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The Responsibility to Protect Human Rights

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The Responsibility to Protect Human Rights

My essay begins with the idea that the responsibility to protect human rights is an international responsibility. Protecting human rights is not just a matter of each state protecting the rights of its own citizens, even though this is one of its primary functions and (arguably) a condition of its legitimacy. For various reasons that I will come to shortly, making human rights protection purely an internal responsibility of states is not going to be effective in many cases. So the wider responsibility falls on that rather elusive entity 'the world community'. Now let me immediately clarify, for present purposes, the scope of the responsibility to protect. First, the human rights at stake are to be understood in a fairly narrow sense, as basic rights - rights to life, bodily integrity, basic nutrition and health, and so forth. When we invoke the international responsibility to protect, we are thinking about those all-too-familiar instances in which human beings are being placed in life-threatening situations, in which they are being starved, or terrorised, or evicted from their homes, or are dying from disease – in other words are caught up in what we have learnt to call humanitarian disasters. We are not primarily thinking in this context about rights that fall outside this core, such as rights to free speech or political participation, important though these may be in other respects.¹ Second, we are talking about cases in which human rights are being violated on a large scale, not about individual violations such as will, regrettably, occur on a daily basis in most states. It is only when the scale of rights violations crosses a certain threshold that the idea of an international responsibility to protect human rights comes into play.²

That idea, I believe, is fast gathering strength as part of what we might call positive international morality, if not yet international law.³ One reason why it is not yet included as an international legal norm is that it appears to conflict directly with the idea of state sovereignty – in particular with the idea that intervention in the internal affairs of states is never legitimate unless the state in question itself authorises the intervention. Whether in any given case there is indeed a direct clash between the responsibility to protect and state sovereignty may depend on why it is that human rights are being violated: here it may be worth considering the various different scenarios in

which the responsibility to protect human rights might be invoked. Without claiming to have produced an exhaustive catalogue, let me distinguish:

- a) Natural disasters – earthquakes, floods, droughts etc – that leave people without food, shelter and other necessities of life.
- b) Deprivation that arises as the unintended consequence of government policies, for example disastrous economic policies that leave many people destitute.
- c) Systematic rights violations on the part of governments, for example the incarceration of political opponents, punishment of their supporters, use of torture or other degrading modes of treatment.
- d) Rights violations resulting from wars between states, of civilians caught up in the fighting, displaced by it, or unable to satisfy basic needs on account of it.
- e) Rights violations arising in circumstances of state breakdown or civil war – massacres, ethnic cleansing, and so forth.

As we work through this list, we see immediately that interventions to protect human rights would challenge state sovereignty most directly in cases b) and c). These are cases in which the state itself is responsible for the rights-violations, either directly or indirectly, and in which intervention must therefore take the form of challenging and trying to reverse the policies in question – which might also mean a change of government or regime. In case a) intervention may be welcomed by the receiving state, so long as it retains some control over the way that it is carried out. In cases d) and e) the very existence of the state as a body having a monopoly of legitimate authority over a well-defined territory is being put in question by events on the ground; if the state is not, in fact, an effective sovereign, then intervention cannot be ruled out by an appeal to the norm of sovereignty.

But in any case, the idea that state sovereignty is a trump card that defeats all other moral and legal considerations has been challenged in recent years, and not only by political philosophers. Belief in the overriding importance of human rights was encapsulated in a semi-official document, *The Responsibility to Protect*, the title of a report issued

by the International Commission on Intervention and State Sovereignty in 2001 in response to the debate over humanitarian intervention sparked by interventions that had happened in the previous decade, such as NATO's intervention in Kosovo, and others that had failed to happen, such as, notoriously, in Rwanda.⁴

The Commission's Report interprets intervention in quite a broad way, covering aspects of humanitarian action that go well beyond the military intervention that might halt a civil war or a genocide. Nevertheless its central focus is on cases of military intervention by outside bodies in the internal affairs of sovereign states, and for this reason the questions that chiefly concern it are questions of international law: first, under what circumstances may the normal presumption of the integrity of sovereign states be set aside by virtue of the human rights violations that are taking place within their borders, and, second, who is authorised to intervene? Is it a necessary condition that the intervention has been approved by the UN Security Council, for instance? These, one might say, are questions about the legitimacy of intervention. There is, however, another question that seems to me equally if not more important, and that prompts the present discussion, namely who has the responsibility to intervene. It is one thing to say that when large-scale violations of human rights are taking place, there is a diffused responsibility on the part of humanity as a whole to protect the victims; it is another to say more precisely where this responsibility falls and how it can be made effective. Such discussion of this question as the Report contains tends to focus on the question whether states should be disqualified from intervening when they have some material interest in the outcome – on which it takes the realistic view that mixed motives are inevitable in international relations as elsewhere, and that it may be necessary for domestic reasons for intervening states to claim that their own national interests are served by their intervention. Elsewhere it laments the Security Council's past inability to mobilise UN member states to act in circumstances where intervention was clearly both legitimate and essential.

