THE FACES OF INTERNATIONAL AGENCY: REFRAMING THE PROBLEM OF HUMANITARIAN INTERVENTION

Dylan Ballard

The ability to distinguish between different moral or legal statuses is essential to the validity of our normative assessments of our own actions and the actions of others. If my neighbor is also my mailman, and I catch him with his hand in my mailbox, I ought to be sure in which capacity he is acting before accusing him of stealing my mail. This paper argues that such distinctions are equally vital to the validity of international moral and legal evaluation. International agents, just like domestic ones, occupy multiple moral and legal statuses that must be teased apart in cases where they confer conflicting rights or duties. This paper holds humanitarian intervention to be such a case: an international agent has the right to intervene under only one of its statuses, the duty not to intervene under another. It is concluded that, since these two statuses confer conflicting moral/legal profiles, the appropriate statuses of the agents involved in a particular intervention (proposed or actual) must be determined – in the light of good reasons – before the situation can be validly appraised.

The intervention by one state into the internal affairs of another stands alone as the most potentially destructive behavior with which international law is forced to deal. A world in which interventions went unchecked would offer weak states no reliable defense against stronger ones, with imperialism, paternalism, and political homogeneity among the possible results. Moreover, the very existence of an international community, ordered by common laws and customs, depends on the universal presumption of the equal protection of all states, which makes submission to the international order beneficial for weak states as well as strong ones. In order to ensure this basic contract, international law attempts to protect those states that cannot protect themselves by placing strong prohibitions on military intervention. The only exception is intervention with a humanitarian intent – that is, an effort designed to protect the citizens of another country from a government that is violating their "human" rights. The question of when such interventions are justified is typically hashed out in terms of how the respective rights and duties of the agents involved ought to be weighed against each other. The prior

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question of just what *types* of agents can have these rights and duties, however, is almost always neglected.

This paper will describe two fundamentally different ways of conceiving a moral or legal situation on an international scale, and examine how these conceptions help reshape the problem of humanitarian intervention. It will also attempt to diagnose the reasons the distinction between the two conceptions has been generally overlooked by writers on the subject, an inquiry that will involve a dissection of two basic equivocations that have caused significant problems in the study of international law and ethics. Finally, it will argue that this widespread oversight has led to an incomplete understanding of the problem of humanitarian intervention, and misdirected many international lawyers and legal scholars into offering solutions that skirt the most interesting aspects of the problem rather than resolving it.

The two ways of conceiving an international event to be discussed are equally comprehensive perspectives on the world at an international level; supposing both perspectives could be assumed completely objectively they would agree on the exact same set of international facts. Rather, the primary differences between the two occur in the respective moral or legal weights they assign to those facts. For the purposes of morally or legally assessing an agent's actions, which facts are relevant always depends in part on the moral or legal status of the agent involved. Thus, since international agents, just like domestic ones, are capable of acting in multiple moral and legal capacities, in cases where the moral or legal standing of one capacity or status is incompatible with the standing of another capacity it is crucial to determine in which capacity the agent is acting. It will be shown that a failure to make this distinction (and to have good reasons for making it) leads to faulty moral and legal judgments, by allowing certain facts to count as morally or legally relevant when they should not, and other facts to be ignored or overlooked when they ought to be considered. Such faulty judgments abound in recent legal scholarship, this paper will contend, because of a general failure to recognize that the concept of humanitarian intervention embodies a fundamental tension between the moral and legal statuses of the agents involved, and that only by first resolving this tension in token cases of intervention is it possible to judge them validly.

Two Equivocations at the Heart of "International" Law

To a certain extent, an all-too-common fallacy has already been committed which will be guarded against for the remainder of this paper. For obvious reasons, those involved in studying and crafting international law use the word "international" perhaps more than any other, though usually without respecting or in any way noting the fact that the word has at least

two relevant meanings. Now this would be a generally harmless mistake if only one of the meanings had any importance to international law, but both meanings can be understood as foundational to an independent conception of international law and morality which is widely accepted (though rarely distinguished from other conceptions) by scholars of the subject. The two meanings I have in mind, then, are roughly these:

International: **(1)** Of, relating to, or involving two or more nations; **(2)** Extending across or transcending national boundaries.

Above, in referring to an "international event," I used the term "international", as having both these meanings without making any effort to point out the equivocation. Certainly I would want to include within the scope of "international" events, in the sense intended above, both those events involving the actions of two or more states and those events transcending state boundaries: terrorist acts are "international" events every bit as much as, e.g., the signing of an economic treaty between China and the United States. The nature of terrorist attacks like those recently committed by al Qaeda, however, are captured better by the term "transnational," and this term will be employed for the remainder of the paper to denote any way of understanding an international action according to which the agents involved are not to be understood as politically and territorially autonomous states, or the citizens of such states. This distinction will turn out to be especially relevant to the analysis of humanitarian intervention, which this paper will argue to be a transnational, rather than an international, concept.

The first definition of "international" given above might or might not stand at the foundation of one of the two conceptions I have in mind. The reason for this ambiguity is a second equivocation, equally common in writings on international law and morality. This fallacy occurs when the author fails to specify the meaning of another term vital to international analysis: "state" or "nation" or "member" (as in a member of a coalition) or "party" (as in a party to an international treaty), etc. However one wants to distinguish these terms from each other, each is ambiguous in the same way – it is simply not clear exactly what a term like "state" denotes. We sometimes call governments or modes of government "states," as when we talk about the "socialist state," and we sometimes call a people united by a common citizenship "the state." More abstractly, we also call political or territorial units "states", ignoring the fact that human beings live within their borders.[1] Anthony Ellis notes one potential danger associated with this state of affairs:

