Borders and Duties to the Displaced: Ethical Perspectives on the Refugee Protection System

David Hollenbach, S.J.
Georgetown University

Executive Summary

This essay proposes some ethical perspectives that can help in the task of reassessing the structure of the global refugee protection system in light of the extraordinarily high levels of refugee movement and forced migration occurring today. It addresses two chief areas. First, it considers whether ethical duties reach beyond the borders that separate nation-states and the implications of such duties for the treatment of refugees and other displaced persons. Drawing on classical ethical perspectives found in secular moral thought and in several religious traditions, the essay argues that national borders have moral weight, but that grave violations of the rights of displaced persons can create responsibilities that are more stringent than duties to co-citizens of one's own country. Second, the essay examines whether the duties to co-citizens or to displaced persons should take priority in various contexts. *Negative duties* that have particular urgency in the effort to shape a more adequate response to forced migrants are proposed, drawing upon classic criteria in the ethics and law of war. These include the avoidance of aggression, war crimes, crimes against humanity, and other violations of justice that often lead to mass displacement. *Positive duties* to come to the aid of the displaced are also developed in light of several standards: the needs of the displaced, the proximity and capability of the responder, whether the response is a last resort, and if the response can be carried out without disproportionate burden on the responder. These negative and positive duties are then drawn upon to argue for a significantly more active response to the needs of forced migrants by developed nations in the global north, by regional and global intergovernmental organizations, by secular and faith-based humanitarian nongovernmental organizations (NGOs), and by citizens at large.

I. Introduction

The international refugee protection system is severely challenged today. In recent decades the forced movement of refugees and internally displaced persons has been rising markedly, reaching an extraordinarily high level today by historical standards. It is well known that there are more displaced people today than at any time since World War II. Despite the

efforts and achievements of many governments and many humanitarian organizations, the protection of displaced persons from the harms they routinely suffer remains a distant goal. Many analysts believe that the conditions faced by forced migrants today have brought the refugee regime to a turning point. UN Secretary-General Ban Ki-moon has called the situation a "monumental crisis" that will require a response based on "monumental solidarity" (Ki-moon 2016). The regime that has been in place since the adoption of the 1951 Convention Relating to the Status of Refugees needs to be reexamined. The challenge to develop more adequate ways of protecting the humanity of those threatened by displacement is in part a moral one. This essay will propose several ethical perspectives that may be of help in this reassessment. The moral challenges, of course, are deeply embedded in the political, military, economic, environmental, and other conditions that drive people from home. Examining the ethical issues, therefore, requires paying close attention to these social conditions. But this essay will highlight several distinctly ethical issues that arise in the reform of the refugee regime. The goal is to draw upon some existing ethical wisdom to shed light on our moral responsibilities to those who are suffering because of the displacement brought about by war and disaster today.

The first part of the essay will address the significance of the borders separating national communities and the sovereignty of states for our moral responsibilities toward displaced people. Are there duties that reach beyond the borders of diverse peoples and sovereign states? If so, how do these duties relate to the responsibilities people have to citizens of their own country? It will be argued that there are duties *both* to fellow citizens *and* to those in great need, especially to those who have no other form of protection than that provided by humanitarian assistance, asylum, or both. The second part will suggest that since we have duties both to fellow citizens and to those from other countries who are facing the crisis of forced displacement, we need to clarify priorities among these types of duty in various circumstances. Such priorities will be developed in light of several *negative* duties not to treat people in ways that cause displacement and several *positive* duties to take action when forced migration is already occurring. It will be suggested that acting in accord with these priorities will help create a more adequate refugee protection system, and that a better system of protection will in turn facilitate fulfillment of the duties proposed.

II. Nation States and Duties beyond Borders

In the face of the growth in the number of refugees and other forced migrants and the degree of their suffering in recent years, some analysts have been calling for a radical rethinking of the relevance of national borders for the ethical responsibilities toward displaced persons. Secular political philosophers such as Joseph Carens and refugee scholars like Philip Marfleet argued some years ago that the time may have come to consider making borders fully open to all who are fleeing from persecution, conflict, or disaster (Carens 1987; Marfleet 2006, 288-90). In a similar spirit, philosopher Martha Nussbaum argued that a cosmopolitan community of all human beings has primacy over narrower communities defined in terms of nationality, ethnicity, or religion. Indeed she called nationality a "morally irrelevant" characteristic of personhood, a position that amounted to an ethical call for open borders (Nussbaum 2002, 5).

