"Responding to Humanitarian Crises"
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Introduction

Everyone agrees that the international community must develop better mechanisms for responding to humanitarian crises. The best mechanism for responding is simply to intervene to prevent a crisis from developing in the first place. However, because the principle of sovereignty imposes strict constraints on action across state borders, international actors are often unwilling or unable to interpose themselves until after conditions have escalated into a full-blown crisis, by which time it has usually become a matter of managing human misery rather than ending or averting it.

Respect for sovereignty is an organizing principle of the existing international legal system, and so abandoning it would fundamentally change how the units of international politics are constituted and relate to one another. The strongest argument against abandoning sovereignty is the potential for unintended consequences with respect to peace, political stability, and the effective protection and promotion of human rights. Sovereignty as we now know it is one of the few bulwarks in the international system against naked imperialism and it plays an important role in regulating competition for influence among powerful states. There is a real worry that in developing principles that allow us to prevent massive suffering and need in one part of the world, we will produce will produce equal or greater suffering elsewhere by faciliating imperial projects and destabilizing relations between competitors.

One way to defuse this worry is to frame interventions across borders as principle-based exceptions to a general rule of state sovereignty. If we assume that protecting and promoting individual human rights is the primary goal of the international

system, and that both state sovereignty and peace and security are important to us primarily as vehicles for achieving this, then (it is argued) we may use the standards of international human rights to identify, and limit, cases in which the presumption of sovereignty may legitimately be set aside. However, the relationship between sovereignty and humanitarian crises is more complex than this picture allows. Theorizing about humanitarian crises inevitably includes recommendations about states and this makes it a species of non-ideal theory. All actual states are rife with injustice, both in their internal structures and in the relationships these structures establish with those outside a state's borders. This fact must be reflected in our reasoning about humanitarian responses.

Sovereignty and Humanitarian Crises

Typically when we think of a humanitarian crisis we think of the aftermath of a natural disaster. However, the majority of humanitarian crises are caused by intra-state conflicts. Such conflicts destroy the physical and economic infrastructures on which people depend, prevent them from sowing and harvesting crops, devastate the landscapes and ecosystems they inhabit, separate them from communities and family members, and often require long-term relocation under conditions of compromised physical security. The predominant cause of intra-state conflicts is intense and systematic neglect and abuse of human rights, often coinciding with ethnic, linguistic, racial or religious differentiation.

Even in cases where the precipitating cause is a natural disaster, it is often not the disaster itself but rather that event in combination with a pre-existing pattern of neglect or

abuse that produces a humanitarian crisis. Intense disempowerment and deprivation compromise individuals' ability to sustain their lives in the face of extreme climactic or geologic events. The problems the international community confronts in cases of humanitarian crises are thus very closely bound up with the problems of intra-state conflict and systematic neglect and abuse of human rights, especially the rights of national minorities and indigenous peoples.

When thinking about possible strategies for addressing these problems, state sovereignty often appears as the villain of the piece. The principle that states must be respected as sovereign within their borders imposes strict constraints on action across borders and outside interference in a country's governing structures. Such constraints seem arbitrarily to empower those who happen to control a state's apparatus to use that control in any way they see fit, regardless of how this impacts the rest of the population. Some argue on these grounds that a strong principle of sovereignty is incompatible with basic principles of equal moral concern and respect for human dignity.[1]

Yet although sovereignty has been put to many villainous purposes, it is not true that it is inherently at odds with the principles of equal moral concern and respect for human dignity. Respect for sovereignty is closely connected to the principle that all peoples have a right to self-determination, and this last has been argued by many theorists, especially advocates for the rights of indigenous peoples, to be a basic element of human dignity.[2] Traditionally, self-determination has two dimensions in international

[1] See for example Christopher Morris, *An Essay on the Modern State* (Cambridge University Press: Cambridge, 1998), Carol Gould, "Self-Determination beyond Sovereignty: Relating Transnational Democracy to Local Autonomy", *Journal of Social Philosophy* 37 :1 (Spring 2006), 44–60.
[2] See S. James Anaya, "The Contemporary Definition of the International Norm of Self-determination", *Transnational Law and Contemporary Problems* 3:1 (1993), 131-164; Erica-Irene Daes, "Striving for Self-determination for Indigenous Peoples" in *The Right to Self-determination*, Y.N. Kly and D. Kly, eds.

law: internal, in which a state's entire population determines the form and operation of its government; and external, in which a population determines its state's relationship to other states.[3] Both dimensions speak to the importance for a population of being able to limit participation in their joint decision-making and being able to insist that whether their decisions are binding not depend on what would please other populations. Sovereignty has been an important legal vehicle for making these aspects of self-determination effective for populations who have been subject to imperialism and colonization, and in this it has been important for resisting exploitation and repression and not just for aiding it.[4]

Three different theoretical arguments have been offered to justify a strong principle of sovereignty: valuable relationship arguments, which point out that in some contexts, respect for individuals' capacities to develop and live out personally salient conceptions of what is important and valuable establishes a general prohibition on interfering with the structure and operations of another polity; individual rights arguments, which point to sovereignty's value as an effective means for securing individuals' human rights; and, international peace arguments, which emphasize the value of sovereignty as a means for securing relations between states that minimize incentives to engage in violent conflict.[5] In addition to these theoretical arguments there

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(Clarity Press: Atlanta, GA, 2001), pp. 50-62; Cindy Holder, "Self-determination as a Universal Human Right", *Human Rights Review* 7:4 (2006), 5-18.