> [W]e must be careful about speaking of what is in a *state's* interests, for this could mean different things. We may think of the state as the union of people and government, but we may also think of it differently, as when, for instance, we speak of the state oppressing its people. Now, an arrangement that is in the interest of the state in the second sense may not be in the interest of the state in the first sense.[2]

When the President of the United States and a handful of his top advisers decide to invade Iraq, we often call this a "state action"; we might just as

well call the election of a political leader a "state action." It appears, however, that these two actions are performed by different agents, the first by a relatively small number of citizens endowed with political power: a government; the second by a body politic: a group of many private citizens expressing a collective intention to effect change at a national level. This difference between peoples and governments also manifests itself in different moral and legal statuses: governments are often granted rights and duties that private citizens, (or peoples), are not, and vice versa. The question we are faced with, then, is so simple as to seem ridiculous: just what *is* a state – is it a people or is it a government? Ultimately our answer will be that it is both, though for the purposes of moral or legal assessment, it is sometimes more appropriate to conceive of it as one and sometimes the other, depending on the context of the international event in question and the legal or moral perspective (or what I have referred to above as a "conception") appropriate to that context. The point to be made is that this equivocation of terms like "state" has yet to be resolved, and by resolving it in the particular context of humanitarian intervention, we are making a genuine contribution to the clarification of international law and ethics.

Now it might be objected that, although the same word "state" is used in international legal contexts to name peoples, governments, political or territorial entities, etc., this is unproblematic from the standpoint of moral and legal theory since both the government of a state and the people which live within its borders share the same moral and legal status in any international case. In support of this view one might point out that, just as governments sign international treaties and therefore have an obvious duty to respect the terms of those treaties, the peoples they govern are no less bound, since they have a *prima facie* duty to respect the terms of legal agreements made by their government on their behalf. Similarly, though it was the *governments* of 108 nations that ratified the Charter of the United Nations in 1945, the peoples of those nations are bound by the relation of legal representation to uphold the principles and protocols outlined in that document.[3] For example, if violating the sovereignty of another state is against international law, then it makes no difference in principle whether the illegal intervention was ordered or otherwise sanctioned by the government of a state (i.e., whether it was an "official" state action) or committed by a group of citizens acting without the support of their government.

However, while this absolutist view may seem somewhat plausible when applied to some cases involving international duties it simply collapses in many international cases involving the ascription of international rights. To take a mundane example, the UN Charter states in Article 9 that the General Assembly "shall consist of all the Members of the United Nations" with each Member having "not more than five representatives."[4]

This provision ascribes to UN "Members" a specific legal right to name up to five persons as their UN representatives; but to which entity is the right ascribed: the government of the "Member" its people (i.e., private citizens), or both (i.e., all of its citizens)? The answer in this case is obvious – only government officials (and not private citizens) are permitted to choose UN ambassadors – but the important point is that this is not obvious from the language of the legal document, even though it is supposed to codify the legal right in question. It is not just that the layman cannot pick up a copy of the UN Charter and determine from the mere denotations of the words it contains to which entities it ascribes its various rights and duties – the equivocations of international terms like "state" and "international" occur in *legal* contexts; the international lawyer has no better case than the layman for explaining which of their several meanings these terms are supposed to have in their various usages other than that he knows (because of his legal education) *this* is how they are generally interpreted by the international legal community.

Now the fact that international legal terms like "state" and "international" require interpretation in order to have meaning is certainly no flaw in itself – interpretation is an absolutely essential aspect of the effectiveness of any legal system, whether municipal or international.[5] What *is* a flaw is the failure to realize that interpretation is really necessary and is actually occurring. It is fine for a word to be used as having two different meanings, so long as the user of the word is clear (both in his exposition and in his own mind) when the word has one meaning and when the other. The fallacy is to use a word as having two different meanings without knowing or saying that it is being so used. This is the flaw in recent literature on humanitarian intervention – the sentence "Every state enjoys, in principle, a right of sovereignty" does not amount to a proposition without interpretation, because "state" is used as a name for many legal and moral statuses. It is absolutely unclear whether a right is being attributed in this case to "every state" under one of these statuses, some of them, or all of them. Yet it seems most writers on the subject, after employing sentences like this one, have made little effort to clarify which status or statuses they mean.

Now it is certainly possible that this is not really a problem for the assessment of humanitarian intervention since the rights and duties involved in *that* concept belong to a state under all or none of its possible legal and moral statuses. That is, it might be that in all possible cases, when a state has a duty of non-intervention under its status as a legitimate government, so does it under its status as a collection of human beings. Conversely, when it does not have the duty it does not have it under either status, and likewise for all the other rights and duties (and their negations) which might have any relevance to the assessment of a case of supposed humanitarian intervention. While this is possible, however,

it is false, and in later sections it will be argued that the most important rights and duties involved in humanitarian intervention as a concept in moral and legal theory are *status-specific*; i.e., they can be borne or not borne by a state under some of its legal and moral characterizations and not others. Before these claims about the nature of a state's various moral and legal statuses can be argued for, however, it must be explained in greater detail just what moral and legal statuses a state is understood as having.

