

## Bombing the beneficiaries

The distribution of the costs of the responsibility to protect and humanitarian intervention

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### Introduction

In its 1999 intervention in Kosovo, NATO was criticized heavily for its reliance solely on bombing from high altitude. Although NATO did not suffer any casualties itself, several civilians were reportedly killed by NATO's sorties. One inference made was that NATO should have deployed ground troops and, in doing so, decreased harm to civilians by taking on greater costs itself. By relying on airpower alone, NATO – and the United States in particular – appeared to be too fearful of NATO soldiers coming home in body-bags at the expense of innocent Kosovo Albanian and Serbian civilians. In other words, NATO placed all the human costs of the intervention on civilians.

NATO's 2011 intervention in Libya also largely relied on airpower. This reliance on airpower was similarly controversial. On the one hand, as in Kosovo, there were no reported NATO casualties. Anders Fogh Rasmussen, the Secretary-General of NATO, claimed that “[w]e have carried out this operation very carefully, without confirmed civilian casualties.”<sup>1</sup> But, on the other hand, an investigation in 2011 by the *New York Times* of airstrike sites found that “at least 40 civilians, and perhaps more than 70, were killed by NATO at these sites.”<sup>2</sup> Again, it seems that NATO transferred much of the human costs of the intervention to civilians.

In this chapter, I will defend what I call the “Restrictive View” for the conduct of armed humanitarian intervention. On this view, those conducting

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<sup>1</sup> In C.J. Chivers and E. Schmitt, “In Strikes on Libya by NATO, an Unspoken Civilian Toll,” *New York Times* (December 17, 2011), available at: [www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all](http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all) (accessed August 29, 2012).

<sup>2</sup> *Ibid.*

interventions and discharging the military intervention element of Pillar Three of the Responsibility to Protect (RtoP) are morally required to take on *greater* costs, rather than distributing these costs to morally innocent civilians, such as those whom they are trying to assist. (Note that I focus on human costs rather than the financial and other costs associated with humanitarian intervention.)

A few years ago, George R. Lucas Jr. presented a brief but cogent defense of the Restrictive View in his general account of the principles of *jus ad pacem*. He argued that armed humanitarian intervention is far closer to domestic law enforcement and peacekeeping, and as such entails greater restrictions than found in traditional accounts of *jus in bello*.<sup>3</sup> For Lucas, intervening soldiers are not entitled to remove themselves at all costs from harm and are not permitted to inflict collateral damage on non-military targets or personnel, but rather are required to incur some costs to themselves and to avoid the kind of acts they are intervening to prevent. Hence, interveners should not endorse policies that reallocate risk to non-combatants, such as force protection, but instead should incur considerable additional risk.

The Restrictive View has, however, been challenged recently by several leading just war theorists. An alternative view, which I call the “Permissive View,” seems to have become increasingly popular. On the Permissive View, those conducting armed humanitarian intervention are morally required to take on only some or a small amount of the costs of intervention, if any. Most notably, Jeff McMahan and Gerhard Øverland have recently argued that interveners can permissibly distribute much of the costs of intervention to the “beneficiaries” of the intervention, such as citizens who are freed from tyrannical rule.<sup>4</sup> Moreover, they claim that the beneficiaries of the intervention should bear the costs of armed humanitarian intervention and the discharging of the RtoP rather than innocent bystanders (who are not beneficiaries).<sup>5</sup>

<sup>3</sup> George R. Lucas, Jr., “From *Jus ad Bellum* to *Jus ad Pacem*: Re-thinking Just-war Criteria for the Use of Military Force for Humanitarian Ends,” in Deen K. Chatterjee and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), 72–96.

<sup>4</sup> Jeff McMahan, “Humanitarian Intervention, Consent, and Proportionality,” in N.A. Davis, R. Keshen, and J. McMahan (eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: Oxford University Press, 2010), 44–72; Jeff McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” *Philosophy & Public Affairs* 38 (2010), 342–379; Gerhard Øverland, “High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?” in Paolo Tripodi and Jessica Wolfendale (eds.), *New Wars and New Soldiers: Ethical Challenges in the Modern Military* (Farnham: Ashgate, 2011), 69–86.

In his comments on McMahan’s “Humanitarian Intervention, Consent, and Proportionality,” Jonathan Glover also shows sympathy for this view in his “Responses: A Summing Up,” in Davis *et al.*, *Ethics and Humanity*.

<sup>5</sup> McMahan defines expected beneficiaries as those whose “overall risk of being harmed (which takes into account both the probability of their being harmed and the magnitude of the harms they might suffer) would be reduced by a war in their defense,” even if “the war

It helps to distinguish between two claims made in defense of the Permissive View. The first is what I will call the “Rescuers Thesis.” This asserts that the beneficiaries should be subject to greater costs than the rescuers. For instance, McMahan argues that when there exists a trade-off between harms to just combatants or non-combatant beneficiaries, the non-combatants’ immunity is reduced by their status as beneficiaries.<sup>6</sup> The second is what I will call the “Bystanders Thesis.” This asserts that the beneficiaries should be subject to greater costs than the bystanders. As we will see, McMahan thinks that, overall, these two considerations counter-balance the reasons in favor of the Restrictive View.

