

Issac Marks Memorial Lecture

WHAT'S THE MATTER WITH SELECTIVE INTERVENTION?

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"Nothing," most Americans would probably respond. Most Americans would claim that it is for the United States to decide for itself whether it wants to engage or not in conflicts that arise around the world, consulting only its own people and its own preferences. Most Americans find nothing wrong with the United States involving itself in the Persian Gulf but not in Yugoslavia; in Haiti but not Liberia; in Somalia but not Rwanda. Perhaps the patterns of American engagement we see are morally defensible; perhaps they are not. But whether or not it would actually be possible to morally reconcile our pattern of selective action and inaction, what matters here is that most Americans experience no need to try.

Our friends in other countries tend not to see things this way. They tend to look for patterns in American behavior, and to expect (or hope) that those patterns will reflect some sort of principle. Even the cynical, who do not hope for or expect a principle, often feel entitled to demand one.¹ They think that there is something wrong when the United States decides such things ad hoc, based on purely selfish interests, the "CNN factor," or sheer domestic political happenstance. And some Americans agree.

During the Cold War, we did not have to deal so much with challenges that American behavior was arbitrary; American behavior was dictated by Cold War imperatives (as we understood them) and everyone knew this. It was not argued that the main defect in U.S. foreign policy was that it was selective and therefore morally arbitrary. The challenges were mainly based on arguments that American behavior was consistent but wrong; that the principles themselves that American behavior were based on were morally incorrect. Perhaps today's decisions carry forward this objection, for it might be said that both during the Cold War and today the guiding principle is nothing more than national interest. But national interest as the guiding principle once had observable coherence; it was the national interest of defeating communism, of encircling it and thwarting it wherever it appeared. National interest now means something else, though what it means is not apparent.

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1. See, e.g., Mushahid Hussain, *Saddam Survives Bush in the Gulf Confrontation*, INTER PRESS SERVICE, Jan. 18, 1993 ("Middle East analysts in South Asia wonder why the West, led by the United States, responded with air attacks on Iraq at a time when they were unwilling to use force to block Serbian aggression against Bosnian Muslims.")

At any rate, and for whatever reason, we now must deal with claims that selectivity is indefensible. And this prompts the question, "why?" What ethical restraint on selectivity should be acknowledged? What moral limits are there on the patterns of intervention, as opposed to limits on the decision whether to intervene in a particular case viewed in isolation? When we step back and try to view the forest with all of its trees, do we like the overall picture that we see? And how are we to judge; what standards should apply? Before we face these questions, we need a clearer idea of what selective intervention is. Or, better put, we need an idea of what the selective intervention challenge *is not*. There are three types of arguments that resemble complaints about selective intervention, but which need to be distinguished.

THREE SIMILAR CLAIMS

There has been so little philosophical attention to the problem of selective intervention that it seems obligatory at the start to face the issue of what the argument against selective intervention is. There are three things that it is not. First, the accusation of selective intervention is not the same as a claim that there is an absolute obligation to refrain from intervening on a particular set of facts, nor the same as a claim that there is an absolute obligation to become involved. While such arguments can be important, they address a different point. Second, selective intervention accusations are not necessarily based on the charge that invidious criteria are being used to draw the line—that race, religion, or gender discrimination (to cite the classic examples) is involved. Third, selective intervention accusations are not identical to a claim that all foreign policy decisions of whatever kind must be reconcilable with one another; with the claim that every action the United States takes must fit into some philosophically defensible pattern. Here is why.

1. *Unconditional Arguments*

By "unconditional arguments" I mean arguments that there exists an obligation to intervene or not to intervene in a particular case viewed in isolation. Sometimes when claims are made that there is a moral responsibility to become involved (or to not become involved) the claims are founded on factors that make no reference to what has been done in other cases. Such arguments, in other words, do not depend on the pattern of involvement that a particular state generates. While important, then, such arguments are not designed to deal with selectivity. Arguments about selectivity are "conditional": they take the form, "If you intervene in the Persian Gulf, then you should also be willing to intervene in Yugoslavia."

Sometimes it seems that critics of American inaction are making claims of the unconditional sort. For example, in the cases of Bosnia, Haiti, and Rwanda, it has been argued with force by many critics that the cost of American inaction has been extremely high in terms of injury to property, personal security, human rights and human lives. This sort of argument does not depend in any way on the history of American intervention or nonintervention in other cases. Such unconditional arguments are philosophically comparable to those underlying philosophical claims on behalf of an obligation to supply international aid. There is a large amount of philosophical literature on the question of whether there is an ethical duty to

assist those in need in other countries. No one has put the ethical claim in a more starkly intuitive manner than Peter Singer.²

Singer offers the hypothetical case of an individual walking by a shallow pond who sees a small child drowning. With only minor effort, and at only a slight cost in terms of muddied clothes and delay, the individual can wade into the pond and save the child. Does any of us doubt that an obligation to save the child exists, when such a small inconvenience will result in such a large good? Singer argues that comparable considerations support an obligation to assist the truly impoverished around the globe. A similar type of argument could be used to the effect that we have an obligation to help those around the globe whose lives are threatened by the actions of their fellow human beings. Thousands of lives were at stake in Haiti, hundreds of thousands in Somalia and Rwanda, and for some period of time the U.S. government simply watched passively.