Two Conceptions of International Morality and Legality

It is one of the more interesting theoretical aspects of the law that every human being on Earth is at once the bearer of many legally or morally relevant statuses, each of which may confer on her different rights and obligations. When these different statuses confer conflicting rights or obligations (as they inevitably do), a judgment is required to determine which status or statuses the agent is to be understood (in the eyes of the law or the public) as acting in the capacity of. Suppose I walked up to a man on the street, a man I didn't know, and promptly shot him to death. Thankfully, in the vast majority of cases where one human being does this to another, the legal judgment is that the shooter is a murderer. Only suppose this case is special: I was ordered to do this, only ten minutes before pulling the trigger, by my employer, the Central Intelligence Agency, and instead of prosecuting me for the killing, the American government rewards me with a press conference and a medal of honor. If I had killed the same man – performed the same exact physical action – ten minutes earlier (say, as retribution for stealing my parking space) I would be judged not a hero but a criminal, and this difference in judgment would, in this case, hinge entirely on my moral and legal status at the time of the killing – i.e., in which of my many "capacities" I was deemed to have been acting. The same man can be at once a private citizen, an employee of the United States government, an authorized assassin, a father, a husband, a debtor to a local bank, the driver of a rental car, the borrower of a CD from his best friend – even in societies with the simplest possible modes of socioeconomic organization the list for each individual is simply voluminous. And it is not the case that I (in this imagined scenario) am an employee of the U.S. government only while on duty, a father and husband while at home – if only this were true, there would be no theoretical entanglements – no need for determining which moral or legal status is relevant for the purposes of moral or legal assessment. However, when a police officer pulls a car over and demands money from its driver, we hold him accountable not only as a police officer and an abuser of the power that status confers, but also as a private citizen and a thief. If the person he pulled over and robbed turned out to be his wife, moreover, we might also hold him accountable in divorce court as a bad husband.

The arguments in this section will rely upon the observation that *international* agents, just like domestic ones, have multiple and simultaneous legal and moral statuses. We have already seen that in talking about international events we use the word "state" to mean several different things. The likely reason for this ambiguity, then, is not that we are simply confused about the meaning of the word, but that a state really *is* several different things. Just as the police officer in the previous example is at once a police officer, a citizen of the United States, a husband, and the bearer of many other statuses with moral and legal implications, a state like the United States is at once a government, a collection of human beings, a portion of the Earth's surface inscribed within certain lines on a map, etc. And just as it is appropriate to conceive or judge a police officer in different moral and legal contexts as police officer, husband, or citizen, it is also appropriate in different international moral and legal contexts to conceive or judge a state as a government, or a collection of human beings, or a portion of the Earth. When the police officer stands in divorce court, for example, he is being conceived of and judged as a husband – that is the legal status appropriate to the legal context of a divorce court. This does not mean the presiding judge is barred from taking into account the fact that the man before him occupies other moral and legal statuses that confer on him certain rights and duties – it means that whatever the judge takes into account (other legal statuses included) must be relevant to the man's legal status as husband and the question of how well he has lived up to the obligations conferred by that status.

Just as individual human beings bear multiple moral and legal statuses on a domestic level, they also do so at an international level, and are every bit as much international agents as states. Every human being is a citizen of at least one state, most of us in virtue of being born in a certain location. In addition, every one of us is a world "citizen" in virtue of being born; that is, the state of being human itself entails a certain irrevocable moral and legal status. This has become something of a platitude in the philosophy of law, but insofar as "human rights" are recognized by the letter of international law it is also a proposition to which the international legal system is expressly committed.[6] When I go to a polling booth on my eighteenth birthday as a newly registered voter and am refused the right to vote, the right that is violated is a right conferred upon me by my status as a citizen of the United States. If I were not a citizen of the United States I would not have the right to vote in her elections. When my government murders me because it doesn't agree with my political views, on the other hand, rights of mine are violated that are not conferred upon me by my status as citizen of the United States, or of any other country, but by my status as a human being – as a citizen of the world. In principle, every human being (it has been argued by many) has, in the words of the Universal Declaration of Human Rights, "the right to life, liberty and security of person."[7] There may be ways to lose this right (e.g., violating

the rights of others), but it is widely agreed that having extreme political views is not one of them.

Viewing individual human beings as world citizens, and states as collections of world citizens, are defining features of the *transnational* conception of international morality and legality. This conception is transnational because, for the purposes of moral or legal judgment, the facts that portions of the Earth are separated from each other by boundaries, and that states are organized into autonomous political and territorial units with formally recognized governments, are held to be irrelevant. All that determines the morality or legality of a particular action according to this conception, rather, are considerations of how the human rights (and human duties) of the agents involved have been affected. Individuals are assigned a right under the transnational conception, for example, by the proposition: "Everyone has the freedom of movement and residence within the borders of each state."[8] The existence of this freedom depends only on the fact that its bearer is a human being, and likewise the duty to respect it.

Contrasted with this is the *international* (narrowly construed) conception of international morality and legality, according to which individual human beings are viewed as citizens or subjects of a particular country or countries, and states as governments, or entities with the ultimate political authority over a defined and commonly recognized portion of the Earth. Individuals are ascribed rights and duties under the international conception by propositions like: "Every United States citizen has the right to bear arms," and "Every person, regardless of nationality, has a duty to respect international law while in international waters." The last proposition belongs to the international conception because the duty being ascribed is derived from the fact that certain governments were, on behalf of their peoples, party to a treaty establishing certain common laws in international waters, and thus the peoples of those countries are subject to those laws. Note that this proposition would only be valid if every state had signed the treaty, though international legal authorities have in the past prosecuted persons for violating treaties to which their governments were never a party. The point is that there is an important difference between assigning a right or duty to "every person" because everyone is a citizen or subject of some state, and all or most states have agreed on certain laws, and assigning a right or duty to "every person" in virtue of the fact that everyone is a human being, and thus the bearer of certain human rights and obligations.[9]

In order to more fully illustrate the difference between these two conceptions, consider the following (imagined) case: a group of people (let us say each from a different country) found a small transnational humanitarian organization and begin raising money for a relief effort in

Uganda, where people having a different ethnicity than the country's dictator are being slaughtered by government officials. Once they have obtained sufficient funds, they fly unannounced to Uganda, purchase weapons on the black market, and begin distributing them to the peasants. These self-styled humanitarians believe they are acting with transnational intentions – that is, they believe they are simply one group of human beings reaching out to another group that is having its human rights systematically violated. When UN officials capture the group, however, they disagree with that characterization, and proceed to try them before an international tribunal for violating Uganda's sovereignty. The UN is judging these individuals according to the international conception: these people have violated the Ugandan government's rights because they are not Ugandan citizens, and thus had no right to enter its borders and distribute any materials whatsoever to its citizens. The accused disagree with the charges because they view themselves and the Ugandans they were attempting to aid under the transnational conception: they were not entering Uganda as citizens of any particular country, but as world citizens – as human beings attempting to aid other human beings in distress. Their failure to respect the sovereignty of Uganda was not a crime because the fact of Uganda's territorial autonomy had, in their opinion, no significance for the moral or legal assessment of their actions. They contend they are being improperly characterized: judge them on whether or not they violated their duties as human beings or the human rights of those they attempted to aid, for it was as human beings they were acting, human beings they were trying to help, and considerations of human rights and duties alone should determine their judgment.

