

Humanity, military humanism and the new moral order*

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Abstract

The post-WWII period has been characterized by an endless process of international humanitarian law-making, aimed at protecting people from their governments. After the collapse of communism, human rights have allegedly transcended their Eurocentrism and have become the first truly universal moral justification for the use of force. This essay explores the meaning and scope of humanity and questions the range of normative resources mobilized in its name. In view of these doubts, it argues that the recent combination of humanism and military force is the outward sign of an emerging moral world order, which is criticized from a number of pragmatic, principled and realist perspectives.

Keywords: human rights; humanity; military humanism; communitarianism; universalism; *Jus Publicum Europeum*; Kosovo; new world order.

The irresistible rise and resistible weaknesses of international human rights

Human rights entered the world scene after the Second World War. The history of their invention has been repeatedly and exhaustively told and will not be attempted here.¹ The most obvious change in the transition from natural to human rights was the replacement of their philosophical ground and

* This article was written in 2002. It is with the greatest sadness and anger that I see my analysis and predictions confirmed in the war to 'liberate' Iraq by bombing it and to 'defend' the human rights of its people by killing them.

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institutional sources. The belief that rights could be protected either through the automatic adjustment of the entitlements of human nature and the action of domestic legal institutions or through the legislative divinations of popular sovereignty proved unrealistic. As Hannah Arendt put it, 'it is quite conceivable that one fine day a highly organized and mechanized humanity will conclude quite democratically – namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof'.² Her statement, phrased as a prediction, has already become a terrible historical fact. The 'market' of human dignity and equality did not conceal a 'hidden hand' and people voted and still vote for regimes and parties determined to violate all human rights, as the examples of Hitler's Germany and Milosevic's Yugoslavia show. If the French Revolution and the first proclamation of rights were reactions against monarchic absolutism, the international law of human rights was a response to Hitler and Stalin, to the atrocities and barbarities of the war and to the Holocaust. In this latest mutation of naturalism, humanity or civilization was substituted for human nature, the Frenchmen of the *Déclaration* were enlarged to include the whole of humanity, international institutions and law-makers replaced the divine legislator or the social contract and international conventions and treaties became the Constitution above constitutions and the Law behind laws. An endless process of international and humanitarian law-making has been put into operation, aimed at protecting people from the putative assertions of their sovereignty. To paraphrase Nietzsche, if God, the source of natural law, is dead, he has been replaced by international law.

The higher status of human rights is seen as the result of their legal universalization, of the triumph of the universality of humanity. The law addresses all states and all human persons *qua* human and declares their entitlements to be a part of the patrimony of humanity, which has replaced human nature as the rhetorical ground of rights. Every state comes under the mantle of the international law of human rights, every government becomes civilized as the 'law of the princes' has finally become the 'universal' law of human dignity. But this is an empirical universality, based on the competitive solidarity of sovereign governments and on the pragmatic concerns and calculations of international politics. The variable universalism of classical natural law or the Kantian universalization acted as regulative principles: they gave a perspective from which each particular action could be judged, in theory at least, in the name of the universal. The empirical universality of human rights, on the other hand, is not a normative principle. It is a matter of counting how many states have adopted how many and which treaties or how many have introduced which reservations or derogations from treaty obligations. When normative universality becomes a calculable globalization, it turns from a lofty, albeit impossible ideal, into the lowest common denominator of state interests and rivalries. The community of human rights is universal but imaginary; universal humanity does not exist empirically and cannot act as a transcendental principle philosophically.

Universal positivized rights close the gap between empirical reality and the ideal left open by the French split between man and citizen, despite their

obvious problems. Their legislation has been taken over by government representatives, diplomats, policy advisers, international civil servants and human rights experts. But this is a group with little legitimacy. Governments are the enemy against whom human rights were conceived as a defence. Undoubtedly, the atrocities of this century shook and shocked some governments and politicians as much as ordinary people. But the business of government is to govern not to follow moral principles. Governmental actions in the international arena are dictated by national interest and political considerations and morality always enters the stage late, when the principle invoked happens to condemn the actions of a political adversary. When human rights and national interest coincide, governments become their greatest champions. But this is the exception. The government-operated international human rights law is the best illustration of the poacher turned gamekeeper.³

Human rights have become the new morality of international relations, a way of conducting politics according to a moral norms and rules. As justification for state policies or as the vague rhetoric of rebellion, human rights are now the canonical text for the moral disposition of world affairs. Their signs and symptoms are evident in proliferating humanitarian wars and interventions, in the sanctions imposed upon states to protect people from their governments and in the increasing criminalization of politics. Force has been repeatedly placed at the service of humanity and this trend seems to be marking the new millennium. To be sure, the theory of just war has offered a kind of moral justification for military action since the Middle Ages. But its scope was limited to Christian causes and its application extended its benefits exclusively to European princes. After the establishment of the modern system of international relations, its import was substantially amended and its controversial and grandiose claims were largely abandoned. But human rights, the new just cause, claim to have transcended the Eurocentrism and religious grounding of just war; they are supposed to be the first truly universal moral justification for the use of force. Just war has returned in postmodernity and the alleged morality of humanity makes the questioning of it increasingly hard. This essay is an attempt to challenge some of the assumptions behind our new just wars. The second part explores the meaning and scope of humanity and questions the range of normative resources it can mobilize. In view of these doubts, the final part examines the recent combination of humanism and military force and concludes that military humanism is the outward sign of an emerging moral world order, which is open to the array of pragmatic, principled and realist reservations that have always accompanied attempts at moralizing politics.

On the humanism of rights

What entities are the legitimate bearers of rights? The answer appears obvious: humans; rights exist for the sake of humanity, they are the acme of humanism. And yet, if we question the self-evidence of common sense, the intellectual reasons

for creating human rights instead of rights for all living beings are not clear. The idea of *humanitas* or of the human being is not self-defining or self-determining. Classical natural law and early modern definitions of rights drew their normative force from claims about what counts as characteristically human and derived their prescriptions from the nature and needs of 'humanness'. But the definitions of the 'human' differed widely according to age, place and school of thought and, similarly, the position of humanity in the world and its relation to other beings has varied enormously throughout history. Human slaves have been excluded from humanity throughout history; in the Middle Ages, on the other hand, pigs, rats, leeches and insects accused of various crimes were formally summoned to courts of law, tried with all the pomp of due process and acquitted or convicted and punished.⁴ Legal recognition has not followed the modern and allegedly universalizing understanding of humanity and, as a result, human rights give rise to a number of difficult conceptual and ontological questions.

Can we have a concept of rights without having a definition of who or what is human? And even if we were to assume that we have an answer to the question of humanity, when does the existence of a human being and the associated rights begin and when does it end? What about embryos, clones, genetically modified beings and cyborgs? Are children, the mentally or terminally ill or prisoners fully human, entitled to all the rights that belong to humanity or are they only partially human since their rights are severely restricted?⁵ What about animals? The animal rights movement, from deep ecology and anti-vivisection militancy to its gentler green versions, has placed the legal differentiation between human and animal firmly on the political agenda and has drafted a number of bills of animal entitlements. Important philosophical and ontological questions are involved here. At one end of the debate, rights are being promoted for those animals, like the great apes, who are genetically closest to humans.⁶ The dividing line between humanity and animality is maintained but moved along. At the other deep end, the divide itself is challenged and humans are seen as one, non-privileged species in the organic continuum of the world.

Companies and other non-human legal persons have been given legal rights, of course, for centuries. Christopher Stone, an American law professor has argued that trees, parks and other natural objects too should be given rights,⁷ and a French author has called for turning greenbelt zones into legal subjects with the power to go to court, through representatives, to protect their ecosystem from intrusion.⁸ It appears therefore that legal subjectivity has not been exclusively bestowed on humans; its use as an economic strategy indicates that the distinction between humanity and its others is not strict or unchangeable. The meaning of humanity was not conclusively settled when we abandoned classical thought or settled for a weak sense of natural law *à la* Hart.⁹ As Leo Strauss argued, the question of human nature has continued to 'haunt modern thought and has become more complicated as a result of the contradictions engendered by positive science and historicism'.¹⁰ But how did we arrive at the concept of human nature and humanity?