[3] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press: Cambridge, 1995), pp. 71-89, 126-140.

[4] On this see Benedict Kingsbury, "Sovereignty and Inequality", *European Journal of International Law* 9 (1998), 599-625, Antonio Cassese, *op cit*, pp 108-118, 320-326.

[5] For a valuable relationship argument see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations, 2nd edition* (Basic Books: New York, 1993), and "The Moral Standing of States: A Response to Four Critics", *Philosophy and Public Affairs* 9:3 (1980), 209-222. For individual rights arguments see Charles Beitz, *Political Theory and International Relations* (Princeton University Press: Princeton, 1979), pp. 92-123, Allen Buchanan, "Recognitional Legitimacy and the State System",

are two important practical considerations. First, the operation of international law as a system of intelligible norms presupposes the ideal of sovereignty. This is true not only for the laws that govern war, conflict, commerce and the sea, but also for humanitarian law and international human rights law. International human rights law uses domestic civil rights standards and legal institutions as a framework on which to hang its own jurisprudence and legal authority, so that the content of international human rights at the very least relies upon and in some instances derives from the content of each member state's domestic legal regimes. Because of this, it is not obvious that we could keep the international human rights structures that now exist and simply pull the assumption of sovereignty out from under them.[6]

Second, the fact that the principle of sovereignty is an important norm of the international system forces international actors to explain intrusive behavior, both to their own citizens and those abroad, and to attempt to justify themselves against the background of the theoretical arguments for sovereignty described above. This has a limiting effect, however incomplete, on the extent to which states are free to opportunistically intervene in other jurisdictions. Benedict Kingsbury argues that in this, the inhibitions associated with the principle of sovereignty at least slightly moderate inequalities of power and provide a shield for weak states and institutions, and have operated as one of the few bulwarks against imperial projects in the post-World War II period.[7] Moreover, many of the arguments against a strong presupposition of

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Philosophy and Public Affairs 28 (1999), 46-78. For international peace arguments see Hedley Bull, *The Anarchical Society, 3rd edition* (Columbia University Press: New York, 2002), Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford University Press: Oxford, 2002).

[6] On the general problem of attempting to theorize toward just institutions without accepting some principle of state sovereignty see Allen Buchanan, *Justice, Legitimacy and Self-determination: Moral Foundations for International Law* (Oxford University Press: New York, 2004), pp. 322-327.

[7] Benedict Kingsbury, *op cit.*

sovereignty use language and forms of argument that echo nineteenth century imperialists' assertion of a developmental divide between the civilized and uncivilized world as a justification for invasion and exploitation of non-European territories.[8] The possibility of opening the door to imperialism, and the extent to which the language of moral concern has facilitated and provided cover for racist exploitation in the recent past ought to give us pause in the face of calls to completely abandon sovereignty.

Sovereignty and Human Rights

In fact, the nature of the current international system is such that it often appears that the only thing worse than a practice of respect for the principle of sovereignty is the absence of such a practice. This has led some to propose a principle of "contingent sovereignty": sovereignty that is contingent on a state's discharging certain responsibilities.[9]

Contingent sovereignty differs from traditional understandings of the concept in the relationship that is posited between sovereignty and statehood. Traditionally in international law, sovereignty has been thought of as a corollary of statehood. In the same way that individual human beings are treated as being physically inviolable simply in virtue of their being persons, states have been treated as having sovereignty simply in virtue of their being states. States officially count as states under international law through their being recognized as such by other states. There are two theories of how this

[8] Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty", *International Journal of Human Rights* 6:1 (Spring 2002), 81-102. For a general discussion of the connection between imperialism and standards of civilization in the history of international law see Antony Anghie, "Finding the peripheries: sovereignty and colonialism in nineteenth century international law", *Harvard International Law Journal* 40:1 (Winter 1999), 1-80.

[9] See for example Stuart Elden, "Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders", *SAIS Review*. 26:1 (2006), 11-24, Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers: New York, 1997).

recognition works: constitutive and declaratory. On constitutive theories, to be a state just is to have been declared to be a state by the relevant international actors (i.e., already existing states). Recognizing a state is thus analogous to christening a ship. On declaratory theories, states do not become states by being recognized; recognition is rather the means by which participants in the international legal order signal to one another and to their institutions that there is good reason to think that the criteria for statehood have been met. Here, recognizing a state is analogous to issuing a passport; international actors treat passports as authoritative declarations of citizenship not because the issuing of a passport makes the person who holds it a citizen but because the mechanisms by which passports are issued are reliable ones for judging the truth of a citizenship claim.