Of course, few cases are as clear as the one that Singer presents. Even as a domestic matter, some cases are not so obvious as the one he posits. Should you give a quarter to the panhandler on the street? Maybe he or she will simply use it to buy drugs. Maybe giving money to panhandlers in the subways encourages people to engage in self destructive (not to mention sometimes intimidating) sorts of behavior. When we turn our attention to international cases, the complexities increase. If we give foreign aid to Kenya, who benefits—the people or their rulers? And so on.

Moreover, uncertainty about the right thing to do is particularly appropriate in many cases of humanitarian intervention. We did intervene in Somalia, and the consequences were not precisely what we wanted. The verdict is still out on Haiti. Humanitarian intervention has the complication that it usually involves some level of coercion. Unlike foreign assistance, intervention is typically greeted with resistance by at least some portion of the population. For this reason, lives may be lost; and they may either be the lives of those who resist, or the lives of innocent third parties who get caught up in the fighting. And intervention typically involves some violation of the sovereignty of a state, which may not always be a fatal objection but is certainly something that should be taken into account. Singer's example has little relevance in the majority of cases, in which it is almost impossible to predict whether the eventual consequences will be good or bad, and how costly the intervention will be in terms of lives and resources of the United States and of the country in whose affairs we have intervened. Most Americans would be happy enough to wade in to save a drowning child; they would simply fail to recognize Singer's hypothetical as a good analogy for Bosnia.

The sort of argument that Singer offers is highly controversial. It is generally recognized—in fact, it is recognized by Singer himself—that his arguments are potentially of an almost unlimited scope.³ By Singer's own admission, these arguments would require people in wealthy countries to give away almost all of their money, down to a point where they have enough to live

2. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972).

3. See, e.g., Carl Selinger, *Equality in the Relief of Destitution Abroad: A Test Case in Distinguishing Duties from Charity*, 2 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 53 (1982). For a criticism of the characterization of utilitarianism as too demanding, see John Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 601–02 (1975).

on and enough to continue to earn more to give away. Singer does not flinch at this conclusion, but many of his readers do.⁴

Perhaps less controversial are absolute arguments on the other side; unconditional arguments, that is, that there is an obligation not to intervene. Such arguments about so-called negative duties not to become involved are generally easier to make in the intervention context than the arguments about positive duties to become involved that Singer raises. For one thing, negative duties typically are not as subject to a charge of "overdemandingness," for typically such negative obligations are less costly to comply with than positive obligations. One need simply fail to do something that one otherwise would, and usually this is within one's resources.⁵ And negative arguments of this sort are important in the intervention context, precisely for a reason already mentioned with regard to positive obligations. Intervention typically involves some violation of another country's sovereignty. We should therefore not lose sight of this issue as we consider patterns of American foreign policy.

But of course, while important, these are not arguments about selectivity per se. They are not arguments of the sort, "You intervened here, therefore you must intervene there," or "You failed to intervene in that one case, therefore you should not intervene in this other circumstance." Arguments about unconditional obligations to intervene or not to intervene are important because they define the parameters within which conditional arguments must take place. Whatever pattern of intervention emerges, if it is to be morally acceptable, it must include any cases in which there is an unconditional obligation to intervene and it must exclude all cases in which there is an unconditional obligation not to intervene. The question of selective intervention concerns what to do about cases in the middle; cases, in other words, where there is neither an absolute obligation to intervene nor an absolute obligation not to intervene. The question of selective intervention concerns whether there are any further limits that must be observed once the middle set is defined. If the United States remains within that middle set, may it base selection on any criteria that it chooses?

2. *Invidious Criteria*

To phrase the question this way is, to American ears at least, virtually to answer it. For American law and legal principle has a ready answer to the question of permissible patterns within the range of cases that (on their own isolated set of facts) could be decided either way. Under American legal principle there are limits even when there is no unconditional obligation to provide a particular benefit or to fail to undertake some particular activity.

4. For one excellent discussion of the problem of demandingness, see Liam Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFF. 267 (1993).

5. Liam Murphy has argued, however, that whether negative or positive obligations are more burdensome is primarily a function of social context. To an average middle class American, it may look easier to satisfy the obligation not to steal or sell drugs than to satisfy one's obligations to share one's resources equally with the poor in other countries. However, to the impoverished American ghetto resident, the decision not to steal or sell drugs can impose a severe economic burden (because there are few job opportunities available) while the obligation to share with the poor in other countries is relatively slight, since there is little to share. See, Liam Murphy, *Fairness and Moral Demands* (1994) (unpublished manuscript, on file with the author).

Even within this middle realm, under American law, the state must not employ invidious criteria.

The invidious criteria that are usually cited in American law are those of race, ethnicity, or religion.⁶ Gender is another factor often viewed as suspect, although in American law it is not considered quite as invidious as race.⁷ The problem of invidious criteria is paradigmatically a problem of patterns; the claim is not that the state must provide welfare benefits, or public schools, or public jobs. The claim is that a pattern of providing such things to one group and not another is simply impermissible when groups are defined in certain ways. In this respect, it appears to be an ideal analogy for attacking the question of selective intervention.