Applying these Conceptions to Humanitarian Intervention

When we grant the legal or moral right of intervention to a state we are viewing that state and the act of intervention according to the transnational conception, while when we ascribe the right of sovereignty to a state, and the corresponding duty of non-intervention to all others, we are viewing the world according to the international conception. When the U.N. Security Council grants a state the right to intervene in another state it is not because the intervening state is a legitimate government, (that fact weighs against intervention, since governments have the duty to respect each other's sovereignty), but because that state is (also) a collection of world citizens, with the same legal status as that of the people whose rights are supposedly being violated in the state targeted for intervention. It is this shared humanity alone that in some cases trumps the strong presumption within the international community against intervention. It should matter not at all, in ascribing the right of intervention, which state the interveners are citizens of, nor that they are subjects of a government party to the UN Charter, nor even that some of them are *officials* of a government party to the UN Charter.

Similarly, a state is understood to be in need of humanitarian intervention under its status as a collection of world citizens, not as a government or a collection of citizens of a particular state. When humanitarian intervention is deemed to be morally or legally permitted, in other words, it is *not* because the following principle has been violated by the offending state or states: "Every state should protect and respect the human rights of its citizens." When NATO intervened in Kosovo as part of a Security Council sanctioned humanitarian intervention it was not an attempt (or at least not if the intervention was legitimately humanitarian) to defend and restore the human rights of the Kosovar Albanians because they were Kosovar Albanians, but because (so the justification went) they were human beings at the mercy of a genocidal government, and any human beings in such a situation deserve defense and protection. Indeed, this type of characterization is mandated by the very definition of human rights: human rights are those rights human beings bear regardless of their nationality, ethnicity, religious affiliation, etc., and since humanitarian interventions are designed to defend and restore human rights, it cannot be, strictly speaking, that the justification for intervention is that a government is violating the human rights of *its citizens* and must be stopped. The fact that the people being harmed are citizens of a particular country, or inhabitants of a particular region, is wholly irrelevant. Rather, the justification must be simply that, somewhere in the world, human beings are suffering mass violations of their human rights.

If humanitarian intervention were characterized any differently, support for it, both in principle and in practice, would be untenable. In a military intervention it is presumed that lives will be lost on both sides. All that can make the loss of life morally and legally acceptable is the notion that the number of lives lost will be relatively minor compared with the number of lives that would be lost if the intervention were not undertaken. This calculus implies that the lives of the interveners and the lives of those living in the state targeted for intervention are to be treated on a par with each other by all involved, such that each life is of equal worth. If the right of intervention were granted to states under their status as governments, however, rather than as collections of world citizens, this expectation of equality would be completely groundless. It is a fundamental duty of every government to its people to treat them as "more valuable" than the peoples of other governments, in that, when the rights of the people conflict with the rights of foreigners, other things being equal, the rights of the people ought to be preferred. The perceived failure to fulfill this duty was one source of the outcry in the United States during its participation in the invasion of Iraq in 2003: American soldiers were dying in a conflict (some argued) that America had instigated and in which it had no right to be involved.

This duty of governments to prefer the rights of their own citizens over the rights of non-citizens when the two come into conflict is an indicator by which the legitimacy of a government can be gauged: when a government consistently fails to facilitate and protect the rights of its citizens to the best of its ability, it ceases to reflect the will of the people in its actions, and ceases to be legitimate. Even one notable failure, moreover, can lead to lost elections in democratic states (which, as a rule, are the types of states granted the right of humanitarian intervention). For obvious reasons, then, governments have a strong interest in at least maintaining the appearance that the people's rights are the first consideration in any governmental action, and this makes them liabilities as humanitarian interveners. A cynic might interject here that this merely shows that interstate humanitarian intervention is an unattainable ideal: states are simply too self-centered to be viable candidates for something as altruistic as war in the name of human rights. In this case, however, the same old equivocation of "state" compels a hasty conclusion. In extreme cases (which cases requiring humanitarian intervention necessarily are) faith must be placed in the notion that states can act in capacities other than that of governments, unconstrained by the host of self-centered rights and duties that status confers. The right of humanitarian intervention should be granted (if it is to be granted at all) to the agent or agents with the best likelihood of success, and since in at least some cases states will meet this description, it is sometimes worth the risk to grant them the right, and view them as collections of world citizens.

It is certainly implausible that states can or should have purely humanitarian intentions when intervening in the affairs of another state. Granting the right of intervention to a state under its status as a collection of world citizens does not imply the assumption that this is the only status under which the state will intervene. It implies, rather, that (so long as the state intervenes under the status under which it was granted the right to intervene) it is under this status that the state as intervener will be morally or legally judged. Did the intervention respect equally the human rights of all involved? This is the type of question necessary to assessing the morality or legality of a supposedly humanitarian intervention, not considerations of how well the intervening state fulfilled those duties and exercised those rights borne under its status as a government. When we judge humanitarian interventions, in short, we judge both the interveners and those affected by the intervention as individual and collections of world citizens, not as sovereign governments.