Pre-modern societies did not develop ideas of freedom or individuality. Both

Athens and Rome had citizens but not 'men', in the sense of members of the human species. The *societas generi humani* was absent from the *agora* and the *forum*. Free men were Athenians or Spartans, Romans or Carthaginians but not persons; they were Greeks or barbarians but not humans. The word *humanitas* appeared for the first time in the Roman Republic. It was a translation of *paideia*, the Greek word for education, and meant *eruditio et institutio in bonas artes* (scholarship and training in good conduct). The Romans inherited the idea of humanity from Hellenistic philosophy, in particular stoicism, and used it to distinguish between the *homo humanus*, the educated Roman, and *homo barbarus*. The first humanism was the result of the encounter between Greek and Roman civilizations and the early modern humanism of the Italian Renaissance retained these characteristics. It was presented as a return to Greek and Roman prototypes and was aimed at the barbarism of medieval scholasticism and the gothic north.

A different conception of *humanitas* emerged in Christian theology, superbly captured in the Pauline assertion that there is no Greek or Jew, free man or slave. All men are equally part of spiritual humanity, which is juxtaposed to deity. They can all be saved through God's plan of salvation and enjoy eternal life in the true city of heaven. If, for classical humanism, man is a *zoon logon echon* or *animal rationale*, for Christian metaphysics, man is the vessel of the soul. Only humans, not animals, trees or spirits, possess an immortal soul, only humans can be saved in Christ. During the Middle Ages, the only subject was the King, God's representative on earth. But the religious grounding of humanity was undermined by the liberal political philosophies. The foundation of humanity was transferred from God to (human) nature, in a process which strengthened the intellectual trend and the political determination to recognize the centrality of individuality. This was the most dramatic effect of the Enlightenment. By the end of the eighteenth century, the concept of 'man' had come into existence and soon became the absolute and inalienable value around which the whole world revolved. Humanity, man as species existence, entered the historical stage as the peculiar combination of classical and Christian metaphysics.

Humanism believes that there is a universal essence of man and that this essence is the attribute of each individual who is the real subject.¹¹ As species existence, man appears without differentiation or distinction in his nakedness and simplicity, united with all others in an empty nature deprived of substantive characteristics. This is the man of the rights of man, an abstraction that has as little humanity as possible, since he has jettisoned all those traits and qualities that build human identity. A minimum of humanity is what allows man to claim autonomy, moral responsibility and legal subjectivity. Man enters the historical scene by philosophically severing his ties with family, community, kinship and nature and by turning his creativity and wrath against tradition and prejudice, all that created, nourished and protected him in the past. The universal man of the declarations is an unencumbered man, human, all too human. His soul unites with all others in Christ and his ontological minimalism links him to humanity philosophically. As species existence all men are equal, because they share equally soul and reason, the *differentia specifica* between humans and

others. But this equality, the most radical element of the Declarations, applied only to the abstract man of species existence and his institutional foil, the legal subject. It had limited value for non-proper men (that is men of no property), even less for women, and was denied altogether to those defined as non-humans (slaves, colonials and foreigners). Undoubtedly the universalizing impetus of humanism can include in theory those others and the history of human rights has been narrated as the continuous struggle to reduce the distance between abstract human nature and those excluded from its temporal and local instantiations, to add gender, class and colour to the abstract man of the Declarations. But this latent potential has been partially realized only through struggles, campaigns and sacrifices and not through the inexorable normative march of the universal.

By the middle of the nineteenth century and after the abolition of slavery, humanity reached its final modern formulation in juxtaposition to the non-human world of animals and objects. At the same time, the invention of the fully 'human', which characterizes the acme of modern humanism, created the precondition for the parallel emergence of the non-human or subhuman as its necessary, infernal double. The *homo barbarus*, the partner and foil of the *homo hominus*, becomes an all-powerful and threatening presence only after humanism has declared the self-evident nature of humanity. We can trace the beginning of the concentration camps, of the 'non-human vermin' of Auschwitz and the 'cockroaches' of Rwanda in this most banal and obvious of definitions which introduces a strict distinction and hierarchy: human and subhuman, man and superman, us and the terrifying absolute others. What history has taught us is that there is nothing sacred about any definition of humanity and nothing eternal about its scope. Humanity cannot act as the *a priori* normative principle and is mute in the matter of legal and moral rules. Its function lies not in a philosophical essence but in its non-essence, in the endless process of re-definition and the continuous but impossible attempt to escape fate and external determination.

Classical humanism, to which all modern versions return, juxtaposed, as we saw, the *humanum* to the *barbarum*. As Joanna Hodge put it, all versions of humanism are followed by a 'double marking, of a return to half-understood Greek ideals and a gesture of setting oneself apart from some perceived barbarism'.¹² The humanism of rights, like all humanism, is similarly based on the definition of the essence of humanity and a desire to go back to the classical sources of the *humanum*, evident in the extravagant claims of early modern legal humanists and their contemporary followers that Greece and Rome developed first the institution of rights. Again, legal humanism was a discourse of exclusion, not just of foreign barbarians but also of women and people of colour. To be sure, the various political and legal philosophies differ in their definitions of the human essence. For liberals, legal humanism protects freedom and dignity, for left liberals and socialists, it promotes equality and liberty while, for multiculturalists, it safeguards a multiplicity of values and life plans determined in each community by local conditions and historical traditions. In all cases,

however, individual and collective human possibilities are demarcated and restricted in advance, through the axiomatic determination of what it is to be human and the dogmatic exclusion of other possibilities.

These criticisms are equally applicable to the concepts of humanity that underpin the most heated debate in human rights, that between universalism and cultural relativism. Both positions exemplify, perhaps in different ways, the contemporary metaphysical urge: each side has made an axiomatic decision as to what constitutes the essence of humanity and follows it, like all metaphysical determinations, with a stubborn disregard of opposing strategies or arguments. They both claim to have the answer to the question 'what is human value' and to its premise 'what is (a) human', and take their answers to be absolute and irrefutable. But both universalism and collectivism are extensions of the metaphysics of subjectivity. The former is an aggressive essentialism, which has globalized nationalism and has turned the assertiveness of nations into a world system. Community, on the other hand, is the condition of human existence but communitarianism has become even more stifling than universalism.

The individualism of universal principles forgets that every person is a world and comes into existence in common with others, that we are all in community. Being in common is an integral part of being self: self is exposed to the other, it is posed in exteriority, the other is part of the intimacy of self. My face is 'always exposed to others, always turned toward an other and faced by him or her never facing myself'.¹³ But being in community with others is the opposite of common being or of belonging to an essential community. Most communitarians, on the other hand, define community through the commonality of tradition, history and culture, the various past crystallizations whose inescapable weight determines present possibilities. The essence of the communitarian community is often to compel or 'allow' people to find their 'essence'; its success is measured by its contribution to the accomplishment of a common 'humanity'. But this immanence of self to itself is nothing other than the pressure to be what the spirit of the nation or of the people or the leader demands or to follow traditional values and exclude what is alien and other. This type of communitarianism destroys community in a delirium of incarnated communion. The solid and unforgiving essence of nations, classes or communities turns the 'subjectivity of man into totality. It completes subjectivity's self assertion, which refuses to yield.'¹⁴ Community as communion accepts human rights only to the extent that they help submerge the I into the We, all the way till death, the point of 'absolute communion' with dead tradition.

The community of being together, on the other hand,

is what takes place always through others and for others. It is not the space of the egos – subjects and substances that are at bottom immortal – but of the Is, who are always others (or else nothing). . . . Community therefore occupies a singular place: it assumes the impossibility of its own immanence. The impossibility of a communitarian being in the form of a subject.¹⁵

In this sense, community is transcendence without a sacred meaning and

resistance to immanence, 'to the communion of everyone or to the exclusive passion of one or several: to all forms and all violences of subjectivity'.¹⁶ The modern creation of society, as a space of competing atoms, forces and signs, has been commonly seen as the outcome of community's destruction. But, according to Jean-Luc Nancy, the historical sequence is different: society emerged not out of disappearing communities but out of disintegrating empires and tribes, which were as unrelated to community as is postmodern society. It is only after the disappearance of the society of atomistic subjects that the non-immanent community of singular beings-in-common will have a historical chance. The community of non-metaphysical humanity is still to come.