Yet despite this neglect, one might think that this problem of assigning responsibilities is central to establishing an effective international human rights

regime. Intervening to protect human rights is typically costly, in material resources in every case, in human resources in many cases (when soldiers, peacekeepers or aid workers are killed or taken hostage), in political capital (when intervention is construed by third parties as motivated by self-interest or imperial ambitions, leading in some cases to reprisals against the intervening state or its citizens). So states have good reasons to avoid becoming involved if at all possible, particularly democratic states where the government will come under heavy domestic fire if the intervention goes wrong. The fact that there are often many agencies – states, coalitions of states, or other bodies – that might in principle discharge the responsibility to protect makes the problem worse. We might draw an analogy here with instances in which individuals are confronted with a situation in which they would have to perform a Good Samaritan act – say going to the rescue of somebody who collapses in the street. Empirical studies of situations like this reveal that the more potential rescuers are present, the less likely anybody is to intervene – so the victim stands a better chance of being picked up if there is only one passer-by at the time he collapses than if there are, say, six people nearby.⁵ Several factors may combine to produce this outcome: people interpret other people's inaction as a sign that the problem is less serious than it might appear; there is a parallel normative effect whereby each person takes the others' behaviour as defining what is expected or right under the circumstances; but perhaps most importantly, responsibility is diffused among the potential helpers: if the victim were to die, no-one in particular could be held responsible for the death.

This problem of diffused responsibility leading to inaction can potentially be solved in two ways. One is the appearance of an authority with the capacity to single out agents and assign them particular tasks. In the street collapse case we might imagine a policeman arriving on the scene and asking bystanders to do specific things to help the victim. Obviously this can only work in cases where enough of those present recognize the authoritative status of the person who is doing the assigning. The second is the emergence of shared norms that identify one person in particular as having the responsibility to take the lead. These norms do not have to carry all of the justificatory load

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needed to support the intervention. After all we can probably assume that every bystander looking at the victim would agree that 'somebody should help that man'. What is needed is an additional norm that can tell us who that somebody is. If we return to the case of the international protection of human rights, there is, as we have seen, an emerging (though not yet complete) consensus on the principle that where systematic violations of human rights are taking place, some agency should step in to prevent them. The problem is to identify the particular agency.

In moving from cases which involve the responsibility to rescue a particular individual to collective interventions to protect human rights, we face an additional difficulty. Given the nature and scale of such interventions, they will in practice nearly always have to be undertaken by states, or by coalitions of states (I shall defend this assumption shortly). But these states are coercive bodies, at least in relation to their own citizens. When they intervene, they impose requirements on people – for example they send soldiers or aid workers to the areas where the rights violations are taking place, often at some considerable risk to the people who are sent. Even if there is no risk to persons, resources are required, and these of course are raised by compulsory taxation of the citizens. So the question arises whether interventions that impose requirements of this kind can ever be justified. It is one thing to say that as human beings we all share in a responsibility to protect the human rights of the rest of mankind; it is another to say that we can be forced to discharge this responsibility via the agency of the state.

Should we then leave states out of the picture and instead embrace a purely voluntary model of international rights protection, leaving such protection entirely in the hands of bodies staffed by volunteers and funded by voluntary contributions? We can find instances where something like this model already applies. Much human rights work is done by aid agencies like Oxfam and volunteer groups like Médecins sans Frontières. But without in any way diminishing the importance of such work, it is hard to see this voluntary model as the solution to all human rights disasters. Its limitations are fairly obvious. Where states themselves are the primary source of the human rights violations, as in our cases b) and c) above, no

voluntary body is likely to have the capacity to stand up to the delinquent state; we know, for example, that aid agencies already face acute dilemmas when in order to carry out their humanitarian work, they have to go along with government policies in the target state that they find objectionable. Furthermore, when the risks to human life rise above a certain threshold, voluntary agencies quite reasonably decide to pull their people out, so if anything is going to be done in cases of type e), involving state breakdown or civil war, it can only be done through intervention by outside agencies that are themselves able to wield coercive power sufficient to separate the warring parties and re-establish social order – in other words by states, or international bodies made up of states. Finally, intervention by voluntary bodies faces familiar problems of accountability: who is to say that a particular form of intervention is legitimate, if undertaken by a body that is not democratically accountable, except perhaps to its self-selected members? This issue becomes troubling whenever intervention is seen to have impact on the outcome of an internal struggle in the society where the rights-violations are occurring. Of course intervening states too can be, and often are, partisan in their actions, but at least they remain accountable for what they do, to their own citizens and to international bodies.

