Introduction

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Saying "humanitarian intervention" in a room full of philosophers, legal scholars, and political scientists is a little bit like crying "fire" in a crowded theatre: it can create a clear and present danger to everyone within earshot. Arguments burn fiercely – although fortunately not literally – on the subject. Some people regard humanitarian intervention as an obscene oxymoron. How can military intervention ever be humanitarian? Others are so suspicious of the intentions of powerful governments that they reach, in practice, the same conclusion: humanitarian intervention should be outlawed.

Humanitarian intervention is defined by J. L. Holzgrefe in the first chapter in this volume. The term refers to the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied. *Unauthorized* humanitarian intervention refers to humanitarian intervention that has not been authorized by the United Nations Security Council under Chapter VII of the Charter. NATO's military actions in Kosovo are a prominent example of unauthorized humanitarian intervention.

The central question that we pose pertains to the conditions under which unauthorized humanitarian intervention is ethically, legally, or politically justified. None of the contributors regards humanitarian intervention as anathema under all conditions, but all of them are well aware of the potential for abuse inherent in its practice. Unlike many volumes on similar subjects, we do not focus specifically on Kosovo or other interventions, although Kosovo does receive particular attention in several essays. Our

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concerns are more general and fundamental. This book analyzes humanitarian intervention in the context of state failure in many parts of the world, and explores fundamental issues of moral theory, processes of change in international law, and how conceptions of sovereignty are shifting as a result of changes in norms of human rights.

Since ethical, legal, and political conditions are all relevant to the evaluation of humanitarian intervention, it is appropriate that the contributors come from a variety of backgrounds, including law, philosophy, and political science. The legal scholars are notably sophisticated about politics as well as about moral philosophy, and by no means limit themselves to explicating the law.

We have sought to make this book not merely multidisciplinary but genuinely interdisciplinary: an integrated volume rather than merely a set of essays. The authors of eight of the chapters attended a conference sponsored by the Center for European Studies at Harvard University and the Kenan Institute for Ethics at Duke University, which took place in Cambridge, Massachusetts, during January 2001. At this conference, about twenty scholars presented memos, and a vigorous debate ensued. These authors also attended a follow-up conference at the Carr Center for Human Rights at Harvard University, in late September 2001, at which draft papers were discussed. This meeting was co-sponsored by the Carr Center, directed by Michael Ignatieff, and the Kenan Institute, directed by Elizabeth Kiss. We have also circulated drafts of relevant papers to authors, during the process of revision, in order to facilitate cross-references and discussions of disputed points.

The volume is divided into parts under the headings of ethics, law, and politics; but these labels are somewhat artificial. All of the chapters take both law and politics into account, and all are motivated in considerable measure by normative concerns. Other ways of organizing the volume would have been equally feasible.

Chapter 1, by J. L. Holzgrefe, offers a systematic review of the multifaceted debate on humanitarian intervention. Holzgrefe critically explores the ethics of humanitarian intervention, distinguishing various theories according to the source, objects, weight, and breadth of moral concern. His discussion focuses on the following ethical theories: utilitarianism, natural law, social contractarianism, communitarianism, and legal positivism. Holzgrefe goes on to relate these ethical arguments to current debates about the legality of humanitarian intervention. He concludes by identifying the

key disagreements, and suggests several ways in which they may be resolved. His chapter provides a clear baseline of past controversy against which the contributions of the other chapters can be evaluated.

Tom J. Farer also discusses past debates on intervention, focusing principally on legal theorists. He neatly juxtaposes legal realists with those commentators that he refers to as classicists or textualists. Farer's emphasis on the legal debate complements Holzgrefe's examination of ethical issues, and deepens the discussion, begun by Holzgrefe, of legal issues. One of Farer's contributions is explicitly to consider the potential for abuse of a doctrine of humanitarian intervention that enables states to intervene without the consent of the United Nations Security Council. This theme is explicated later by the legal analyses of the three chapters in Part III.