Constitutive theories have proved difficult to maintain consistently and seem not to capture actual international legal practice. Because of this, most theorists of international law subscribe to some form of declaratory theory. Declaratory theories usually include being treated as a state by other states as one of the criteria necessary for statehood, and then introduce other criteria according to the view of what properties are necessary for an actor to exercise the functions of statehood in the international legal system. These considerations of function are part of what has made it possible in recent years to talk not just about the rights but also the responsibilities of states, and to develop theoretical arguments for making recognition contingent on certain standards of legitimacy. However, once a state has been recognized, the right to sovereignty has been thought to follow as part of the functional architecture that allows a state to continue to operate as such within the international system.

In contrast, the concept of contingent sovereignty allows that statehood and sovereignty may in some instances come apart. Within contingent conceptions of sovereignty, failure to meet the conditions of having rights to sovereignty is not grounds for thinking that we are no longer confronted with an example of a state. Rather, it is grounds for thinking that the case at hand is an example in which statehood obtains without establishing rights of sovereignty. Allen Buchanan has proposed that we make sense of this possibility by distinguishing between states and governments.[10] Stuart Elden suggests rather an increased fluidity in the concept of sovereignty, so that governance, exclusion and territoriality are no longer assumed necessarily to coincide.[11] The U.N.'s International Commission on Intervention and State Sovereignty argues that states have rights of sovereignty only in virtue of their participation in a community that is committed to upholding them.[12] These proposals require us to rethink not just sovereignty and territoriality, but the very practice of international recognition.

As described above, international recognition is about the presence or absence of *statehood*. Sovereignty plays an important evidentiary role in this judgment, insofar as unwillingness to extend rights of sovereignty is taken to weigh against the presence of a state. In contrast, the concept of contingent sovereignty proposes either that the practice of recognition has two dimensions, one related to statehood, the other to sovereignty; or that unwillingness to extend rights of sovereignty ought not in fact be relevant to practices of recognition. Buchanan argues for the former, two-dimensional, view of

[10] Allen Buchanan, *Justice, Legitimacy and Self-determination: Moral Foundations for International Law*, pp. 281-284.
[11] Stuart Elden, *op cit*.
[12] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, (International Development Research Centre: Ottawa, 2001), pp. 12-13, electronic version accessible at http://www.iciss.ca/report-en.asp.

recognition; the International Commission's model proposes the latter: that although recognition is a precondition for acquiring rights of sovereignty, having such rights and being recognized as a member of the international community need not coincide.

These puzzles about how sovereignty relates to statehood are avoided by those who argue that sovereignty *per se* is not something to which states can have rights, either moral or political, at all. For example, Michael Smith has argued that respect for sovereignty ought properly to constrain the sorts of activities that may be undertaken across borders not in virtue of moral or political right to sovereignty that certain activities would contravene, but in virtue of basic principles of political ethics, such as that the obligations of individuals to conform to the demands of a government depends on the extent to which it respects and protects their rights, and that resorts to forceful coercion must be undertaken in a way that limits the potential for distortions based on self-interest and takes into account the potential for unintended harm.[13] In contrast, Mark Stein has outlined how, within a utilitarian theory, considerations for and against interventions across borders might be addressed under basic principles of interpersonal ethics.[14] In both these approaches, decisions about whether to respect existing borders rest not on a consideration of rights to or against intervention, but on considerations of how such respect realizes or contravenes political and moral obligations in general.[15]

Human Rights and Intervention

[13] Michael Smith, "Humanitarian Intervention: An Overview of the Ethical Issues", *Ethics and International Affairs* 12, 63-79.
[14] Mark S. Stein, "Unauthorized Humanitarian Intervention", *Social Philosophy and Policy* 21:1 (Winter 2004), 14-38.
[15] Allen Buchanan has criticized this kind of approach to international law and institutions as naïve. See Allen Buchanan, *Justice. Legitimacy and Self-determination*, pp. 22-29.

In arguing that sovereignty is contingent because the rights of states depend on participation in a collective agreement, the International Commission's position remains state-centered (developed out of and for the perspective of those who control a state). In contrast, Fernando Teson argues that sovereignty is contingent because the rights of a state are derivative of the rights of the individuals who constitute them. In Teson's words,

> because the ultimate justification of the existence of states in the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy but its international legitimacy as well.[16]

Most philosophical arguments for contingent sovereignty resemble Teson's human rights-centered argument.

One important consequence of this emphasis of human rights is that the peace to which respect for a state's sovereignty is supposed to contribute has come to include not only the absence of armed conflict but also the presence of adequate living conditions. This shift both expands the range of humanitarian crises that are potentially legitimate grounds for intervention, and shifts the burden of argument to those who would deny that intervention is permitted in cases where the existence of a humanitarian crisis has been established. Such a shift in the burden of argument places front and centre questions about action to prevent humanitarian crises and whether we may have not just permission but a duty to intervene. These questions are difficult even to ask within the traditional framework for treating questions about intervention across borders, just war theory.

[16] Fernando Teson, *op cit*., p 15.