The continuing pathos of the universalism/relativism debate coupled with its repetitive and rather banal nature indicates that the stakes are high. Postmodern mass societies and the globalization of economics, politics and communications increase existential anxiety and create unprecedented uncertainty and insecurity about life prospects. In this climate, the desire for simple life instructions and legal and moral codes with clearly defined rights and duties becomes paramount. Codification transfers the responsibility of deciding ethically to legislators and resurgent religious and national fundamentalisms, to false prophets and fake tribes. In an over-legalized world, rules and norms discourage people from thinking independently and discovering their own relation to themselves, to others, to language and history. The proliferation of human rights treaties and the mushrooming of legal regulation are part of the same process, which aims to relieve the burden of ethical life and the anxiety or, in Heidegger's terms, the 'homelessness' of postmodern humanity. International human rights law promises to set all that is valuably human on paper and hold it before us in triumph: the world picture of humanity will finally have been drawn and everyone will be free to follow his essence as defined by world governments.

Nietzsche realized the metaphysical link between the modern individual and the operation of rights. 'In fact it was Christianity that first invited the individual to play the judge of everything and everyone; megalomania almost became duty: one has to enforce eternal rights against everything temporal and conditioned.'¹⁷ Individualism and egalitarianism, the two apparently opposed grounds of human rights, are in reality allies, according to Nietzsche, in a world where the individual is the only (valueless) value left. 'The modern European is characterised by two apparently opposite traits: individualism and equal rights; that I have at last come to understand.'¹⁸ While individualism claims to promote difference and uniqueness, it is only a form of egalitarianism, which makes people, fearful of an existence without meaning and values, demand that everyone should count as their equal, in other words the same, in an endless quest for personal gratification. But when individual desire is turned into the ultimate principle its protective value is devalued. The individual is an extremely vulnerable piece of vanity, predicted Nietzsche. His prophecy has become the bitter truth of our century.

'Military humanism'

These criticisms have acquired great urgency in the wake of the war over Kosovo, the first military campaign in history conducted in the name of humanism and human rights. According to Tony Blair, this was a just war, promoting the doctrine of intervention based on values, while Robin Cook declared that NATO was a 'humanitarian alliance'. The war gave us the opportunity to assess the claim that human rights have become the new just cause for military action.

Throughout history, people have gone to wars and sacrificed themselves on the altar of principles like nation, religion, empire or class. Secular and religious leaders know well the importance of adding a veneer of high principle to low ends and murderous campaigns. This is equally evident in Homer's *Iliad*, in Thucydides' chilling description of the Athenian atrocities in Melos and Mytilene, in the chronicles of the crusades and in Shakespeare's historical plays. In the most famous passage of the Peloponnesian War, the defeated Melians argued unsuccessfully that, if the Athenians slaughtered them after winning in battle, they would lose all claim to moral superiority and legitimacy among their allies and citizens. For the pragmatist Athenians, however, a limited genocide would give a clear lesson to their wavering allies and would be of great political value, unlike the moral and humanitarian position. The Athenians compared terror and moral principle according to their likely effect, chose the former and provided an early example of *realpolitik*. Stalin's turn to the Orthodox patriarch and his use of religious themes in the defence of the Soviet fatherland against the Nazi attack in 1941, despite decades of religious persecution, was a good illustration of the moral and metaphysical turn often taken by pragmatic or scared dictators.

The cynicism of the powerful is well known and has been treated with wry smiles by writers and poets. Shakespeare, as much as Brecht, was fascinated by the way in which the hawks of war put on the fleece of moralist and preacher, better to persuade soldiers and citizens about the value of dying and killing for the cause. The moralization of war is relatively easy when the moralizers are victims of external aggression, but the crusaders, the empire builders, the colonialists and the Nazis were not lacking in moral high ground either. The ability to present most wars as just and the lack of a moral arbiter who could sift through conflicting rationalizations has made the just war one of the hardest moral mazes. The question of the justice of a war (or of a liberation struggle a.k.a. campaign of terror) has always presented an interesting paradox: for the warring parties there is nothing more certain than the morality of their cause, while for observers there is nothing more uncertain than the rightness of the combatants' conflicting moral claims. As C.H. Waddington put it, 'the wars, tortures, forced migrations and other calculated brutalities which make up so much of recent history, have for the most part been carried out by men who earnestly believed that their actions were justified, and, indeed, demanded, by the application of certain basic principles in which they believed'.¹⁹ But, as the

author explains, these principles were in most cases just rationalizations to make killing and dying more palatable. War is the clearest example of what Lyotard has called the *differend*:

As distinguished from a litigation, a *differend* would be that case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their *differend* as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits that rule).²⁰

It is against this background of moral undecidability that we must examine the theory of 'just war' and its contemporary version in the 'humanitarian' wars of the last decade. The theory, first developed in the Middle Ages, was an attempt by the Church to serve Caesar without abandoning fully its pledges to God. But the key element that allowed a war to be blessed by the Church was its *justa causa*, its mission to promote the faith and punish its enemies. The theological theory of just war, based on a radical distinction between the faithful and the faithless and immoral, allowed the conduct of wars aimed at annihilating the infidels. The justness of the cause permitted the conduct of total war on the morally inferior if not subhuman enemies. It justified the unremitting violence of the Crusades, the genocidal attacks on the Indians and indigenous people of the newly discovered lands and, later, the atrocities of the religious wars, which, conducted on both sides in the name of the true faith, knew no limit in their attempt to annihilate the morally degraded enemies.

According to Carl Schmitt, the emergence of the *Jus Publicum Europaeum* in the eighteenth century replaced the endless and inconclusive discussions about what counts as just cause.²¹ The modern theory of the just war aims to remove theological and moral concerns from the conduct of international relations and is the clearest sign of the emergence of a system of relations based on sovereign states. The modern law of war disassociates the just war from a *justa causa* and relates it to a just enemy, defined as an external sovereign, a foe who shares at the formal level all the attributes, rights and duties of statehood. A war between sovereigns is just because the combatants are formally equal actors (*hostes aequalitur justis*) who, as a result of their equivalent status, accept legal formal and conventional limits on the aims and conduct of war. The rapidly developing early modern European public order does not care about the justness of the cause of a war but about the status of the warring parties as sovereign actors with the rightful power to decide and conduct war.

For Schmitt, the modern international order replaces the question of the war aims with that of 'who decides'. It displaces the morality and religion of ends with that of sovereignty. The European wars of the eighteenth and nineteenth century are no longer total and the question of the regulation and legitimation of violence moves from ends to means.²² The *justus hostis*, the legally recognized enemy, is distinguished from the infidel; the aim of the war is no longer to

annihilate barbarians. But, while the war between European sovereigns became regulated and limited, Schmitt insists that this 'normalization' was grounded on its exception, namely, the awareness of the difference that separates the Europeans from the rest of the world. 'War is conducted differently between Europeans and non-Europeans as indeed among Europeans outside continental Europe.'²³

A second consequence of the change was the 'enemies within': those political and social forces which challenge the internal *ordre public*, but do not have sovereign status, could not be recognized as formal enemies, worthy of some respect and constraint. They were reduced to the condition of bandits, terrorists, rebels, in other words infidels to the claims of sovereign statehood. They became either absolute enemies, targets of elimination through total war, or people not entitled to be considered as enemies and therefore targets of police action and criminal sanctions. As Ananiadis puts it, the

negotiation of the relations between self and other under the principle of sovereignty promotes the morality of exclusion and leads inescapably to the elimination of difference. But the converse is also true: the existence of a difference that must be eliminated, or of an exception is the necessary precondition for the construction of sovereignty.²⁴

Modern European sovereignty was based on the recognition of other sovereigns and the consequent limitation of actions against them under the principle of reciprocity and on the consequent exclusion of non-European and non-state actors from the dignity of recognition and equivalence.

