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HUMANITARIAN INTERVENTION – EIGHT THEORIES¹

- Steven P. Lee -

Human rights are, I will assume, universal values. All humans should have their rights respected. But many individuals in other states do not because their governments either systematically violate those rights (an oppressive state) or fail to stop other individuals from violating them (an inept or failed state). States must use coercion to protect the rights of their own citizens. It is the duty of each government to promote respect for the human rights of its citizens, not to violate those rights itself and not to allow others to violate those rights. But when a state fail to do this, as is unfortunately often the case, are foreign governments justified in exercising coercive power to remedy the situation, or obligated to do so? Henry Shue has argued that, in the case of basic rights, not only must everyone respect those rights, but they must also protect others when their rights are under threat from third parties.² When those who need their rights protected from violation are foreigners, the issue may become one of humanitarian intervention (HI). HI is the use of military force by one state (or group of states) against another state to promote respect for human rights among the citizens of that other state. Does a state's coercive power, as embodied in its military forces, have a moral role to play in promoting respect for rights when this is lacking in foreign states?

Much has been written about the ethics of HI in the past twenty years. In this paper I discuss a variety of justifications that have been proposed (in fact, seven theories of justification), finding difficulties with each of them, and then I offer a theory of justification of my own. My approach to justification will differ from most of the earlier accounts in two ways. First, I begin the discussion of justification at a different point. Second, I seek to expand the traditional discussion of

¹ An early version of this paper was written during my tenure as a Resident Fellow at the Center for the Study of Professional Military Ethics, United States Naval Academy, Annapolis, 2003-04, and I would like to thank the Center for its support, especially its director, Al Pierce. A later version was presented at a seminar sponsored by ELAC, the Oxford Institute for Ethics, Law and Armed Conflict, at Oxford University on 11/11/08, and I thank the participants for their comments, especially the Institute's directors, Jennifer Welsh and David Rodin. Parts of this paper are adapted from my "Coercion Abroad for Justice and Democracy," in Reidy, Riker [2008] pp. 177-188.

² See Shue [1996].

HI to cover a topic not usually addressed, namely, the question of the *scope* of justified HI. If HI is sometimes justified, precisely when is it justified? How extensive and severe must human rights violations be for HI to be a morally appropriate response? Is HI justified only in *extremis*, as with genocide and the like, or also short of this?

The general view is that HI is sometimes justified, and I will assume, for the moment at least, that this is so. My questions are: (1) *how* should HI be justified? and (2) what is the proper scope of HI? These questions are related because an answer to the first is needed to provide an answer to the second, helping to settle borderline cases where the justifiability of HI is controversial among those who believe that HI is sometimes justified. Moreover, a plausible account of *how* HI is justified should make clear *that* it is justified. An adequate answer to the first question would complete the argument by showing that what was assumed at the beginning, that HI is sometimes justified, is in fact the case. Note that my concern is primarily with the question of whether and when HI is *permissible*, which is implied by my considering whether it is justified. But I will on occasion below raise the stronger question of whether HI is *obligatory*.

The moral problem of HI, as it is usually posed, is that its justifiability seems to be at odds with just war theory. Just war theory respects national sovereignty, and HI requires a violation of national sovereignty. Thus, the justifiability of HI would create an apparent lack of coherence in our moral understanding of war, and another purpose of this paper is to seek an account of HI (and just war theory) that avoids this incoherence.

SOME PRELIMINARIES

The definition of HI is a good place to begin. Its *genus* is military intervention and its *species* is humanitarian action. Military intervention is the use of military force by one state (or group of states)—which I will call the *intervener*—against another state—the *target* state—*not* in response to the target state's external aggression. In other words, military intervention is the *nondefensive* use of military force by a state (or states) against another state. If a state uses military force in response to another's external aggression, it is a matter of defence; if a state uses force against a nonaggressor, it is intervention. An intervention is humanitarian when it has as its purpose (and/or its effect) the avoidance of human rights violations inflicted on the citizens of the target state. Normally, the rights violations are inflicted by other residents of the target state, usually agents of the state's government, rather than by natural causes, such as hurricanes. The humanitarian cri-

sis to which HI is a response is often the result of serious social conflict within the target state.

HI is a form of *rescue*, its purpose being to rescue individuals in another state caught up in a humanitarian crisis, generally brought about by rights violations imposed by their fellows. Two points about this should be noted. Because it is rescue of those whose rights are threatened with violation, rather than punishment of a state for engaging in human rights violations, it is preventive, not punitive. It occurs only when the intervention can prevent on-going rights violations, so that there are some violations that are threatened but have yet to happen. Second, HI may involve either *mere rescue* or *rescue through regime change*. In the case of mere rescue, the threatened rights violations are avoided without the need to overthrow the regime. In the case of rescue through regime change, the regime is removed as a necessary step to achieving the humanitarian ends. Mere rescue might be needed, for example, in a situation where a government is not fully in control of its state and where providing rights protections might require defeating a paramilitary or guerrilla force outside the state's control. But if it is the state that is engaging in the rights violations, often the only way to bring about rescue is to overthrow the regime.