The attacks of 11 September 2001 ("9/11") on the Pentagon and the World Trade Center occurred as we were preparing for our conference later that month. They raise the question of whether humanitarian intervention has become an obsolete topic in light of the struggle against terrorism being led by the United States. This issue is also addressed by Farer. He acknowledges that the war against terrorism could eclipse humanitarian intervention entirely in American foreign policy. However, the war against terrorism could lead instead to more intervention justified at least in part on humanitarian grounds. Indeed, insofar as the United States and its allies decide that fighting terrorism requires efforts to restructure failed states, they could engage in interventions that are designed both to prevent terrorism and to help save the people of those states from misery and chaos.

Humanitarian intervention will surely be different after 9/11 than it was before. Some of the arguments formerly heard that only "disinterested" intervention is permissible will ring hollow as long as terrorism is a serious threat. But whether 9/11 will lead to more or less humanitarian intervention as defined in this volume remains to be seen.

Part II contains two chapters that assess the ethics of humanitarian intervention. In chapter 3, Fernando Tesón, an international legal scholar who is also the author of *A Philosophy of International Law*,[1] puts forward a liberal argument for humanitarian intervention when human rights are being seriously abused. Human rights are intrinsic values and must prevail, where a choice has to be made, over the merely instrumental value of state sovereignty. Indeed, states may have not only the right to intervene but also

[1] Westview Press, Boulder, 1998.

the moral obligation to do so. Tesón's argument is self-consciously Kantian. He criticizes contentions that national borders, an obligation to obey existing international law, or concern about global stability have moral standing sufficient to override the duty to intervene when states are engaging in, or permitting, severe abuses of human rights. Tesón acknowledges that innocent people are often killed or hurt in military interventions. To evaluate such actions, he employs the doctrine of double effect from just war theory: it is permissible for intervenors to cause the deaths of innocent people if by so doing they prevent much greater harm, and if the damage they do is unintended. In marshalling his arguments for humanitarian intervention, Tesón seeks to trump the principle of non-intervention with the principle of protecting human rights.

In the terms used by Allen Buchanan, a philosopher and the author of chapter 4, Tesón's argument is based not merely on "simple moral necessity" but on an argument about lawfulness. What Buchanan calls "the Lawfulness Justification" expresses "a commitment to values embodied in the legal system – not just those of morality – in this case the protection of human rights." The distinctive contribution of Buchanan's chapter is to evaluate a third justification for humanitarian intervention, which he calls the "Illegal Legal Reform Justification." Such a justification could be used to defend intervention that is illegal on strict textual grounds, such as NATO's actions in Kosovo in 1999, as a means of reforming the international legal system. Defenders of reform through illegal action point out that it is hard to achieve reform through either treaties or efforts to change customary law: lacking a coherent legislative process, the system has a strong status quo bias. Major advances, such as those in the Nuremberg trials, have been made through actions that were arguably illegal under then-existing international law.

Like Tesón, Buchanan dismisses arguments that presume the sanctity of existing international law. What he calls "the state consent supernorm" does not always trump. On the contrary, doctrines of moral authority can be developed that do not rest on mere subjective preferences, but that justify actions taken without necessarily obtaining state consent. Buchanan then puts forward some guidelines for attempts at illegal reform of international law. However, when he applies these guidelines to the Kosovo intervention, he finds that NATO did not put forward a preferable alternative rule to the existing rules requiring Security Council endorsement of military intervention, and that its actions do not, therefore, constitute a justifiable example of illegal legal reform. Buchanan's analysis, although it begins with a narrow

issue, deeply probes issues as fundamental as the nature of state consent and the status of customary international law.