In what follows, I first present the *prima facie* case for the Restrictive View. I then reject the Rescuers Thesis and the Bystanders Thesis. I argue that these fail to show that there is a morally relevant distinction in this context between rescuers, beneficiaries, and bystanders and, as such, the Bystanders Thesis and the Rescuers Thesis do not repudiate the *prima facie* case for the Restrictive View. In the final section, I present three further, more applied reasons in favor of the Restrictive View.

Before beginning, it should be noted that (unless otherwise stated) my discussion of the costs to be borne by rescuers, beneficiaries, and bystanders is focused on cases where the rescuers, beneficiaries, and bystanders are morally innocent, that is, where they are not morally culpable for the situation where the need for rescue arises, that is, the humanitarian crisis. In practice, rescuers, beneficiaries, and bystanders may sometimes be culpable to some extent for creating the need for armed humanitarian intervention, such as when the beneficiaries previously repressed an ethnic group that then violently attacks them, thereby causing the humanitarian crisis. Overall, the distribution of the costs of intervention should also reflect the culpability of the rescuers, beneficiaries, and bystanders.<sup>7</sup>

It should also be noted that I am not concerned with the issue of the permissibility of intervening *per se*. The likely distribution of the costs of intervention does sometimes alter the permissibility of resorting to an intervention, but does not always determine it. For instance, an intervention (e.g., NATO’s 1999 intervention in Kosovo) may be all-things-considered morally permissible,

would be fought in a way that would expose them to new and different risks.” McMahan, “The Just Distribution of Harm,” 359–360.

I will also use the terms “beneficiaries,” “bystanders,” and “rescuers” to assist in the assessment of the philosophical issues. Of course, these labels simplify somewhat. I acknowledge that applying such labels to actual groups can lead to political problems associated with the stigmatization of particular groups.

<sup>6</sup> McMahan, “The Just Distribution of Harm,” 373.

<sup>7</sup> I frame the chapter in terms of culpability for simplicity’s sake, although I do not think that much turns on this. It seems to me that my defense of the Restrictive View could also be framed in terms of agent-responsibility (McMahan’s measure of liability), that is, where the rescuers, beneficiaries, and bystanders are not agent-responsible for the crisis.

despite the highly problematic distribution of costs (e.g., the imposition of much of the costs onto the beneficiaries), because overall it does much more good than harm.<sup>8</sup> The distribution of the costs of intervention is a further, morally important issue in its own right and for other issues (e.g., it may determine the *degree* of justifiability of the intervention and which agent should undertake intervention), in addition to its import for the issue of permissibility.

### The prima facie case for the Restrictive View

I will start by outlining the prima facie case for the Restrictive View. It should be made clear here that McMahan largely agrees with this case. He believes (mistakenly, I will argue) that it is counter-balanced by the Rescuers Thesis and the Bystanders Thesis.<sup>9</sup> As we will see, Øverland is less sympathetic to this prima facie case.

#### *Doing and allowing*

One reason why it might seem that interveners should accept costs and avoid harming bystanders and beneficiaries is the difference between “doing” and “allowing,” which is sometimes framed in terms of “killing” and “letting die.” In short, it is widely held that it is sometimes better that one avoids *doing* harm, even if this will lead to *allowing* greater harm. McMahan is very sympathetic to the import of this difference. He argues that if a combatant has a choice between “a course of action that will *allow* an innocent person to be killed and an alternative course that will prevent that person from being killed but will *kill* another innocent person as a side effect, he must not kill, even if the person he allows to be killed is himself.”<sup>10</sup>

Although of some relevance, it should be noted that there are limitations to the significance of the difference between doing and allowing for the issue of the distribution of the costs of intervention. To start with, the import of this difference is generally not held to be absolute, so that it may still be acceptable for interveners to sometimes *do* harm.<sup>11</sup> It also does not straightforwardly follow from the difference between doing and allowing that rescuers should take

<sup>8</sup> I defend the weightiness of likely, relative effectiveness in the overall assessment of the permissibility of humanitarian intervention in James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2010).

<sup>9</sup> More precisely, McMahan frames this the other way around. He thinks that “the effects of noncombatants’ beneficiary status” is “offset by the combatants’ professional duty and usually by the asymmetry being killing and letting die.” McMahan, “The Just Distribution of Harm,” 370.

<sup>10</sup> *Ibid.*, 370.

<sup>11</sup> See Pattison, *Humanitarian Intervention and the Responsibility to Protect*, 120. McMahan also rejects the view that the asymmetry between killing and letting die is of absolute moral significance. See Jeff McMahan, “Pacifism and Moral Theory,” *Diametros*, 23 (2010), 3–20.

on greater costs. They can simply refrain from rescue that does harm. In other words, the difference between doing and allowing provides only a negative reason for why rescuers should not harm innocents. It only becomes relevant for the distribution of the costs of intervention when conjoined with a positive reason (e.g., a duty to rescue) that explains why interveners are required to *not* refrain from acting, but instead should intervene and, when doing so, avoid doing harm.