Just war theory takes the paradigm of intervention to be the threat or use of coercive force, and emphasizes motivations, rules of conduct, and standards of fit between these and the ultimate goal, assumed to be restoration of peace.[17] This focus on coercion and violence frames considerations of proportionality, externalities and possible triggering conditions in a way that makes it difficult to justify preventive action. The emphasis in just war theory on the duties attached to social and political roles such as head of state, military commander or field officer also limits the possibilities of justifying the costs of intervention unless the harms involved are egregious. The legacy of just war theory can still be seen in the emphasis on justifying intervention from the perspective of the international community, and the emphasis on choice of means.

Preventive action is also difficult to justify if our duties to those in other countries are duties of beneficence or charity rather than duties of justice. To argue that we do not have obligations of justice to those with whom we do not share state institutions is to argue that we do not have principled duties to ensure that people outside our borders benefit from our social and political organization. What we owe to people outside our borders are moral duties not to do them harm, and to rescue or assist them should we find them in a situation of imminent danger, but we do not have a duty to ensure that they are as well off as those with whom we share institutions. It is not that people with whom we do not share state institutions do not matter. Rather, in the absence of shared state institutions we may treat differences between our situation and that of another as a matter of luck or someone else's wrongdoing. In cases where another is badly off, this means that there is no principled reason for us to bear the costs of remedying that person's

[17] See for example, Paul Christopher, "Humanitarian Interventions and the Limits of Sovereignty", *Public Affairs Quarterly* 10: 2 (April 1996), 103-119; Mona Fixdal and Dan Smith, "Humanitarian Intervention and Just War". *Mershon International Studies Review*. 42 (1998), 283-312.

circumstances rather than her, or the person who put her in those circumstances if it is the result of someone else's harming them. This permission for indifference breaks down when the circumstances are not merely unhappy, but life-threatening or so miserable as to be intolerable. In such an extreme case, we would have a duty to rescue of some sort, contingent on our being well situated to pull the rescue off, and our not having to bear overwhelming costs in order to do so. This view of the duties we have to those outside our borders implies that the level of misery or abuse has to be obvious and extreme, and the likelihood of success has to be high to establish that we must (as opposed to may) incur the costs associated with intervention.[18] The typical case for prevention will not meet this threshold, and so there are very limited prospects within this type of view for establishing a duty to intervene.

There are better prospects for a duty to intervene within views that accept that people outside of our borders have claims of justice and not just charity to contributions to the protection and promotion of their human rights. Among those who accept that duties of justice extend beyond those with whom we share state institutions, some argue that these duties are grounded in our duties to human beings as such, some argue that these duties are grounded in our being connected by a shared set of institutions, and some argue that these duties are grounded in our common membership of a world community. For example, Allen Buchanan argues that we have a natural duty of justice to ensure that all human beings, as moral agents with a primary claim to equal moral respect, have access to institutions that protect their basic human rights.[19] In contrast, Thomas Pogge

[18] See for example Jerome Slater and Terry Nardin, "Nonintervention and Human Rights", *Journal of Politics* 48 (1986), 86-95, Howard Adelman, "The Ethics of Humanitarian Intervention: The Case of the Kurdish Refugees", *Public Affairs Quarterly* 6:1 (January 1992), 61-87.
[19] Allen Buchanan, *Justice, Legitimacy and Self-determination*, pp. 95-97.

argues that we have duties to ensure the existence of institutions that protect the human rights of those outside our borders in virtue of the existence of a global basic structure, or a set of institutions that establishes causal links between our everyday participation in economic, social and political activity and the life prospects and possibilities for action of those who live far away.[20] Nancy Sherman grounds our duties to ensure human rights protections for those outside our borders in our common membership in a "global moral commonwealth", the existence of which makes possible the kind of empathic engagement necessary to act for the benefit of others.[21] Buchanan points out that although duties to those with whom we share institutions do not exclude duties to those outside our borders, duties to fellow citizens may impose constraints on how we may act to discharge those duties.[22]

Some have suggested that our duties to intervene originate in a right of abused and at-risk people to intervention on their behalf . For example, Gillian Brock and Véronique Zanetti have argued in separate contexts that people whose human rights are neglected or abused have a right to intervention on their behalf by any international actor situated to contribute to their relief without excessive self-sacrifice.[23] We should be extremely cautious about arguments for a right to intervention. One of the distinctive features of rights language is not just that it makes individuals the locus of moral concern, but that it does so in a way that normatively empowers them, at least in principle. To be a right-holder is to be the potential subject of a wrong, and not just an object with respect

[20] Thomas Pogge, *World Poverty and Human Rights* (Polity Press: Cambridge, UK, 2002), pp. 52-70.
[21] Nancy Sherman, "Empathy, Respect, and Humanitarian Intervention". *Ethics and International Affairs*. 12 (1998), 103-119.
[22] Allen Buchanan "The Internal Legitimacy of Humanitarian Intervention", *Journal of Political Philosophy*. 7:1, p. 71-87.
[23] Gillian Brock, "Humanitarian Intervention: Closing the Gap Between Theory and Practice", *Journal of Applied Philosophy* 23:3, 277-291; Véronique Zanetti, "Global Justice: Is Interventionism Desirable?" in *Global Justice, op cit,* pp. 204-218.

to which wrong may be done. Right-holders may claim goods and performances from others in virtue of their rights, or they may to decide to forego claims that they are entitled to make. Part of what it is to be a right-holder is to have the power to make others answer for their actions as regards that with respect to which there is a right. In the case of potential beneficiaries of a duty of intervention, none of these elements of right-holding seem to be present. The very situation that makes potential beneficiaries of a duty to intervene candidates for a right to intervention limits their capacity to exert control over the circumstances or manner in which the duties that the right establishes are discharged, or to demand an account when the duty is not discharged satisfactorily.