The idea of rescue suggests that one way to look at HI, through one sort of domestic analogy, is as an international analogue of individual paternalism. If states are relevantly analogous to individuals, then HI could be seen as a form of paternalistic intervention is the activities of a state for its own good. The humanitarian crises creating the need for HI would be a state's inflicting harm on itself, from which it may need to be rescued. Thus, paternalistic (or anti-paternalistic) arguments could be offered in support (or criticism) of HI. But some would argue against this analogy, viewing it as a mistake to treat states as super-individuals. Also, this analogy moves away from the idea that the direct purpose of the intervention is rescuing individuals.

The idea that the government of the target state may not be fully in control suggests a distinction between three kinds situations in which HI may occur. First, the government of the target state may be fully in control. We may call this a *normal state*. Second, the government may be only partly in control, in the case of an *inept state*. Third, the government may have little or no control, or there may be no functioning central government, which would be a *failed state*. This makes a difference because a main issue in a moral account of HI is the sovereignty of the target state, and sovereignty, while present in the case of a normal state, is partly or fully absent in the other two.

Three points are in order. (1) The kind of justification at issue in this paper is moral rather than legal justification; the two are distinct, though obviously related. (2) When viewed in terms of just war theory, the moral justification of HI is a matter of when it is just to go to war, so it is a question of *jus ad bellum* rather than the *jus in bello*. (3) A distinction is often made between substantive and procedural justifications for HI, which is a distinction between the proper basis and criteria for HI and the proper procedure for reaching a decision to launch a HI. The question of proper procedure is about who should make the decision and what procedure they should follow, one main issue being whether a HI may be elected unilaterally or instead must be authorized by an international body. My focus will be on substantive justification.

From a moral perspective, HI is usually understood as an exception to the general rule of contemporary *jus ad bellum* that only defensive war is justified. In fact, the claim that HI is sometimes justified may be referred to as the *HI exception*. The general rule is often referred to as the *non-intervention principle*. The moral problem is that HI is an exception to the non-intervention principle, as HI involves the use of force against a state that has not engaged in external aggression. As one theorist puts it:

Humanitarian intervention is generally treated as an exception to the nonintervention principle, which requires us to respect the integrity of a foreign country and not to interfere in matters of domestic jurisdiction.³

The *standard approach*, as I will call it, asks: How is that an HI exception to the non-intervention principle can be justified? Different theorists offer different answers. Often the justification is simply asserted, but it is not adequate to view HI as merely an exception to the rule. The bland assertion that “all rules have exceptions” will not do. An account of HI must explain how it is that HI is an exception. The account must explain both the non-intervention principle and the HI exception. The account must show that non-defensive war is generally morally prohibited and that HI, despite being a case of non-defensive war, may be justified.

The non-intervention principle is an expression of state sovereignty, understood as a moral principle. The explanation goes something like this: Respect for sovereignty is of moral value, and this is why it is generally morally wrong to initiate war against another state, unless the state has engaged in external aggression. When a state aggresses, it surrenders its moral right to have its sovereignty re-

³ Bagnoli [2006] p. 117.

spected. In that case, defensive war against that state is morally justified, and the use of military force is not intervention, but an effort to repel aggression. So, HI is an exception to the moral rule that a state's sovereignty should be respected absent its violation of the sovereignty of other states. The problem for just war theory is to show how the nature of the general rule, and the notion of state sovereignty with which it is connected, is such that there can be a HI exception.

SEVEN THEORIES

To set the stage for an adequate account of HI, I will discuss seven theories of HI, versions of which have been advanced in the literature over the past two decades, and I will argue that each, though providing some insight, is overall inadequate. I will endeavour to present the theories in a roughly dialectical way, showing how each one in the series is an improvement on the previous one despite its own shortcomings, preparing the way for the theory I will propose.

(1) On the first theory, HI is justified because the humanitarian crisis to which it responds represents a threat to international peace and security. Humanitarian crises have effects beyond the state in which they occur, such as cross-border floods of refugees, posing a threat to the international community. If a state does something that undermines international peace and security, this is akin to aggression, and a military response is akin to defensive war. Under such a construal, HI is, morally speaking, a defensive war and so not in fact an exception to the non-intervention principle.

According to Howard Adelman, HI: "is not invoked just because human rights have been violated, even in a massive way. The state may exist to protect the rights of its citizens, but its failure does not provide the grounds for intervention." Rather, HI is justified by the threat to international peace and security caused by the humanitarian crisis. When that crisis causes a massive outflow of refugees, for example, the stability of neighbouring states and the region is undermined. "A state loses its legitimate right to [have its sovereignty] respected only when it threatens the peace and security of its neighbours" through the effects of the humanitarian crisis. The defence of the rights of the population in the target state achieved by the HI is at most "a by-product of that intervention."⁴ It is not its justification.

This is the approach of the United Nations Security Council. Under Article 2(4) of the UN Charter, intervention in a state's domestic affairs is not permitted.

⁴ Adelman [1992] p. 75.

So, when the Security Council has endorsed HI, such as its action to protect the Kurds in Northern Iraq after the 1991 Gulf War, it has done so under the guise of Chapter VII of the Charter, which allows the authorization of military action “as may be necessary to maintain or restore international peace and security.” But this approach involves the legal fiction that a humanitarian crisis calling for HI always constitutes a threat to international peace and security. The existence of a threat to international peace and security is not a necessary condition in the range of cases where HI intuitively seems justified. For example, while ethnic cleansing is likely to lead to a cross-border flood of refugees, as in the case of Kosovo in 1999, genocide, morally the worse crime, might not. It seems, for instance, that in the case of the 1994 Rwandan genocide, the victims were slaughtered largely before they had a chance to flee the country. Indeed, the more ruthless and effective a campaign of domestic genocide is, the less likely it is to disturb international peace and security.