All this seems to have changed in the late twentieth century. We are told that the new world order is based on respect for human rights; that universal moral standards have been legislated and accepted by the international community and can be used as the new *justa causa*; finally, that legal tribunals and moral directorates have been set up to navigate through conflicting moral claims. One may be slightly suspicious of the moral probity of the Security Council of the United Nations, which includes a state which only a few years ago slaughtered its own demonstrating students (China) or another which has ratified a minimum of human rights treaties and has actively campaigned against the establishment of the new permanent war crimes tribunal (USA). These concerns become even more serious when one realizes that the United States and Britain went ahead with the bombing of Iraq in 1998 and of Serbia in 1999 without the authorization of the Security Council of the United Nations, the only body entitled to order military action in defence of international peace and security.

The willingness of Western powers to use force for apparently moral purposes has become a central (and worrying) characteristic of the post-Cold War settlement. But Waddington's law still stands. The Serbian brutalities were carried out in the name of national sovereignty, territorial integrity and the defence of history and culture against terrorist and foreign aggression. Nations owe their legitimacy to myths of origin, narratives of victory and defeat, borders

and imagined or real historical continuities but not to humanity. On the Western side, Waddington's 'basic principles' have been re-defined as reason, human rights and cosmopolitanism and have helped generate an 'ethical impulse' in public opinion²⁵ which has put some pressure on Western governments. But who authorizes the discourse of the universal? Will universal human rights overcome moral disagreement or are they one side of the conflict? Are they a 'rule of judgment' which can reconcile the *differends*, in Lyotard's terms, or are they one more *differend* in the conflict?

Three recent instances stand out in this respect: first, the continuing sanctions against Iraq and the renewed bombing of that country since 1998. The economic embargo, imposed by the UN after the end of the Gulf War in order to force the regime to destroy its weapons of mass destruction, had already taken its toll by that time. The sanctions were slightly eased in 1996, under the 'oil for food' programme, after the World Health Organization found that most Iraqis had suffered from near starvation for years and 32 per cent of all children were seriously malnourished. Operation Desert Fox, which involved the blanket bombing of military and associated targets, was launched in December 1998, on the eve of the vote to impeach President Clinton by the American Congress. The United Nations were not consulted before the presidential decision to start the bombing, although the Security Council was in session discussing the latest report of the United Nations weapon inspectors when the decision was taken. The daily bombing of Iraqi sites has continued relentlessly, after the end of that operation, but has gone largely unreported.

The combined effects of ten years of sanctions, bombing and mismanagement of food and medical supplies by Saddam's regime have brought the country to the brink of collapse. Repeated reports describe how Iraqi urban society has been ruined and the social fabric seriously degraded. According to a Western reporter,

the west is conducting a monstrous social experiment with the people of Iraq. A once prosperous nation is driven into the pre-industrial dark ages. It will take years to fathom the harm being done to the lives of 21.7 million people by a policy intended . . . to bring Iraq back into the international community of nations by toppling Saddam Hussein.²⁶

Dennis Holloway, the UN humanitarian co-ordinator in Iraq, resigned his post in the summer of 1998, stating that the sanctions had killed one million Iraqis, half of whom were children. When this statistic was put to Madeleine Albright, in 1996, she responded: 'I think this is a very hard choice but the price – we think the price is worth it.'²⁷ Currently, according to UNESCO estimates, 4,000 to 5,000 children die every month because of poor water supplies, inadequate food and lack of medicines.

Second, the Rwandan genocide. During a few long months, in 1994, one million people were slaughtered, in what remains, with Cambodia, the greatest genocide of the twentieth or 'human rights' century, after the Holocaust. According to the minutes of informal Security Council meetings, which have

recently emerged, the United Nations peacekeepers sent detailed messages about the developing genocide, early in April 1994, and warned that the situation would quickly worsen without the presence of United Nations officers. General Dallaire, the commander of the UN peacekeeping force sent six messages to New York, the first as early as 11 January, warning of the impending crisis and requesting permission to act but received a routine answer from the secretariat ordering him not to act.²⁸ The first priority of the United States and Britain, however, was to withdraw the peacekeepers because any casualties would have a 'negative impact on public opinion'. According to the historian Linda Melvern, Karl Inderfurth, the American UN representative, stated that the peacekeeping force 'was not appropriate now and never will be' and that the United States had 'no stomach for leaving anything there'.²⁹ Having spent 80 per cent of the time deciding whether to withdraw the peacekeepers and only '20 per cent trying to get a ceasefire', the Council finally voted, on 24 April, to withdraw the peacekeepers, except for a token force of 270. Five days later, the Council President proposed a resolution declaring that a genocide was taking place and putting into effect the sanctions of the Genocide Convention. The Western powers objected; the British representative did not want the word genocide used because it would make the Council 'a laughing stock'.³⁰ The lives of the few hundred Western peacekeepers were clearly more important than the hundreds of thousands of Africans. General Quesnot, a French general who knew the Rwandan situation well, estimated that '2,000 to 2,500 "determined" soldiers would have sufficed to halt the slaughter'.³¹ As the Nigerian ambassador rhetorically asked, 'has Africa dropped from the map of moral concern?'

Finally, Kosovo. This was the first war of the new world order officially conducted in the name of the postmodern just cause, human rights. The Gulf War was dominated by the language of rights and law. But the obvious and blatant aggression of the Iraqi regime in occupying Kuwait meant that the rudiments of the post-war international order were brutally violated and the American-led response could be glossed in the terminology of international legality. That was clearly not the case with Yugoslavia, which claimed undisputed sovereignty over Kosovo and presented its action against the Kosovo Albanians as a case of internal police action against secessionist insurgency. It is ironic therefore that the response of NATO in its Kosovo campaign can be seen as the first and clear instance of police action by the new world order. The Kosovo war established the parameters of a new type of sovereignty no longer based on the nation-state and its formally equivalent relations with other states. The actions of NATO were initiated and carried out in circumstances where its overwhelming force guaranteed the outcome of hostilities and the quasi-moral international order under construction justified the action against the Serbs in the name of humanitarian values. We had, in other words, a combination of violence and morality, a new type of just war, which justified the extremity of its means through the proclaimed morality of its ends.

We can detect three central characteristics of this emerging order. First, it is

a moral order, in which human rights provide the justification for the new configuration of political, economic and military power and the cause for the conduct of just wars. Second, it concentrates overwhelming material force (economic, technological and military) and, as a result, the importance modernity has placed on the regulation of just means suffers. And, finally, the action against those resisting the new order takes the form of a police operation that aims to prevent, deter and punish criminal perpetrators rather than political opponents. Conversely, the enemies of the new order have often willingly adopted the role assigned to them of the terrorist, of the great criminal who reverses moral principles in the name of a different and higher morality. By committing atrocious acts of terror in the name of religion or justice, the enemies perversely confirm both the moral nature of the new order (the justice of ends) and its preoccupation with efficiency (the destructive effectiveness of means).

One could start by noticing that the traditional jurisprudential divide between natural law and positivism does not hold in international law. A close look at the history of state and empire building indicates that natural/human rights claims always accompanied the project of state building. I have argued elsewhere that, despite the apparent opposition between morality and power, the revolutionary declarations of right of the eighteenth century helped construct the omnipotent modern sovereign.³² Similarly, the role of human rights in the construction of the post-war international order was central even though quite ambiguous. The key principles of international law, from the United Nations Charter to all major treaties, were those of national sovereignty and non-intervention in the domestic affairs of states. While the victorious powers fought tooth and nail over the definitions and priorities of human rights, civil against economic or individual against collective, they unanimously agreed that these rights could not be used to pierce the shield of national sovereignty. Human rights were a major tool for legitimizing nationally and internationally the post-war order, at a point at which all principles of state and international organization had emerged from the war seriously weakened. The contradictory principles of human rights and national sovereignty, schizophrenically both paramount in post-war international law, served two separate agendas of the great powers: the need to legitimize the new order through its commitment to rights, without exposing the victorious states to scrutiny and criticism of their own flagrant violations. As Lewis put it, 'the debate about human rights and the upholding of human dignity, was in reality a process of re-legitimation of the principles of sovereignty and non-intervention in the domestic affairs of sovereign states. The most powerful states, through the human rights discourse, made their priorities the universal concern of others.'³³ Human rights became an instrument for underpinning the power of states.