### *Role-based duties*

So why are humanitarian interveners, and in particular intervening soldiers, required to take on greater costs? I suggest below that there is a duty to intervene, which may apply to states and other agents on occasion. Like the duty to rescue (e.g., in cases of a child drowning in a pond), the carrying out of this duty may require that *reasonable* costs be borne, even by those who have not consented to these costs (e.g., citizens, conscripts, and bystanders) (see section IV). But I think volunteer soldiers can sometimes be required to take on *greater* costs. This is because some intervening soldiers have role-based duties to do so. That is, sometimes soldiers enter into a contractual bargain whereby, on the one hand, they accept greater risks as part of their role (including for cases of humanitarian intervention) and, on the other, they receive a set of benefits, such as a generous pension scheme, healthcare, and free higher education. When such a bargain is entered into freely and is fair, the soldiers are required to live up to the terms of their agreement and therefore accept greater risks. Similarly, McMahan argues that combatants have a professional duty to take risks because this is what “they have pledged to do and are paid to do” and are in this respect like other “professional defenders or rescuers,” such as the police, firefighters, bodyguards, and lifeguards, who have role-based duties “to take risks and even on occasion to allow themselves to be harmed when that is necessary to fulfill the functions of their role.”<sup>12</sup>

Accordingly, it may be reasonable to ask soldiers to accept greater risks than, for instance, civilians who are conscripted to undertake military intervention. To reiterate, even civilians and conscripts may be also required to accept some costs – namely, a certain level of *reasonable* costs that results from the duty to rescue. The point is that sometimes the contractual bargain agreed to by combatants means that they can be asked to take on *greater* costs.

Øverland is skeptical about this argument about role-based duties. He rejects an analogy between the police and intervening soldiers made by Lucas (Lucas claims that, like the police, intervening soldiers should accept greater costs and generally avoid the use of force if it will endanger civilians).<sup>13</sup> Øverland accepts

<sup>12</sup> McMahan, “The Just Distribution of Harm,” 366–367.

<sup>13</sup> Øverland, “High-Fliers,” 81.

that the police may be required to do things that involve a “background” of risk, such as looking for suspects, and that this risk is often higher than for other professionals. But, he argues, although in the long-run police officers (like lifeguards and firefighters) may be exposed to an aggregated higher risk than those in other professions, when confronted with a particular situation where additional risks are involved, they have no duty to bear these risks. The same is true, Øverland seems to think, of intervening soldiers.

However, regardless of whether the police can be required to take on risks in particular situations, it seems that intervening soldiers can be required to do this. Indeed, this is what they are employed to do – to fight in occasional, risky wars. So, like the police, soldiers are exposed to an aggregated higher level of risk. But, unlike the police, for the armed forces, this is largely manifested in particular situations (i.e., wars and some training exercises). Moreover, even if one doubts that soldiers *generally* agree to risks in particular situations, *some* clearly do. Most notably, private contractors agree on a case-by-case basis to specific operations, consenting to the likely risks in the terms of their contractual bargain.<sup>14</sup> In addition, some regular soldiers agree to specific tours of duty and are paid additional danger money for risky operations.

### *Orders and duties*

It might also be responded that, in practice, soldiers do not possess role-based duties of armed humanitarian intervention and therefore intervention when not risk-free is impermissible. For instance, it might be claimed that soldiers do not consent to perform interventions for humanitarian goals – such operations are beyond the terms of the soldier–state contract that focuses on defensive wars – and therefore they do not possess role-based duties to perform non-defensive operations.<sup>15</sup> However, as I have argued elsewhere, the claim that

<sup>14</sup> Øverland may be happy to admit that private contractors have role-based duties in risky interventions. At the end of his chapter, he asserts that we may have a duty to finance intervention “in the hope that willing soldiers will come forward ready to bear the necessary risk associated with a successful intervention. And if the intervening soldiers in this way have contracted to take on the additional risk, they would have a contract-based duty to do so.” Øverland, “High-Fliers,” 84–85. I consider the moral issues surrounding using contractors for such operations in James Pattison, “Just War Theory and the Privatization of Military Force,” *Ethics & International Affairs* 22 (2008), 143–162; James Pattison, “Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies,” *International Theory* 2 (2010), 1–31; James Pattison, *The Morality of Private War* (Oxford: Oxford University Press, under contract); D. P. Baker and J. Pattison, “The Principled Case for Employing Private Military and Security Companies in Interventions for Human Rights Purposes,” *Journal of Applied Philosophy* 29 (2012), 1–18.

<sup>15</sup> See Martin L. Cook, “‘Immaculate War’: Constraints on Humanitarian Intervention,” in A. F. Lang Jr. (ed.), *Just Intervention* (Washington, DC: Georgetown University Press, 2003), 145–154.



soldiers do not consent to perform armed humanitarian interventions is erroneous, since such operations can now clearly be expected by soldiers when they enlist.<sup>16</sup> Moreover, it is worth noting, as an aside to the main issue of the just distribution of costs, that the case for the Restrictive View does not hang on the existence of such duties. Let me explain.

I have thus far focused on the duties of the *intervening soldiers*. But focusing on soldiers' duties alone misses an important point. Regardless of whether soldiers possess role-based duties to take on greater costs, interveners can sometimes justifiably *order* their soldiers to take on greater costs.<sup>17</sup> In fact, the leaders of the intervener (or the intervener as a collective) may have *duties* to order their soldiers to take on greater costs, even if it is the case that one holds that their soldiers do not have duties to do so (the soldiers may also not necessarily have duties to obey their leaders).