It is under the transnational conception, then, that we assign the right of intervention to states. Just as importantly, under the transnational conception states do *not* have the duty of non-intervention. The duty of non-intervention arises out of the fact that we live in a world of politically and territorially autonomous units managed by governments and inhabited

by citizens subject to those governments. Violation of the duty occurs when the boundaries of one of these units is crossed (either physically or indirectly, as in cases of economic intervention) by an entity which does not have the right to do so, with the intention of disrupting the internal policies or procedures therein. According to the transnational conception of international legality and morality, however, the boundaries defining states have absolutely no moral or legal relevance. If two states are both understood as collections of world citizens, as is mandated by the transnational conception, and one of the collections interferes with the activities of the other, the intervening persons cannot be condemned on the grounds that they violated a duty of non-intervention, because a collection of world citizens is not a sovereign entity. (They could be condemned, of course, on the grounds that they violated the human rights of those they affected.) As far as the legal duty of non-intervention goes, it arises from the fact that over a hundred governments signed the UN Charter in 1945, making the citizens of those states, and many more since then, subject to the provisions of that Charter, one of which is the duty to respect the political and territorial autonomy of other states. But, as will be discussed in detail later, the UN Charter is a legal document grounded firmly in the international conception, and if intervening persons are understood and judged as world citizens, they cannot be punished or condemned for violating a Charter they have a duty to respect as citizens of a particular country. In fact, as we saw earlier in the thought experiment about the Ugandan intervention, when people are punished for violating the sovereignty of a state they are always punished either as governments or as citizens of their respective states, and never as world citizens. The explanation for this is simple: world citizens and collections thereof have no duty of non-intervention.

When we ascribe the right of sovereignty to a state, or the corresponding duty of non-intervention, on the other hand, the situation is exactly reversed: we *do* understand that state under its moral and legal status as a legitimate government or as a collection of state citizens – that is, under the international conception described above. The right of sovereignty arises out of the fact that people live together and form distinct societies, determining for themselves (in ideal cases) what kind of governance is needed and desired within the confines of that social structure. A legitimate government, then, is understood as an extension of the will of the people – a will that is not to be opposed or subverted by outside forces within its own sphere of influence, lest the natural right of all peoples to self-determination be compromised. Because every state in principle has this right of sovereignty, every state also has the duty to respect the sovereignty of all others; if this duty were not generally respected, a world containing the right of self-determination could not exist, and the threat of powerful states thrusting their moral, legal, and social standards on weaker states would be far more immediate. Thus, the right of

sovereignty is justified by many as a vital check on imperialism of all flavors.

When we claim an agent to have violated the sovereignty of a state, (thereby violating the duty of non-intervention), therefore, we evaluate and accuse that entity either as a sovereign government, or the citizen of a sovereign government. Sovereign governments bear the duty of non-intervention most indisputably, since the right of sovereignty they enjoy depends on the sovereignty of each state being generally respected. Moreover, as legitimate governments are understood as extensions of the will of the people, the people, under their moral and legal status as citizens of a sovereign state, share equally in the duty of non-intervention. Governments which violate the sovereignty of other governments, therefore, can be criticized on the grounds that they "would deny to others the right to do what they do".[10] It is because the agent in question is, or is a citizen of, a legitimate government that exists in virtue of its citizens' right of self-determination, in other words, that it cannot morally or legally deny the same right to another agent with the same status.

Under the international conception, furthermore, states cannot have the right of intervention. That is, when states are conceived of as legitimate governments, and individuals as state citizens, intervention cannot be justified either morally or legally because of the aforementioned right of sovereignty. In order for humanitarian intervention to be justified, it is not enough that the offending government merely engages in some unseemly activities, or is financially corrupt, or at times neglectful of some of its people. So long as a government is still assessed and judged morally and legally as a legitimate government by those with the authority to judge and assess, intervention cannot be justified. The level of corruption necessary to justify humanitarian intervention, rather, is extreme to the point that the offending state ceases to be viewed under its status as a legitimate government at all, and begins to be viewed under its status as a collection of world citizens, some of which are abusing the human rights of others. Some acts, done under the auspices of governmental authority, are so egregious that it is no longer appropriate to treat the agents responsible as legitimate governments, or citizens thereof, and these are the kinds of acts (either potential or actual) necessary to warrant humanitarian intervention. Of course, it is hardly a novel point that humanitarian intervention in a state is justified only when the government of that state ceases to be legitimate, (e.g., when it engages in genocide). This fact has great importance for my argument in this paper, for it shows that intervention becomes justified only when the offending state(s) ceases to be understood, from the standpoint of international legality or morality, under the international conception, and begins to be understood under the transnational conception. Only under the transnational conception do states lose the right of sovereignty and become potential

targets for humanitarian intervention, and only under the transnational conception can other entities (e.g., states, international coalitions, transnational organizations) possibly bear the right of intervention.

To summarize, in this section it has been argued that it is under the transnational conception of international morality and legality, and only the transnational conception, that states can have both the moral and legal right of humanitarian intervention. It has also been argued that it is under the international conception, and only the international conception, that states can have the right of sovereignty and the corresponding duty of non-intervention. In the section that follows it will be shown that this picture compels a reframing of the problem of humanitarian intervention, such that the choice between protecting human rights and respecting state sovereignty in a particular case, viewed by many as *the* problem of intervention, is really informed by the more fundamental choice of how to conceive, for the purposes of moral or legal assessment, the context of a particular act of intervention and the statuses of the agents involved. That is, in a very substantial sense, the answer to the question of whether a particular state is morally or legally justified to undertake a humanitarian intervention depends squarely on how one defines the term "state."