The problem is not that those judged to have rights to intervention will in most cases not be able to exercise them on their own behalf. Rather, the problem is that the purported right-holders have very little control over whether and under what circumstances the duties that their right establishes are discharged, and little to no capacity to demand accountability for non-performance. In this, the holders of a right to intervention appear not as subjects who originate claims but objects with respect to which right must be done. This worry is exacerbated by the practical observations that in most cases those exercising a right of intervention on the right-holder's behalf will also be a subject of duties following from it, and that it would be difficult to imagine circumstances under which people on whose behalf a right of intervention is exercised successfully secure restitution from those who acted as proxies in the face of a mismanaged or negligent intervention.

In fact, it is not the right-holders that a right to intervention empowers but their proxies. For example, Saba Gul Khattak and Mariella Pandolfi have pointed out in the

context of the Afghanistan and Kosovo interventions, respectively, that there is an inherent limit on the extent to which those on whose behalf interventions purport to be undertaken can contribute directly, and in their own voices, to debates about the form that such intervention takes.[24] Moreover, as noted above, to describe the responses we advocate in terms of human rights is already to benefit from a rhetorical shift in the burden of persuasion; this effect is intensified by describing such responses as called for by a human right to humanitarian intervention. Given the limited possibilities for those on whose behalf such action is advocated to appear directly in discussions about how such rights ought to be interpreted and discharged, this rhetorical positioning of opponents to intervention is worrying, in that parties to the debate who purport to speak on behalf of those with a right to humanitarian intervention enjoy all the rhetorical advantages of the right-holders' moral position without any mechanisms of accountability for the uses to which those advantages are put.

Both Buchanan and Pogge emphasize duties to establish institutional arrangements that are conducive to the protection and promotion of human rights, and in particular our duties to establish institutions that prevent crises from arising in the first place. In fact, the importance of recognizing obligations to prevent as well as redress humanitarian crises is one of the reasons cited by the International Commission on Intervention and State Sovereignty for thinking about intervention across borders in the context of a responsibility to protect rather than a right to intervene.[25] In general, duties to undertake preventive action have been most clearly and persuasively articulated by

[24] Saba Gul Khattak, "Afghan Woman: Bombed to Be Liberated?"*Middle East Report*. 222 (2002), 18-23; Mariella Pandolfi, "Contract of Mutual (In)difference: Governance and the Humanitarian Apparatus in Contemporary Albania and Kosovo", *Indiana Journal of Global Legal Studies*, 369-381.
[25] *The Responsibility to Protect*, *op cit.*,2.28-2.33

theorists who focus on the construction of morally defensible institutions. Pogge argues that it is only from an institutional approach that we can adequately capture the nature of our obligations to address global human rights abuses.[26]

Intervention and the State

Whether they emphasize permission to ignore sovereignty, duties to redress abuse and neglect, or responsibilities to prevent escalation, most contemporary treatments of interventions across borders focus on the balance of harms and benefits that can be expected from various forms of intervention, and on what Tom Farer calls "the threshold condition": the threshold at which harms to those inside a state tips the balance against non-intervention.[27] In this regard, it is important to be clear about what counts as intervention. The term "intervention", even "preventive intervention" usually brings to mind military deployment and the use of force. However, there are a wide range of activities well short of military action through which a state may intervene in the operations of another state. For example, to extend refugee status to another state's citizens or allow them entry despite their own government's having refused to grant them travel papers is not only to criticize another state's political system, but to deny in a very profound way the right of its government to decide how open its borders will be. To actively aid people fleeing a country (as the Swedish coast guard aided Jewish refugees fleeing occupied Denmark in Word War II) is to go even further and infringe territorial integrity. Permitting the broadcast of messages hostile to a neighboring country's

[26] Thomas Pogge, "An Institutional Approach to Humanitarian Intervention", *Public Affairs Quarterly* 6:1 (January 1992), 89-103.
[27] Tom Farer, "The Ethics of Intervening in Self-Determination Struggles", *Human Rights Quarterly* 25 (2003), 388

government, imposing punitive tariffs, attaching conditions to compliance with extradition, prosecuting individuals for activities that are legal in the state in which they were undertaken, and attaching strings to offers of aid or to the restructuring of loans are other ways that officials of one state may undermine the capacity of those in another state to effectively execute a policy. States may also influence the internal relations and stability of another state through diplomacy, and what James Nickel calls "jawboning" (criticism of another state that is not accompanied by threats). Nickel argues that in general, jawboning, education and other non-invasive forms of enforcement are more effective mechanisms for ensuring respect for human rights than are threats or applications of force.[28]