To see this, consider the following hypothetical example. The United States is planning to intervene in Angola in response to genocide. The intervening soldiers have no contractual, role-based duties (e.g., suppose that the United States reinstates the Draft and uses unjustly conscripted citizens). The president of the United States faces a choice whereby she can order ten American soldiers to likely death, thereby avoiding the collateral death of 1,000 Angolan citizens, or she can maintain very high levels of force protection, thereby avoiding any risk to American soldiers but leading to the unintentional collateral death of 1,000 Angolans. It seems to me that she should adopt the former option. Although she may herself have role-based duties to look after American soldiers, these are not of overwhelming weight. As such, they can be outweighed by the prospect of saving a much greater number of non-citizens' lives. Indeed, she may have a *duty* to do so, if we hold that there is a duty to save the greatest number<sup>18</sup> that is not outweighed by her associative duties and role-based duties as president. In fact, this is what I think lies at the heart of the frequent critique of political leaders for maintaining high levels of force protection. Such leaders give too much weight to the lives of their own soldiers at the expense of the lives of a greater number of non-citizens.

Thus, even if the soldiers do not possess role-based duties to accept greater costs when engaged in humanitarian intervention, their leaders may also have the right – and perhaps the duty – to order their soldiers to take on greater costs, as the Restrictive View asserts.

<sup>16</sup> See Baker and Pattison, "The Principled Case for Employing Private Military"; Pattison, *Humanitarian Intervention and the Responsibility to Protect*, 110–112. Also see McMahan, "Humanitarian Intervention," 69–70.

<sup>17</sup> This point is defended in much more detail in Baker and Pattison, "The Principled Case for Employing Private Military."

<sup>18</sup> On the duty to save the greatest number, see Nien-Hê Hsieh, Alan Strudler, and David Wasserman, "The Numbers Problem," *Philosophy & Public Affairs* 34 (2006), 352–372.

### The Rescuers Thesis

I have claimed that, first, the difference between doing and allowing means that interveners should avoid doing harm (although this difference is limited in its relevance for how costs should be distributed) and, second, intervening soldiers often have contractual, role-based duties to take on greater costs. As such, there is a *prima facie* case for holding that intervening soldiers should take on greater costs than beneficiaries or bystanders. I have also claimed, third, that interveners may sometimes permissibly order their soldiers to take on greater costs.

Against this *prima facie* case, McMahan and Øverland claim that the beneficiaries of armed humanitarian intervention should take on much of the costs. For Øverland, this is because he appears to be skeptical about role-based duties (as we have seen), thinks that beneficiaries have reason to accept costs, and largely denies the duty to intervene (discussed below). For McMahan, this is because he thinks that rescuers and bystanders should not be required to bear the costs of intervention. He believes that this consideration ultimately balances out the points about doing and allowing and role-based duties.<sup>19</sup>

In this section and the next, I will argue that beneficiaries are *not* required to take on greater costs, in comparison with either rescuers or bystanders. As such, the *prima facie* case is not counter-balanced. More specifically, I will reject the Rescuers Thesis and the Bystanders Thesis in turn.

The Rescuers Thesis might seem to have some initial plausibility because those undertaking humanitarian intervention often have to perform risky operations that put their lives at risk in order to save the lives of others. To say that rescuers have a duty to rescue at significant cost to themselves seems to be overly demanding. In the case of a child drowning in a pond, we would not think that a passer-by is morally required to significantly endanger his or her own life in order to save the drowning child. To be sure, it is widely held that a passer-by has a duty to rescue and *is* required to take on *reasonable* costs. A rescuer may be required to get very wet and, in doing so, ruin his clothes and money in his wallet when saving the drowning child – this is a reasonable cost – but not to put his own life at notable risk – this is too demanding. I agree that rescuers are not required to take on high costs. But it does not follow from the general notion that *rescuers* cannot be required to take on high costs that *intervening soldiers* cannot be required to take on high costs. The intervening soldiers may have agreed to these costs, as we have seen.

McMahan and Øverland present a further argument, which runs as follows.<sup>20</sup> Those being rescued *benefit* compared to what would have happen without the

<sup>19</sup> McMahan, “The Just Distribution of Harm,” 373.

<sup>20</sup> Øverland notes that this argument is conditional on intervening soldiers not having the duty to bear costs (about which, I have claimed, he is mistaken), “High-Fliers,” 75.



intervention, so would agree to take on significant costs. This argument relies on a contrast between two options. In Option 1, there is no intervention and the would-be beneficiaries are left to their fate. In Option 2, there is intervention, but the beneficiaries take on significant costs. Since the beneficiaries would choose Option 2, they can be burdened with much of the costs of the military intervention. Thus, McMahan thinks that (when discounting the *prima facie* case discussed above) the beneficiaries should shoulder a *greater* amount of the costs than the rescuers. In his words:

[I]t may not be wrong for combatants to fight in ways that involve a lower risk to themselves but expose noncombatants to new risks, provided that the noncombatants are nevertheless expected beneficiaries of the defensive action – that is, provided that the action’s reduction of the risks they face from the original threat exceeds the risks to which the action itself exposes them.<sup>21</sup>

I agree that the victims have reason to accept significant costs compared to *what would have happened without the intervention*. But the options presented by the Rescuers Thesis are not the only available. There are in fact (at least) three options. In Option 1, there is no intervention and the would-be beneficiaries are left to their fate. In Option 2, there is intervention, but the beneficiaries take on significant costs. In Option 3, there is intervention, the would-be beneficiaries take on some costs, and the rescuers take on some costs. It seems clear that the would-be beneficiaries have reason to accept Option 3.<sup>22</sup>

What are the implications of this? The comparison between only Option 1 and Option 2 is valid only when considering highly non-ideal circumstances where rescuers would not accept Option 3 and will carry out *only* Option 1 or Option 2. Of course, this is often the experience of humanitarian intervention, where for political reasons (e.g., the domestic unpopularity of soldiers coming home in body-bags) those undertaking humanitarian intervention do not want to accept costs. But we are not concerned with such highly non-ideal circumstances here. Rather, we are considering the most morally desirable distribution of the costs of the intervention and whether interveners should accept greater costs. And when our focus is on this issue, we need to consider all the options that are relevant to the distribution of the costs of the intervention. Since the would-be beneficiaries have reason to accept Option 3 and would reject Option 2 in favor of Option 3, they cannot be said to be “benefited” by Option 2. In other words, when we make a valid comparison for the issue at stake, it is clear that the would-be beneficiaries do not have reason to accept

<sup>21</sup> McMahan, “The Just Distribution of Harm,” 359.