In response to such difficulties, we might propose an alternative version of the voluntary model. Suppose the United Nations, or some other international body of similar scope, were to create a taskforce for humanitarian intervention. Money raised by a global tax would be used to recruit soldiers and others willing to act under UN authorisation. Because of the tax element, this model is not a purely voluntary one, but it could be argued that everyone would merely be contributing their fair share of the costs of discharging a universal obligation to protect human rights. Since the members of the taskforce would be recruited on a voluntary basis, no untoward coercion is involved.

Such a model is *prima facie* attractive, but we have to ask about the realism of its underlying assumptions. If a force is to be created with sufficient capacity to take on delinquent rights-violating states, as in scenarios b) and c), or to re-establish order in the event of state breakdown, it would require an enormous investment not only in manpower but in armaments, delivery

systems, and so forth – it would need in other words to replicate the armed forces of a mid-size contemporary state, at the very least. We must ask whether the UN, or its equivalent, is likely in the near future to command the resources and the authority to bring such a force into existence. We must also ask about the decision procedures that would allow it to be deployed. Would it, for example, require the universal consent of all member states bar the delinquents? Observing the present difficulties in obtaining UN authorisation for even relatively small-scale peacekeeping operations inevitably induces scepticism about this version of the voluntary model.

If such scepticism is justified, it follows that the responsibility to protect human rights must in practice be discharged primarily by states, or by international institutions like NATO that represent coalitions of like-minded states. How, then, can it be made legitimate from the point of view of those who are forced to bear the costs of intervention? We might envisage a contractual model of international responsibility as an alternative to the voluntary model. The model would look something like this. Citizens, understanding that they have a responsibility towards the human rights of people world-wide, agree to authorise their states to discharge this responsibility on their behalf, an agreement that involves consenting to be taxed for this purpose and/or being sent in some capacity to deal with human rights violations on the ground. Having themselves been authorised in this way, states would then contract with each other to distribute the responsibility – for example forming coalitions in order to create intervention taskforces of different kinds. If this model could be put in place, it would clearly resolve the problem that I identified earlier – the problem, namely, that each state is understandably reluctant to take on the responsibility to protect human rights itself, given the likely costs of discharging that responsibility. According to the terms of the model, each state would be contractually bound to contribute, and if its citizens protested, they could be reminded that they had contracted to authorise the state to act on their behalf.

But does the model really provide a feasible solution to the problem? We need to look more closely at

the reasons citizens might have for agreeing to the contract that is being proposed, given that ex ante they have no coercively enforceable obligation to protect the human rights of outsiders. Much depends here on which of the five scenarios outlined above we are contemplating. Consider scenario a) – cases in which human rights are put at risk by natural disasters such as floods and famines. Citizens might well sign up to an international contract of mutual aid in response to such situations, because, first, although the likelihood of falling victim to such disasters varies considerably from place, still in principle any region of any society might at some time find itself facing a natural disaster, so the contract appeals not only to altruism but also to risk aversion; second, the expected cost of the contract, for any individual or any society, remains moderate. When one society is hit by a natural disaster, other societies would be expected to supply relief funds whose cost can be spread widely across all members of the contributing states, while those who are sent to implement the relief effort are not, normally, in great personal danger themselves. Contrast this with the case of military intervention in response to civil war or genocide. For liberal societies especially, there is virtually no element of mutual aid here; their citizens cannot reasonably anticipate being rescued from civil war or genocide themselves under the terms of the contract. It is sometimes argued that they may benefit in other ways – for example by virtue of facing a lesser threat of terrorism if the conflict situation is resolved. But recent experience surely casts considerable doubt on this proposition. Intervention may benefit large numbers of people whose lives are currently being threatened by civil war or genocide, but at the same time it is likely to arouse hostility among those who lose out in the process, and their sympathisers in other countries – so there is a real risk that violent action may be taken by way of retribution against the intervening state. Moreover the cost of intervention may be high, and very unevenly distributed. Citizens might very reasonably wish to set limits to their future liability, and therefore decline to issue a general authorisation to their states of the kind proposed; they would want to retain the right to decide on each intervention case by case, taking account of the likely costs involved when set against gains to human rights that the intervention would bring.