Between them, Tesón and Buchanan show the power of philosophical analysis as applied to issues of intervention. They both make cogent arguments against the view that existing international law, made by and for states, necessarily carries moral weight. For Tesón, the international legal system should be reformed to fulfill values of human rights. If states override conventional international law but effectively protect human rights, more power to them. Buchanan does not undertake such a radical critique of the sources of international law. He argues that states seeking to promote human rights through intervention must meet a number of demanding criteria, and, in particular, must be able to show that the rule they endorse is likely to be superior to the rule they are breaking. These different philosophical positions clearly have consequences for policy evaluation. Tesón implies that NATO's intervention in Kosovo was justified, while Buchanan views it as unjustified, at least in terms of the illegal legal reform criteria that he evaluates.

Michael Byers and Simon Chesterman provide a striking contrast to Tesón's dismissal of the principle of non-intervention and Buchanan's critique of customary international law. In chapter 5, Byers and Chesterman declare that if any justification is to be provided for NATO's Kosovo intervention, it should be one of "exceptional illegality." In Buchanan's terms, Byers and Chesterman put forward a version of the "Simple Moral Necessity Justification," which declares that "basic moral values can trump the obligation to obey the law."[2] They strongly defend the principle of non-intervention as firmly established, as a general rule, in international law. To denigrate this principle would be to assume a radical and unsound change in the international legal system. The United Nations Charter, customary international law, and the repeated declarations of bodies such as the UN General Assembly, all have reinforced the non-intervention norm over the last six decades; the only credible conflicting precedent is the no-fly zone over Iraq, dating from 1991. In their view, the United States, aided by a small group of Anglo-American lawyers, is seeking to loosen the constraints of the non-intervention norm, but opinion from Africa and elsewhere in the world remains strongly opposed. Byers and Chesterman argue that customary

[2] See Allen Buchanan, "Reforming the International Law of Humanitarian Intervention," ch. 4 in this volume, p. 132.

international law cannot be changed simply by the most powerful states in the system, or by prominent international legal specialists from those states. Relaxing the non-intervention norm would alter the principle of sovereign equality – a principle manifestly as valuable to weak states as it is inconvenient to powerful ones. If intervention is morally required, it should be defended as such, and not used as part of "an unwarranted attempt to revise by stealth the fundamental principles of international law."[3]

Thomas Franck views international law as part of an evolving discourse, subject to reinterpretation in a way that is reminiscent of how the common law changes over time. Indeed, each organ of the United Nations is authorized to interpret the Charter's mandate for itself, and must do so to prevent the emergence of a large gap between law and a "common sense of values." Such a gap would threaten the legitimacy of international law and international organizations.

One way to narrow this gap is to consider "necessity" and "mitigation" as justifications for what otherwise would be clear violations of law. Franck examines the institutional practice, in the United Nations, of humanitarian intervention, arguing that specific facts have often trumped abstract legal principles in the name of necessity and mitigation. UN responses to India's invasion of East Pakistan in 1971, Vietnam's invasion of Cambodia in 1978, and Tanzania's invasion of Uganda in 1978, all reveal that the United Nations has been willing to acquiesce in unilateral intervention under certain circumstances. The UN also acquiesced in military intervention by West African regional forces in Liberia in 1990 and in Sierra Leone in 1997. In this light, NATO's Kosovo intervention is not obviously illegal. Although the Security Council failed to endorse the action in advance, it did reject a resolution condemning it, and engaged in "a form of retroactive endorsement" through resolutions at the end of the conflict. Franck asks whether the intervention was unlawful and answers: "Yes and no."[4] It violated Article 2(4) of the Charter; but the consequences were not bad since the action led to a result consistent with the intention of the law. In Buchanan's terms, Franck resorts to the Lawfulness Justification of NATO's intervention. In his view, UN organs perform a "jurying" function: like juries, they weigh the evidence and decide whether, in view of all of it, a nominal

[3] See Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law," ch. 5 in this volume, p. 197.

[4] Thomas M. Franck, "Interpretation and Change in the Law of Humanitarian Intervention," ch. 6 in this volume, p. 226.

violation of law should be punished. The result, in practice, is an evolving international law that takes account of changing ethical understandings.