Such a universalist cosmopolitan ethic echoes the first of the principles that guide the actions of the International Committee of the Red Cross (ICRC) and that is usually taken as foundation of the humanitarian movement, namely the principle of "humanity" (ICRC 1986). The chief author of the ICRC's principles, Jean Pictet, noted that in this principle the term "humanity" refers to the whole of humankind and all its members (Pictet 1979). Concern for humanity, therefore, is concern for *all* members of the human race and the conditions that *all* are facing. To act in accord with humanity is to act with inclusive concern toward all men and women. The principle of humanity thus leads to another of the ICRC's standards: impartiality. To act with humanity is to respond impartially to all members of the human family on the basis of their need, not because of some characteristic that differentiates them from others, such as their citizenship, nationality, race, religion, class, or political opinion.

The universality of the ICRC's principle of humanity is also a characteristic of the normative basis of the modern human rights movement. Human rights are rooted in the universal and equal dignity of all human beings. The preamble of the 1948 Universal Declaration of Human Rights directly links recognition of the "inherent dignity" of all persons with protection of "the equal and inalienable rights of all members of the human family."[1] The commitment of the human rights movement to the dignity of all persons, not just those belonging to particular nations, religions, or ethnicities, is evident from the fact that the United Nations titled its 1948 statement of human rights a *universal* declaration.

Drawing on the normative standards of both the humanitarian and human rights movements, we can affirm that *all* persons deserve *equal* protection from grave threats to their worth as persons. This is evident in the way terms such as "all," "everyone," and "no one" are used throughout the Universal Declaration of Human Rights. The Declaration states that all persons possess human rights without distinctions based on "race, color, sex, language, religion, political or other opinion, national or social origin."[2] This relativizes all in-group/out-group boundaries. It challenges understandings of religious, national, or cultural identity that would limit respect only to those people belonging to a particular community. The human rights ethos thus seeks to tear down the walls dividing people into those who count and those who do not count, at least when the most basic requirements of humanity are at stake. No white rule over non-white; no Aryan over Jew; no European colonist over non-European colonized; no male superiority to female. Though religious convictions are deeply important to those who hold them, such convictions must never be used to deny the humanity or human rights of others in the name of God. Ethnic or national identities are never legitimate grounds for excluding people from the most basic requirements of their human dignity. Respect for human dignity also requires fulfilling the social/economic rights of all people to adequate food, work, education, and health care, and for the solidarity across economic differences required to fulfill these rights.[3]

This cosmopolitan vision is rooted in a commitment to human dignity that can be supported by secular philosophical argument. Pictet affirmed that the ICRC's principle of humanity

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1 Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

2 Id., Art. 2.

3 International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

requires that "everyone shall be treated as a human being and not as an object, as an end in himself and not as a mere means to an end" (Pictet 1979, 17). This language echoes a major philosophical understanding of human worth or human dignity, namely that of Immanuel Kant. The core principle of Kant's moral philosophy is that persons are always to be treated as ends in themselves, and never simply as means (Kant 1993, 36). All persons possess this dignity. Thus Kant was led to adopt a cosmopolitan morality that sees some important political responsibilities reaching across national borders.

This cosmopolitan orientation can also be supported on religious grounds. Both Judaism and Christianity hold that all persons are brothers and sisters in a single human family no matter what their nationality or ethnicity. Every person has been created in the image and likeness of God (Genesis 1:27). This common creation gives every person a shared dignity and worth that reaches across all boundaries that are humanly constructed, such as the borders between nation-states. These borders are in no way absolute and must be seen as subordinate to the respect due to the shared dignity of every person as an image of God. Pope Francis drew on this biblical vision during his recent visit to the Greek island of Lesbos, where he assured Syrian refugees seeking entrance into Europe that "God created mankind to be one family" and called Europe to "to build bridges" rather than "putting up walls" (Francis 2016a, 2016b). Such sensitivity to the needs of migrants and refugees is present not only in Christianity but also in Judaism and Islam. Each of great monotheistic traditions of Judaism, Christianity, and Islam traces its origins back to the Patriarch Abraham, who was himself a migrant from the home of his kinsfolk to the land of Canaan. The identity of Jews is also importantly shaped by the story of the Exodus — a migration from slavery in Egypt to freedom in the land of God's promise. The New Testament portrays Jesus as the leader of a new Israel, who just after his birth had to flee persecution as a refugee to Egypt along with Mary and Joseph. Muslims measure time from the founding event of Muhammad's *hijra,* or migration, from Mecca to Medina. The founding of each of these major faiths has migration across borders as one of its key elements, which is one of the reasons each of these faith communities sees its religious and ethical commitments as reaching across borders. The great Asian religions also insist that ethical duties do not stop at national or religious boundaries, particularly when refugees and migrants are in danger (for fuller development, see Hollenbach 2014). A similar sense of universal responsibility can be found in African traditions, where concepts such as *bumuntu* (humanness), *umoja* (unity), and *ujamaa* (solidarity) point to the interconnectedness of all persons (Nkulu-N'Sengha 2011, 38-40). There is little doubt, of course, that religious communities can fall into in-group versus out-group conflicts that are among the causes of forced migration. Nevertheless, most religious traditions possess a strong normative conviction that ethical responsibility reaches across religious and national boundaries and that the fullest expression of moral virtue is assisting people in distress, including strangers, migrants, and refugees.