In addition, if the justification for military action is the threat to international peace and security, rather than the humanitarian crisis that causes it, then it becomes possible to propose less costly, hence preferable, military measures that would deal with the international threat without ameliorating the humanitarian crisis, though often such measures would make it worse. For example, if a flood of refugees causes the threat to international peace and security, the easier military solution may be to seal the borders or otherwise keep the refugees within their state rather than intervening to end the violation of their rights. This is what happened to German Jews in the 1930s. This account of HI misses the moral point.

(2) The second account of HI seeks to solve the moral problem by removing HI from the purview of just war analysis. On this account, HI is not really war, but a different sort of use of force, closer to crime fighting. As a result, the moral categories of the just war tradition may not apply to it. This is a view taken by George Lucas: “The attempt simply to assimilate or subsume humanitarian uses of military force under traditional just war criteria fails because the use of military force in humanitarian cases is far closer to the use of force in domestic law enforcement and peace-keeping.”⁵ HI would then fall under a distinctive set of moral criteria, which Lucas refers to as *jus ad pacem*, “the justification of the use of force for humanitarian or peaceful ends,” which are closer to criteria governing the use of force for domestic crime control than to those of *jus ad bellum*.⁶ The justification of crime control is simply that persons are suffering in certain ways at the hands of

⁵ Lucas [2004] p. 73.

⁶ *Ibidem*, p. 74.

others or having their rights violated. For example, police officers can enter private homes, normally a realm of local “sovereignty,” when they have good reason to believe that a crime is being committed within. Analogously, when human rights crimes are going on within a state, other states may be justified in intervening for that reason alone. Sovereignty, which is a bar to war, is not a bar to international crime control.

Doubtless, there are differences between HI and typical cases of war. But are these differences morally relevant? Lucas’s argument that HI is morally different from war in this way is problematic. He says, “*Jus ad Bellum* does not apply to humanitarian operations [because] they are not, nor are they intended to be, acts of war on the part of the intervening forces.”⁷ But HI involves a clash of military forces on the soil of the target state. If it did not, it would be mere humanitarian assistance. This is true in all cases of HI, not just those involving regime change. What the military forces do in a HI is largely indistinguishable in its outward manifestations from typical cases of war (though it may have additional “nation-building” elements). The morally relevant features of war are present in HI—combatants and civilians suffer and die. The main difference between HI and other cases of war lies in the motive of the intervener. The case that we should abandon *jus ad bellum* as the template for our moral understanding of HI has not been made.

(3) There are a host of factors in the modern era that have eroded the sovereignty of states. Stanley Hoffmann lists a number of them.⁸ First, there are factors concerning the growth of economic interdependence, which have made states less able to control the impact on their populations of decisions taken in other states and have created an increasing gap between legal sovereignty and what Hoffmann refers to as *operational sovereignty*. Second, interventionist actions of the superpowers during the Cold War and secessionist movements challenging the legitimacy of some states, especially since the end of the Cold War, have eroded our sense of the pre-eminence of sovereignty. Third, an awareness of the appropriate limits of sovereignty has resulted from a greater emphasis on universal human rights and the international dangers of domestic activities such as the development of weapons of mass destruction and the drug trade. The result of all of this is that the traditional barriers between domestic and international politics have been

⁷ *Ibidem*, p. 77.

⁸ Hoffmann [1996] pp. 14-16. Hoffmann attributes the term “operational sovereignty” to Robert Keohane.

crumbling. More and more, individuals have been facing each other directly across borders without the effective intermediation of their states.⁹

The result, Hoffmann suggests, is the need to limit the scope of the non-intervention principle, allowing interventions in some cases. But the main problem with this approach is that the factors cited by Hoffman are largely limitations on the effective exercise of sovereignty. They may represent an accurate description of international relations, but we need to understand the prescriptive force of these factors to understand their implications for our moral problem. Does a loss of effective or operational sovereignty imply directly a loss of the moral prerogatives of sovereignty? In addition, this approach offers no clear way to determine what decrease in operational sovereignty corresponds with which threshold for justified intervention. We need to understand how this balancing goes in some detail.

Hoffmann is not of much help here. He sees the need for this, observing that “the task of the moralist here must consist in weighing conflicting moral claims.”¹⁰ When does the weighing and balancing yield an answer in favor of HI? The answer that Hoffmann, along with others, provides is that HI is justified in response to large-scale human rights violations, “massive and systematic suffering,” actions that “shock the conscience of mankind.” But this does not tell us how the balancing goes in any but a very general way. He does have important things to say about the procedural (as opposed to the substantive) question of justification.¹¹ But in regard to the substantive questions, there is more that must be said.

(4) The question is: what are the theoretical underpinnings that show the proper balance between the moral concerns of the non-intervention principle and those of HI? On this, the work of Bryan Hehir is helpful. In his discussions of HI, Hehir proposes that the limitations on sovereignty required to permit the proper HI exceptions should be understood in terms of the constraints of the just war tradition. There are two streams to the just war tradition: the older, moral, tradition; and the modern, legal, tradition.¹² It is the legal tradition that tends to limit justified war to defensive war, treating the non-intervention principle as a very high moral hurdle. If we want an adequate account of HI, Hehir argues, we should consider instead the resources of the moral tradition, which represents the richness of the just war tradition that the legal tradition ignores. The basic idea behind just

⁹ I owe this way of putting the point to George Lucas.