Something similar appears to be happening in the post-Cold War era. Human rights are rapidly becoming the basis of the constitution of the new world order and construct it as a principled and moral arrangement. Constant emphasis was placed on the moral purpose of the Kosovo campaign and conversely on the

immoral, indeed inhuman, nature of the Serbs, which justified the use of extreme means. The statements of the politicians on both sides of the Atlantic still ring in our ears and there is no need to quote them here extensively. What was more worrying was the willingness of major public figures to accept the claims of Washington and London and lend intellectual support to the campaign. Jürgen Habermas, in a newspaper article entitled 'Bestiality and humanity', stated that NATO's peacekeeping operation was a 'step on the path from the classical international law of nations towards the cosmopolitan law of a world civil society'.³⁴ The idea of an emerging cosmopolitan order, which brings together legality and morality under the promise of perpetual peace, is the most striking characteristic of the post-Cold War era. Human rights and human(itarian)ism supply the values which allow the merging of the positivism of power and the morality of justice. The moral order provides legitimacy to a new configuration of power relations, which applies to the whole globe, leaving no region, state or group beyond its reach.

The proclamation of the new moral order in Kosovo was accompanied by the blatant demonization of the Serbs. The controversial historian Daniel Goldhagen claimed that 'the majority of the Serbian people, by supporting or condoning Milosevic's eliminationist politics, have rendered themselves legally and morally incompetent to conduct their own affairs [sic] and a presumptive ongoing danger to others. Essentially their country must be placed in receivership.'³⁵ Barry Buzan, an English academic and respected commentator on international relations, stated that people have the government they deserve and when a government reflects its people and promotes policies inconsistent with basic human rights, then 'the war must and should be against both government and people'.³⁶ The insidious idea of collective responsibility of a whole people for the actions of their leaders was not lost to the military.³⁷ A few weeks after the start of the war, General Michael Short of the US Air Force told journalists that what was necessary for success was to hit civilians. His tactic was going to be 'no power to your refrigerator. No gas to your stove, you can't get to work because the bridge is down – the bridge on which you held your rock concerts and all stood with targets on your heads. That needs to disappear.'³⁸ The unjust, inhuman enemies of the international moral order deserve no mercy. They must be punished paradigmatically in order to establish the moral authority of the new military humanism. The punishment grounds the right of the punisher to mete out the medicine.

And yet the moralization of politics and the criminalization of political opponents can scarcely resolve conflict. The West does not have a monopoly on morality and human rights are not the only code that claims universal validity. Serbs massacred in the name of threatened community, while the Allies bombed in the name of threatened humanity. Both principles, when they become absolute essences and define the meaning and value of culture without remainder or exception, can find everything that resists them expendable. We can see why by briefly exploring their structure, as they move from the moral to the legal domain. Universal morality claims that all cultural values and norms

are not historically and territorially bound but should pass a test of universal consistency. As a result, judgements which derive their force and legitimacy from local conditions become morally suspect. But, as all life is situated, an 'unencumbered' judgement based exclusively on the protocols of reason goes against the grain of human experience. The morality of religion and community, on the other hand, is potentially even more murderous. It draws its strength not from abstract ideas and universal reasoning but from specific stories of domination and humiliation and from concrete aspirations of retribution and redemption. What these two apparently lethal enemies have in common is the arrogance of moralism: if there is one moral truth but many errors, it is incumbent upon its agents to impose it on others. The agent of 'real' morality, be it the ethical alliance and representative of the universal or the proud communitarian and religious zealot, knows what morality demands. Universalism easily leads to imperialism and an impotent communitarianism to atrocities and massacres like those we recently witnessed.

Moral differentiation is supported by a second factor, far removed from the realm of morality and closer to the calculations of force. As Schmitt argued in the *Nomos der Erde*, when overwhelming military inequality characterizes the warring enemies, the idea of a just war between formally equivalent enemies is undermined. The inferior opponent is no longer considered as a *justus hostis*, he stops being an external enemy and combatant and becomes the object of suppression, normally reserved for the enemy within. Inequality of means promotes the idea of inequality of status and ends. The powerful considers his superiority as an indication of moral righteousness, of a just cause, which allows him to turn the enemy into a common criminal who must be punished. The impotent enemy becomes a quasi-internal rebel and the war against him takes on the character of police action. Moral argument and force support each other harmoniously so that the old distinction between just ends and just means of violence, meticulously analysed by Walter Benjamin in his *Critique of Violence*, is no longer relevant. Moral ends justify the overwhelming means and overwhelming force generates morality.

Overwhelming force characterized the Kosovo campaign at all levels. Its most apparent result was the strict hierarchization of the value of life. The United Nations monitors were withdrawn, in March 1999, before the bombing campaign started. More importantly, every precaution was taken during the war to eliminate the likelihood of NATO casualties. The possibility of engaging ground troops was repeatedly and categorically denied by NATO spokesmen until late in the campaign. The bombers flew at extremely high altitudes (some 15,000 feet) which put them beyond the reach of anti-aircraft fire. The tactic was successful: NATO forces concluded their campaign without a single casualty. But there were serious side-effects too: total air domination without the willingness to engage in a ground war did not stop Serb atrocities. Evidence emerging after the war shows that the ethnic cleansing intensified and the worst massacres occurred after the start of the bombing campaign. The number of Albanian victims is still disputed and is now calculated in the low thousands but

it is reasonable to conclude that the declared war aim of 'averting a humanitarian catastrophe' failed badly. Second, as a result of the high flight altitudes of the bombers, the likelihood of civilian 'collateral damage' increased significantly. Civilians were killed in trains and buses, in TV stations and hospitals, in the Chinese embassy and other residential areas. One of the most grotesque mistakes was the killing of some seventy-five Albanian refugees whose ragtag convoy was hit repeatedly, on April 14. Part of the explanation offered by a contrite NATO was that tractors and trailers cannot be easily distinguished from tanks and armoured personnel carriers at an altitude of 15,000 feet.³⁹

From Homer to this century, war introduces an element of uncertainty, the possibility that the mighty might lose or suffer casualties. Indeed, according to Hegel, the fear of death gives war its metaphysical value, by confronting the combatants with the negativity that encircles life and helping them rise from their daily mundane experiences towards the universal.⁴⁰ In this sense, the Kosovo campaign was not a war but a type of hunting: one side was totally protected while the other had no chance of effectively defending itself or counter-attacking. Many (retired) army and armchair generals argued during the campaign that it could not be won swiftly without ground troops. They were proved partly wrong. A war without casualties for your side, an electronic game type of war or Reagan's unbeatable 'star wars' may be the dream of every military establishment. But a war in which a soldier's life is more valuable than that of many civilians cannot be moral or humanitarian. In valuing an allied life at hundreds of Serbian lives, the declaration that all are equal in dignity and enjoy an equal right to life was comprehensively discredited.