The Problem of Humanitarian Intervention: Usurping the Standard View

According to the standard framing of the problem, the concept of humanitarian intervention presents a moral and legal challenge chiefly because it necessarily involves the collision of two international principles that are mutually exclusive. The Charter of the United Nations makes it explicitly illegal for one state to intervene in the domestic affairs of another, a law understood as conferring a *prima facie* right of sovereignty to each state (or at least each state formally recognized by the United Nations) as well as a duty to each state of non-intervention.[11] Indeed, the concept of sovereignty is the centerpiece of the UN Charter, which in turn is the central document in international law.

The Charter embodies a particular non-ideal theory of international relations compelled in large part by the aftermath of Hitler's attempt to conquer the world in World War II: the best way to achieve and maintain international peace and security is to ensure that states are generally left alone, to prohibit aggressive war, and to establish a principled respect for the world's diversity of cultures and political regimes.[12] This might be called the "Good fences make good neighbors" theory of international relations, and it is certainly true that millions of lives, both military and civilian, have been lost over only the last few centuries as a direct result of the right of sovereignty being violated by imperialistic governments. By asserting the right of sovereignty as an explicit legal right, the forgers

of the UN Charter hoped to check such interstate aggression by making it punishable under international law and, perhaps more importantly, taboo within the international community.[13]

In the last fifty years, however, intrastate problems have drawn increasing attention from the international community.[14] If a government is killing or otherwise violating the human rights of its people, it seems that sovereignty should provide that government no defense. It is important to leave governments to their own affairs when they are fulfilling their responsibilities to their peoples, but when they fail to do so it has increasingly become the opinion of the international community that intervention may be in order. The UN Charter allows for such recourse, by permitting the intervention of one or more states into the affairs of another if the action is approved by a majority vote of the Security Council.[15] Thus, the legal problem facing members of the Council in assessing the validity of potential interventions has traditionally been understood as involving the weighing of the respective legal rights and duties borne by the states involved. Since in principle every state has a right of sovereignty, the right of intervention claimed by the state requesting permission to intervene must be judged to outweigh considerations of sovereignty in order for the intervention to be licensed. Burleigh Wilkins, in his introduction to a recent collection of essays on humanitarian intervention, concisely outlines this framing of the problem:

> If the "plain letter of the law" has any applicability to international law, it is this: states shall not intervene militarily or otherwise in the affairs of other states. This is stated explicitly in the Charter of the United Nations…The Charter and other UN documents also assert that human rights are to be protected, but the responsibility for the protection of human rights seems to rest on the governments of the states where the violation of these rights occurs…[Yet] the question of what protection if any the UN should provide to individuals when their human rights are violated by the government, or with the complicity of the government, of the country in which they live remains a contentious issue...Since all legal systems contain principles which under some circumstances may oppose one another, it is arguable that respect for state sovereignty and respect for human rights are two such principles. Historically the respect for state sovereignty has been allowed to trump respect for human rights, but now it has become arguable that when states fail to respect the human rights of their citizens (or others who reside within their boundaries), they may be held accountable.[16]

In a humanitarian intervention, some entity claims a right to intervene – i.e. claims to have a right which outweighs both the right of sovereignty enjoyed in principle by its target and the corresponding duty of non-intervention. The standard framing infers from this that the central problem in morally or legally assessing a supposedly humanitarian intervention is determining who has the more compelling case, the state(s) claiming the right of intervention or the state(s) claiming the retention of the right of sovereignty. The method of assessment is to consider the respective arguments of all the states involved and then determine which state(s) has the strongest argument. Though this is certainly an essential aspect of normatively assessing an intervention, however, it is but one aspect, and not, as the standard framing claims, the one most logically fundamental to that process. There is more than one legal/moral tension inherent in the concept of humanitarian intervention, and the tension to be discussed occurs not between the conflicting rights and duties of different *states*, but between the conflicting rights and duties of the same state under different legal *statuses*.

The fundamental question is this: for the purposes of morally or legally assessing the supposedly humanitarian intervention of "state x" into "state y", how is it most appropriate to conceive or understand "x" and "y" (i.e., under what status should "x" and "y" be judged as acting)? Is it more appropriate that they be judged as two governments, thus having a mutual duty not to interfere with the other's internal affairs, or as two collectives of human beings, thus having the mutual right (in certain cases) to protect and defend the other's human rights? Of course, in many cases it may be most appropriate to consider the two states under both conceptions, since moral or legal violations may occur under one conception that do not occur under the other, but the point is that this requires separate assessments – we are dealing with four international agent-statuses, not two, and are thus faced with a far more difficult moral and legal calculus than the standard framing of the problem of humanitarian intervention would have us believe. The right of intervention and the duty of non-intervention are not borne by the same entity under the same moral and legal status (which would certainly be a problem, if it were true), but by the same entity under different moral and legal statuses, and so the problem consists in determining which status is ultimately to "win out." On a general level the standard question remains – Is the right of intervention in this case strong enough to override the duty of non-intervention? – But the method for determining an answer requires an additional step; we are not merely comparing the respective weights of two moral and legal principles, but first determining the plausibility of conceiving a particular state or states as one type of international agent rather than another.

In other words, we must answer two questions: In what morally or legally relevant capacity is it most plausible to treat the intervening agent as acting? and: In what capacity is it most plausible to understand the subject of the intervention as being selected as a target or objective? These are separate questions from, and logically prior to: Does the agent have a right of intervention in this case? They are logically prior because the moral or legal statuses (i.e., facts about the nature of the statuses) of the agents involved in a particular situation necessarily constitute some of the premises in the argument for ascribing a right or duty to those agents – states are governments *and* collections of human beings, and they have different rights and duties under each of these capacities. We have to decide under what capacity they are acting (or being selected as the target of an action) in order to determine if they are even the *type* of agent that could have the right or duty in question.