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This in turn would prevent states signing up to any arrangement that would oblige them to intervene regardless of the current wishes of their citizens.

We might then conclude that interventions become legitimate only when they are supported directly by a democratic vote of the citizens in the state that is to undertake them - a vote either in the form of a referendum or of an election in which parties with different policies on particular interventions, or on intervention in general, compete for the electorate's support. This approach would not of course solve the multi-agent problem at international level: assuming that in any particular case, several states, or several different coalitions of states, could carry out an intervention successfully, their citizen bodies would find themselves in the position of bystanders at an accident, each hoping that somebody else will step in to help while being willing to shoulder the responsibility themselves as a last resort. But would it even solve the internal legitimacy problem, assuming the vote goes in favour of intervention? Can a majority vote in favour of some policy justify the imposition of substantial costs upon a minority of citizens who may have voted against the policy? In general, the answer to this question must surely be Yes. The essence of democratic politics is that minorities are obliged to accept the outcome of a majority vote even if this is to their disadvantage. On the other hand, the legitimate authority of the majority is usually understood to be circumscribed in various ways. Minorities have rights too: their human rights cannot be infringed; they are owed various kinds of equal treatment, and so forth. The question, then, is whether decisions involving interventions to protect the human rights of non-citizens are to be seen simply as part of normal politics within those constraints, where majority votes can legitimately bind minorities, or whether they raise deeper questions, such that a more inclusive form of consent is needed to make them legitimate.

Allen Buchanan, in an illuminating discussion of the internal legitimacy of humanitarian intervention, has posed the problem in the following way.⁶ Suppose we were to see the authority of the state as stemming from a hypothetical agreement among its members to create an association that serves their interests; then humanitarian intervention becomes problematic, except in the unlikely event that it receives unanimous

support from the citizens. Since the purpose of the intervention is to protect the human rights of outsiders, it falls outside the scope of the hypothetical contract, and those opposed to the intervention who would have nevertheless to bear some of the costs are entitled to refuse to do so. Thus soldiers can be required to fight in national defence, or more widely in pursuit of national interests, but not merely to protect the human rights of outsiders - a view famously articulated by Samuel Huntington, who said, in relation to the US intervention in Somalia in 1992, 'it is morally unjustifiable and politically indefensible that members of the Armed Forces should be killed to prevent Somalis from killing one another'.⁷ To get beyond this point, a more expansive conception of the state is needed, which Buchanan labels 'the state as an instrument for justice'. On this view, the state is seen as a mechanism which individuals can use to discharge the 'natural duty of justice' that they owe to foreigners as well as to compatriots. The natural duty of justice is the duty to help ensure that all persons have access to institutions for the protection of their basic rights, so long as this can be done without incurring excessive costs.

Because of the limitation contained in the last clause, Buchanan's understanding of the natural duty is consistent with the idea that citizens can justifiably display some degree of partiality for their compatriots - they do not have to weight the protection of non-citizens' rights equally with the protection of citizens' rights.⁸ Suppose that most citizens interpret the natural duty in this way: they give priority to protecting the human rights of compatriots even while recognizing some responsibility for the human rights of vulnerable foreigners. Even so, acts of humanitarian intervention would seem to be justifiable so long as the costs and the benefits were proportionate - if, for example, the number of lives saved or amount of suffering averted was considerably greater than the overall cost in death or injury to members of the intervening state. But the problem with this approach is that it treats the citizens as a homogeneous bloc and overlooks the possibly very unequal distribution of costs within that group. It does not, in other words, consider the position of the soldier or civilian worker who is killed or injured in the course of what, overall, may be a

relatively low-cost intervention.

It may be said in reply to this that soldiers – and a similar argument might be made in the case of certain categories of civilians – when they join the armed forces undertake an open-ended contract to fight and risk their lives as and when necessary. They may join up primarily to serve their country, in the sense of defending its interests, but once they have enrolled, they have put themselves at the disposal of the state, and they are no longer entitled to judge for themselves when and for what purposes they are going to be deployed. If this is not clear to them already, it should be spelt out in their contracts of employment. Obviously this argument applies only to the case of volunteer or professional armies, not to conscripts, and we might therefore conclude immediately, with Michael Walzer, that only volunteers can be used in humanitarian interventions.⁹ But does it apply even to them? For the argument from consent to go through, we would need to be convinced that those who join the military do so out of choice, not necessity, and with a reasonable grasp of the risks they are likely to incur. Perhaps they have been seduced by rosy advertisements of the life of adventure that today's soldier enjoys, or the high-tech equipment he or she will be operating, at a safe distance from the enemy. These advertisements may be justifiable on balance, because there is certainly a problem of finding enough people willing to join the armed forces in a society where military life no longer has the cachet it once had, but we need to ask whether the recruits' consent is firm enough to silence concern about the risks they may be exposed to in the course of humanitarian intervention.