¹⁰ Hoffmann [1996] p. 19.

¹¹ *Ibidem*, pp. 21-23.

¹² These two are discussed by Hehir [1979] pp. 121-139.

war thinking, Hehir maintains, is that force can and sometimes should be an instrument of justice.¹³ In the case of human rights violations within a state, justice may be done by intervention. In contrast, the legal tradition tends only to address the injustice of aggression.

The moral tradition can help because it recognizes more diversity in the criteria that must be satisfied for a war to be justified. The most important criterion is just cause. While the legal tradition recognizes only self-defence as a just cause, for the moral tradition, stopping human rights violations may be another. Moreover, there are other *jus ad bellum* criteria, and, “all must be tested together” when “the case is made to expand the reasons for intervention.”¹⁴ In order to limit the occasions of justified HI, Hehir appeals to the criteria of proper authority, right intention, last resort, and possibility of success.¹⁵ Certainly, the criterion of proportionality should be included as well. We must have a reasonable expectation that HI will do more good than harm.

Hehir provides a just war context for HI, and so moves the discussion forward. But his account is not completely satisfactory. He shows that sovereignty may be limited and HI permitted by an appeal to the broader understanding of just cause in the moral tradition. The non-intervention principle plays a weaker role in the moral tradition than in the legal tradition. Moreover, Hehir does set some limits on the scope of HI by arguing that the other criteria of *jus ad bellum* may be used for this purpose. But it is not clear that these limits are the proper ones because the various *jus ad bellum* conditions in the just war tradition apply to all war, defensive or humanitarian. To claim that these conditions are needed to place proper limits on HI suggests that defensive war and HI are equally easily justified, when it seems rather that HI is harder to justify than defensive war. In addition, the various *jus ad bellum* criteria in addition to just cause seem *ad hoc* in the sense that, while each has some intuitive plausibility as a limitation, the moral tradition does not present them in a coherent way as flowing from a single moral foundation.

(5) A fifth approach to the justification of HI is offered by Michael Walzer.¹⁶ Walzer does not follow Hehir in returning to the moral tradition in just war thought. He works from the legal tradition, adopting what he calls the “legalist paradigm.” But he acknowledges that some qualifications must be made to this

¹³ Hehir [1998] p. 32.

¹⁴ *Ibidem*, p. 44.

¹⁵ *Ibidem*, pp. 44-46.

¹⁶ Walzer [1977].

paradigm, what he calls “rules of disregard,” and HI is one of these. The virtue of Walzer’s account is that it seeks a greater theoretical coherence in showing how HI exceptions follow from a proper understanding of just war theory in its modern, legalist sense.

Rights provide the moral foundation for Walzer. Human rights are the foundation of much of just war theory, for example, the *jus in bello* principle of discrimination. But Walzer proposes to treat *jus ad bellum* as founded on a different sort of right, what might be called a *common-life right*.¹⁷ This is a right of the political community, which suggests that it is a collective right belonging to a social group rather than to individuals. But Walzer claims that this right is derived from the rights of individual. He does not want to give the community or state a transcendent existence by making the state an ultimate subject of rights. The political and social arrangements of a society are worked out over time by its members. The arrangements are their collective work, a matter of their collective self-determination, whatever form the government. Each citizen has a right to what all have collectively created, and aggression is a crime because it violates this right. The aggressor seeks to supplant the social and political arrangements to which the citizens of the target state have a right. This is the moral foundation of sovereignty and the non-intervention principle.

Walzer says that HI is justified when the level of rights violations within a state reaches a point that “shocks the moral conscience of mankind.” Hoffmann and other theorists have made a similar claim about HI. It is represented in the words of Carla Bagnoli.

Grievous violations of human rights, including ethnic cleansing, massacre, and other acts that “shock the moral conscience of mankind,” are just too serious to be regarded merely as a matter of domestic jurisdiction.¹⁸

But the virtue of Walzer’s account is that he goes beyond this mere assertion. He seeks to show how the HI exception is theoretically consistent with the moral foundation of the non-intervention principle by arguing that, in the case of extreme humanitarian crises, common-life rights do not apply. “When a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply.”¹⁹ The non-

¹⁷ *Ibidem*, pp. 53-63.

¹⁸ Bagnoli [2006] p. 118.

¹⁹ Walzer [1977] p. 101.

intervention principle is a reflection of common-life rights, so HI is not permitted, except when these rights do not apply.

There are at least three problems with Walzer's account of HI. First, the idea of common-life rights is problematic. Walzer does not want to countenance collective rights, that is, rights that attach to communities rather than to individuals. For example, he says at one point that he does not want to ascribe transcendence to communal life, which the recognition of collective rights would seem to require.²⁰ Thus, as mentioned, he claims that common-life rights are or derives from individual rights. But it is not clear how this derivation goes. For common-life rights accrue to a person not as such, but as a member of a collective, and the right is to the enjoyment of something that is a collective creation.

