALE

Here again, Nardin plays with words. He claims that the U.S. strategy of fighting tyranny as a way to neutralize its enemies is not "humanitarian intervention." I agree, although I don't particularly care about labels. I make two points. First, based on my analysis of intent, I argue that the liberation of Iraq was an instance of humanitarian intervention, regardless of motive. Second, I argue that the broader strategy (the motive) *in fact* had a defensible humanitarian component. I do not mean to suggest that any pro-democracy foreign policy counts as "humanitarian intervention" in the sense defined by international law. I merely suggest that, while right motive is (within certain limits) irrelevant to the justification of the intervention, the United States' motive for invading Iraq was not obviously wrong.

THE QUESTION OF AUTHORITY

I have little to add to what I say in the article about the deficiencies of the Security Council. It seems to me that Nardin's discussion of legal legitimacy rests on debatable positivistic jurisprudential assumptions, but I will not pursue the point. Yet perhaps the U.S. attitude here (and in Kosovo) portends a process of *change* in international law. The way to change international rules is to challenge them; this is the process of customary law creation. If the Security Council is an inadequate guardian of human freedom, and if the United States believes that it is

⁴ I thank Horacio Spector for this point.

⁵ Nardin suggests that I support intervention to end "ordinary oppression" (p. 22). Not so. My standard is *severe tyranny*, which is less than genocide or mass murder but more than ordinary oppression.

important (for whatever reason) to rectify that, then (barring an improbable amendment of the UN Charter) the only avenue of change is what Allen Buchanan has called “the morality of unlawful legal reform.”⁶

THE COSTS OF THE WAR

My article omits discussion of the costs of the war, except for pointing out that the Iraq war, like all wars, is governed by an appropriate account of moral costs and benefits—for example, some version the doctrine of double effect.⁷ Such a theory must include both an appropriate standard of necessity and proportionality, with reference to the justice of the cause, and an appropriate theory of collateral harm. Whether the Iraq war meets this standard is a complex empirical matter that cannot be settled in the pages of this journal.⁸ If the Iraq war does not comply with such theory, then it will be hard to justify. Having to undertake such a reckoning does not, however, set apart this war from other wars. It seems to me that many critics of the war raise the question of cost because they have *already* decided that the cause is dubious.

I would like, however, to mention Abu Ghraib, since Nardin drops references to that incident to cast doubt on U.S. intention or motive.⁹ Certainly that episode is appalling and should be condemned in the strongest terms. It does not, however, void the humanitarian nature of the intervention. While the relationship between *jus ad bellum* and *jus in bello* is complex, they must in principle remain separate. Concededly, if serious violations of the laws of war multiply they will destroy the legitimacy of the war. The facts in Abu Ghraib are indeed war crimes, but not the most egregious. They were (inexcusable) acts of *degradation* against enemy *soldiers* or persons thought to

be closely connected to them. In contrast, the most serious war crimes are *killings* of innocent *civilians*, or noncombatants. And even these kinds of egregious violations, acts that massively target civilians, while abhorrent and unlawful, would not invalidate a war that had a just cause. The Allies killed tens of thousands of civilians in a single bombing at Dresden and killed more than one hundred thousand civilians with two nuclear bombs in Japan, yet no one argues that whatever justifications they had for fighting Nazism (including the humanitarian justification) became, by virtue of those war crimes, unavailable.

It is thus perfectly consistent to say: 1) The intervention in Iraq was humanitarian; 2) The abuse of prisoners was a war crime; and 3) The intervention was justified.

Moreover, the U.S. government has publicly condemned the abuses, has vowed not to repeat them, and has prosecuted and convicted those responsible, as required by international law and common decency. The violations are not a central part of the conduct of the war; in fact, they are even *less* central to the Iraq war than the episodes of Dresden or Hiroshima were to World War II.

⁶ See Allen Buchanan, “Reforming the International Law of Humanitarian Intervention,” in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003), pp. 130–73.

⁷ See Fernando R. Tesón, “The Liberal Case for Humanitarian Intervention,” in Holzgrefe and Keohane, eds., *Humanitarian Intervention*, p. 53.

⁸ I point out, however, that, contrary to what Nardin suggests, during the military operation the coalition took special care to minimize civilian casualties. The deaths that have occurred since are principally attributable to the insurgency, a criminal enterprise, and the operations necessary to defeat the insurgents.