Even if we can show that soldiers have freely consented to be exposed to risk or death or serious injury, moreover, it does not follow that the state that has received their consent is entitled to expose them to any risk, no matter how large. Although no longer civilians, they are still citizens, and are owed what following Dworkin we can call 'equal concern and respect'. It can perhaps expose them to a reasonable degree of risk, in pursuit of a sufficiently good purpose (which would include the protection of human rights). But what counts as a reasonable degree of risk? How many lives may one justifiably anticipate sacrificing in an intervention that if successful would save life

on a large scale? There is, as far as I know, no clear answer to these questions to be found in the literature of moral and political philosophy. But if in place of this we look to the practice of democratic states, and to public opinion in those states, the implicit answer is that in the case of humanitarian interventions where no national interest is at stake, the anticipated risk must be quite low. Once a few hundred soldiers have been killed or seriously injured, opinion shifts rapidly against the intervention.¹⁰ Huntington's position remains an extreme one, but popular opinion trails not very far behind it: it is not willing to accept that many Americans should be killed to prevent Somalis from killing one another.¹¹

You may think that popular opinion here is simply falling victim to an unthinking form of nationalism, perhaps even racism, which sets the value of (dark-skinned) foreigners at close to nothing. But before rushing to this conclusion, we should step back a bit to reflect. Return for a moment to the duty of rescue considered now as a responsibility of the individual – the duty to pull a drowning person out of the river. As this is usually expressed, it is a duty to rescue endangered persons when this can be done at little cost to oneself – in other words there is built into the duty a very considerable tilt in favour of the intervener, who has no obligation to incur a risk of the same magnitude as the risk to which the victim is now exposed. (This tilt is reflected in the law of those states that have 'Bad Samaritan' laws that impose a legal duty of rescue. The duty applies only where the victim is facing a threat of death or serious injury; the rescuer is required to intervene only when he can do so without incurring significant risk; and often he is given a choice between carrying out the rescue himself and contacting the relevant authorities, for instance the police.¹²) Again what counts as a 'reasonable cost' in these circumstances is left undefined, but one helpful suggestion is that one should be willing to incur risks of the kind that one runs anyway in the course of daily life, crossing roads, driving cars and so forth.¹³ Suppose we were to use this as our benchmark: it would still be possible for someone to refuse to intervene on grounds of risk, even though the risk involved was only a little higher than the risks he would be taking anyway as he went about his daily business. If this is the correct understanding of moral

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duty in cases where there is only one rescuer, and so responsibility rests entirely with that person, what should we say about cases in which there are several potential rescuers, and so the additional question of how to allocate responsibility arises – which is normally the position when large scale violations of human rights are threatened?

There are, in fact, at least two variants on the multi-agent scenario. In the first, the rescue is best carried out by a single agent, and the problem is one of identifying that agent: if several rescuers leap into the water in an attempt to rescue the drowning person, they get in each other's way and make a successful rescue less likely. What is needed here is to pick out, for example, the strongest swimmer among those standing on the river bank. In the second, co-operation between the rescuers increases the chance of success and/or reduces the potential cost to each rescuer: if the water is fast-flowing but not too deep, a human chain could be formed reaching out to the victim. It is easier to escape responsibility in the first case than in the second, because each person may reasonably believe that some other bystander is better qualified than he to leap into the water, whereas once the chain begins to form, it will be hard to find good reasons not to join it. Which variant better represents the case of international intervention to protect human rights? At first sight, it seems that this is a case of scenario two: intervention will be more effective, and less costly to each political community, when undertaken by a multinational force. But in practice this may not always be so. First, an effective intervention is likely to involve only a small number of states, and so there is still the problem of how the list should be drawn up, with each state having an incentive to minimise its contribution, or better still not be involved at all.¹⁴ Second, co-ordination may be difficult if different contributing states impose different cost limits on the intervention – for instance some states are only willing to accept a very low risk of their personnel being killed or injured. Under these circumstances there may be heated disputes about what form the intervention should take, leading to paralysis. For these reasons, the first scenario may better capture the problem of distributing responsibilities at international level.