The second problem is that, even if there were common-life rights, it is not clear that they would cease to apply in the case of severe humanitarian crises. Even in a state bent on genocide against a minority, a political and social community still exists among a majority of the population. If there were common-life rights, they would apply to what the members of that majority had created, even if the potential victims of genocide had been left out. Thus, there would still be common life rights that HI would violate. The obvious response to this is that the individual rights of the potential victims of the genocide would outweigh the common-life rights of the members of the general community. This is a plausible response, but it is not clear that it is one Walzer can allow. For he nowhere seems to make allowance for a weighing of conflicting rights at the level of *jus ad bellum* justification.

This leads to a third problem. Even if the first two problems are ignored, that is, even if we assume that there are common-life rights that cease to apply in situations in which the HI exception seems to be appropriate, his theory is not a full account of the cases in which HI is justified. The reason is that there are more rights at stake than common-life rights, and these rights may come into conflict with common-life rights. In the case of severe domestic oppression, individual rights are being violated, and our obligation to prevent (or the permissibility of our preventing it) would conflict with our obligation to respect the common-life rights. There would have to be a weighing of conflicting reasons for acting. The evil of intervention must be balanced against the evil of allowing the domestic oppression to continue. The result would probably be a broader scope for justified HI than Walzer envisions; the scope may not be limited to severe humanitarian crises.

²⁰ *Ibidem*, p. 254.

He might not find this intuitively uncongenial, but his account of HI is inadequate to the extent that he does not include a discussion of such weighing or balancing.

(6) One way to correct Walzer's account is to adopt a just war theory that grounds *jus ad bellum* in a fuller account of individual rights. David Luban suggests this approach, proposing that we could "define *jus ad bellum* directly in terms of human rights, without the needless detour of talk about states."²¹ This is a cosmopolitan approach. If war is to be justified, it must be justified in terms of the human rights that all share equally.

A cosmopolitan account of HI is offered by Fernando Teson.²² States have no moral value in themselves. They may have some derivative moral value, but only to the extent that they further the protection of individual rights. State sovereignty and the non-intervention principle are of instrumental rather than intrinsic value. According to Teson, permissible HI is "the proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect."²³ "Tyranny" and "anarchy" are his shorthand for the conditions of governance (or lack thereof) that involve massive violations of individual rights. It is tyranny and anarchy in a state that is the occasion for HI, and HI is permitted so long as the force used is proportional to the benefit achieved, the force is used in accord with the doctrine of double effect, and those to be rescued consent. This consent, generally unobtainable in fact, is "ideal consent," that is, hypothetical consent the victims would offer, given that they are rational and understood that some of them would die, as collateral damage, in the fighting.²⁴

Teson's account is an advance, but is not without problems. One is Teson's lack of specificity regarding "tyranny" and "anarchy." These terms are presumably stand-ins for cases of severe and widespread human rights violations in a state, but how severe and how widespread do the violations need to be before HI is justified? Given that Teson's account is explicitly one that founds justifiable HI on individual rights, his lack of discussion of what particular nature and extent of rights violations would justify HI is disappointing. Certainly some rights violations are more serious than others. The lack of specificity is especially problematic in the case of "tyranny," for it covers over one of the main fault lines among

²¹ Luban [1985] p. 201.

²² Teson [2003]. See also Teson [1997].

²³ Teson [2003] p. 94.

²⁴ *Ibidem*, pp. 119-121.

friends of HI. A tyranny is a state in which the people have little or no say in the government, but it need not include the kind of horrific rights violations one usually thinks of in connection with HI, such as genocide, ethnic cleansing, and enforced slavery. Is intervention when a tyranny does not engage in violations of this sort permissible? Is intervention to establish democracy permissible?

A second problem, one Teson recognizes but does not adequately confront, is that, if an account of HI is founded on individual rights, it may need to take into consideration the rights of citizens of the intervening state. “How can a liberal government justify humanitarian intervention to its own citizens?”²⁵ The rights of the intervener’s citizens would be respected only if the intervention had political legitimacy in that state. Now, this is not a problem, it seems, if one regards HI as a matter of mere permission rather than obligation. For, if HI is merely permissible, the prospective intervener is morally free to intervene or not, and the issue of whether that decision is political legitimate is not a factor in the moral status of HI. But, if HI is a matter of obligation, it seems that that decision is morally usurped, and it is problematic how this can be the case. Teson makes efforts to refute various libertarian objections to states’ forcing soldiers to go abroad to fight for foreigners.²⁶ But it seems to me that this misses the main point, which is that of democratic legitimacy. If HI is a matter of obligation, an account of it must incorporate an understanding of the conditions for democratic legitimacy. This Teson does not provide.

This lacuna is addressed by David Luban. Though he offers a straightforward cosmopolitan account in the essay cited earlier, he later becomes a “chastened cosmopolitan,” in the face of what the Kosovo War, in particular, revealed about the practical and political limitations on effective HI.²⁷ The Kosovo War was a HI, but apparently it could not politically be fought as it should morally have been fought, that is, with ground troops instead of an exclusive reliance on air attacks. The public in the United States, so it was thought, would not tolerate their combatants becoming casualties. This is the issue of political legitimacy. If the political legitimacy of the decision to intervene is part of the morality of HI, then, “just war theory must offer . . . an argument within deliberative democracy . . . explaining why [the citizens] should support an altruistic foreign intervention.”²⁸ But a problem arises here. As Luban points out, “a people always has a right not

²⁵ *Ibidem*, p. 123.

²⁶ *Ibidem*, pp. 123-128.

²⁷ Luban [2002].