In much of the literature on intervention sovereignty is treated as a *prima facie* barrier to helping people and state structures are treated as a potential resource. In this, there is often a presupposition that the problem with sovereignty is that it allows governments to use their states to pursue bad things with respect to a population as well as good. Solving the problem of sovereignty is thus a matter of figuring out how we can ensure that governments use their states only for good and never for evil. This view of the problem of sovereignty accepts a set of claims about states that ought to be controversial: that states develop as local entities first and then appear internationally; that it is appropriate to value territory as states value it; that the monopolization of authority associated with states is an inevitable feature of political organization; and that the fundamental units of political analysis for purposes of understanding the international system are states and individuals.

[28] James W. Nickel, "Are Human Rights Mainly Implemented by Intervention?" in *Rawls's Law of Peoples: A Realistic Utopia?*, Rex Martin and David Reidy, eds. (Blackwell Publishing: New York), pp. 263-277.

However, one of the primary causes of human rights abuse and indifference is the perceived imperative of building and maintaining a state. For example, Guatemalan military elites in the 1980's targeted indigenous communities as obstacles to political stability on the grounds that the persistence of such communities interfered with the development of a modern state by offering alternative and parallel mechanisms for governance. Peruvian Maoists similarly focused on the elimination of alternative forms of social and political organization as a crucial element of political modernization. In both these cases the perceived need to eliminate indigenous communities was premised not on the belief that such communities undermined the state's claims to sovereignty, but on the belief that such communities undermine the possibility of maintaining a state at all. This view of sub-state groups is closely bound up with a view of what states have to offer the population within a territory that emphasizes stability of expectations, efficiencies of scale, and the monopolization of coercive enforcement. Such considerations make the capacity to dominate and exclude alternative forms of political organization within a sphere of influence a core part of what is valuable about states.

This understanding of what makes a state worth having is troubling, both for the idealization of domination and control, and for the oversimplification of states as vehicles of action. A state is a complex web of bureaucratic organizations, each operating according to its own logic and priorities, and most structuring the incentives and scope for advancing personal priorities of those who populate them in a way that encourages strategic behavior with respect both to other aspects of the state and with respect to the population that the state is supposed to serve. Given these features it is implausible to think of states as tools that political representatives may pick up and put down at will as

they work away in service of a population. Moreover, the perceived importance of building and maintaining states is deeply implicated in the history of abuse of indigenous peoples and national minorities. Many scholars have suggested that this is not a coincidence, as it is inevitable that the intersection of competition for control and disposition of a state's apparatus, racism, personal ambition, and the tendency of bureaucratic projects to take on a life of their own that characterizes state politics will have very bad consequences for large numbers of people.[29] This suggests that the central problem confronting the international community in humanitarian crises is not the problem of sovereignty but the problem of the state.

Humanitarianism and Non-Ideal Theory

Richard Falk has argued that states are inherently hostile to the persistence of unassimilated groups in general and the persistence of indigenous peoples in particular.[30] Even if Falk is mistaken and this hostility is not inherent to statehood, it is nonetheless true that all actual states are deeply unjust both in their internal structure and operations, and in the relationships they establish between individuals and groups across state borders. Because of this, to theorize about the permissions, duties and prohibitions on intervening across borders is necessarily to engage in non-ideal theory. John Rawls describes ideal theory as "realistic utopianism": given basic facts about human psychology, and the world we inhabit, ideal theorizing identifies the principles that would characterize just institutions under conditions of "strict compliance" (the conditions in

[29] See for example James Scott, *Seeing like a State* (Yale University Press: New Haven, CT, 1998); Richard Falk, *Human Rights Horizons: the Pursuit of Justice in a Globalizing World* (Routledge: New York, 2000).
[30] Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in *The Rights of Peoples*, James Crawford, ed. (Clarendon Press: Oxford, 1988), pp 17-38.

which most people act justly most of the time.)[31] He contrast this with theorizing about the conditions of "partial compliance" that obtain in everyday life, where our lives are structured in ways that discourage many people from acting as justice requires and we are often forced to weigh one institutional injustice against another. Even if we think of our theorizing about humanitarian crises as intended to develop a view of what international institutions might look like, given our existing circumstances, to the extent that the potential participants in those institutions will inevitably include representatives of states, we must assume that many of those participating will not be motivated to act in accordance with the demands of justice.