Pope John XXIII appealed to this normative universalism in 1963 when he drew on both Christian religious warrants and secular philosophical arguments to affirm that national boundaries do not limit the reach of moral duty. Indeed the Pope explicitly argued that citizenship itself is not limited by national boundaries but has an authentically global meaning. In his words, "the fact that one is a citizen of a particular State does not detract in any way from his membership in the human family as a whole, nor from his citizenship in the world community" (John XXIII 1963, no. 25). This affirmation of the reality of global

community relativizes the moral significance of national borders and state sovereignty. It means that the duty to protect human rights reaches across borders. Such trans-border duties have particular relevance to the plight of refugees, who by definition lack the protection that would normally be provided by their home state. Since refugees have lost the protection of their home state, they will effectively end up with no rights at all unless the duty to protect rights is genuinely transnational. The duty to protect the displaced must therefore reach across borders if they are to receive any protection at all. As Pope John XXIII stressed, "Refugees cannot lose these rights simply because they are deprived of citizenship of their own States" (John XXIII 1963, no. 105).

In international politics, however, states do matter. Even in the midst of today's growing global interdependence, national communities continue to play very important roles in relation to the rights and needs of displaced people. From a normative point of view, an authentically cosmopolitan ethos calls for recognition that while all persons share a common humanity, showing concrete respect for all will require recognizing that every person also has distinctive characteristics, including diverse bonds of kinship, culture, and shared citizenship. Thus respecting people as they are calls for respect both for their common humanity and also for the ways they differ from each other (Appiah 2006, xiv-xviii). One of the key differences between people is their nationality and citizenship. Recognition of this fact has recently led Nussbaum to reverse her earlier position that national borders are morally irrelevant. She now draws on Grotius and Kant to argue that people exercise their freedom and express their dignity by shaping the institutions of their own nation-state (Nussbaum 2006, 255-62). Seyla Benhabib has developed a similar argument (Benhabib 2004). For these reasons, protecting human dignity will require respect for the self-determination of accountable states. At the same time, both Nussbaum and Benhabib also insist that sovereignty must be understood in a way that fully supports the fundamental human rights of all, including migrants and refugees. They seek to protect these rights by calling for porous borders rather than entirely open borders. An adequate assessment of responsibilities toward refugees and other displaced persons will thus require taking into account the importance of states for the protection of dignity and rights. It will also have to assess the impact of forced migration both on the human dignity of those who have been displaced and also on the communities who receive them.

There are religious warrants for the duty to respect communal differences just as there are for the duty to respect common humanity. In Judaism, God's covenant with Israel gives the Jewish people a distinctive religious and national identity that must be respected. This stress on religious distinctiveness gives Jews a particularly strong sensitivity to the right of diverse peoples to be different from each other. Of course, this sensitivity to the importance of difference does not eliminate Israel's awareness of the duty to respect the common humanity of all persons affirmed in the creation story and in God's covenant with Noah, which extends beyond Israel to all of creation (Genesis 9:1-17). Indeed precisely because of the special covenant that led God to set Israel free from bondage as strangers in Egypt, the Hebrew Bible repeatedly stresses that the Jewish people have strong duties to the strangers they encounter in the land of Israel itself: "You shall not oppress an alien; you well know how it feels to be an alien, since you were once aliens yourselves in the land of Egypt" (Exodus 23:9; see Leviticus 19:33-34 and many other places). Thus Judaism combines universalism and particularism in a way that recognizes both the right to national

self-determination and an onerous duty to migrants and refugees that reaches across the borders of Israel and the Jewish people (Sacks 2003, ch. 3).