²⁸ *Ibidem*, p. 86.

to go to war.”²⁹ If so, we cannot discover any feature intrinsic to a humanitarian crisis that would morally compel another nation to intervene. The set of conditions for obligatory HI would simply have to include a kind of dummy clause: and the intervening nations decided in a politically legitimate way to intervene.

Luban resists such a conclusion, however, seeking to find a feature intrinsic to a humanitarian crisis that would make HI morally compelling. In effect, what he seeks is a theory of moral motivation regarding obligatory HI. He offers the distinction between civilization and barbarism, claiming that some rights violations are so heinous that they are barbaric or uncivilized. In the face of barbaric acts perpetrated upon innocent victims, people in other states would feel shame that this is occurring and feel an obligation to act to prevent such behaviour. The shame is the moral motivation for intervention. There would then be a correlation between barbaric cases of human rights violations that would incite such shame and cases where we may expect that a majority of the citizens of a prospective intervener would consent to the intervention, insuring that the decision to intervene would be politically legitimate. So, if a humanitarian crisis involves barbaric acts, then we could assume that HI would have domestic legitimacy for a potential intervener, and so be obligatory, not merely permissible.

This approach of Luban’s also contributes to the issue of the proper scope of intervention. HI should occur only when the rights violations to which it is a response have crossed the line into barbarism. Luban’s use of the idea of barbarism is similar to Michael Walzer’s use of the traditional idea of acts “that shock the moral conscience of mankind” and Teson’s use of the idea of situations being “beyond the pale.”³⁰ All of these ideas are meant to address the issue of scope of HI, and all of them refer to an emotional element in outsider’s reactions to the rights violations. Each of these is a relational property attributed to crises in virtue of the emotional reaction of others to the crises. There are several problems with this. One is that the use of an emotional element to help set the proper scope of HI introduces into the account an element of vagueness. What is shocking to one person may not be to another.

A related problem is the susceptibility of these factors to irrelevant considerations. Luban admits that the perception of barbarism is based on sentiment, varies across cultures, and is manipulable. For example, media reporting largely determines whether humanitarian crises come to our attention and, more importantly, whether they are portrayed in a way that causes them to be seen as barbaric.

²⁹ *Ibidem*, p. 94.

³⁰ Walzer [1977] p. 107; Teson [2003] p. 98.

But clearly media attention is not a morally relevant factor. Moreover, our feelings that a humanitarian crisis is a case of barbarism may be influenced by our biases and prejudices. Some, including Kofi Annan, argue that this is part of the explanation for the failure of the West to act in the case of the Rwandan genocide.

There is a third problem for Luban's account. The element of barbarism is for him a feature that moves a humanitarian crisis from a level in which HI is permissible to one in which it is obligatory. If HI is merely permissible, states are free to decide whether or not to intervene. But this suggests that Luban would allow, as opposed to require, intervention in a quite broad range of cases, a much broader range than is normally thought to be appropriate. Traditionally, HI was thought to have at best a narrow range of permissible instances because of concerns about the moral import of state sovereignty. Of course, Luban, consistent with his cosmopolitanism, however chastened, does not see state sovereignty as having intrinsic moral value. But it may well have significant instrumental value, and so needs to be taken more seriously, even by cosmopolitans. The apparent breadth of permissible HI on Luban's account may not take it seriously enough.

(7) It seems like what is necessary is a reconceptualization of sovereignty. There is one final account of HI to consider that promises this, one that recommends a conceptual shift in our understanding of HI. When a person has a human right, this implies a duty others have, or a *responsibility* they have, to respect that right. Earlier we noted Shue's understanding that a person's right implies that others have a duty not only to respect this right, but also to protect the person from violation of that right by third parties. Thus, HI could be understood as a *responsibility to protect* those suffering rights violations at the hands of others, even when national boundaries intervene. This shift in understanding was suggested by Kofi Annan, UN General Secretary, and developed by the International Commission on Intervention and State Sovereignty, which issued a report, *The Responsibility to Protect*, in 2001.³¹ As Jennifer Welsh notes, the Commission's "main contribution to the debate was primarily conceptual: changing the language from a "right of intervention" to a "responsibility to protect."³² Part of the point of the redescription was to emphasize the protection of the rights of those suffering rights' violations rather than the rights of potential interveners. As Welsh discusses, there may be some pragmatic benefits from this change in focus, but there also seems to be a significant pragmatic drawback. It does implicitly what Lucas's account does explicitly, namely, it makes HI sound more like police action than

³¹ ICISS [2001].

³² Welsh [n.d.] p. 6.

war. We should always call war by its proper name, lest we forget the horror it involves, whatever good it may also do.

But, as Welsh also notes, there is a conceptual shift in the idea of the responsibility to protect, concerning the concept of sovereignty. The responsibility to protect applies not only to third parties, but also to states in relation to their own citizens. When states are said to have this responsibility toward their own citizens, it can be seen as a condition on their sovereignty. A person should have her rights protected, and if her state does not do so (indeed, especially if her state is the one violating those rights), it has failed its responsibility to protect her and morally opened itself up for another state to do the job. This is, I think, a genuine theoretical advance, whether or not it also is a practical advance. But it gets the cart before the horse. Instead of granting sovereignty a moral status in itself, then seeking to discover moral conditions that might weaken it, it is better to understand that the moral status of sovereignty, at the theoretical level, is derived from the moral force of individual human rights. It is this idea that I seek now to develop in a sketch of my own alternative approach account, theory number eight.