⁹ Similarly, some have suggested that those violations of the laws of war have cancelled the moral worth of the intervention. See, e.g., Mark Danner, “We Are All Torturers Now,” *New York Times*, January 6, 2005, p. A27.

The abuses are reason to demand prosecution of those responsible, but not to relinquish the humanitarian justification for the war. All wars have war crimes—that does not mean that there is no such thing as a just war. Finally, the humanitarian intent is the intent of the *leaders*, not necessarily of every soldier, so Nardin’s reference to Abu Ghraib in the context of intent and motive is inapposite.

EMPIRE

Trading on the negative connotations of the word “empire,” Nardin accuses me of “humanitarian imperialism.”¹⁰ He is right that what I call the “grand strategy” has to be discussed not as part of the narrower humanitarian intervention doctrine, but as

part of the rights and duties of the hegemon—“empire,” in his terms. I have only one observation here. The fact of hegemony is not necessarily bad. Certainly a world without a hegemon but replete with dictators is worse than a world in which a hegemon exercises beneficial influence. If being a humanitarian imperialist means advocating that the hegemon use its might to advance (by appropriate moral means) freedom, human rights, and democracy, then I am a humanitarian imperialist.

¹⁰ Nardin also criticizes me for picking only the “good” traditions in American diplomacy, thus omitting references to the “bad” ones. I do not say, however, that the idealistic, liberating and transformative tradition of the American republic was the *only* tradition in American foreign policy, only that I read the Iraq war as part of that one.

tion is buttressed by relentless ideological propaganda. People abhor the regime, but, alas, the prospects of peaceful or violent return to democracy are nil, as the regime has the weapons. Here, people are not dying in huge numbers, but their lives depend on the whims of a tyrant, who kills enough of them weekly so as to keep them subjugated, yet not enough to cause a massacre (this was, roughly, Hussein's *modus operandi*).⁴

This scenario does not satisfy the stringent standards set by Nardin. There are no massive killings, no extermination camps, no genocide, no ethnic cleansing. Yet it seems to me that in these cases the victims have a right to seek outside help, and that foreign governments may assist them, even by force (assuming acceptable costs). That is why I set severe tyranny as the standard for humanitarian intervention. It includes not only genocidal tyranny, but also the sort of oppressive rule I just described. Nardin and like-minded commentators would protect this tyrant against intervention, even if the victims desperately want to get rid of him, and even if the costs would be acceptable.⁵

Nardin criticizes me for focusing on "the character of the regime to be overthrown," instead of focusing on "thwarting specific crimes . . . or rescuing the victims of those crimes" (p. 21). Yet his distinction is quite artificial. The character of the regime is defined by the crimes it commits, not by something else. I do not support waging war against objectionable regimes (say, John Rawls's decent hierarchical regimes). I support the permissibility of war, under certain conditions, to end severe tyranny. Saying that the military operation is aimed at freeing people from a severely tyrannical regime is the same as saying that the operation is aimed at thwarting the crimes of that regime.

THE GRAND HUMANITARIAN RATIONALE

Here again, Nardin plays with words. He claims that the U.S. strategy of fighting tyranny as a way to neutralize its enemies is not "humanitarian intervention." I agree, although I don't particularly care about labels. I make two points. First, based on my analysis of intent, I argue that the liberation of Iraq was an instance of humanitarian intervention, regardless of motive. Second, I argue that the broader strategy (the motive) *in fact* had a defensible humanitarian component. I do not mean to suggest that any pro-democracy foreign policy counts as "humanitarian intervention" in the sense defined by international law. I merely suggest that, while right motive is (within certain limits) irrelevant to the justification of the intervention, the United States' motive for invading Iraq was not obviously wrong.

THE QUESTION OF AUTHORITY

I have little to add to what I say in the article about the deficiencies of the Security Council. It seems to me that Nardin's discussion of legal legitimacy rests on debatable positivistic jurisprudential assumptions, but I will not pursue the point. Yet perhaps the U.S. attitude here (and in Kosovo) portends a process of *change* in international law. The way to change international rules is to challenge them; this is the process of customary law creation. If the Security Council is an inadequate guardian of human freedom, and if the United States believes that it is

⁴ I thank Horacio Spector for this point.