As we learned after the end of the war, the total protection of Western aircrews meant that the success of bombing was extremely limited. Despite NATO's cautious triumphalism during the campaign, only thirteen Serbian tanks were hit in eleven weeks of intensive bombing and the vast majority of Serbian surface-to-air missiles survived. Civil targets were easier to identify and destroy. According to first estimates, some fifty bridges were destroyed as well as a number of TV and radio stations, hospitals, schools and nurseries, cultural, economic and industrial sites, computer networks and electricity generating plants.⁴¹ The targeting of the civilian infrastructure and the repeated mistakes led Mary Robinson to state, after four weeks of bombing, that the campaign had 'lost its moral purpose'.⁴²

This apparent divergence indicates, however, the main character of the new military humanism as a combination of morality and might, of values and effectiveness. While, in modernity, morality and might were related externally as ends and means and were often in conflict, they have now become fully integrated into a morality/force amalgam. The wide acceptance of the morality of action increases its effectiveness and the success of an action augments its moral force and persuasiveness. To that extent, the success of an operation cannot be judged morally in isolation from its military conduct and, similarly, the morality of an action cannot be separated from its military outcome. Robinson was still distinguishing between morality and military action or

between ends and means. But the new moral-military order does not carry out such compartmentalized judgements. Morality exists if it is effective and military action is moral if it succeeds. On those grounds, Kosovo was the first successful just war of the new moral order. The obvious failures of its aftermath, the extensive ethnic cleansing and murder of Serbs, the inability to reach a political solution and the spread of the war into Macedonia can be seen as the not totally undesirable side-effects of the new order. When morality replaces politics and military action policies, a sense of permanent crisis with recurring emergencies becomes dominant. Moral principle necessarily diverges from the messy world of social, political or ethnic conflict and creates the context, the justification and the potential for permanent military action. The current situation in Macedonia is telling in this respect. NATO forces are deployed in Macedonia to 'harvest' the weapons of the Albanian insurgents, the weapons NATO gave them in Kosovo. As a Greek saying goes, one harvests what one has sown.

Finally, the application of overwhelming force according to the principles of the new morality gave the Kosovo campaign the character of a policing operation. The close links between sovereign action and policing have been discussed by Benjamin, Schmitt and Agamben.

Whereas the sovereign is the one who, in proclaiming a state of emergency suspending the validity of the law, marks the point of indistinction between violence and law, the police operate in what amounts to a permanent 'state of emergency'. The principles of 'public order' and 'security', which the police are under obligation to decide on a case-by-case basis, represent a zone of indistinction between violence and law perfectly symmetrical to that of sovereignty.⁴³

The policing character of military humanism is apparent at many levels. Anthony Giddens has argued in his *Third Way* that the liberal-democratic state is the 'state without enemy'.⁴⁴ This 'foeless' society is now reproduced at the international level. There are two aspects to this: first, the new just or humanitarian war does not attack a *justus hostis*, an enemy who belongs on the same place as the attacker, but attempts to stop, apprehend and punish a criminal or rebel against the international order. Second, the universal morality and military might of the new order makes its reach truly global.

During the Kosovo and even more during the Afghanistan campaign, a main strategic goal of the United States was to build an international coalition supporting the action with various degrees of involvement. President Bush stated repeatedly after the September 11 atrocities that 'whoever is not with us is with the terrorists'. The enemies of the new order are terrorists and all means of suppression are justified in the campaign against terror. If we concentrate on the Kosovo campaign, its policing character was evident in a number of ways: the continuous presentation of the Milosevic regime and of the Serbs as criminals; the attacks on civilian installations and the acceptance of a certain degree of 'collateral damage'; the exclusive use of air bombardment as the means of war and the desire to protect the policemen/soldiers fully; finally, the huge pressure

put on the Belgrade regime to surrender Milosevic to the Hague tribunal in return for large sums in aid, a practice that reminded of the rewards and bounties offered for the arrest and surrender of great criminals to the authorities. In all these actions, the political opponent was painted as a common and brutal criminal, someone who violates the universal moral codes for selfish, cruel or mad ends. Indeed, all recent wars involving the United States have been characterized by what one could call a 'posse' mentality, the first aim of which was to arrest some evil person or bring an evil regime to justice. Noriega in Panama, Mohammed Aided in Somalia, Milosevic in Yugoslavia, Osama Bin Laden were the master criminals. Similarly the Haiti invasion and the Gulf War were presented as operations to stop and punish criminal activities. No area of the globe can be abandoned, since the new integrated order can be disturbed by activities in its most remote reaches.

Second, this type of globalization leads to the gradual abandonment of the territorial principle of modern statehood wedded to geographical landmarks, historical separations and political demarcations. Territory and place, the dominant characteristics of modern sovereignty, are being replaced by a boundless global space which, unlike the mountains and seas and frontiers of twentieth-century international relations, does not hinder operations but has become an infinite resource of the new order. Space with its all-seeing, all-listening satellites, its all-conquering rockets, its vastness syncopated by the non-communicating billions of stars, creates a mirror for the earth of the new millennium.

The largely undefended bombardment of Yugoslavia and Afghanistan is the ultimate sign of the military superiority of one side and became acceptable only because the enemy had been successfully presented as morally inferior criminals against whom the use of lethal technology is not only justified but indispensable. More importantly however air bombardment is symbolic of the boundlessness of a new type of power not constrained by geographical boundaries and state frontiers. It is not coincidence that the first war of the new moral order was an air campaign as was the attack on Manhattan and the Pentagon, the 'first war' of the twenty-first century according to President Bush. While modern sovereignty was bound to place, the new order is both modelled on the openness of space and uses space as its most appropriate conduit. It is organized horizontally alongside planes of activity that bear no relation to the constraints earth places on human activity. No geographical limits, state frontiers or claims to sovereignty can restrict or restrain the writ of the new order. Technology and communications provide the means of global presence and the morality of humanism the eternal values of its action. Space and time become resources rather than hurdles for the new moral order. Limits placed hitherto by state sovereignty simply call for the local adjustment of action, public opinion reservations for an intensification of the moral message that qualifies the action. Its real limits are formed by pragmatic and utilitarian calculations: Rwanda did not have much strategic, political or economic interest for the new order, as was the case with Afghanistan after the Soviet defeat. But, when recent events showed that 'remote' places like

Afghanistan are possible sources of disturbance, American policy included them in its list of candidates for correction.

But the criminalization of the enemy on a global scale can have dreadful side-effects. A painful lesson from the atrocities of September 11 was that enemies of the new moral order, themselves the keepers of another truth and the enforcers of a different morality, have adopted the role of criminals and are comfortable in their designation as terrorists. When politics becomes policing and policies moral action, some political opponents willingly take on the rogue roles assigned to them and bring to atrocious completion the caricatures of their motives and evil.

The attacks on America had all the characteristics of an evil reversal of the new order. The terrorists used hijacked passenger airliners as a combination of fighter aircraft and missile, as manned and guided missiles. By doing this, they adopted and reversed the globalizing principle that the most symbolic strike and most effective punishment of enemies/infidels is delivered from the air. The immediate reaction to the atrocities illustrated the conceptual difficulties created by the emergence of the new order while the ideas, arrangements and principles of the old are still alive. When President Bush announced that the attacks meant war against terrorists and those who harbour them, a clamour of voices from the least hawkish of commentators responded 'yes, but who is the enemy'. In many interviews that followed the attacks, the question kept coming back: how can we speak of war if we do not have an enemy state or government or President against whom we can declare war? But, while the imagery of sovereign states and of recognizable enemies still dominates the liberal imaginary, the response advised by most American and British commentators is consistent with the priorities of the new order. The terrorist atrocity was presented as an attack on civilization and freedom, which called for a 'crusade' led by the Americans leading the freedom-loving nations. Second, the military response, while unconventional in the absence of a state-enemy, should use 'decisive force', as Wesley Clarke, a former allied commander in Europe, argued and, should involve 'information, law enforcement and military force'.⁴⁵

The discussion of the role of law enforcement in the actions against terrorists is further evidence of the impasses created by the emerging world order. Liberal commentators like Michael Ignatieff argued that the 'most effective response may not be the instant vengeance of a cruise missile but concerted international police work that leads to arrest, extradition, trials and imprisonment of perpetrators'.⁴⁶ Geoffrey Robertson went furthest in this respect, arguing that the terrorist attacks should be described as 'crimes against humanity' and treated according to the remedies and sanctions available in international law. Others less aware of the fine distinctions of international law called the attacks 'war crimes', arguing that they were acts of war and crimes at the same time, indicating again the conceptual difficulties created by this new type of criminal hostilities and the acceptable response to them. To be sure, current international law, still wedded to the remnants of state sovereignty, does not recognize non-state sponsored terrorism as a crime against humanity. Robertson has argued

consistently that terrorism of all kinds should be subjected to the laws of war irrespective of its links with a state or states. Its perpetrators should be delivered to the International Criminal Court, which should be hastily established, and all international law provisions and restraints should be applied to the military action against the culprits. These usually include the authorization of the Security Council, proportionality in the conduct of operations and compliance with the laws of war.⁴⁷

But the main character of the new moral order is precisely that it does not make clear distinctions between moral and legal arguments or between enemies and criminals. In all recent wars, the role of international law has been secondary. With the exception of the Gulf War and Somalia, the Security Council was bypassed. The Kosovo campaign in particular could hardly be reconciled with the current state of international law. Policing operations follow a different logic from that of wars, which are supposed to comply with the niceties of international law. As a more realistic professor of international law put it, 'terrorists benefit from no privilege as soldiers under the laws of war. . . . They are therefore, legally speaking, "unprivileged combatants" – to be fought on military terms with respect to non-combatants in their midst but if captured treated as criminals.'⁴⁸ War and police operations have been merged in the same way that morality and force have become largely interdependent.