The problem here is not that having to theorize about states places an in-principle limit on how close our solutions will approach the ideal; that would be the problem of having to settle for remedies and preventive measures that are less effective or less complete than we would ideally like. The problem is rather that any institution we set up or action we take is likely to either create a new injustice or leave intact an existing one. The problem arises because to include representatives of states in our theorizing is to take a set of institutions and asymmetries in political power that we know to be deeply unjust as the departure point out of which we develop our view of how humanitarian crises should be handled. The injustice of actual states, especially with respect to their internal populations, is significant for two reasons. First, the fact of injustice in states' structures implies that participants in international institutions cannot be counted on to act as justice requires, partly because of the structure of their incentives and partly because of the distorting effect that their home institutions is likely to have on their capacity to perceive

[31] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Belknap Press: Cambridge, MA, 2001), p. 13.

injustice accurately. Second, even if based on accurate perception of the wrongs it means to address, the injustices of a state's structures will pattern the form and possibility of action within it so as to reinforce old injustices or generate new ones.

Recognizing that the kind of action under consideration in theorizing about humanitarian crises is necessarily non-ideal does not rule out the possibility of developing a principled basis for advocating some responses to humanitarian crises and rejecting others. However, we must explicitly incorporate considerations arising from the injustice of the institutions that comprise actual states into our theorizing. Doing so has several important consequences. First, we should adopt a general presupposition against military intervention. Second, we should be very cautious about non-military interventions. Third, we should consider our duties to monitor and intervene in the operations of our own states as part and parcel of our duties to address and prevent human rights abuse and neglect in other states. Finally, we should encourage and opt for facilitative mediation as the most promising avenue of state-based intervention. I will take these in turn.

First, we should adopt a general presupposition against military intervention. Sober consideration of the structure and operation of actual states leads to the conclusion that military intervention will usually fail to improve a situation of humanitarian crisis and often make things worse for the individuals it is intended to assist. This is so not because military intervention involves the use of violence, but because it involves the use of one state's armed forces as a means to achieving objectives whose primary beneficiaries are supposed to be the residents of another state. This fact structures decision-making regarding deployment, including the identification and articulation of

objectives, the determination of rules of engagement, and the level of resources committed, so as to make it extremely unlikely that intervention will produce either short-term or long-term transformation that unambiguously benefits those in whose name the intervention is undertaken. Such transformation is unlikely in part because the structure of state-based decision-making is such that both democratic and authoritarian regimes are unlikely to intervene in ways that promote human rights and democracy in another country, and in part because as a form of crisis intervention, military deployment is the one least likely to produce positive and long-lasting transformation.

For example in a study of third-party interventions in civil wars and other inter- and intra-state conflicts, Bruce Bueno de Mesquita and George Downs found that such interventions tend to lead to little, if any, improvement in democratic development and often leads to the erosion of democracy.[32] They found this to be the case for both democratic and autocratic interveners. These results were explained by the imperative of a state's leadership to maintain the support of their "domestic selectors": the domestic constituency that can depose them. The type of domestic constituency to which leaders must respond varies between democratic and authoritarian states, but what does not vary is the priority of that domestic constituency's interests and priorities over those of the population of the target of intervention. De Mesquita and Downs argue that ensuring outcomes of an intervention that accord with this priority is inherently at odds with democratization. This argument with respect to democratization may also be expected to hold with respect to the choice of tactics, rules of engagement, and the type and level of

[32]Bruno Bueno de Mesquita and George W. Downs, "Intervention and Democracy". *International Organization*. 60 (2006), 627-649.

resources committed to an intervention, and may explain the preference for high-level bombing in the recent history of humanitarian deployments.

Steven Roach has argued that some of these worries can be mitigated by using the International Criminal Court (ICC) as a legitimating body for responses to humanitarian emergencies.[33] However, even if the ICC can be developed to defuse concerns about decisions to deploy forces, worries about the form of deployment and the resources committed would remain. In addition, armed forces have inherent drawbacks as a tool of humanitarian assistance. For example, the simple reality of military deployment militates against its effectiveness for humanitarian purposes. In a typical military deployment hundreds of heavily armed people who are unfamiliar with the geography and do not speak the local language are sent into a fragile social, political and physical landscape, often preceded or accompanied by several tonnes of explosives dropped from the air. In addition, recent experience suggests that the mixed role of military contingents as police as well as deliverers of aid jeopardizes the principle that assistance should be provided to anyone who needs it, blurs distinctions between aid workers and military personnel, creates tensions within target communities, and increases pressure on a finite pool of resources.[34] Given these considerations it is reasonable to expect that in the typical case deploying armed forces will exacerbate the existing conflict, intensify pressure on local people, and undermine other forms of assistance without significantly benefiting local populations.

[33]Steven C. Roach, "Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council", *International Studies Perspectives*. 6 (2005), pp. 431-446.
[34] Randolph C. Kent, "International Humanitarian Crises: Two Decades Before and Two Decades Beyond", *International Affairs* 80:5 (2004), 851-869.