⁵ Nardin suggests that I support intervention to end "ordinary oppression" (p. 22). Not so. My standard is *severe tyranny*, which is less than genocide or mass murder but more than ordinary oppression.

important (for whatever reason) to rectify that, then (barring an improbable amendment of the UN Charter) the only avenue of change is what Allen Buchanan has called “the morality of unlawful legal reform.”⁶

THE COSTS OF THE WAR

My article omits discussion of the costs of the war, except for pointing out that the Iraq war, like all wars, is governed by an appropriate account of moral costs and benefits—for example, some version the doctrine of double effect.⁷ Such a theory must include both an appropriate standard of necessity and proportionality, with reference to the justice of the cause, and an appropriate theory of collateral harm. Whether the Iraq war meets this standard is a complex empirical matter that cannot be settled in the pages of this journal.⁸ If the Iraq war does not comply with such theory, then it will be hard to justify. Having to undertake such a reckoning does not, however, set apart this war from other wars. It seems to me that many critics of the war raise the question of cost because they have *already* decided that the cause is dubious.

I would like, however, to mention Abu Ghraib, since Nardin drops references to that incident to cast doubt on U.S. intention or motive.⁹ Certainly that episode is appalling and should be condemned in the strongest terms. It does not, however, void the humanitarian nature of the intervention. While the relationship between *jus ad bellum* and *jus in bello* is complex, they must in principle remain separate. Concededly, if serious violations of the laws of war multiply they will destroy the legitimacy of the war. The facts in Abu Ghraib are indeed war crimes, but not the most egregious. They were (inexcusable) acts of *degradation* against enemy *soldiers* or persons thought to

be closely connected to them. In contrast, the most serious war crimes are *killings* of innocent *civilians*, or noncombatants. And even these kinds of egregious violations, acts that massively target civilians, while abhorrent and unlawful, would not invalidate a war that had a just cause. The Allies killed tens of thousands of civilians in a single bombing at Dresden and killed more than one hundred thousand civilians with two nuclear bombs in Japan, yet no one argues that whatever justifications they had for fighting Nazism (including the humanitarian justification) became, by virtue of those war crimes, unavailable.

It is thus perfectly consistent to say: 1) The intervention in Iraq was humanitarian; 2) The abuse of prisoners was a war crime; and 3) The intervention was justified.

Moreover, the U.S. government has publicly condemned the abuses, has vowed not to repeat them, and has prosecuted and convicted those responsible, as required by international law and common decency. The violations are not a central part of the conduct of the war; in fact, they are even *less* central to the Iraq war than the episodes of Dresden or Hiroshima were to World War II.

⁶ See Allen Buchanan, “Reforming the International Law of Humanitarian Intervention,” in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003), pp. 130–73.

⁷ See Fernando R. Tesón, “The Liberal Case for Humanitarian Intervention,” in Holzgrefe and Keohane, eds., *Humanitarian Intervention*, p. 53.

⁸ I point out, however, that, contrary to what Nardin suggests, during the military operation the coalition took special care to minimize civilian casualties. The deaths that have occurred since are principally attributable to the insurgency, a criminal enterprise, and the operations necessary to defeat the insurgents.

⁹ Similarly, some have suggested that those violations of the laws of war have cancelled the moral worth of the intervention. See, e.g., Mark Danner, “We Are All Torturers Now,” *New York Times*, January 6, 2005, p. A27.

The abuses are reason to demand prosecution of those responsible, but not to relinquish the humanitarian justification for the war. All wars have war crimes—that does not mean that there is no such thing as a just war. Finally, the humanitarian intent is the intent of the *leaders*, not necessarily of every soldier, so Nardin’s reference to Abu Ghraib in the context of intent and motive is inapposite.

EMPIRE

Trading on the negative connotations of the word “empire,” Nardin accuses me of “humanitarian imperialism.”¹⁰ He is right that what I call the “grand strategy” has to be discussed not as part of the narrower humanitarian intervention doctrine, but as

part of the rights and duties of the hegemon—“empire,” in his terms. I have only one observation here. The fact of hegemony is not necessarily bad. Certainly a world without a hegemon but replete with dictators is worse than a world in which a hegemon exercises beneficial influence. If being a humanitarian imperialist means advocating that the hegemon use its might to advance (by appropriate moral means) freedom, human rights, and democracy, then I am a humanitarian imperialist.

¹⁰ Nardin also criticizes me for picking only the “good” traditions in American diplomacy, thus omitting references to the “bad” ones. I do not say, however, that the idealistic, liberating and transformative tradition of the American republic was the *only* tradition in American foreign policy, only that I read the Iraq war as part of that one.