Catholic social ethics also seeks to combine cosmopolitan universalism with respect for the distinctive identities of peoples. St. Augustine and St. Thomas Aquinas affirm a Christian duty to love all humans as our neighbors. At the same time they recognize that those with whom we have special relationships, such as the members of our family or our political community, deserve special treatment as an expression of our love for them. Thus a key task in Christian ethical reflection is to determine the order of priorities that should exist among these diverse loves (an *ordo amoris*). In some circumstances love for those nearer to us should take priority over concern for those at greater distances. On the other hand, when those farther away have greater needs, they can have priority. Similarly, Catholic social thought also appeals to what has come to be called "the principle of subsidiarity" to determine whether the more local or more global should take priority. This principle affirms that there are special duties within smaller and more proximate communities. In tandem with the principle of solidarity, subsidiarity also insists that when there is serious need at a greater distance or when local communities cannot or will not respond to this need, larger regional communities or the international community as a whole can have a duty to provide help (*subsidium*) to those in need (Pius XI 1939, nos. 79-80).

Though the subsidiarity principle was developed within Catholic social thought, it has become a standard point of reference in the European Union (the Union) in discussions of the relation between the responsibilities of the larger structures of the Union and the responsibilities of each of the European states. Subsidiarity requires that the Union itself should act only when member states cannot achieve required goals or when the Union itself is better able to achieve what is needed.[4] In other words, the larger transnational community of the Union does not replace the communal bonds that exist in the member states but supplements the action of the states when they are unable to take needed action or when the Union itself can act more effectively. In an analogous way, subsidiarity implies that the primary responsibility toward internally displaced persons falls on the country of which they are citizens. Their own country has the primary duty to protect them. But if their country of citizenship fails to protect them or acts in a way that compels them to flee, the duty of protection moves to neighboring countries and to larger regional and international actors.

Thus national borders carry considerable moral weight in determining ethical responsibilities toward displaced persons, but there are also obligations to the displaced that reach across borders. From both a secular philosophical standpoint and in most religious perspectives, there are duties *both* to one's fellow citizens *and* to forced migrants who need of protection through asylum or through some other form of emergency assistance. Neither of these types of duty is absolute. Duties to fellow citizens do not always trump duties to forced migrants, nor do duties to forced migrants always override duties to co-citizens. The key question, therefore, becomes what relative weight should be assigned to each of these duties in diverse circumstances.

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4 Treaty on European Union (Maastricht, 7 Feb. 1992), European Union Consolidated Treaties, *entered into force* 1 Nov. 1993, Title I, Art. 5(3).

III. The Need for Priorities

The displacement crises of today thus call for careful reflection on the relative weights of the obligations and rights that arise from our common humanity on the one hand and from our distinctive identities and citizenship in specific states on the other hand. Let me suggest several priorities among these types of obligations, focusing first on action required by *negative* duties not to act in ways that cause displacement and the kinds of mass movements of refugees we are witnessing today, and then on several *positive* duties to take action to alleviate the plight of the displaced and to improve the protection system that is currently in place. These two types of duties can be equally stringent (Shue 1980, 51-60).

A. Negative Duties

Most of the forced migration in the world today is caused by conflict and war. Half of today's refugees have been driven from homes by the conflicts in Syria, Afghanistan, and Somalia, and most of the internally displaced have been forced to flee by conflict within their countries (Guéhenno 2016). Key negative duties relevant to displacement caused by conflict can be highlighted by drawing on the moral tradition known as the just war ethic. This tradition distinguishes morally legitimate from illegitimate use of force, so it should probably be called the just/unjust war tradition. It has roots in Christian thought, especially Catholicism, but it has analogies in other religious traditions and overlaps in important ways with the tradition of the international law of armed conflict (Walters 1971; Walzer 1977; Hehir 1980; Hashmi 2002).

In its modern form the just/unjust war tradition draws a sharp line between force used in the defense of human rights and force that violates rights. The *jus ad bellum* norm of just cause requires that force be strictly limited to defending the rights of innocent persons to life, freedom, and security, and the rights of nation-states to self-determination and territorial integrity. Conversely, there is a negative duty *not* to use force aggressively against other peoples to deny them their political freedom, to exploit them economically, or because they are culturally different. Violation of these negative duties is both immoral and criminal.