AN ALTERNATIVE APPROACH

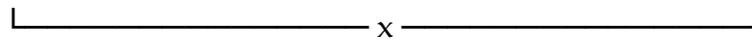
Approaching HI through just war theory and sovereignty, which I earlier called the standard approach, creates the sorts of theoretical problems I have been discussing. The alternative approach I will recommend considers matters from the other end, so to speak. The standard approach assumes a basic discontinuity between the domestic and international use of coercion, a discontinuity represented by the idea of sovereignty. On this view, coercive interference, seen from a moral perspective, is treated differently at the international and the domestic levels. At the domestic level, use of force is justified directly in terms of the rights that the interference seeks to protect, while at the international level, it must be justified in terms seeking exceptions to the sovereignty inspired rule that only defensive military force is justified. The alternative approach I suggest is to understand foreign interference to protect human rights as morally continuous with domestic coercion, in the sense that each can be morally assessed directly in terms of the rights it seeks to protect and the rights it would violate. While such use of force would presumably be more limited when applied abroad than when applied domestically, this difference would flow from the circumstances of the two situations, and would not be based on the applications of different moral principles. There would be no moral discontinuity between the use of force at the two levels.

The second aspect of my discussion is addressing the proper scope of HI. What is the extent of the human rights violations necessary to justify foreign mili-

tary force to avoid them? The search for the HI exception under the standard approach seems especially ill-suited to answer the question of what, if any, justification there could be for HI beyond a response to the sort of extreme human rights violations represented by genocide. Having a clear way of approaching an answer to the scope question is practically important because of the inherent danger in allowing states permission for intervention without a clear understanding of what facts on the ground would be necessary to justify it. As an illustration of the scope problem, consider the following regimes arrayed in terms of the degree to which their populations are subject to human rights violations:

Rwanda in 1994

Rawls's Kazanistan



Kazanistan is the imaginary state introduced by John Rawls, which, while tolerant of different religions, reserves certain privileges to members of one faith.³³ Our intuitions about the justifiability of HI are probably clear for Rwanda (intervene) and Kazanistan (don't intervene), but likely not about cases in between. We need a theory to explain these intuitions and to clarify our thinking about middle cases.

To make the case for this approach which regards the domestic and international cases of uses of force for rights protection as continuous, I will consider limitations in regard to the domestic case and then seek to generalize them to the international case. My rejection of the moral discontinuity relies on the universality of human rights. But I recognize that there is an *apparent* discontinuity between the cases, which the idea of sovereignty attempts to capture, and I will try to show that this appearance does not imply discontinuity in fact.

In the domestic case, the most important limit on state power is that it not be used for oppression, that is, it should not be used in a way that violates the human rights of those in its power. In addition, following Shue's formula discussed earlier, state power should be used to protect human rights, that is, to keep individuals from violating the rights of others. But, even within this sphere, the scope of its justified use is limited. State power should not be used to avoid *all* domestic human rights violations. The general idea behind these limitations is that the use of force to protect human rights would sometimes be *counterproductive*.

³³ Rawls [1999] pp. 75-78.

These counterproductivity limitations fall into two general categories: (1) *efficiency limitations* and (2) *rights-balancing limitations*.

Efficiency limitations concern factors such as the ability of state power to achieve adequate protection of the rights in question and the cost in scarce resources of its attempt to do so. Consider the case of lying. While each person has, in general, a right not to be lied to by others, no one thinks that state power should be used to suppress lying (apart from special cases, such as contracts, court testimony, or lies by government). One way to explain this is in terms of efficiency limitations. It would be an inefficient use state power to seek to protect the right of its citizens not to be lied to because it is not likely the government would be very successful at achieving this goal and the extent of governmental resources involved in a serious effort to achieve this goal would be disproportionate to the value of the rights-protection that could thus be achieved. But I will not say anything more about efficiency limitations here. They are largely a consequentialist matter and, when applied in the international case, would fall primarily within the scope of the just war criterion of proportionality. The difference between the standard approach and my alternative approach concerns mainly the criterion of just cause, for which rights-balancing limitations are more relevant.

Rights-balancing limitations involve the costs in rights violations that may accompany efforts to protect rights. The limitations result from the balancing the rights violations resulting from the use of the coercive power against the protection of rights that the coercion achieves. Rights violations may follow from use of state power to protect rights because sometimes such use of power violates other rights. Consider again lying. If the state sought to use its power to protect a right not to be lied to, it is clear that other rights, especially privacy rights would be a casualty. The state could protect a right not to be lied to only at the cost of failing to respect rights to privacy. It is clear that in the case of lying, rights-balancing limitations would be sufficient to deny government the power to seek to suppress lying.

The best way to show that there is a basic continuity between the domestic and international cases is to cite domestic examples where the coercive power of the state is morally limited by respect for what goes on within a *social group*. The reason is that HI is a matter of interference in the affairs of a large social group, specifically another state. So, let us consider the way that government coercion to protect rights domestically is morally limited in the case that the rights violations occur within a social group. When the activities of domestic social groups violate the individual rights of their members, the state is often justified in using force to protect those rights. But not always.