Even when the form of intervention contemplated does not involve the deployment of military forces, there is reason to be pessimistic about the prospects for unambiguous improvements in the lives of local people. Non-military interventions are neither subject to the worry that important distinctions between assistance and policing will be lost, nor to concerns that the forms of action with the worst externalities for civilians are precisely those most likely to be chosen by an intervening state. However, they are subject to worries about intensifying competition for finite humanitarian resources, and about the ways in which injustices in the structures of the originating state may distort interventions undertaken by its officials and citizenry. Some have also argued that such interventions disrupt or displace local organizations and institutions for addressing problems, and so compromise the long-term prospects of transformation.[35]

A third consequence of our theorizing about responses to humanitarian crises being non-ideal is that our duties to remedy injustice at home are part and parcel of our international duties. If injustice in the states under which we reside is an important contributing factor to the injustice of international institutions more generally, then remedying that injustice will be one of the responsibilities that fall on us as part of our duty to create institutions that prevent and address humanitarian crises. For example, if the hostility of state institutions to the persistence of indigenous peoples puts indigenous people at risk of human rights abuse, then our duties to create institutions that prevent and address such abuses will include duties to prevent and address that hostility. To

[35] See for example, Marina Ottaway and Bethany Lacina, "International Interventions and Imperialism: Lessons from the 1990s", *SAIS Review* 23:2 (Summer-Fall 2003), 71-92; Mariella Pandolfi, *op cit.*, Eric Belgrad and Nitza Nachmías, eds., *The Politics of Humanitarian Aid Operations* (Praegar: Westport, CT, 1997). For a general discussion of perverse effects in connection with international organizations see Michael N. Barnett and Martha Finnemore, "The Politics, Power and Pathologies of International Organizations", *International Organization* 53:4 (Autumn 1999), 699-732.

discharge our duties in this regard will require us to identify and eliminate such hostility in our own state as well as in the states of others. Justice at home is a prior condition of our being able to trust our diagnoses of what changes are required, both in the international system and in other states, to remedy propensities to abuse and neglect. It is also a condition of our being confident that our leaders' need to maintain support does not encourage them to precipitate conflict and violate human rights elsewhere.

Finally, honest reflection on the nature of both states and the international system suggests that our best option for preventing humanitarian crises is mediation, and in particular facilitative mediation. Earlier I noted that most humanitarian crises are precipitated by intra-state conflicts, and those that are not are often exacerbated by state-based hostility to the persistence of a sub-state group. Both these circumstances could plausibly be mitigated by some form of mediation, especially when state-group tensions first emerge (or re-emerge after a period of dormancy). In a recent study of the effect of differences in mediation style on the outcomes of international crises, a group of political scientists found that although forms of mediation that attempt to enlarge the range of alternatives open to parties by altering their perceptions of the costs of conflict (manipulation) appears to be more effective than other forms in securing immediate crisis abatement, it is relatively ineffective at reducing tension and conflict over the long term.[36] In contrast, facilitation, in which the mediator seeks only to act as a conduit of information and avoids to the greatest extent possible making substantive contributions to the negotiation, is much less likely to produce a formal agreement, but is much more likely to reduce tension and conflict over the long-term.

[36] Kyle C. Beardsley, David Quinn, Bidisha Biswas, and Jonathan Wilkenfeld, "Mediation Styles and Crisis Outcomes", *Journal of Conflict Resolution* 50:1 (February 2006), p. 81.

Facilitation achieves results within the existing context and relationships, and so to the extent that these relationships are characterized by unjust distributions of power, the outcome of such mediation will not be just. However other forms of intervention, including manipulation, face the same problem and so this is not a reason to reject facilitation. The relevant question is whether we have reason to believe that unjust actors engaged in mediation will produce less morally repugnant institutions and decisions than those engaged in other forms of intervention, and whether between facilitation and manipulation, the former is less repugnant.

There is reason to think that mediation generally, and facilitation in particular, is better given the nature of states and of the international system. Facilitative mediation involves relatively limited resources and is not open-ended, and so is easier to advocate within state structures, and in the early stages of conflict, abuse or neglect. Also, facilitation is less confrontational and less public than military intervention or jawboning, and so is more likely to be accepted, especially in the early stages of conflict, abuse or neglect. Finally, facilitative mediation specifically includes a commitment to limit the mediator's own input into the possible solutions identified and pursued, and so there are relatively fewer opportunities for injustices in the structure of an intervening state to carry over.

Conclusion

The problem the international community confronts in humanitarian crises is closely bound up with the problems of intra-state conflict and the abuse and neglect of human rights, and these problems are best understood as a problem grounded not in

sovereignty as such but rather in the ideal of the state. Because theorizing about the appropriate way to respond to humanitarian crises, both institutionally and as individuals, necessarily involves arguing about how to use and respond to states, such theorizing is necessarily non-ideal. All actual examples of states have deeply unjust structures and operations, both internally with respect to the populations that fall within their jurisdictions, and externally, with respect to populations outside their borders. We ought to expect these injustices to be reflected in state-based actions and decision-making. This implies that whatever we decide with respect to humanitarian crises we will be at best weighing injustices, but it does not imply that we cannot develop principled reasons for choosing some responses and avoiding others. Recognizing the problems with states as vehicles of action does suggest, however that mediation, and in particular, facilitative mediation, is the best route of intervention. It also suggests that we should be cautious about the circumstances and form that even non-military intervention may take, that eliminating injustice from our own states is an important part of addressing neglect and abuse of human rights elsewhere, and above all that we ought to adopt a presupposition against military intervention.