Such a violation is just what happened in perhaps the worst humanitarian crisis of recent times: the Rwanda genocide of 1994, where force was massively used to deny the basic rights of the Tutsi people. It was also appallingly violated in the slaughter at Srebrenica, where thousands of Bosnian Muslims were killed because of their identity as part of an "ethnic cleansing." The displacements that resulted from each of these conflicts were massive. This suggests that a central priority in efforts to prevent massive forced migration should be much stronger efforts to prevent and halt the unjust resort to the use of force.

Just war norms also forbid direct, intentional attacks on civilians, as well as collateral harm to civilians that is disproportionate to the good being sought. International law sets forth similar prohibitions in the Geneva Conventions, which insist that civilians be distinguished from soldiers and be protected both from direct attack and from disproportionate collateral harm.[5] Violations of these standards are war crimes and can become crimes against

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5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (Geneva, 8 June 1977) 1125 U.N.T.S. 3, Art. 48.

humanity if "widespread and systematic" (Robertson, 2006, 430-39). Regrettably, several of the worst recent cases of forced migration have been due to violations of these moral and legal prohibitions of attacks on civilians.

For example, tactics used in the civil war that began in South Sudan in December 2013 have regularly violated the rights of civilians to security. Human Rights Watch (HRW) and a UN panel of experts concluded that both the government of South Sudan and the opposition forces had "committed extraordinary acts of cruelty that amount to war crimes and in some cases potential crimes against humanity" (HRW 2014; Panel of Experts 2015). Because of this mayhem, by July 2015, over 1.6 million South Sudanese had become internally displaced and over 750,000 had become refugees. The strategies and tactics used by both sides in South Sudan have themselves turned South Sudan into a grave humanitarian emergency marked by massive displacement.

The Syrian crisis reinforces the conclusion that armed conflict can lead to mass displacement when the adversaries violate their duty not to attack basic rights of civilians. The UN Independent Commission of Inquiry on Syria concluded that the war crimes, crimes against humanity, and human rights violations were so severe that the Syrian reality should "shock the conscience of humanity" (UNHRC 2014, no. 138). These violations have led to the single largest forced migration in recent history. The flight of refugees has threatened the stability of neighboring countries, including Turkey, which today hosts the largest number of refugees of any country in the world; Lebanon, where more than one in every six persons within the country's borders is a refugee from Syria; and Jordan.

The International Criminal Court (ICC) was established in 1998 to hold people accountable for violations of standards of international law like those that occurred in Rwanda and Bosnia and that are continuing in South Sudan and Syria. The Rome Statute that created the ICC gave it jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute arose from the recognition that duties of the international community based on our common humanity can take priority over the sovereignty of independent nation-states when human rights violations rise to the level of atrocity. The ICC has so far not been able to bring to trial some of those it has charged with such atrocities due to its inability to secure cooperation on various fundamental matters. For example, while President Omar al Bashir of Sudan faces charges of genocide and crimes against humanity for his actions in the Darfur region of Sudan, he has thus far eluded arrest due to the reluctance of certain ICC member states to detain him. In another case, charges against President Uhuru Kenyatta of Kenya had to be dropped because the ICC prosecutor could not get witnesses to testify, likely because of threats to their safety and bribes. Nevertheless, the ICC has had success in a number of other cases and it has launched a process that promises to strengthen the accountability faced by those responsible for the atrocities that contribute to some of the worst refugee and migration crises occurring today. Duties not to violate basic rights are surely more likely to be enforced today than in the past, and those who do violate them are less likely to get away with it than used to be the case. People will continue to be forced to flee from their homes as long as they face the danger of being caught up in conflict marked by unjust and indiscriminate violence. Preventing displacement thus requires notably more effective ways to hold the military and political leaders who organize such violence accountable for what they do. Enforcement

of the law of war and of the standards of international humanitarian law should thus be a priority in efforts to enhance the effectiveness of the refugee protection system.

B. Positive Duties

Regrettably, we have learned from history and from insight into human moral weakness that threats to human rights will continue to occur. This raises the question of what *positive* obligations we have to come to the assistance of the displaced when crises in fact occur.