Let's take stock of where we have got to. My paper began from the premise that we all share in a general

responsibility to protect human rights that crosses national borders. As human beings we cannot simply sit back and watch as others are deprived of their rights to life, subsistence, bodily integrity, and so forth. But for this responsibility to become effective, it has to be assigned to particular agents, who are then given the duty to protect the rights of specific groups of people. The primary assignment is to states, whose claim to sovereignty rests in part on their ability to protect the human rights of their own citizens. But where this breaks down, either through state incapacity or because the state adopts policies that violate the rights of its own people, a further assignment of remedial responsibility to outside bodies has to be made. The issue then is how this should be done, particularly in light of the fact that the costs agents are asked to bear in the course of their intervention must be reasonable ones. I then looked at two possible solutions to the problem. The first was the voluntary model, where each person is left to decide for themselves what contribution they will make towards protecting human rights, either directly, by say volunteering to become an aid worker, or indirectly by offering financial support to aid organisations. This, I suggested, was likely only to work in a sub-set of cases, where the costs of intervention were not high, and intervention did not require a direct confrontation with a state that was itself responsible for violating human rights. The second was the contractual model, where citizens commit themselves in advance to discharge the responsibility to protect, preferably via a binding international agreement that would require states to intervene when asked to do so either on their own or as part of a multinational force. I argued that citizens would be unlikely to agree to this, and this would be reasonable in light of the prospective costs – it would be like binding oneself to rescue drowning swimmers regardless of how many of them there were, and how fast the river was flowing. One can accept the duty of rescue, but justifiably retain the right to decide when the costs of a rescue are too high, at least within certain limits.

Since neither of these two models seems likely to succeed, what we are left with is this: the responsibility to protect human rights is primarily a responsibility of states, which must however retain the right to decide when they will undertake an intervention in defence

of these rights. Where states can join forces and work together to offer protection, that is all to the good. But they cannot bind themselves to enter such coalitions in advance, not least because the intervention must be justified internally, to their own citizens, in light of the fact that the costs are going to fall upon those citizens, and often very unequally upon different sub-groups. It is important that those who face the greatest risks should do so willingly, but I argued that one should not take the fact that the army, say, is recruited on a voluntary basis as justification for requiring soldiers to take part in an intervention regardless of the likely cost. The upshot is that in some situations there is likely to be what we might call a protection gap: there are people who can legitimately demand protection, because their rights are being violated by forces that they are unable to resist, whether forces of nature or human agents, but those who might protect them can legitimately refuse, because the costs they are being asked to bear are too great, either absolutely or in relation to those being borne by others. I won't try to judge which real cases – Rwanda, Darfur, etc – might fit this description.¹⁵

I want to end by drawing out two general corollaries of the position I have been defending. First, as I noted earlier, most discussion of humanitarian intervention, in the specific sense of military humanitarian intervention, has been preoccupied with the question of legitimacy: who has the right to intervene in any particular case. Reading this literature, one can get the impression that there are too many states eager to intervene who have to be kept in check by some principle of due authorisation. However the gist of my argument has been that, if we are looking at cases that are simply humanitarian and do not have significant geo-political aspects, then the likelihood is that we shall have too few rather than too many willing interveners – that states will be playing games with each other to minimise the risk to themselves in contributing to the relief of what is clearly a humanitarian disaster. From this perspective I share Michael Walzer's view that we should not try to lay down in advance conditions for who may intervene, but rather be guided by the simple maxim 'who can, should'.¹⁶ I speculate here that the reason most authors want to impose legitimacy conditions on humanitarian intervention is that they are thinking about the issue of intervention in general,

and quite properly want to lay down restrictions on that. In other words, one may think that states should not interfere in one another's internal affairs even for good purposes, such as promoting or safeguarding democracy, and therefore support general principles of non-intervention, but want to make a clear exception for cases of the kind I identified at the beginning of the paper, where basic human rights are being violated on a significant scale. The solution, therefore, is to worry less about the question 'who has the right to intervene?' and more about the question 'when are human rights being violated on such a scale that anybody who can has the right to intervene? What is the threshold beyond which we are clearly facing a humanitarian disaster?'

My second corollary concerns the role of international law in protecting human rights. To what extent can the responsibility to protect human right be turned into a legal obligation? It follows from what I have argued that there could not be a general legal obligation of this kind – there could not be an obligation to engage in humanitarian intervention that would parallel the 'Bad Samaritan' laws that in some states impose a duty of rescue on individuals. This does not mean that international law has no role to play in protecting human rights. Its main role, however, is surely to restrain potential violators of these rights. Since most states have now signed up to the original UN Declaration and the subsequent charters of human rights, one can say that there is at least the basis for a legal obligation to respect these rights. The problem, as we all know, is how to make international law effective in the absence of a powerful enforcing body, which does not exist now and is unlikely to exist in the foreseeable future. But perhaps international law might first be given normative force, in the form of rulings about acceptable and unacceptable human rights practices, even though such rulings could not in the immediate future be enforced. As bodies such as the International Criminal Court become better established, the effect would be to serve notice on the rulers of rights-violating states that they might in the future find themselves liable to prosecution. In this way international law could play some part in preventing human rights disasters that fall under headings c), d) and e) on my original list.