At first it seems that this might be the answer. Certainly some of the traditional suspect criteria—race, ethnicity, and religion, to name the obvious examples—are evident in international conflict. One occasionally hears accusations that the decision not to intervene in Bosnia was motivated by the fact that the only lives at stake were Muslim lives; or that we would have done something about Rwanda or Haiti if the persecuted had been white. There certainly does seem to be some correlation between our willingness to act and the affinity we feel for those who suffer; and this correlation feeds the suspicion that selectivity is based on whether the victims are like “us” in their race, religion, or ethnic affiliations.

Whether these accusations fit the facts is highly debatable, however. For one thing, we did intervene in Somalia and Kuwait, and the rights and lives at stake in those cases were Muslim rights and lives. True, in Kuwait, American financial interests were at stake; but while this may mean that our motives were not holy, it undercuts the argument that we make decisions based on the religion of the victims. In Somalia, of course (as opposed to Bosnia) Muslims were on both sides of the dispute; arguably, then, we were biased in the sense that we will only intervene over the objections of non-Christians. There are ways to make the accusations fit the facts.

But what this last argument suggests is that you can characterize any intervention either in terms of who it offends or who it helps. If one wants to charge invidious decisionmaking based on racial, ethnic, or religious affiliation, one can make the case either by pointing to the disfavored status of the group that wanted intervention and did not get it, or in terms of the disfavored status of those who didn't want intervention but whose objections were overridden. Because one can potentially criticize either intervention or failure to intervene, there can usually be found a “suspect class” somewhere that is dissatisfied with American decisionmaking. Was our hesitation to intervene in Haiti invidious because the victims were black, or was our ultimate decision to intervene invidious because the government we sought to supplant was black? Charges of invidiousness sometimes take on a rather ad hoc character and are for that reason less convincing.

6. For the principle that race or ethnicity is a suspect classification, see, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Korematsu v. United States*, 323 U.S. 214 (1944). For a general statement of the notion that discrimination against discrete and insular minorities is suspect, see *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

7. Many cases on the constitutionality of gender differentiations indicate that the level of scrutiny is somewhat less than that directed at racial or ethnic distinctions. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1975); *Reed v. Reed*, 404 U.S. 71 (1971).

It does not seem that those who object to American selectivity have only invidious criteria in mind. Of course, it would be morally outrageous if the United States based its decisions to become involved on the race or religion of the victims, as if Muslim lives mattered less to us than Christian lives, or black ones less than white ones. When that happens—undoubtedly it sometimes does—it must be condemned, if the motive beneath it can be established. But more than this is involved when selectivity is charged. Let us consider a third possibility.

3. *A Universal Requirement of Principle*

A third argument to consider is the simple one that all distinctions made in foreign policy must be made on grounds of principle. Clearly, what is at issue here is distinction between one case and another, rather than an unconditional obligation to become involved or not. And clearly, the distinctions that are problematic here go beyond the traditional invidious factors that are considered suspect in other areas. The accusation of selectivity may boil down to the charge that there is simply no relevant basis for a difference in treatment. Perhaps the only basis then for criticizing selectivity in intervention is that selectivity is always wrong unless it can be justified on grounds of principle. A rational basis for difference in treatment must always be shown.

If this is what is at stake, then it should be clear why Americans generally are reluctant to treat selective intervention as a problem. This line of argument is potentially very far reaching; it would seem to require that principled justifications be offered whenever the United States decided to do one thing rather than another. Yet decisions to extend trade benefits or agricultural credits, to enter into military alliances or to mutual assistance treaties are usually not thought to be subject to any strong obligation of consistency. Do we have to justify whose membership in NATO we support? With whom we decide to trade? Are we never allowed to decide anything according to American national interest?

Perhaps; but this is a very strong requirement of principle. Before we settle for that conclusion we might first ask whether intervention presents a stronger case for a requirement of principled consistency than other sorts of foreign policy decisions. The answer is likely to be that trade benefits and military alliances, agricultural credits and mutual assistance treaties are things that other nations aren't *entitled to*. Because they have no right to insist on such things, it seems, their cases that these things should be handed out on a principled basis are weakened.

At this point it is necessary to return to the first attack on selective intervention that we considered: the unconditional right argument. We considered the claim that selective intervention might be wrong because some nation had an unconditional right to American involvement, or some unconditional right to be free of American involvement, and that this was the real objection to decisions not to intervene or decisions to intervene. This suggestion was rejected as an analysis of the selective intervention dispute precisely because it was not an objection to selectivity. Nothing turned on what the United States had done in other cases. But we have apparently now returned to this point, after all, for once again we seem to be suggesting that the

difference between selectivity in the giving out of military or financial aid and selectivity in the decision whether to intervene may turn, after all, on the fact that there is no obligation to give military aid in any particular isolated case—on the fact that there is no unconditional obligation.

The point is actually different, however. The claim is not that the United States has to intervene because on the isolated facts, no such obligation exists. The claim is that the permissibility of intervention, generally, is a normative matter; the United States is not just entitled to intervene whenever it wants. Because intervention typically violates the sovereignty of other states, and because it often involves methods (such as military measures) that endanger people in those states, a justification for intervention must exist. And even once it has been shown that a justification does exist, this does not exhaust the normative power of the principles underlying that justification. Those principles still continue to exert power to compel consistent treatment.