The chapters by Byers and Chesterman, on the one hand, and by Franck, on the other, are studies in contrast. Byers and Chesterman seek to preserve what Franck calls the "freeze-frame" of Article 2(4), prohibiting intervention not authorized by the Security Council. They fear that powerful states such as the United States, aided by clever legal scholars such as Franck, will poke loopholes in Article 2(4) large enough to fly bombers and missiles through, virtually at will. Franck, on the other hand, is concerned to maintain the legitimacy of international law. For him, legitimacy depends on law not being so strongly at odds with the ethical views of influential people that powerful states find it easy to discard. Both Byers and Chesterman and Franck seek to uphold the role of international law, but their strategies for doing so are diametrically opposed.

In chapter 7, Jane Stromseth takes up a related issue: should principles governing humanitarian intervention be codified? Recall Farer's discussion of legal realists vs. textualists in international law. Textualists such as Byers and Chesterman seek clear, bright-line law to restrain the depravations of powerful states. Byers and Chesterman, as we have seen, oppose loosening restraints on intervention; but those textualists who favor Tesón's liberalism might therefore want to codify their new principles, as a means of encouraging states to fulfill their supposed obligations to intervene in appropriate circumstances, while guarding against abuse. Stromseth, however, argues not only that codification would be a mistake, but that the uncertain legal status of humanitarian intervention is a good thing, since it provides "fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making."[5] Stromseth is therefore firmly in Franck's camp, as opposed to that of Byers and Chesterman: she is an incrementalist rather than a textualist.

Stromseth provides the most sustained discussion in this volume of the various legal positions taken with respect to the Kosovo intervention. She discusses not only Security Council actions but also the legal justifications – which were quite different – of various NATO states. She then analyzes four distinct approaches to humanitarian intervention: (1) the status quo approach, denying the legitimacy of unauthorized intervention; (2) the

[5] Jane Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," ch. 7 in this volume, p. 233.

"excusable breach" approach, as exemplified by the Byers/Chesterman chapter; (3) a "customary law evolution of a legal justification" approach, which is close to what Franck advocates; and (4) an approach advocating a clear right of humanitarian intervention, such as that of Tesón. Stromseth views international law now as somewhere between positions (2) and (3), and she favors further movement towards the customary evolution view. Codification, under current conditions, is a false hope because codification would be difficult to enact; if enacted, the rules agreed would be vague; and the very process of codification would harden attitudes just when flexibility is needed. Discourse about incremental change, with a special emphasis not just on legality but on effectiveness, would be much superior as a way of generating salutary change in international law concerning humanitarian intervention.

The legal and philosophical arguments represented in this volume cover a broad range of views, omitting only those of doctrinaire opponents of all unauthorized humanitarian intervention. The categories employed by Holzgrefe, Farer, and Buchanan come alive in the passionate advocacy, on different sides of the issues, of Tesón, and of Byers and Chesterman. Natural law thinkers confront issues raised by utilitarians; textualists contend with incrementalists if not with strict legal realists; justifications from Simple Moral Necessity contrast with those from Lawfulness. Franck and Stromseth illustrate the subtlety and nuance of international legal scholars accustomed to work back and forth between doctrine and practice, while Tesón and Byers/Chesterman (who, despite their differences, share a more principled or doctrinaire approach) demonstrate the power of principles in providing criteria for action. As our discussion of Tesón and Byers and Chesterman has indicated, two sets of authors may be separated along one line of cleavage, but united with respect to another. Points of difference as well as agreement are interesting and subtle; the reader should be ready to put components of positions together for herself, rather than simply to choose between contrasting worldviews.

The final section of this volume turns to explicitly political issues, moving away from law. My own chapter develops a point made by Stromseth: that more attention should be paid to the effectiveness of intervention. In my view, traditional conceptions of sovereignty are a serious barrier to effectiveness, and I therefore advocate the "unbundling" of sovereignty. Domestic sovereignty should, where possible, be sustained, but the classical ideal of external sovereignty – involving the exclusion of external

authority structures from decision-making – should be abandoned for many of the troubled societies in which intervention is contemplated. External sovereignty creates "winner-take-all" situations that aggravate conflict, and makes it very difficult for participants to make credible promises. In my view, societies with low capacity for self-governance will have to accept very limited sovereignty, which can be gradually enhanced as they develop effective institutions of their own for conflict management. For many societies, political authority will need to be institutionalized on a multilateral basis for a very long period of time.