International law could not, however, resolve the

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problem of how to allocate responsibility for protection in cases where the human rights disaster is already occurring. Unless a scheme of voluntary co-operation between states arises – again unlikely in the short run – the best hope seems to be the emergence of norms that would pick out particular states, or groups of states, as bearing special responsibility for each individual case. The problem, as I have argued elsewhere, is that the norms we might find plausible do not, unfortunately, all point in the same direction.¹⁷ In the international case we might think, for example, of geographical proximity – states, or groups of states, should have a special responsibility for protecting human rights in their own region; cultural similarity – Islamic states, say, should have a special responsibility for rights violations in other Islamic states; historic connection – states should have a special responsibility towards countries they have interacted with over time, for example their ex-colonies; and special capacity – states that have a particular kind of expertise or resources should assume responsibility when that expertise or those resources are needed. We can observe cases where each of these norms has come into play. But clearly their reach is going to be patchy, they will point in different directions in some cases, and following them would distribute the burden of intervention in arbitrary ways – some states being called on to intervene more often and at much greater cost than others.¹⁸

For the time being, therefore, the best we can hope for is something like the following: first, there should be a clearer international understanding of what counts as a human rights disaster, such that the general norm of non-intervention can be set aside. The states directly involved are of course likely to resist being labelled in this way, since they will have their own political agendas to pursue which may well be contributing to the disaster, but that does not matter so long as there is wide international agreement, in the UN and elsewhere, that the scale of human rights violation has crossed the threshold.¹⁹ Then there should be communication between states with the capacity to intervene with the aim of applying norms such as those I've just listed to pick out one or more states as responsible agents. Perhaps in the longer term it might be possible to work out a system of burden-sharing so that the costs of intervention can be more

evenly spread – though this will undoubtedly be difficult. (Even in what might be thought to be the much simpler case of distributing the burden

of admitting refugees – simpler because this can be characterised crudely just as a matter of the numbers to be admitted – coming up with a generally acceptable scheme has proved problematic.²⁰) One reason for this is that the present capacity of states to contribute to human rights interventions, particularly interventions that involve the use of force, is heavily influenced by the past policies of these states, in building up their military capability, or choosing not to do so. These policies in turn will reflect different conceptions of national identity, and can be defended by appeal to national self-determination. What, for example, should we say about a country like Switzerland which for historic-cultural reasons has developed a system of national defence that is precisely that and nothing more, and whose contribution to peace-keeping efforts overseas is therefore unavoidably minimal? Or of countries such as Germany and Japan whose constitutions place narrow limits on military activities? Could they be brought into a burden-sharing scheme by being asked to make larger contributions in other areas, such as reconstruction in the aftermath of an intervention?

In the absence of such a scheme, and given that the UN can only encourage and not require member states to take action even in cases where it has resolved that intervention is justified, there is not much to rely on apart from diplomacy and the moral imperative to protect human rights, made more pressing by media reports of the unfolding disasters. Under these circumstances it seems inevitable that what I have called the protection gap will persist: hundreds of thousands of people will continue to have their rights infringed because the responsibility to protect them remains undistributed.

Footnotes

¹ There is some disagreement about whether this wider set of rights should be seen as human rights proper, or as something else – rights of citizenship, for example. My reasons for favouring the latter view can be found in D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7. But for present purposes it is not essential to resolve this disagreement, so long as we are clear about the substance of the rights that generate the responsibility to protect.

² I shall not in this essay investigate the source of this responsibility. I shall take it for granted that where large scale violations of human rights are occurring, everyone who is able to do something to prevent that happening has a responsibility to do so: it would be morally wrong – a denial of equal human worth – simply to stand by and do nothing. This basic premise does not, however, settle either the extent of this responsibility or how it should be distributed among persons. For that reason I use the language of responsibility rather than obligation – obligations are concrete moral requirements that arise when the two issues just canvassed have been settled.

³ For contrasting views on the question whether a right of humanitarian intervention now forms part of international law, see N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000) and S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001). For discussion, see J. Welsh, 'From Right to Responsibility: Humanitarian Intervention and International Society', *Global Governance*, 8 (2002), 503-21.