The arguments from international law have great value at the moment of writing this when the bombardment of Afghanistan has not provided any concrete results yet in the war against terrorism. But, from a wider perspective, they miss the point: in a just war against criminals, international law can be seen as part of the process of moralization of politics with all the problems presented above. A prominent aspect of this tendency is the proliferation of international penal courts and tribunals. These were initially of a specialist jurisdiction aimed at punishing the vanquished opponents in Yugoslavia or Rwanda. But the creation of more permanent criminal courts and other quasi-legal institutions will allow the new moral order to assume fully the mantle of legality and to mobilize legal procedures not just after the event, instances of which can still be criticized as victors' justice, but also in advance of the action.

Undoubtedly, all measures that remove human rights and their administration from governments, the main villains of the piece, are welcome. Independent judges, sensitive to the plight of the oppressed and dominated of the world and appointed for long periods with security of tenure, are better qualified to judge war criminals than diplomats and *ad hoc* governmental representatives. This is not the place to examine in detail the many criticisms of the use of criminal responsibility as a method of promoting human rights, nor of the specific shortcomings of the treaty of Rome, which established an International Criminal Court (ICC). A few general comments are necessary however. The symbolic value and the emotional force generated by war crime prosecutions are undoubtedly considerable, particularly for those on the 'right' side of the conflict that led to the crimes. But, as we know from domestic experience, the individualization and criminalization of politics has rarely ended political conflict. Similarly, one

suspects that not many wars or atrocities were prevented because leaders feared for their fate, if defeated, and not many dictators were deterred by Nuremberg or will be deterred by Pinochet's sojourn in Surrey. Criminal punishment, like all individualized legal procedures, is likely to have little effect on massive human rights violations, particularly if the minimal media coverage of the Yugoslav war crime tribunal and the non-existent Rwandan one are an indication of popular interest.

In the light of recent events it is important to comment on the attitude of the United States towards the ICC. The Americans were the greatest enthusiasts for the tribunals for Yugoslavia and Rwanda. When it came to negotiations for the permanent criminal court, however, the American position was reversed. The Americans fought hard, using threats and rewards, to prevent the universal jurisdiction of the court.⁴⁹ They claimed that the court would be used for politically motivated prosecutions against American soldiers when, as the world's last superpower with global interests, they invade or intervene on foreign soil. The Americans tried to restrict the court's jurisdiction to nationals of states that have ratified the treaty, something which would have undermined the premise behind the new court. David Scheffer, the American representative, stated that, if the conference approved universal jurisdiction for the court, the United States would 'actively oppose' it from its inception.⁵⁰ The conference, anxious to include the major international military power in the treaty, seriously restricted the court's powers and weakened its independence, but did not give the absolute guarantee that no American soldier would ever be brought before the court. As a result, the United States was one of seven countries, which included the 'usual rogue' states of Iraq, Libya and China, to vote against the final and much compromised version. And when Clinton signed the treaty of Rome, on the last day of his presidency, he set into motion a series of events that may jeopardize the very existence of the fledgling world court. International law experts have been asked to find ways for President Bush to 'unsign' the treaty; the American Service Members Protection Act discussed in Congress in the summer of 2001 authorizes the President to use force to free Americans 'captured' by the court, a provision which has given the legislation the nickname of the Hague Invasion Act.

The United States usually promotes the universalism of rights. Its rejection of the world criminal court was a case of cultural relativism that took the form of an imperial escape clause. It was also an implicit admission that war crimes are not the exclusive preserve of 'rogue' regimes.⁵¹ The new order is characterized by its moral commitment but also its flexibility, in which moral language and legal procedure are easily interchangeable. It should not surprise us. Universalism, domestically and internationally, comes with an opt-out facility. This is not just a question of the hypocrisy of power; a claim to universality can be made, if one power at least is not covered by it and is able to define the parameters of the universal. The universal is always declared by a singular and this declaration exempts the singular from the universal's application and force. This was France in the early modern order and the United States in the new moral order.

Notes

- 1 Among many, see the following introductions to the history and philosophy of human rights: Louis Henkin (1990) *The Age of Rights*, New York: Columbia University Press; Norberto Bobbio (1996) *The Age of Rights*, Cambridge: Polity; Jack Donnelly (1989) *Universal Human Rights in Theory and Practice*, Ithaca, NY: Cornell University Press.
- 2 Hannah Arendt (1979) *The Origins of Totalitarianism*, San Diego: Harvest, p. 299.
- 3 An extreme illustration of this problem existed until 1998, in the most successful human rights machinery, the European Human Rights Convention. While the Convention provided for a semi and a fully judicial body (the Commission and the Court), the final decision in cases not referred to the Court was taken by the Council of Ministers. As a result, many politically controversial cases were left to the Ministers who, rather than accept the decisions of the investigatory Commissions, put them on hold. The problem was confounded by the fact that the individual who had launched the complaint was not entitled to refer the case to the Court for final determination. This has changed with the implementation of the 11th Protocol to the Convention and the merging of Commission and Court. But the members of the new unified Court are still nominated by the governments and, from past experience, are reluctant to vote against perceived national interests. It may sound impossible but, unless governments are removed from the running of human rights institutions, these will have little legitimacy.
- 4 Jean Vartier (1970) *Les procès des animaux du Moyen Age à nos jours*, Paris: Hachette; Luc Ferry (1992) *The New Ecological Order*, trans. Carol Volk, University of Chicago Press, pp. ix–xvi.
- 5 ‘At common law, it used to be the case that prisoners, at any rate if convicted of felonies, lost all their civil rights and liberties. They even lost the right to bring legal proceedings, so that they became, in legal terms, non-people’ (David Feldman (1993) *Civil Liberties and Human Rights in England and Wales*, Oxford: Oxford University Press, p. 276). In a slow process, greatly facilitated by decisions of the European Court of Human Rights in the 1970s and 1980s, prisoners have been admitted to a second-class humanity. See Stephen Livingstone and Tim Owen (1993) *Prison Law*, Oxford: Oxford University Press, particularly chs 3, 6 and 10.
- 6 The Great Ape project, a group of scientists, philosophers and lawyers which includes among others Douglas Adams, Richard Dawkins, Jane Goodall and Peter Singer, has drawn up a list of rights for large primates and argues that chimpanzees, orang-utans and gorillas should be given rights to life, liberty and freedom from torture. Peter Singer (1999) ‘Rights for chimps’, *The Guardian* 29 July: 9; Peter Singer and Paola Cavalieri (eds) (1993) *The Great Ape Project: Equality before Humanity*, London: Fourth Estate.
- 7 Christopher Stone (1972) ‘Should trees have standing? Towards legal rights for natural objects’, *Southern California Law Review*.
- 8 Marie-Angèle Hermitte (1988) ‘Le concept de diversité biologique et la création d’un status de la nature’, in *L’homme, la nature, le droit*, Paris: Bourgeois.
- 9 H. L. A. Hart (1997) *The Concept of Law*, 2nd edn, Oxford: Clarendon, pp. 189–94.
- 10 Claude Lefort (1986) *The Political Forms of Modern Society*, ed. John Thompson, Cambridge: Polity, p. 240.
- 11 If the essence of man is to be a universal attribute, it is essential that *concrete subjects* exist as absolute givens; this implies an empiricism of the subject. If these empirical individuals are to be men, it is essential that each carries in himself the whole human essence, if not in fact, at least in principle; this implies an idealism of the *essence*. So empiricism of the subject implies idealism of the essence and vice versa.
(Louis Althusser (1969) *For Marx*, trans. B. Brewster, London: Allen Lane, p. 228)
- 12 Joanna Hodge (1995) *Heidegger and Ethics*, London: Routledge, p. 90.
- 13 Jean-Luc Nancy (1991) *The Inoperative Community*, Minneapolis: University of Minnesota Press, p. xxxviii.