A state (in the indeterminate sense) may have a *prima facie* right of intervention far outweighing its duty of non-intervention, for example, but if that state intervenes in the capacity of a government (e.g., without the consent or knowledge of its people) then it is highly implausible to judge the action as that of a people, meaning, since the right of intervention is borne by collections of world citizens and not governments, that the intervention is illegal, immoral, or both (depending on the mode(s) of normative assessment).

To illustrate this possibility in a concrete legal context, imagine the United States is granted a legal right of intervention in Liberia by a unanimous vote of the Security Council. The people of Liberia have been targeted by their government as part of a program of ethnically and politically motivated genocide. The U.S. government eagerly begins preparations for the intervention, which it sees as having a political (as Liberia is a trade partner of the U.S.), in addition to a humanitarian justification, despite the fact that the vast majority of the American people are against the intervention because of its exorbitant price tag. In the face of mass public protests, the U.S. government continues with the intervention as planned, defending the human rights of the Liberian people, achieving its political goals, and passing the costs onto a largely discontented electorate. It is likely that those who would call this action a case of legal or moral humanitarian intervention (or, at the very least, legal or moral intervention) are assuming the standard framing of the problem of intervention. In this case the United States has a legal right of intervention which, being formally recognized by the international community, presumably far outweighs the Liberian government's right of non-intervention. It is tempting to say, then, that the American people in this scenario are simply wrong – a genuine humanitarian crisis exists in Liberia and the United States has both the ability and the legal right to rectify the situation.

But this conclusion is only tempting if one believes the right of intervention is granted to governments. If one accepts my arguments in the previous section, it can only be concluded that this imagined intervention into Liberia is illegal, since the U.S. government is exercising a legal right that doesn't belong to it. There is clearly more to assessing the morality or legality of a supposed act of humanitarian intervention than determining whether the intervening state (broadly construed) has the right to intervene – the right must also be exercised properly. Traditionally writers on the subject have taken moral or legal execution of a humanitarian intervention to include considerations like the minimalization of civilian casualties, respect for the right of self-determination, the possession of a valid exit plan, etc.[17] What has not been considered is the requirement that the intervening state act in the capacity under which it is granted the right to intervene.

By revising the standard framing to reflect this requirement, a new legal and moral tension is revealed in the concept of humanitarian intervention, existing internal to the intervening state rather than externally and between the intervener and the subject of intervention. As Wilkins says, "All legal systems contain principles which under some circumstances may oppose one another", but there are at least two different ways a legal principle can oppose another.[18] The standard framing of the problem of humanitarian intervention embodies one: respect for state sovereignty at times opposes respect for human rights because an intervening state "x" may have a *prima facie* right to intervene in another state "y" on humanitarian grounds while "y" has at least a *prima facie* right not to have its internal affairs interfered with; thus, each state bears a legal privilege in principle, but the two privileges are mutually exclusive and it must be decided which state has the stronger case – i.e., which privilege is weightier. But two different legal standards need not be borne by different agents in order for them to conflict. The same agent can bear one legal standard under one of its legal statuses and a second legal standard under another of its legal statuses, and the two legal standards can be mutually exclusive. This takes place in problematic cases of intervention when a state, under its legal status as a collection of human beings, is conferred a legal right of humanitarian intervention, while *the same state*, under its status as a government and party to the UN Charter, bears a duty not to intervene in the affairs of other states. The result is a tension between two legal standards borne not by two different states, but by the same state under two different legal statuses.

Conclusion: Kosovo as a Test Case

In 1999, NATO waged a war against Yugoslavia (without Security Council approval) that was characterized by many (most vociferously by the participating members of NATO) as a humanitarian intervention. In the

midst of this war, however, two opposing perspectives emerged in the international press. Vaclav Havel, then president of the Czech Republic – a member of NATO – described the conflict as follows:

But there is one thing no reasonable person can deny: this is probably the first war that has not been waged in the name of "national interests," but rather in the name of principles and values…Kosovo has no oil fields to be coveted; no member nation in (NATO) has any territorial demands on Kosovo; (Serbian President Slobodan) Milosevic does not threaten the territorial integrity of any member of the alliance. And yet the alliance is at war. It is fighting out of a concern for the fate of others. It is fighting because no decent person can stand by and watch the systematic, state-directed murder of other people.[19]

This assessment is rooted firmly in the transnational conception. Havel argues that NATO is acting not as a coalition of autonomous states (that is, as a coalition of legitimate governments) but as a collection of "decent" people, responding to the mass "murder of other people." Thus, he understands the NATO interveners and the Kosovar Albanians, on behalf of which the intervention was supposedly undertaken, as linked by their common humanity – NATO is acting as a concerned group of world citizens fulfilling its "human duties" in defense of another group of world citizens whose human rights are in dire need of protection.
Robert Fisk, on the other hand, expressed an opposing perspective:

> How much longer do we have to endure the folly of NATO's war in the Balkans...? It broke international law in attacking a sovereign state without seeking a UN mandate. It killed hundreds of innocent Serb civilians – in our name, of course, while being too cowardly to risk a single NATO life in defense of the poor and weak for whom it meretriciously claimed to be fighting. NATO's war cannot even be regarded as a mistake; it is a criminal act.[20]

Fisk offers two distinct charges, the first rooted in the international conception, the second in the transnational conception. In the first he claims the war to be a criminal act because it is illegal to attack a sovereign state without UN approval. This is true, of course, only if the entity being attacked *is* a sovereign state, and this requirement was far from being obviously met by Slobodan Milosevic's genocidal regime. Even if Fisk is correct in understanding Yugoslavia as retaining the right of sovereignty, however, the point is that he needs some argument for viewing Yugoslavia under the international conception before ascribing rights to Yugoslavia *under* that conception.