⁴ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre: Ottawa, 2001) and *The Responsibility to Protect, Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre: Ottawa, 2001).

⁵ I have considered these studies, and their normative implications, in '“Are they my poor?”: the problem of altruism in a world of strangers', *Critical Review of International Social Philosophy and Policy*, 5 (2002), 106-127.

⁶ A. Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', *Journal of Political Philosophy*, 7 (1999), 71-87.

⁷ Cited in J.L. Holzgrefe, 'The Humanitarian Intervention Debate' in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), p. 30.

⁸ I have defended such a position in 'Reasonable Partiality for Compatriots', *Ethical Theory and Moral Practice*, 8 (2005), 63-81.

⁹ M. Walzer, 'The Argument About Humanitarian Intervention', *Dissent*, Winter 2002, p. 32.

¹⁰ For some discussion of this point, with references to supporting empirical evidence, see J. Goldsmith, 'Liberal Democracy and Cosmopolitan Duty', *Stanford Law Review*, 55 (2002-3), 1667-1696.

¹¹ In case this should be thought of as mere selfishness, remember that the issue is not what individual people may be willing to do themselves to save the lives of potential victims – we have enough evidence of heroic personal altruism to lay that question to rest – but how far they are prepared to require others – their fellow-citizens – to engage in risky humanitarian rescues.

¹² See, for example, J. M. Ratcliffe (ed.), *The Good Samaritan and the Law* (Garden City, N.Y.: Anchor Books, 1966); M. A. Menlowe and A. M. Smith (eds.), *The Duty to Rescue: The Jurisprudence of Aid* (Aldershot: Dartmouth, 1993). For discussion of the arguments for and against such legislation, see J. Feinberg, *The Moral Limits of the Criminal Law, Vol 1: Harm to Others* (New York: Oxford University Press, 1984), ch. 4; H. H. Malm, 'Bad Samaritan laws: harm, help or hype?', *Law and Philosophy*, 19 (2000), 707-50; A. Ripstein, 'Three Duties to Rescue: moral, civil, and criminal', *Law and Philosophy*, 19 (2000), 751-79; C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Clarendon Press, 2006), ch. 2

¹³ For this suggestion, see Fabre, *Whose Body is it Anyway?*, ch. 2.¹⁴ As an illustration, consider the difficulties involved in putting together a 15,000 strong force for peacekeeping duties in South Lebanon in the summer of 2006: even among those countries who declared themselves willing to participate, the numbers offered were remarkably low, France leading the way with an initial promise of 200 troops, later increased after considerable pressure to 2,000.

¹⁵ This idea of a protection gap has been challenged on the grounds that all (genuine) rights must have corresponding duties, so in cases where it turns out that no agent has an obligation to intervene (on grounds of risk, say) it follows that no right has been infringed. Putting the same point another way, all rights, including human rights, have inbuilt limitations that mirror the limited obligations of potential rights-protectors – so my right to life does not extend to the right to be rescued from a fast-flowing river if no suitably powerful rescuer is present. I reject this view. It is true that rights are subject to feasibility constraints, so that, for example, one has no right to a life-preserving resource that it is beyond human power to provide, but more mundane cases of scarcity reveal that the mere absence of an agent with a corresponding duty does not invalidate a right. I have developed this point in Miller,

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National Responsibility and Global Justice (Oxford: Oxford University Press, 2007), ch. 7, sect. V.

¹⁶ Walzer, 'The Argument About Humanitarian Intervention'.

¹⁷ See my paper 'Distributing Responsibilities', *Journal of Political Philosophy*, 9 (2001), 453-71.

¹⁸ Unequal distribution of costs may not be arbitrary where it can be shown that the intervening state bears some historic responsibility for the human rights violations that are now occurring – for example if it is an ex-colonial power that has previously supported one faction in a state that is now experiencing civil war.

¹⁹ At present such agreement exists in the case of genocide – even those developing countries that are generally reluctant to accept any breaches of the sovereignty norm are willing, in principle, to allow intervention to prevent an impending genocide (they may object to the particular agents who undertake the intervention). Clearly the threshold is here being set very high; there are many large scale human rights disasters that do not take the form of genocide – for instance ideologically driven policies that lead to mass starvation. I am grateful to Carolyn Haggis for information on the evolving attitude of African states in particular to interventions aimed at stopping genocide.

²⁰ I have discussed this question briefly in 'Immigration: the Case for Limits' in A. Cohen and K. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005). I refer there to proposals discussed in J. C. Hathaway, and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 115-211 and P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243-297.



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