- 14 Martin Heidegger (1977) 'Letter on humanism', in *Basic Writings*, ed. David Farrell Krell, San Francisco: Harper, p. 221.
- 15 Jean-Luc Nancy, op. cit.: 15.
- 16 Ibid.: 35.
- 17 F. Nietzsche, *The Will to Power*, trans. W. Kaufmann and R. J. Hollingdale, New York: Vintage, pp. 765, III, 401.
- 18 Ibid.: 783, III, 410.
- 19 C. H. Waddington (1960) *The Ethical Animal*, London: Allen & Unwin, p. 187.
- 20 Jean-Francois Lyotard (1989) *The Differend*, trans. G. Van den Abbeele, Manchester: Manchester University Press, p. xi.
- 21 Carl Schmitt (1997[1950]) *Der Nomos der Erde in Volkerrecht des Jus Publicum Europaeum*, Berlin: Ducker & Humblot.
- 22 Michael Walzer (1980) *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, London: Penguin, is the best introduction to the topic.
- 23 Gregory Ananiades (2000) 'The new nomos of the earth: thoughts on the contemporaneity of Carl Schmitt', *Contemporary Issues* 22(74–5): 39.
- 24 Ibid.: 48.
- 25 This was particularly evident in Britain during the Kosovo conflict, where consistently high majorities supported the war. The American reaction was more muted. A majority opposed the war when respondents were asked to contemplate more than fifty American casualties.
- 26 *The Guardian* (1999) 'Iraq is falling apart; we are ruined', 24 April: 14.
- 27 Quoted in ibid. For a recent and moving presentation of the damage sanctions have inflicted on the Iraqi people, see James Buchan (1999) 'Inside Iraq', *Granta* 67: 169–92.
- 28 Alison des Forges (1999) *Leave None to Tell the Story: Genocide in Rwanda*, New York: Human Rights Watch, pp. 172–7.
- 29 Linda Melvern (1998) 'How the system failed to save Rwanda', *The Guardian* 7 December: 10.
- 30 Alison des Forges, op. cit.: 638–9. When the US was asked by various NGOs to jam RTLM, a radio station which was inciting genocide, the State Department, after receiving legal advice, responded that 'the traditional American commitment to freedom of speech was more important than disrupting the voice of genocide' (p. 641).
- 31 The full story is chillingly told in Alison des Forges, 'Ignoring genocide', op.cit., pp. 595–635 and 607.
- 32 Costas Douzinas, op.cit., ch. 5.
- 33 Norman Lewis (1988) 'Human rights, law and democracy in an unfree world', in Tony Evans (ed.), *Human Rights Fifty Years On: A Reappraisal*, Manchester: Manchester University Press, p. 89. For the relationship between domestic policies and international attitudes, see P. G. Lauren (1996) *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination*, 2nd edn, Oxford: Westview Press, 1996.
- 34 Jürgen Habermas (1999) 'Bestialität und Humanität', *Die Zeit*, 29 April.
- 35 *The Guardian*, 29 April 1999.
- 36 Barry Buzan (1999–2000) 'The conduct of war', *Bulletin of the Centre for the Study of Democracy*, 7(1): 2.
- 37 Writing in the tense days after the terrorist attacks on New York and Washington, one observes a tendency in certain parts of the American media to demonize the whole Arab nation or indeed all Muslims. It could be seen as a mirroring effect of the demonization of the United States by the extreme Islamists who were prepared to commit suicide and take with them the innocent citizens of the 'Great Satan'.
- 38 *The Observer* 16 May 1999, p. 15
- 39 None of this explains or justifies the atrocities committed by Serbs and the systematic ethnic cleansing of the Kosovo Albanians. The actions of the Serbian police, paramilitaries and army will enter the annals of twentieth-century barbarism alongside those of Hitler, Stalin, Saddam Hussein and Pol Pot. No moral arithmetic exists to allow us to

compare the number of massacred Albanians with that of the maimed Serbs, or of the gassed Kurds with that of starving Iraqis. Nor would a few Texan or Scottish dead soldiers in Kosovo balance out the hundreds of killed civilians. To paraphrase the Holocaust survivor Emmanuel Levinas, in every person killed the whole humanity dies.

- 40 In order not to let them become rooted and set in this isolation, thereby breaking up the whole and letting the community spirit evaporate, government has from time to time to shake them to their core by war. By this means the government upsets their established order, and violates their right to independence, while the individuals who, absorbed in their way of life, break loose from the whole and strive after the inviolable independence and security of the person, are made to feel by government in the task laid on them their lord and master, death.

(Hegel (1977) *The Phenomenology of Spirit*, trans. A. V. Miller, Oxford: Oxford University Press, pp. 272–3)

Jacques Derrida (*Glas*, Lincoln: University of Nebraska Press) comments: ‘So war would prevent people from rotting; war preserves “the ethical health of peoples”, as the wind agitating the seas purifies them, keeps them from decomposing, from the corruption, from the putrefaction with which a “continual calm” and a “perpetual peace” would infect health’ (1986: 101, 131–49).

- 41 Professor Ian Brownlie, the eminent human rights expert, in evidence to the International Court of Justice said, on 10 May 1999: ‘There is no general humanitarian purpose to the [bombings] . . . the pattern of targets indicates political purposes unrelated to humanitarian reasons’ (*The Guardian*, 11 May: 8). The Court declined the Serbian government’s application to declare the bombing illegal, although it expressed concerns about its effects on civilians

- 42 *The Guardian* (1999) ‘Shift in bombing a warning to Serbs’, 29 May: 4.

- 43 Giorgio Agamben (1993) ‘The sovereign police’, in Brian Massumi (ed.) *The Politics of Everyday Fear*, Minneapolis: University of Minnesota Press, p. 62.

- 44 Anthony Giddens (1998) *The Third Way*, Cambridge: Polity, p. 70.

- 45 Wesley Clarke (2001) ‘Decisive force’, *The Guardian*, 15 September.

- 46 Michael Ignatief (2001) *Financial Times*, 13 September.

- 47 Geoffrey Robertson (2001) ‘There is a legal way out of this’, *The Guardian* 14 September, and see his *Crimes against Humanity*, Penguin, 2000. In the same vein, see Ann-Marie Slaughter (2001) ‘A defining moment in the parsing of war’, *Washington Post* 16 September.

- 48 Kenneth Anderson (2001) ‘Language, law and terror’, *Times Literary Supplement*, 21 September.

- 49 *The Guardian* (1998) ‘US troops will quit, allies warned’, 10 July: 3.

- 50 *The Guardian* (1999) ‘Self-interest brings court into contempt’, 14 July: 15.

- 51 Recent historiography has shown that atrocities are a common occurrence in wars and have been committed by Allied forces in both world wars and in Vietnam. See Joanna Bourke (1999) *An Intimate History of Killing: Face to Face Killing in 20th Century Warfare*, London: Granta, ch. 6. The concern was therefore to avoid having American soldiers tried for atrocities by an international body and try them, if necessary, under American military and criminal law, as in the case of Colonel Callan after the My Lai massacre.