To address this issue we can draw on a mode of moral analysis originally developed in the 1970s in the context of debate about who had duties to help eliminate the apartheid regime that separated South African people by race and ethnicity. In that debate, some maintained that only those who had created the apartheid system had a duty to work to overcome it. But a very different ethical approach was proposed by several scholars at Yale University who argued that under certain circumstances persons, communities, institutions, and states can have positive duties to help remedy harms they did not themselves cause. They called their approach the Kew Gardens Principle, for it arose from their reflection on a tragic case that occurred in the Kew Gardens section of New York City in 1964 (Simon, Powers, and Gunnemann 1972). According to press reports, a young woman named Kitty Genovese was viciously assaulted, stabbed, and died a slow death while 38 nearby people watched and did nothing, failing even to call the police. It has since been learned that the initial reports of what happened were not fully accurate (Lemann 2014). But the public outrage stimulated by the press reports points to the fact that most people have a conviction that there can be positive moral duties to aid others in emergency situations. It is not enough to avoid causing harm. In some situations omission can become as morally objectionable as commission.

Drawing on this conviction, the Kew Gardens principle argues that an agent has a positive responsibility to help when four conditions are present: (1) there is a critical *need*; (2) the agent has *proximity* to the need; (3) the agent has the *capability* to assist; (4) the agent is likely the *last resort* from whom help can be expected (Simon, Powers, and Gunnemann 1972, 23-25). Subsequent reflection has added a fifth condition: (5) the action can be taken *without disproportionate harm* to the one providing assistance. These criteria, of course, cannot be applied mechanically. But they can help us think about the scope of positive responsibilities in the face of the crisis-level suffering that is displacing so many people today.

For example, there can be little doubt that large numbers of people are in grave *need* of protection in Syria and South Sudan today and that this need is driving many from their homes. Those inside the borders of these crisis-torn countries are vulnerable to harms that could lead to their deaths or to violations of other basic rights, and they are in flight because of this vulnerability. The duty to respond to such need falls first upon those whose *proximity* to the crisis makes them more likely to have knowledge of the need and better understanding of how to respond to it. This means, of course, that the government of the nation where the crisis occurs and local communities within that nation bear the prime responsibility. In South Sudan and Syria, therefore, both the governments and the opposition forces in each country have the negative duty to stop the atrocities that are causing crisis and the

positive duty to help lift the burdens of suffering. Duty to take positive action, however, does not end at the national borders of the countries where crisis is present. When people become aware of crisis in a neighboring country or even in a country at a great distance, this awareness leads to what might be called intellectual or psychological proximity. It puts them in *moral* proximity to those who are suffering.

There has been helpful though imperfect response to the duties arising from proximity by the countries neighboring South Sudan. The regional organization of Sudan's neighboring countries — Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea — is called the Intergovernmental Authority on Development (IGAD). IGAD has played a diplomatic role in seeking to mediate the conflict within South Sudan that began in 2013, as they did in helping secure the Comprehensive Peace Agreement that ended the earlier conflict between northern and southern Sudan that ultimately led to the independence of South Sudan in 2011. Regrettably, economic and political self-interest has sometimes distorted the mediation efforts of several countries that are part of IGAD, particularly Uganda and Ethiopia. This has in turn led several countries from outside the region to become involved in an effort known as IGAD Plus, which includes the African Union (AU), United Nations, China, United States, United Kingdom, Norway, and the European Union. A sense of moral responsibility arose in these more distant countries because of their proximity through awareness. These combined regional and global mediation efforts have certainly not been perfect. Nevertheless, a fragile peace process is underway (ICG 2015). Both nearby and distant neighbors can have the knowledge that enables them to make a difference.

The criterion of *capability* also sheds light on positive duties to respond to crises that displace large numbers of people. In considering this issue it has become common to point out that someone who cannot swim does not have a duty to come to the aid of a child who is drowning if providing the aid requires swimming, while a good swimmer can have a duty to respond. Lebanon, Turkey, and Jordan are today already massively overburdened with Syrian refugees. They do not possess the economic and other resources to take in many additional refugees. On the other hand, the resources of the wealthy nations of northern Europe, North America, and the oil-producing Gulf states give them the capability to receive many more refugees and to share the burdens being carried by Syria's already overtaxed proximate neighbors. The assistance being provided to the countries bordering Syria is woefully inadequate. Capability to assist gives many nations in Europe, North America, and the Gulf a duty both to receive many more Syrian refugees than they have and a responsibility to provide more assistance to Syria's nearby neighbors (Rummery 2015). The duty to share the burden of assistance to displaced people is proportional to the capability of doing so. Countries with greater economic and political capacities to help have proportionally greater responsibilities to do so. These responsibilities may be carried out by granting asylum and refugee status to more of the displaced, and, perhaps most urgently, by providing economic and other forms of assistance to countries like Turkey, Lebanon, and Jordan who are already carrying a disproportionate burden.