<sup>22</sup> Note that Option 3 is permissible since interveners can take on (1) at least the reasonable costs of the duty to rescue or (2) high costs if the intervening soldiers possess the relevant role-based duties.

significant costs. Accordingly, the Rescuers Thesis is largely premised on a problematic comparison.

*The duty to intervene*

One way, however, to maintain the Rescuers Thesis is to deny the duty to intervene. If one denies the duty to intervene, and humanitarian military intervention is at best supererogatory, then interveners do not have to a duty of rescue and do not have to accept even reasonable costs. They can therefore permissibly transfer *all* the costs to the beneficiaries.

But this seems to be an extreme position. After all, we tend to think that there are positive Samaritan duties of rescue and that these can apply at the international level, such as in cases of military intervention to assist those suffering in other states. To deny the duty to intervene in principle, one would have to, for instance, assert an unpalatably strong account of the moral import of state borders or communal bonds, reject international positive duties of rescue, or endorse pacifism. Each of these positions is widely regarded as untenable.<sup>23</sup>

Alternatively, one could accept that there is in principle a duty to intervene, but assert that in almost all actual cases the costs of intervention would be unreasonable for the intervening soldiers. They would be asked to bear too much in order to save the lives of foreigners, such as the risk of death and injury. Intervening soldiers can therefore transfer much of the costs to the beneficiaries of armed humanitarian intervention. This is, in essence, Øverland's view. He implies that humanitarian interventions are generally supererogatory for the intervening soldiers:

Most interventions would seem to place a higher risk on the intervening soldiers than people in general are required to bear in order to save others from harm. The very idea that we could have a duty to intervene is therefore peculiar. After all, the risk would have to be imposed on some of us, namely our soldiers. If we do not think people have a duty to shoulder considerable risk to assist people with whom they have no special relationship, not even when the latter are in dire need, it is hard to think we can have a duty to intervene at all if such intervention will impose any substantial risk on the intervening soldiers.<sup>24</sup>

<sup>23</sup> See, for instance, Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005) on state borders and communal bonds. See Allen Buchanan, "The Internal Legitimacy of Humanitarian Intervention," *Journal of Political Philosophy* 7 (1999), 71–87, on positive duties. And on pacifism, see McMahan, "Pacifism and Moral Theory."

<sup>24</sup> Øverland, "High-Fliers," 78. Unlike Øverland, McMahan believes that humanitarian intervention is often a duty. He says "the reasons that favor humanitarian intervention actually rise to the level of obligation far more often than we intuitively recognize." McMahan, "Humanitarian Intervention," 63.

The problem, however, with Øverland's claims here are that, as we have seen, intervening soldiers may have role-based duties to undertake humanitarian intervention, and this means that even very risky actions can sometimes reasonably be required of them.<sup>25</sup>

### The Bystanders Thesis

We have seen that the Rescuers Thesis is mistaken because it rests on a problematic comparison. We have also seen that rescuers are not required to take on high costs, but can be required to take on reasonable costs. Let us now consider the Bystanders Thesis. This, recall, claims that the beneficiaries should bear costs instead of bystanders. Like the Rescuers Thesis, the Bystanders Thesis depends on the claim that beneficiaries have a reason to accept costs, whereas bystanders do not. To that extent, McMahan presents the following example:

Villain will cause Victim to lose a limb unless a third party, Defender, takes defensive action on Victim's behalf. Defender has two equally effective options, each of which will, however, have as an unavoidable side effect the breaking of an innocent person's arm. One option would break innocent Victim's arm while the other would break innocent Bystander's. It is clear that Defender ought to choose the option that will break Victim's arm. This option would involve harming Victim for his own sake; he would be better off overall for being defended even at the cost of a broken arm. But the second option would involve harming Bystander for the sake of another and would leave him worse off. If Defender breaks Victim's arm, Victim will have no grounds for complaint against Defender.<sup>26</sup>

In fact, McMahan thinks that bystanders should have "maximum immunity." This is because, he argues, they have no corresponding reasons to share in the costs of the rescue, since they are not liable, are not beneficiaries, and have no special duty to be sacrificed.<sup>27</sup>

However, like the Rescuers Thesis, the Bystanders Thesis largely rests on a problematic comparison, which runs as follows. In Option 1, there is no

<sup>25</sup> Cécile Fabre claims that soldiers do not have duties to perform humanitarian interventions (unless a specific volunteer army for that purpose is developed) because (1) in risky interventions, rescuers do not have duties to accept harm to themselves and (2) in non-risky interventions, rescuers cannot be required to prepare to undertake intervention (which would be a transgression of individual autonomy), in Cécile Fabre, "Mandatory Rescue Killings," *Journal of Political Philosophy* 15, no. 4 (2007), 363–384. For replies to these claims, see Baker and Pattison, "The Principled Case for Employing Private Military." See also David Lefkowitz, "On a Samaritan Duty of Humanitarian Intervention," in Tripodi and Wolfendale, *New Wars and New Soldiers*, 87–101.