I do not hold that limitations on sovereignty are desirable only for troubled societies. On the contrary, German sovereignty was limited throughout the Cold War, and the European Union has accepted a view of pooled sovereignty in which individual states are subject to the supremacy of European law. Indeed, the European Union illustrates an important point: that creating effective governance institutions is much easier in "good neighborhoods," with peaceful and democratic neighbors, than in bad ones. The divided societies of south-eastern Europe therefore have better prospects than those of Africa. The impact of the neighborhood makes it all the more important to engage in efforts to support countries in troubled areas where there is relatively good governance, to create a basis for its gradual expansion. The policy lesson of my analysis is that sustained involvement after intervention will be necessary for intervention to be effective – a lesson that is reinforced by our growing understanding of the sources of terrorism after 9/11.

In the final essay, Michael Ignatieff focuses on state failure, building on some of the themes introduced in my chapter. Ignatieff agrees that to fix failed states we need to rethink sovereignty,[6] but he also argues that we have to rethink the concept and practice of neutrality. State failure, in Africa, the former Soviet Union, and elsewhere, has its roots in weak state capacity, but is often aggravated by democracy. Inserted into ethnically divided societies without strong institutions for conflict resolution, the competition for office institutionalized in democracy can foster polarization, leading to civil war. Resource riches are also part of the problem rather than the solution, as competing factions fight for diamonds, gold, or oil. When two quite equally matched factions vie for power, external sovereignty merely perpetuates the problem, and some form of international protectorate becomes essential

[6] Michael Ignatieff, "State Failure and Nation-building," ch. 9 in this volume, p. 307.

for restoring order. Pooling and limitation of sovereignty are as essential for these societies as they are desirable for the wealthy democracies of the European Union and the North American Free Trade Area.

Interventions are often hindered, according to Ignatieff, by the desire of intervenors to remain neutral between competing factions. But UN involvement in Bosnia demonstrated the disastrous results of seeking to remain neutral between oppressor and victim. Furthermore, politically naive insertion of aid into conflict-ridden societies may accentuate conflict by giving armed participants more to fight about, and by helping civilian populations to endure continual civil war. Aid in Afghanistan, for instance, could merely strengthen the various warlords, enabling them to fight longer. Aid cannot, therefore, be regarded as neutral, but has political implications, which can be adverse as well as benign. Neutral intervention can also reward aggression, through mediation that takes facts on the ground as given. Hence Ignatieff argues for more vigorous and sustained intervention: "the idea of a responsibility to protect also implies a responsibility to prevent and a responsibility to follow through."[7]

One strand of thinking in this volume could be described as that of forceful liberalism. It emphasizes the defense of human rights through humanitarian intervention, whether authorized by the Security Council or not. Sovereignty for these thinkers is only an instrumental value: useful under some conditions, but not a shibboleth. Sins of omission, exemplified by the absence of intervention to stop the genocide in Rwanda in 1994, are more serious threats than sins of commission. Strong, sustained action is needed to help troubled societies and rebuild failed states. This line of argument runs from Tesón in chapter 3 to Keohane and Ignatieff in chapters 8 and 9.

To this theme, however, there are several counterpoints. Byers and Chesterman warn that powerful states typically seek to devalue sovereignty norms, since sovereignty limits their freedom of action. If the weak are to be protected, they say, beware of hegemonic states and their supporters bearing the gifts of humanitarian intervention and nation-building. Franck and Stromseth also implicitly counsel against letting action be determined too strictly by principles, which can wreak havoc in situations that may call for incremental change and the humility born from discourse and practice. Buchanan shows that criteria derived from principles, with respect to

[7] Ibid., p. 320.