To illustrate, when the United States considered military involvement in the Persian Gulf, it was not entitled to intervene merely because intervention suited its own purposes. While as a practical matter U.S. interests certainly played a dominant role in the fact that the United States ultimately decided to take on Iraq, these United States interests were only the motivation, and not the justification for what it did. For a justification to be convincing, it would have to rely on more than the fact that the action was beneficial to United States interests; the justification would have to be based in some way on the interests or norms of the community as a whole, not as a single member.

Once invoked, however, such a public norm continues to play a role in other decisions, such as whether to intervene in Somalia, Yugoslavia, or Haiti. Once the norm is invoked, then it is no longer enough in those other three cases to show that these are cases in which intervention is also justified and then let the United States pick which ones it chooses. The reliance on public norms in the first case, as a justification for doing what is in one's interest, exerts a gravitational pull—it creates a precedent—for future decisions. Conversely, the failure to intervene in the second case retroactively undercuts the justification for intervening in the first.

That is why intervention is different from a grant of trade privileges or formation of a military alliance. Because there are no independent ethical constraints for or against granting trade privileges—because doing so is wholly within American discretion—no justification must be offered, and there are no independent ethical norms to exert a gravitational pull. No precedent is established, because the initial decision does not need to be based on principle in the first place. Conversely, there is no problem of retroactive undercutting of the justification for American treatment of the first case, because no justification for the first case was even needed.

Surely this is what many people have in mind when they criticize U.S. selectivity. It is thought that there is something wrong with the United States' citing the fact that Iraq violated international law as a basis for military response while ignoring comparable arguments in other cases. The Bosnian Serbs have also flouted international law and violated human rights provisions, yet little has been done in response. It is not that there must be a principled explanation for every action that the U.S. engages in. It is, instead, that regarding actions that require principled justification the overall pattern of

action must be consistent with that principled justification. Once the U.S. relies on principle it has let the genie out of the bottle; it must be consistent with those principles in future cases. It cannot employ those principles only when they are convenient.

We need to examine more closely why this argument might be thought to have appeal. Why does principle, once relied on, acquire independent force? Does it always? The issue is perhaps best approached by looking at particular principles that the United States has relied on in making decisions to become involved, to show how they acquire their gravitational power.

THE PRINCIPLES SUPPORTING INTERVENTION

In the Persian Gulf war, what gave the United States its strongest claim to intervene? At Kuwait's invitation, and with the approval of the Security Council, the United States led a multilateral force which reversed the invasion of Kuwait by Iraq. The invasion had been in flagrant violation of international law. This fact, together with the fact that proper international decisionmaking procedures were followed, provided a basis for U.S. actions. As I have argued elsewhere, the best jurisprudential basis for U.S. intervention was that Iraq had consented in advance to the international norms that it then violated, and had consented in advance to the decisionmaking procedures that the United States and its allies followed in initiating military challenge to the illegal occupation.⁸

What exactly did Iraq consent to? First, it consented to the basic international law norms of territorial nonaggression; it did this, most explicitly, by signing the U.N. Charter, which contains a prohibition on armed aggression. If it had grievances against Kuwait, it was obliged to present them through the appropriate international channels. But this consent does not, in and of itself, constitute consent to being attacked by the United States once a violation occurs. There is a question of the proper remedy, as well. How do we know that the appropriate remedy is military resistance by a group of allies lead by the U.S.? Here, again, we can look at the U.N. Charter. The remedy was appropriate because it was the one envisioned by norms that Iraq agreed to. The United States was not a self appointed vigilante; it was authorized to act by the world community.

If we take consent as the touchstone of legitimacy for the Persian Gulf War, then we must ask what if anything it means for United States' decisions not to intervene in other cases. The problem that the consent theory raises for failures to intervene is that it seems highly unlikely that any state would agree to have norms enforced against it without some understanding that norms would also be enforced when the tables were turned. Would a state agree that it must comply with international law when it wanted to take unfair advantage of others, but that others might violate its own rights with impunity? Would it consent to granting the United States and its allies power to enforce international law in only the cases where their interests were at stake?

That is highly improbable. The essence of general norms is their general applicability, and general compliance by others is the quid pro quo for agreement that you, yourself, will be found. The reason for consenting is the

8. LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE SUPERPOWER WORLD*, at ch. 5 (1994).

advantages obtained from other states' reciprocating. For this reason, a theory of intervention that rests on compliance with norms of international law, and with consent to those norms and to the norms providing for their enforcement, is inconsistent with allowing the most powerful actor in the system—the only one effectively positioned to enforce international norms—to pick and choose when to intervene.

At issue here is something that at first appears rather similar to the question of motivation. It might be argued that when the United States decides to engage in coercive actions overseas, it must do it for reasons relating to the well being of the international system as a whole. It cannot do so for the unilateral advantage of the United States. The problem (under this view) with selective intervention is that it reveals that the United States is acting only for selfish motives. Although intervention in one circumstance may have had an adequate justification, it was in fact undertaken for some completely different and illegitimate motive. When another case comes along, the United States continues to act according to its illegitimate motive, and thus fails to intervene in a case where the good reasons for intervention would require it. The problem with selective intervention, in other words, is that illegitimate and legitimate motives converge in some cases but not in others. The fact that intervention is not undertaken when the two do not coincide demonstrates that the real reason being acted upon is the illegitimate one.