In the second charge Fisk claims that NATO did not live up to the requirement that in a humanitarian intervention all lives, being equal in terms of human rights, are to be treated with equal respect, thus understanding both NATO and Yugoslavia as collections of world citizens standing (at least in principle) on an equal plane. But it is true that NATO had a responsibility to give equal respect to all lives only if NATO *was* acting as a collection of world citizens, and not as a group of governments. Again, this was far from obvious, as (despite Havel's rosy portrayal) there were certainly political incentives for NATO's governments in undertaking the intervention. The point is Fisk needs an argument for viewing NATO and Yugoslavia under the transnational conception before he can ascribe them duties and rights (respectively) *under* that conception.

In the passage above Fisk understands Yugoslavia during the war first as a sovereign state and then as a "failed" state – i.e. a collection of world citizens with no right of sovereignty. The obvious problem is that he cannot have it both ways. He cannot consistently assign to Yugoslavia the right to be treated as world citizens – that is, as having lives of equal worth to those of the NATO interveners – *and* the right of sovereignty, for these rights belong to states under different and, in the case of intervention, mutually exclusive moral/legal statuses. If NATO's intervention is to be understood as a war, then it was probably illegal (international wars being legal only in self-defense) but also in which case the NATO soldiers had no duty, other things equal, to treat Serbian lives as having equal value to their own. The goal when engaging in a war, after all, is to achieve the desired outcome with the smallest possible number of casualties on one's own side, and even in an unjust war a commander, acting in state interests, probably has a general duty to his troops to favor their safety over the safety of others.[21] If NATO's intervention was humanitarian, on the other hand, NATO did have a duty to treat all lives involved as equals, but it did not have the duty to respect Yugoslavia's sovereignty, since in cases of justified intervention the subject of the intervention is necessarily not the kind of entity that can have a right of sovereignty.

Now it should be stressed that in this particular case NATO's intervention was probably, by the letter of international law, illegal when viewed from either perspective. The point is that it can only be viewed from *one* perspective. If, as Fisk says, Kosovo was illegal because it was not licensed by the UN, then legally speaking it was not a humanitarian intervention at all, but a war. And if it was a war then Fisk's second charge does not apply, for an entity engaging in a war bears no duty, other things equal, to give the lives of its soldiers and the lives of enemy civilians equal consideration. In short, Fisk's double condemnation in the above passage is untenable, a fact that is obscured by his failure to consider Kosovo from a single, consistent moral/legal perspective.

Because his first charge understands NATO and Yugoslavia under the international conception, his second charge, rooted in the transnational conception, cannot add to his case. Because international agents occupy multiple moral and legal statuses, in order to meaningfully assign an international right or duty one must specify under what status or statuses the international agent is to bear the right. The standard framing of the problem of humanitarian intervention is wrong, and it is wrong because its dual-employment of the term "state" is fallacious: it is not only misleading but incomplete to assert that Yugoslavia had a right of sovereignty *and* a right that its citizens be treated as world citizens by the NATO interveners – Yugoslavia had these two rights under different, mutually exclusive legal statuses. Similarly, it is false that NATO bore the duty of non-intervention in Yugoslavia *and* the duty to treat all people involved in the intervention as equals – it had only one of those duties, and which it had depends on under which legal status it is understood as acting.

Endnotes

[1] For a more detailed discussion of these uses of "state," as well as several others not mentioned here, see W.J. Rees, "The Theory of Sovereignty Restated," *Mind*, Vol. 59, No. 236, (Oct., 1950), pp. 499-502.
[2] Anthony Ellis, "War, Revolution, and Humanitarian Intervention," *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview Press, 2003), 25.
[3] *Charter of the United Nations*, (1945).
[4] *Charter of the United Nations*, Ch. 4, Article 9, (1945).
[5] Burleigh Wilkins, "Introduction," *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview Press, 2003), 9.
[6] Burleigh Wilkins, "Humanitarian Intervention: Some Doubts," *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview Press, 2003), 36.
[7] *Universal Declaration of Human Rights*, Article 3, (1948).
[8] *Universal Declaration of Human Rights*, Article 13.1, (1948).
[9] For similar reasons, the proposition "The human rights of every person are to be secured and protected by his or her government" is not a composite transnational/international proposition as it might seem, but a wholly international one. The right being ascribed to "every person" here is the right to have one's human rights secured and protected, and this right is being granted in virtue of the fact that everyone is the citizen or subject of some government.
[10] Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform," *Ethics*, Vol. 111, No. 4 (Jul., 2001), 694.
[11] Wilkins, 9-10.
[12] Alfred P. Rubin, "Humanitarian Intervention and International Law," *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview Press, 2003), 114-115.
[13] Rubin, 116.
[14] Buchanan, 123.
[15] *Charter of the United Nations*, Chapter VII, (1945).
[16] Wilkins, 9.
[17] E.g., Georg Meggle, "Is This War Good? An Ethical Commentary," *Lessons of Kosovo: The Dangers of Humanitarian Intervention* (Toronto: Broadview Press, 2003), 28-29.
[18] Wilkins, 10.
[19] Vaclav Havel, "Kosovo and the End of the Nation-State," *New York Review of Books* (10 June 1999): 4-6.
[20] Robert Fisk, "Who Needs NATO?", *The Progressive* (22 July 1999): 22-23.
[21] Of course it is not the case that in a war a commander has a duty to favor the safety of his soldiers over the safety of everyone else in all cases. When wartime atrocities occur, like the wanton killing of civilians, the perpetrators are punished as war criminals. My point is that they are punished under the international conception; as citizens of a particular state, which is party to certain international treaties (e.g., the Geneva Conventions), they have a duty to obey the rules of war. The crime should be understood differently, even if the punishment is the same, if the atrocities occurred during a humanitarian intervention. In that case the crimes were committed by world citizens and not by, e.g., soldiers of a state's army, so the source of the duty they violated cannot be an international treaty like Geneva.

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