<sup>26</sup> McMahan, "The Just Distribution of Harm," 361.

<sup>27</sup> *Ibid.*, 374. Øverland seems to agree that bystanders should enjoy maximum immunity, "High-Flier," 80.

intervention and the would-be beneficiaries are left to their fate. In Option 2, there is intervention and the beneficiaries take on significant costs. In Option 3, there is intervention, the bystanders take on some costs, and the beneficiaries take on some costs. It is suggested that since beneficiaries would rather be rescued than not, they have reason to accept the costs, whereas the bystanders do not. Hence, Option 2 is preferable, and Option 3 should not be chosen.

But this inference is mistaken. Beneficiaries also have reason to prefer Option 3 to Option 2, since they would be subject to less harm. So, if we are concerned with the reasons that apply to beneficiaries, Option 3 would be chosen. Of course, bystanders have reason to prefer Option 2 to Option 3. But why should the reasons that apply to bystanders outweigh the reasons that apply to the beneficiaries? Both sets of individuals would (we can assume) be morally innocent. Beneficiaries may benefit from the rescue, but they are already in a highly problematic position to start with, such as facing severe oppression. They have done nothing that means that they, rather than bystanders, should bear the costs. Status as a beneficiary is not a reason, then, to distribute costs to beneficiaries instead of bystanders. The fact that the situation of beneficiaries is improved by rescue is a morally irrelevant characteristic when it comes to the distribution of costs.

To be clear, I am not claiming that costs should be distributed to the bystanders *over* the beneficiaries because the former have had bad luck and so should not have to bear any further costs. This is a more controversial claim than I wish to present. My point, rather, is the more limited one that, when unavoidable, costs should be distributed fairly – by which I mean equally – between morally innocent beneficiaries and bystanders.

It is necessary to flesh out this claim a bit more. There is, I think, a universal duty to prevent human suffering. This translates into a duty to rescue in certain cases and for certain individuals. For instance, only certain actors may be able to perform the rescue effectively. However, since other actors possess the duty to prevent human suffering, they can be also asked to bear *reasonable* costs. Therefore, it is not only the rescuers that may be required to bear reasonable costs. Bystanders can as well. (Beneficiaries may also be required to bear reasonable costs in their rescue.)


Consider again the case of a child drowning in a pond. Suppose that there is a fit and capable swimmer who can save the child, but that saving the child would create a big splash that would ruin the clothes and the money in the wallet of an incapacitated bystander. Does the fact that the bystander would be subject to some costs mean that the capable swimmer should not act? After all, the bystander is innocent, but would be subject to some harm by the rescue. This seems mistaken. The bystander has, I think, a duty to prevent human suffering and can be required to take on *reasonable* (although not *high*) costs of another's performance of this duty. By saving the child, the rescuer is performing the

bystander's duty as well as his or her own. The bystander is morally required to take on reasonable costs of the rescue if necessary.<sup>28</sup>

Moreover, it is worth noting, as an aside, that it is not clear that rescuers should *always* refrain from causing bystanders *high* costs. This is because the rescue may still be permissible because it will lead to highly beneficial consequences. For instance, the rescuer may be able to save 1,000 lives and, as a side effect, put a bystander at sizeable risk of serious harm. To reiterate, the bystander does not have a duty *herself* to take on high costs, but it does not follow from this that the rescuer should not place high costs on the bystander if this is necessary and will lead to highly beneficial consequences.

I have suggested, then, that bystanders can be required to bear *reasonable* costs and that rescuers may sometimes permissibly impose high costs on bystanders. But what of my claim that costs should be split *equally* between bystanders and beneficiaries? The point here does not relate to whether these costs are reasonable and, in particular, whether bystanders have duties to accept reasonable costs. It is a more general point about the distribution of costs, aside from the issue of the duties to accept costs, and again relates to how third parties may distribute costs. It runs as follows.

In forced-choice situations, if there is an unavoidable, large cost, this should be split equally between the bystander and beneficiary, even if the cost to the beneficiary and the bystander would be more than the costs that they have duties to bear. To see this, consider the following case.

 Bob has accidentally stepped on a hidden mine, which is yet to go off. There are two ways to save him. In Option 1, although no one else would be hurt, Bob would be grievously injured in the rescue. As a result, Bob would no longer be able to live a flourishing life (e.g., he would be impoverished as the result of paying for the treatment of his severe injuries). In Option 2, when Bob would be rescued, he and five innocent bystanders would suffer the loss of an arm, but all would still be able to lead flourishing lives. In Option 3, Bob would not be rescued; he would be killed by the mine.

It does not seem to me that Option 1 should necessarily be chosen, which the Bystanders Thesis presupposes (since bystanders would not be hurt and Bob would benefit from the rescue compared to Option 3). The fact that Bob “benefits” here does not point to any morally relevant quality of Bob or action by Bob, such as his free choice or wrongdoing, that means that he should bear the costs of his rescue. It is morally arbitrary that he will benefit since it is arbitrary

<sup>28</sup> One way of defending the maximum immunity of bystanders is to invoke the difference between doing and allowing discussed above. However, this difference would also seem to apply to beneficiaries. That is, rescuers should also avoid doing harm to beneficiaries. Moreover, although the import of the difference between doing and allowing should be taken into account so that rescuers generally avoid doing harm (as noted above), it is generally held that this difference is not of overwhelming magnitude and as such doing harm may still sometimes be morally permissible.

that he has stood on the mine in the first place. To that extent, being a beneficiary or a bystander is morally irrelevant.