There is no doubt that some of the complaints directed against United States inaction take this form. The apparent insincerity of the justifications that were given for our actions in the Persian Gulf War was bitterly resented; the self righteous hypocrisy of citing international law in some cases but ignoring it in others has not made us many friends. Consider an analogous example: U.S. selectivity in deciding whether to protest other countries' human rights records. Especially during the Cold War, the United States was rather selective about whether it protested human rights violations, sometimes citing a distinction between what came to be known as "authoritarian" and "totalitarian" regimes.⁹ We protested the abuses of the Sandinistas but not those of our friends in El Salvador, and decried the abuses of the U.S.S.R. while saying little about those of the friendly regime in Turkey.

Without denying that hypocrisy is a bad thing, it should still be recognized that there is more at stake in selectivity than the fact that an action was undertaken for the wrong motivation. One might have a good motive and do the wrong thing; conversely, one can have the wrong motivation for doing what is essentially the right thing. Many Americans, for example, believe that we did the right thing in organizing the coalition that fought the Persian Gulf War, even though we did it for a mix of reasons, some of which were bad ones. What we are concerned with here is whether the things the United States does are right. Furthermore, motivation is really not the same question as selectivity; the latter depends on patterns in a way that the former does not. Criticism of motivation would be appropriate even if there were only one single instance involved, and the United States actually did the right thing (albeit for the wrong reason.)

9. This distinction, commonly attributed to Jeanne Kirkpatrick, has been much criticized in the American news media for its obvious Reaganite ideological bias. See, e.g., *Exposing the Lies About El Salvador*, N.Y. TIMES, Mar. 26, 1993, at A1, 28.

It is not clear that bad motive taints the actions that are taken; this is a complicated philosophical question on which there are strong arguments pro and con. For example, assume that we have an American national interest in intervening in one case—say, the Persian Gulf—but we realize that to be consistent we should also intervene in some other—perhaps Haiti. If we decide to intervene in both, then this may be motivated by nothing more than a combination of self interested involvement in one case and an awareness that if we behave inconsistently we will be subject to world criticism. If we decide to go ahead, are our actions based on good motives or bad? It's hard to say, but what is important is that this is a different question than whether we have done the right thing. Motive may matter, and it certainly affects public perceptions of American behavior, but it is not the point at issue here.

It should be clear that the form of the argument that we have advanced against selectivity is importantly shaped by the specific argument that was given as the basis for intervention. The justification that we examined was based on consent; the reason that it is not permissible to enforce international law in some cases but not in others is that no state would consent to selective enforcement, because observance by others is the *quid pro quo* for one's own observance of norms. Selectivity violates the principle of reciprocity. One might reasonably ask whether there could not be other types of justifications that would not have this characteristic, which when applied in one case would not create any precedent in others. It is not possible to rule such justifications out, categorically and in advance, and for this reason each justification relied upon must be examined individually, to see whether it has this consequence or not.¹⁰

An interesting example concerns human rights violations as a basis for intervention. Basic human rights norms are not the product of consent in the same way as most conventional norms of international law.¹¹ As a matter of positive law itself, human rights norms are generally considered "*jus cogens*": that is, beyond the power of the state to derogate from, even with the consent of other states.¹² As a philosophical matter, it is generally thought that human rights exist independently of what states want; they are some sort of philosophically prior natural law that acts specifically to limit what states may do. The prohibition on selectivity thus cannot be based on the fact that states would not consent to selective intervention on the basis of human rights violations. If one exists, it must be grounded in some other form of reasoning.

10. One can hypothesize various justifications that do not create precedents in this way; the question, though, is whether there are likely to be justifications with this characteristic that are plausible. For example, if there were a justification for intervention that was founded on the notion that the United States had a right to impose its will, unilaterally, on the rest of the world, then application of such a justification in one case would not give rise to an obligation in other cases, for the whole point would be that the United States was authorized to do as it chose. This hypothetical justification, however, merely proves the point. Justifications that are so self serving are unlikely to be very convincing in the first place.

11. It should be recognized that many human rights norms are also norms based on the consent of states. As to these, the consent based analysis already set out would apply. In the discussion that follows, though, I am assuming that the justification for the norms is not consent but the intrinsic moral plausibility of the content of the norms themselves.

12. See generally, Marjorie M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 (1987).

One way to see the difference between justifications based on human rights abuses and justifications based on general enforcement of consent-based international law is to compare no enforcement, partial enforcement, and full enforcement from the point of view of each. Where the reason given for intervening is that international law has been violated, then it would seem that full enforcement is definitely preferable to no enforcement and to partial enforcement, but that as between partial enforcement and no enforcement the latter may be preferable to the former. The reason is precisely the one that we have already outlined: reciprocity. States might very well prefer to retain their complete freedom of action rather than to agree to limitations on their actions with no assurances that other states will be comparably limited. If consent is the motivating force behind the justification for intervention, then partial enforcement will probably rank behind both full and no enforcement.¹³

The same can probably not be said of prevention of human rights abuses as a justification for intervention. The three alternatives to compare are: no prevention of human rights abuses, full prevention of human rights abuses, and partial prevention of human rights abuses at the will of the United States. Is no enforcement preferable to partial enforcement? It would appear not, if the only consideration is protection of human rights. From an independent fairness perspective, it is no doubt unjust that one nation should escape the requirements of human rights norms when other states are required to comply.¹⁴ But this is simply to reiterate one's opposition to selective intervention. If what one is seeking is a reason for opposing selective intervention, then in the case of human rights violations such a reason cannot be found in the initial justification for intervention.¹⁵ Some other basis must be found, and to this point we have not identified one.