The existence of duties such as these is a consequence of the fact that the responsibility to assist displaced people reaches across national borders. The fact that state sovereignty is not a moral or political absolute becomes clear in face of the needs of forcibly displaced persons. In his work on response to the needs of internally displaced people, the Sudanese

scholar and diplomat Francis Mading Deng argued that sovereignty is such an important value because it secures each country's ability to protect its own people by preventing external powers from taking harmful action within its national boundaries, for example by invasion or colonial exploitation. Deng called this sovereignty-as-responsibility (Deng 1996). Sovereignty does not mean a government is free to do whatever it will within its own borders, such as taking actions that create large numbers of internally displaced persons or refugees. If a government fails to protect its own people, either because it is unable or unwilling to do so, the duty to assist those who are threatened by this failure can pass to the other nations. Thus the responsibility to assist and to protect the rights of persons threatened with or experiencing displacement falls first on their own government. But if their government is unable or unwilling to secure their rights, the responsibility to do so can move to other countries and their people (Martin 2010, 28-31).

Deng's thinking contributed in an important way to the development of the doctrine of the Responsibility to Protect (R2P), initially proposed by the International Commission on Intervention and State Sovereignty (ICISS) and subsequently affirmed at the 2005 UN General Assembly World Summit (UNGA 2005, nos. 138-39; ICISS 2001). R2P states that the international community can have positive duties "to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." Protective action should come in the first instance from people's own government. Only if that government is failing to provide this protection should other countries consider action. When violations of human rights reach the level of atrocity and lead to the displacement such violations often cause, action by other countries through "diplomatic, humanitarian and other peaceful means" can become appropriate and even required.

The responsibility to protect has been the focus of heated controversy since it was endorsed by heads of state at the UN General Assembly in 2005. Political realists oppose it because they hold that foreign policy should be determined by the interests of one's own people, not by a supposed moral responsibility to other countries. Others see it as a form of neo-imperialism. Still others say that the situation in Libya today in the aftermath of the NATO intervention there shows R2P doesn't work, and that the current massive crisis in Syria and surrounding countries shows the R2P cannot work. Despite these critiques, it is important to note that the responsibility to protect has in fact been invoked on a number of occasions since 2005 and that it has led to effective protection of people from grave rights violations.

For example, when conflict flared in Kenya following the disputed 2007 elections, nonviolent, diplomatic initiatives were taken by numerous international actors to stop the conflict that took several thousand lives and displaced half a million people. Kofi Annan stated that he saw the crisis in Kenya through "the R2P prism" (Cohen 2008). This led to intense diplomatic initiatives by the United Nations, the African Union, and a number of other governments from Africa and around the world, including the United States (International Coalition for R2P, sec. II). A power sharing agreement was reached and the downward spiral into civil war and perhaps even genocide was stopped. The Kenyan case illustrates that the responsibility to protect can be successfully carried out through nonviolent political and diplomatic means.

The R2P doctrine has also been invoked on several occasions in the past decade to justify the use of military force to protect people from atrocities, following the UN General

Assembly's affirmation that if diplomatic initiatives do not succeed, the use of armed force can become legitimate as a last resort under chapter VII of the UN Charter. For example, in 2012 France and the Economic Community of West African States took military action with UN approval in the pursuit of peace in Mali, and in 2013, the UN Security Council supported the use of force by French and African Union troops to stop the atrocities that were occurring in the Central African Republic and the displacement of nearly one million refugees and other forced migrants.[6] Though these cases are certainly not resolved, they indicate that the doctrine of the responsibility to protect can lead to action that can help prevent grave crisis from becoming much worse and can lead to some improvement in crisis situations that force many people from their homes. Two other cases, however, Libya and Syria, raise questions about whether R2P has any relevance to current efforts to respond to the refugee crisis.