Consider the limitations on interference to protect rights inherent in family law. Rights violations often go on within families, and the state is often justified in interfering in families to protect its members' rights. This is, I take it, part of the import of the feminist slogan, "the personal is the political." Systematic violations of human rights within families, such as the mistreatment of women, should be subject to restriction by state coercion. But there are forms of rights violations in families apart from spousal abuse, and there are recognized limitations on the extent to which such coercive interference to avoid those violations is justified, though these limits are subject to debate and shift over time. In traditional family law, there is the doctrine of "oneness" of the family that, for example, restricted the applicability of tort law within the family.³⁴ This doctrine has been weakened legally in recent decades in the name of the protection of the individual rights of family members, but it remains to some extent a barrier to state coercion. For example, we do not encourage individuals to inform on the illegal activities of their family members (within limits), and there are limitations on the extent to which spouses can be compelled to testify against each other in court.³⁵

In order to explain these limitations on state interference in the rights-violating activities within social groups, I propose that we consider state interference in groups to be a violation of the *rights of association* of members of the group. A state's respect for rights of association is the bedrock of its respect for civil society. Individuals choose to belong to groups and often commit considerable energy to the flourishing of the groups. Their choices and commitments deserve to be respected, *other things being equal*. State interference to protect the rights of a group's members may violate the members' rights of association in two ways. First, the individuals whose rights the state seeks to protect may have chosen to tolerate the rights violations for the sake of the group, given the stake they may have in the group's flourishing. The individuals may believe, often correctly, that state interference would damage the group, and their choice to tolerate the violations should be respected, other things being equal, as part of respect for their rights of association. This may suggest, at a minimum, that there should be no state interference unless the victim invites it, but this raises tricky questions in particular cases about consent and coercion within the group, as it often evident in cases of spousal abuse within families.

But there is a second type of rights violation resulting from state interference in a group. Interference in the group, when this would damage the group,

³⁴ Krause [1986] p. 116.

³⁵ *Ibidem*, p. 131.

potentially violates the rights of association of all the group's members, not only those whose rights the interference seeks to protect. Often many of the group's members would not be involved and have no responsibility for the rights violations that may occasion the state interference. Damage to the group would not respect the choices and commitments they have made to the group. My claim is not that such considerations are always overriding, but only that they must be taken into consideration, counted as rights violations to be weighed against the rights violations within the group that the interference seeks to avoid. This is the import of the *ceteris paribus* clause, "other things being equal," in any claim that individual rights of association shields groups from state interference to protect the rights of the members. The result of the weighing is what determines whether the interference is justified, or is, at least, a necessary condition for such justification.

The continuity I am claiming between the domestic and the international cases of the use of force to protect rights may now be made clear. The individual rights of association that place a partial barrier in the way of state interference in civil-society groups to protect rights of their members applies at the international level as well, where the rights of association are those of the members of other societies, overseen by other states, and the groups of which they are members are those other societies. From a moral point of view, other societies may be regarded in the same way as civil-society groups within a state are, in regard to coercive interference by that state to protect rights within the groups, with individual rights of association of the groups' members placing a partial barrier to interference in both cases. What Michael Walzer labels as rights of political community, common-life rights, as I called them, are simply rights of association that are at the foundation of the respect states owe groups, whether they are civil-society groups within the state or other societies. Walzer's rights of political community are simply a species of the rights of all social groups against outside interference with their affairs.

There are, of course, many differences between national societies overseen by other states and civil-society associations within a particular state. But, if we approach the justification of the use of force exclusively in terms of individual rights, including rights of association, the differences are not morally relevant, in the sense that the same moral principles are operative in both cases. The obvious difference between civil-society groups and whole societies overseen by other states is that the interfering state may have legal legitimacy to interfere in the former case that it lacks in the latter. But legal legitimacy, in this sense, is simply a reflection of the idea of state sovereignty. If state sovereignty is not itself morally basic, neither is this sense of legal legitimacy. The other differences between socie-

ties overseen by their own states and civil-society groups within a particular state, from the point of view of potential interference by that state to protect rights, would bear on how the balance is struck between rights of association and the rights the state would protect by interference, but they would not bear on the fact that that it is this balance that is morally relevant in determining the justifiability of interference. And there are, of course, many differences between the cases in terms of the likelihood of success of the interference in achieving the rights protections. But these consequentialist differences would bear on the justifiability of interference, in the international case, through the just-war criterion of proportionality, what I called an efficiency limitation on interference.

CONCLUSION

Whereas the standard approach is statist, my alternative approach is cosmopolitan. It sees the fundamental category of moral justification of war, including HI, as individual human rights. My main argument is that HI can be justified on the same basis as domestic coercion, that is, on the grounds of protecting individual rights in cases where that interference would also lead to violations of individual rights of association. This eighth theory avoids the basic problem with most of the other seven, namely, a focus on treating state sovereignty as a moral category of its own, something applying only to groups overseen by state organizations, and trying to configure a HI exception within that focus.

How does this account of HI help with the scope issue? Well, my approach does not provide an easy answer to where on the line between Rwanda and Kazakhstan the point of justifiability should be drawn, any more than the standard approach does. But it does provide a clear answer as to how the location of the line should be determined, which the standard approach does not. Instead of seeking to divine whether a humanitarian crisis in another society is sufficient barbarous, or such as to shock the moral conscience of mankind, we may determine the answer by weighing our reasonable expectation of the rights that the interference would protect against our reasonable expectation of the rights of association that the interference would violate. This does not make the answer easy to come by or noncontroversial, but it gives us a clear method to apply, and that is something.

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