Even if one recognizes that selectivity arguments do not have much force when the justification for intervention rests on human rights enforcement, this qualification is not likely to cover very many cases.¹⁶ There are few countries that have only intervened in cases where human rights justifications exist. Regarding the vast majority of countries that have intervened (and the United States certainly fits within this vast majority), at least some of the interventions would have required justifications of other sorts—if, indeed, justification of any sort could be found. Where these justifications relied on arguments that

13. We will return in a moment to the question whether partial enforcement based on some particular, and principled, decision criteria might not be preferable to no enforcement.

14. Note, though, that this intuition may be grounded, in part, on the sentiment that no nation at all should be able to avoid complying with the requirements of basic human rights, rather than on any implication of the fact that other states have been required to comply. It may be an unconditional argument rather than an argument about selectivity. If so, partial enforcement is still preferable to no enforcement.

15. A possible justification would be that selective enforcement breeds cynicism about human rights, and therefore leads to less human rights observance in the long run. Whether or not this is true as a factual matter is debatable; for although selectivity no doubt does breed cynicism, it does not seem that likely that human rights abusers will commit more violations than they would in a world of total nonenforcement because of such cynicism.

16. Note also that even where the norm itself is not founded on consent, consent may be the only recognizable basis for the remedy in question. For example, human rights norms are not founded on the consent of states, but it is possible to argue that submission to a particular world tribunal for adjudication of claimed human rights violations might arguably be based on consent nonetheless. For a particular intervention to be legitimate, both the norm that was violated and the norm that supplied the remedy must have adequate philosophical grounding. See BRILMAYER, *supra* note 8, at 100-04.

themselves had precedential effect, the fact that some other intervention might have been justified on purely human rights grounds would not relieve the acting country of the obligation to be consistent.

Despite the fact that some justifications would not give rise to a prohibition on selectivity, then, the general argument against selectivity is very broad. Indeed, it is probably the argument's very breadth that accounts for the general reluctance to acknowledge a prohibition on selective intervention. Even some authors who are generally sympathetic to claims that the United States should act on principle seem reluctant to recognize an obligation to become involved simply because it has involved itself in other cases.¹⁷ It is easy to understand this reluctance, considering that there are many situations in which it might be argued that international law violations exist that ought to be addressed by powerful nations, especially considering the tremendous costs that this would involve. Is it really possible for a single nation to bear responsibility for law enforcement all around the globe? Won't the United States be completely overwhelmed if it accepts the responsibility for doing so? An important question to ask, however, is whether this is the logical conclusion of accepting a prohibition on selectivity. There are arguments that a general prohibition on selectivity nonetheless leaves room for principled exceptions.

EXCEPTIONS BASED ON PRINCIPLE

It's interesting that one does not hear the argument made in the domestic context that because the police could not possibly enforce all of the laws one hundred percent, they should have complete discretion to enforce it in only those cases where they feel like doing so. In the domestic context, just as in the international context, there are insufficient resources for full enforcement of the laws. While police have a great deal of discretion to enforce the law or not—and while their decisions are ordinarily not judicially challengeable¹⁸—this does not mean that we feel that they are entitled to make such decisions

17. See, e.g., Lori Damrosch, *The Civilian Impact of Economic Sanctions, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 274, 276 (Lori F. Damrosch ed., Council on Foreign Relations Press 1993) (arguing that "Unilateral sanctions need not be principled; collective sanctions ideally should be. National decision-makers have leeway to pursue self-interested policies or even to act without apparent rationale, as long as they stay within the limits of tolerance of their own politics."). See also, Stephen Solarz, *When to Intervene*, 63 *FOREIGN POLICY* 20, 39 (1986) ("The determining criterion should be U.S. national interests in each particular case.").

It should be noted that, in the above-referenced chapter, Damrosch is concerned primarily with economic sanctions, even though the remainder of the book addresses noneconomic sanctions. Thus, it is not clear whether she would intend these remarks to apply to military intervention as well.

Sometimes what seems at first to be a defense of complete selectivity turns out to be nothing more than a claim that the United States cannot afford to intervene in every situation. Damrosch then goes on to argue for criteria that are in fact relatively principled, such as whether the intervention can reasonably be expected to successfully accomplish its objectives. See, e.g., Henry S. Bienen, *The Morality of Selective Intervention; Foreign Policy: We Should Act Only Where We Can Assist a Positive Outcome—In Bosnia, Say, But Not in Rwanda*, *L.A. TIMES*, June 22, 1994, at B7 (Op Ed.) ("We need not be and cannot be consistent in our response to ethnic violence. Our economic and military resources are not sufficient for us to be the world's policeman.").