Another way of putting this is that it does not seem that Bob, rather than anyone else, should necessarily bear *all* the costs of his brute bad luck. On the contrary, there is a strong case for holding that the costs of brute bad luck should be shared in order to reduce their effects. This is in order to allow as many agents as possible to lead flourishing lives. When one agent has to bear all of the costs of brute bad luck, his opportunities to lead a flourishing life are likely to be significantly reduced. But when the costs of brute bad luck are shared amongst several agents, the costs borne by each agent will be lower and all the agents may be able to lead flourishing lives, despite the costs.<sup>29</sup> The costs of brute bad luck should be shared, where possible, *equally*, so that no particular agent will suffer a greater harm to his or her chances than any other, thereby not undermining the equality of opportunity. Accordingly, there is a strong reason for holding, contra the Bystanders Thesis, that costs should be distributed equally between bystanders and beneficiaries, and that the status of being a beneficiary is morally irrelevant.

In addition, it is worth noting that the Bystanders Thesis has highly counter-intuitive implications. Most notably, in defensive wars citizens may be required to bear *greater* costs than non-citizens on this position. In particular, this is when citizens would be benefited by the defensive war because, for instance, it fends off an unjust aggressor. They would be, in effect, “beneficiaries.” In fact, the Bystanders Thesis *could* potentially lead to the conclusion that *citizen beneficiaries* should be subject to greater costs than the (morally innocent) *non-citizen combatants* who are fighting an unjust war of aggression against the citizens’ state. Consider a case, for instance, in which certain combatants (e.g., some conscripts) are not morally responsible for their participation in the war and, as such, are simply tools of their state’s unjust aggression, whereas the citizens of the defending state “benefit” from being defended. More clearly, it follows from the Bystanders Thesis that morally innocent non-combatants from the *unjust aggressor state* should be subject to lower costs than the morally innocent non-combatants from the *just defending state*, given that the former are in effect bystanders and the latter are beneficiaries.<sup>30</sup>

<sup>29</sup> It should be noted here that McMahan thinks that costs might permissibly be distributed by bystanders if this will “significantly decrease the overall expected harm to the innocent,” but (in contrast to the position that I am defending here) not if the harms will simply be spread. McMahan, “The Just Distribution of Harm,” 362.

<sup>30</sup> To be sure, McMahan acknowledges this point. He says that, in such a case, “the view for which I have argued implies that the just combatants ought to choose the course of action that will involve killing a few of their own fellow citizens.” McMahan, “The Just Distribution of Harm,” 364. He does think that special relationships might be relevant when the distribution of costs between just *defending soldiers* and *defending citizens* is at issue (*ibid.*, 372), but this distribution is not what I am concerned with in this chapter.



One way to avoid this potentially counter-intuitive implication is to invoke strong associative duties among citizens. If one holds such a position, the Bystanders Thesis's implication that citizen beneficiaries should bear the costs rather than non-citizens is outweighed by the duties to prefer citizens.<sup>31</sup> But the problem with relying on associative duties here is that they would need to be very strong to avoid the counter-intuitive implications, whereby generally it is permissible for non-citizens to be distributed significant costs instead of citizens. But this seems far too permissive and is itself counter-intuitive.<sup>32</sup> Indeed, McMahan avoids endorsing strong associative duties. He thinks that any special relationship between the civilians and combatants does not render it permissible to transfer the costs to the bystanders. He argues:

Just as the state's duty to protect its citizens cannot make it permissible for its combatants to do what they would not be permitted to do in the absence of that duty, so the duty of just combatants to protect just civilians cannot make it permissible for them to cause more harm to innocent bystanders as a side effect than it would be permissible for the just civilians themselves to cause by acting in self-defense.<sup>33</sup>

Rather than asserting unpalatably strong associative duties, the much more intuitively plausible explanation as to why morally innocent citizens who are beneficiaries are not required to bear greater costs than non-citizens is simple. There is no morally relevant distinction between beneficiaries and bystanders.

### The moral and political case for greater costs on interveners

Thus far, I have argued – against the Permissive View and in favor of the Restrictive Thesis – that those undertaking armed humanitarian intervention should take into account the difference between doing and allowing and may have role-based duties to accept greater costs than the potential beneficiaries of the intervention. The latter point presents a *prima facie* case for holding that interveners should take on greater costs. I have also rejected the Rescuers Thesis and the Bystanders Thesis that could potentially counter-balance this *prima facie* case. I want now to turn to consider some more practical considerations. I will start by considering – and rejecting – two arguments for holding that interveners should bear lower costs, before presenting two reasons in favor of the view that they should bear *greater* costs.

First, it might be argued that requiring of interveners that they bear costs is likely to discourage them from acting. If they know that they are likely to have to accept even reasonable costs, they may decide not to act. And, as McMahan

<sup>31</sup> McMahan notes this possibility, *ibid.*, 376.

<sup>32</sup> See Buchanan, "The Internal Legitimacy of Humanitarian Intervention"; Caney, *Justice Beyond Borders*; and McMahan, "The Just Distribution of Harm."