18. See, e.g., *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (no standing to challenge state's failure to enforce laws, or state's racially discriminatory enforcement of the law).

either on self interest or on whim. As a moral matter, it is clear that we feel that principle must play a part in these decisions.

Perhaps this is in part because police are supported by our tax dollars. Their obligation to decide on principle may come from the fact that they are working for us. But framing the issue this way does not explain a lack of principle in international relations. The fact that we do not increase our taxes to allow full enforcement seems to indicate a willingness to give police discretion. We could, if we wanted, decide to pay more taxes to achieve a higher level of law enforcement. Other countries of the world cannot be charged with acquiescence in quite this way. Besides, does the fact that our domestic police work for us make the argument that they have to consider our general interests more compelling or less compelling? Why not say that the fact that other nations have not hired the United States makes it more obligated to respect their interests, rather than less? After all, we're self-appointed.

More importantly for present purposes, though, what the domestic analogy suggests is that *there are* ways of making determinations of when to enforce the law *that are principled*. To respond to the pragmatic limitations on one's own ability to compel respect for norms is not necessarily to act in disregard of principle.¹⁹ Instead of stopping dead at the observation that it is not possible to enforce the law all of the time, we should take this as the beginning of analysis. What principled reasons might there be for less than full enforcement?

Certainly it must be appropriate to consider the relative urgency of the various things that could be done with the particular resources that are available. If some violations of international law are more egregious than others, then all other things being equal it cannot be a basis for objection that the more serious violations are attended to first and—if resources run out—to the exclusion of less serious ones. If two violations are equally egregious, but one can be dealt with within the resource constraints that the United States faces while the other cannot, then there is little point in trying to address both, or in giving priority to the one that cannot be resolved. Perhaps this is nothing more than a "cost/benefit" analysis of law enforcement. If so, it has its analogs in domestic law enforcement, where it is taken for granted that problems must be prioritized. Two factors to consider in prioritizing violations are the harm that will be suffered without enforcement and the likelihood that enforcement can do something about the situation. It is a question of how to get the most "bang" for one's law enforcement "buck."

There are several ways that the calculus becomes more complicated. First, it will be clearer in some cases than in others exactly what international

19. It is sometimes erroneously assumed that there is some tension between being pragmatic and being principled. There is no reason that pragmatic assessment of the consequences of what one is considering doing should be considered a sign of deviation from principle, however. Many schools of moral thought (utilitarianism is one) require the individual who is acting to determine the likely consequences of his or her alternative choices of actions. What people who contrast pragmatic with principled lines of reasoning are often doing is erroneously equating principled moral reasoning with the application of moral rules such as "do not kill" or "do not lie." Such simple deontological rules do not require the actor to assess the consequences of deciding not to kill or not to lie. It is this feature of that form of moral reasoning, rather than the fact that it is principled moral reasoning, that is arguably open to criticism.

law requires. Sometimes there are clear rights and wrongs, clear bad guys and good guys, but more often this is not the case. In domestic law there exist judicial mechanisms that can determine after the fact what legal right and wrong require. One arrests "suspects" and then determines whether they are innocent or guilty. While in theory this is also possible in international law—and judicial organs such as the World Court or various international human rights tribunals do exist—often the very act of intervening will itself upset the status quo so much that it should not be undertaken unless there is a high degree of certainty about who is right. If the police are thinking of shooting a fleeing suspect, it would be nice to know that he or she is really guilty.

Where such uncertainty exists, then, it makes sense to allocate one's attention to the cases where it is clear what international law requires. So enter the third and fourth factors. In addition to the magnitude of the harm to be prevented and the likelihood that something can be done about it, one must consider the certainty that the action one is taking is really directed against the party who is in the wrong. And it must be clear that intervention does not itself just make matters worse, for even where the cost of intervention falls on the right party it may be out of proportion to the harm being done.

These considerations seem to resemble those that would be taken into account in deciding whether intervention would be justifiable in the first place (as opposed to whether some prior intervention creates a precedent for intervention now). And, for an important reason, they do. The reason that these considerations overlap with those that should be taken into account in deciding whether a justification exists is that we are, essentially, prioritizing problem situations to determine which are the most compelling from the point of view of the very justification for intervention. In which of the various problems around the world is the justification for intervention the strongest? For intervention to be warranted at all, the situation must meet a certain threshold of justification; minimum criteria must be met, and these criteria depend upon the content of the justification relied on. (A justification revolving around violations of international law, we saw, incorporates elements of state consent, but if other justifications were relied on they might incorporate other factors.)

But even once the minimum standard of justification is met, some cases that meet the threshold will be stronger, clearer, or more urgent than others—in terms of that same standard of justification. In terms of intervention, it makes a great deal of sense to allocate energy to those cases in which the justification for intervention is the strongest. And this suggests another way to state the prohibition on selective intervention. A prohibition on selectivity means that selective intervention is permissible if and only if selectivity can be explained in terms of the degree to which intervention is justified. The prohibition on selectivity is grounded, ultimately, in the justification for intervention itself, because that justification supplies the basis for ranking which interventions are more justifiable and therefore which ones it makes sense to address first in situations of scarce resources.

This restatement of the problem leaves one thing out, however. We already alluded to the notion of a "cost/benefit" analysis. It suggests that we should allocate scarce resources in such a way that we maximize the overall extent to which we can accomplish the priorities, viewed in light of the ranking suggested by the interventions' justification. But the amount of good that can be

done is itself a function of how resources are being allocated by domestic political processes. Even if we are under an obligation to do the most good with the resources we are willing to allocate, this does not say anything about the extent to which we have an obligation to allocate resources.

This factor will, essentially, be determined by looking at previous cases in which we did decide to get involved. If we have been relatively willing to commit resources in previous situations (where, coincidentally, our national interests were at stake) then it is unconvincing now to explain our unwillingness to get involved on the grounds that resources are not available. If we were willing to tolerate, then, a low rate of return for our international law enforcement investment, principle requires that we be willing to tolerate it also in other cases when the justification for intervention is at least as strong.

Although this description involves substantial oversimplification, and assumes that it is possible to quantify with precision things that cannot be quantified at all, it is intended as a heuristic device to imagine the kinds of things that should be taken into account in deciding whether a particular pattern of intervention is permissible. If in fact one could rank the various possibilities for U.S. intervention, taking into account the extent to which we can be clear about the equities and the extent to which our intervention can achieve what it is designed to do, and if it were possible to determine in each of these cases the extent to which a commitment of a particular amount of resources would achieve those goals, then (according to the argument I am making) our obligation would be to take those situations in the order we arrive at. At a certain point we will run out of resources, and at that point we can stop.

Prior decisions to intervene create precedents because we cannot stop short of cases ranked comparably to those where we have been willing to intervene before.²⁰ The fact that we are simply unwilling to supply the necessary resources now to deal with this particular case, when we have been willing to supply the resources to deal with cases in which intervention was no more justified, does not supply a reason for the difference in treatment.

CONCLUSION

There is something quite peculiar about the American tolerance of inconsistency in the decision whether to intervene. It would not be surprising if tolerance of arbitrary or unprincipled decisionmaking was limited to that part of the American public which recognized *realpolitik* as the only guide to foreign policy. But even Americans who would recognize principled limitations

20. A particularly difficult problem concerns what to do when there is a change in the level of available resources. The argument in the text assumes that the level of available resources remains constant. If one hundred million dollars are available per year, and last year the United States intervened in a situation with a certain level of cost effectiveness (in terms of furthering human rights, respect for international law, etc.), then this year it should intervene in cases with a great or greater a level of cost effectiveness, as described in the text.

But what if this year there is less money available, because there was a huge savings and loan bailout, may a higher "cost benefit score" be required? Or what if there is more money available, because the wheat crop was very good and a lot of American wheat was sold overseas? Is a lower cut off then mandatory? Or, perhaps even more complicated, what if there are twice as many circumstances arising around the world in which humanitarian intervention must be considered, while the level of resources has remained the same? Such difficult questions negate any false sense of security one might get about the tractability of the questions presented in the text to any sort of simple cost benefit calculation.

on our intervention in other countries' domestic concerns (who would claim, for instance, that we needed a good reason to invade Grenada or Panama, or who would recognize a moral obligation not to kill innocent civilians unnecessarily in our aerial bombardment of Iraq) do not all agree that there might be principled limitations on our decisions not to intervene.

My argument has been that there is a connection between these two issues. The source of limitations on the decision not to intervene is, precisely, the limitations on the decision to intervene. One's principles about what the United States is entitled to do if it chooses are also principles about how to exercise that choice. The reason is that justifications for intervention are also justifications for a pattern of intervention. The morality of what one is to do cannot be evaluated in the abstract, without awareness of what one has done in the past.

Most likely, the disinclination to engage in speculation about an obligation to be consistent arises from the fear that recognizing a moral obligation to become involved is potentially enormously demanding, in terms of both economic resources and human lives. Americans are afraid about the scope of the obligations they will be expected to assume. For this reason, they would retain the right to base each decision whether to become involved on an individualized cost/benefit analysis, and to make that cost/benefit analysis on the basis only of the costs and benefits to Americans.

But framing the choice this way is a mistake. The alternatives are not, first, untrammelled discretion, and second, placing oneself utterly at the service of the world. I have argued that the United States is entitled to set limits to its involvement, so long as it expends those resources it has committed in a way that recognizes which cases for intervention are most strongly justified. The prioritization of strength of justification must be principled, but determining the point at which one will no longer be involved is based on self interest as well.

If one chose, one could very well argue that self interest is itself undermined if the United States becomes captive to *realpolitik*. When one state, which is clearly the preeminent international power, takes advantage of that situation to pursue its own agenda single-mindedly, the advantages that it realizes are purely for the short term. When the United States makes hard decisions to defend world values generally, it gains respect that can be traded on when it later chooses to assert world leadership. My claims, however, do not rest on self interest ultimately. It is true that often self interest and principle coincide; and I happen to believe that in cases where self interest is hard to calculate, almost invariably principle supplies a good rule of thumb. My arguments, however, are more importantly moral arguments. Selective intervention can be morally objectionable, and Americans should be concerned with asking why, how, and in what circumstances that is true.