<sup>33</sup> McMahan, "The Just Distribution of Harm," 364.

and Øverland claim above, the would-be beneficiaries of intervention would prefer that the would-be interveners intervene than not. McMahan argues that, although this point about encouraging interveners does not provide a “basic moral reason” in favor of the Permissive View, it does provide “a reason to give some recognition to the distinction between beneficiaries and bystanders in law.”<sup>34</sup> Yet, there is a notable countervailing danger with this position: if it is publicly asserted that interveners do not need to accept costs, they may in practice end up distributing *all* costs to the beneficiaries in cases where they would otherwise have shared the costs. Besides, when attempting to encourage humanitarian intervention, surely we should try to develop norms that encourage morally justifiable intervention whereby potential interveners both intervene *and* accept some costs. On a particular occasion, beneficiaries may grudgingly accept greater costs to themselves when interveners will not act otherwise. Yet we should strive for norms about armed humanitarian intervention where this is not the case.

Second, McMahan claims that humanitarian interveners may need to maintain higher levels of force protection in order to ensure that they can effectively achieve their aims.<sup>35</sup> However, in all post-World War II cases of humanitarian intervention,<sup>36</sup> the interveners have been militarily stronger than the opposing forces. It is unlikely, then, that this argument has any real-world applicability. The size and capability of the intervener means that they are likely to achieve the just cause without the need to preserve their soldiers’ lives at all costs.<sup>37</sup>

On the other hand, there are three reasons to hold that interveners should accept greater costs. The first is because, simply, they are engaged in humanitarian intervention.<sup>38</sup> To that extent, Lucas claims there needs to be a consistency between the humanitarian ends of the intervention and the means used, since the justification of the military intervention rests on its achieving the promotion of human rights with minimal harm of the sort that it is trying to halt.<sup>39</sup> Øverland rejects such claims, arguing that “[t]he mere fact that you have ideals when entering into a rescue situation does not imply that you have to bear all the risk.”<sup>40</sup> But this misses the point. Until recently, only defensive wars were conventionally and legally permitted by the governing rules of the international

<sup>34</sup> *Ibid.*, 366.   <sup>35</sup> *Ibid.*, 377.

<sup>36</sup> See the list of interventions in Pattison, *Humanitarian Intervention and the Responsibility to Protect*, 1–2.

<sup>37</sup> That said, if interveners were required to take on almost *all* costs in order to avoid *any* costs to innocent civilians, such instrumental reasons might be relevant. Sacrificing a large number of intervening soldiers to protect only a few civilians may be counter-productive. See *ibid.*, 109.

<sup>38</sup> Note that this reason is specific to humanitarian intervention and not to other types of war.

<sup>39</sup> Lucas, “From *Jus ad Bellum* to *Jus ad Pacem*,” 77–78.

<sup>40</sup> Øverland, “High-Fliers,” p. 83.

system. Armed humanitarian intervention has grown to be another generally accepted exception to the international prohibition on the use of force, but a circumscribed one, given the widespread fear of abuse of such interventions. To maintain the exception, interveners need to be *seen* to be intervening with significant care. If they cause significant harm to those whom they are supposedly trying to save, the skepticism surrounding armed humanitarian intervention may once again grow very large and the conventional and legal permission be foreclosed. To that extent, Lucas is right that the humanitarian purposes that sometimes permit overriding state sovereignty are compromised if the intervening forces harm innocent civilians.<sup>41</sup>

Second, and more straightforwardly, interveners that transfer costs onto the beneficiaries may soon lose the “hearts and minds” of those whom they are trying to assist. As a result, they may face greater internal opposition and find it more difficult to achieve their humanitarian purposes.<sup>42</sup>

Third, although perhaps indirectly, interveners may sometimes have been in part morally responsible for the humanitarian crisis. Since they were partly morally responsible for the situation, they should bear greater costs, and certainly more costs than the morally innocent beneficiaries of the intervention.<sup>43</sup> Consider, in this context, Western support for Saddam Hussein, the Rwandan Hutu government, and Muammar Gaddafi, whose states were later subject to humanitarian military interventions. (I refer here to French, British, and American intervention in northern Iraq in 1991 to create safe havens and to implement no-fly zones to protect thousands of endangered Kurds, rather than the 2003 war in Iraq.) Moreover, it might be claimed, *à la* Thomas Pogge, that the West is implicated in the imposition of an unjust global economic order that leads to severe humanitarian crises.<sup>44</sup> To be sure, the intervening soldiers may not be responsible and so may not have further additional duties to accept costs. Rather, the suggestion is that the interveners as a whole may be required to take on greater costs.

For these reasons, in addition to the *prima facie* case, the Restrictive View for the conduct of humanitarian intervention is correct. Those conducting armed humanitarian intervention are morally required to take on *greater* costs rather than transferring these costs to civilians.

<sup>41</sup> Lucas, “From *Jus ad Bellum* to *Jus ad Pacem*,” 77.

<sup>42</sup> Øverland accepts this point, “High-Fliers,” 84.

<sup>43</sup> Øverland also notes this possibility, *ibid.*, 77.

<sup>44</sup> See: Thomas Pogge, “An Institutional Approach to Humanitarian Intervention,” *Public Affairs Quarterly* 6 (1992), 89–103; and Thomas Pogge, *World Poverty and Human Rights*, 2nd edn. (Cambridge: Polity Press, 2008).

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