In the Libya case, the United Nations authorized action to protect civilians when fears arose that Libya's leader, Muammar al-Qaddafi, was about to commit atrocities. Qaddafi referred to his adversaries in Benghazi as "cockroaches," the very epithet Hutu used for Tutsi during the Rwanda genocide (BBC News 2011). As a result, the UN Security Council, with the notable support of the Organization of the Islamic Conference and the League of Arab States, called for the use of "all necessary measures" to protect civilians.[7] NATO intervened with airpower, Qaddafi was killed, and his regime was overthrown. Sadly, Libya has since fallen into political chaos, with armed conflicts among several groups, significant violations of human rights on the basis of religion, the displacement of many, and the unsafe flight of migrants across the Mediterranean (Amnesty International 2015, 5-6). These consequences confirm for some observers the conviction that pursuing humanitarian goals not required by national self-interest is likely to do more harm than good (Kuperman 2015, 66-77). I would argue, however, that the intervention in Libya failed not because it was excessive but because it was incomplete. Following the norms that some specialists in the ethics of war are today calling *jus post bellum*, justice after conflict, NATO and the United States should have followed up their intervention with action to rebuild and to prevent the chaos that developed (Chollet and Fishman 2015, 154-57). What happened in Libya was an incomplete implementation of R2P, not a simple failure. Had the intervention followed through with the peace building and reconstruction efforts that were clearly required, the situation on the ground in Libya would not have disintegrated in the way that it has, and many fewer people would be in flight from the chaos of that tragic situation.

Syria has also been invoked to suggest that R2P is dead. The political complexities and moral ambiguities of the Syrian situation go very deep. But these complexities do not discredit the existence of a duty to protect people facing atrocities when protection is possible. Thomas Weiss has argued that the wisdom of the use of military force to protect people from atrocities is governed by three factors: legality, moral legitimacy, and feasibility (Weiss 2014). In Syria it is clear that the *legal* prohibitions of war crimes and of other atrocities have been massively violated. The *moral legitimacy* of efforts to stop a conflict that has

6 UN Security Council Resolution 2085, U.N. Doc. S/RES/2085 (2012) [Authorizing intervention in Mali]; UN Security Council Resolution 2127, U.N. Doc. S/RES/2127 [Authorizing intervention in Central African Republic].
7 UN Security Council Resolution 1973, U.N. Doc. S/RES/1973 (2011), [Authorizing intervention in Libya], 4, 6.

displaced over half the Syrian population and killed hundreds of thousands of civilians is also evident. The *feasibility* of military intervention to alleviate the crisis, however, is unclear. This does not undermine the idea that there is a responsibility to protect people from atrocity and from being driven from home by mayhem when it is possible to do so. The apparent lack of presently feasible ways to overcome the crisis in Syria suggests that intervention is not now called for by R2P. I would argue, however, that the duty to protect the Syrian people does call for continuing political and diplomatic initiatives to find a path toward their protection. Not only Assad and the rebels, but also Russia, Iran, some Gulf states, and others are keeping the crisis in Syria alive. The global community, therefore, has a duty to continue engage these powers diplomatically and possibly through other forms of continuing engagement.

There is also continuing responsibility to the large number of Syrians presently seeking refuge in Europe and other parts of the developed world. At a minimum, we need to live up to 1951 Refugee Convention's call for refugees fleeing persecution to be granted protection. Countries in Europe and North America have the capability and resources to grant asylum or refugee protection to a considerably larger number of Syrians than is happening today. The number of Syrians seeking asylum in Europe is not even close to the number already within the borders of Syria's neighbors (ICG 2016). When in the fall of 2015 UK Prime Minister David Cameron announced that his country would grant refugee protection to 20,000 Syrians over the next five years, he was appropriately reminded that Lebanon had admitted that many Syrians over the past two weekends. Indeed, developing countries today host 86 percent of the world's refugees, with the very poorest countries hosting 25 percent of the global total (UNHCR 2015, 2-3). The rich nations of the North have the capability and therefore the responsibility to admit a larger number of refugees and asylum seekers and to assist the poorer countries already hosting most of the world's refugees. A substantial increase in the funds being provided to Syria's neighbors for this burden sharing by the North should be a priority today.

To achieve this, the rich nations of the northern hemisphere will have to overcome tendencies to racially or religiously driven xenophobia and the mistaken fear that terrorists are often refugees. In addition, European powers such as France and the United Kingdom that gained economically from their colonies in Africa and Asia have duties to be open to refugees from these regions. A country with a history of military involvement in another nation can also have special obligations to people in flight from that nation. The United States recognized its particular duty to receive refugees from Vietnam after the Vietnam War. Though the US intervention in Iraq was certainly not the sole cause of the displacement of many Iraqis, it was a significant factor that contributed to the political chaos that led to the huge forced migration of Iraqis that has occurred. Political scientist Stephen Walt recently observed that if the United States and its allies had not invaded Iraq in 2003, there would almost certainly be no Islamic State today (Walt 2015). Thus there would be fewer people from Iraq and Syria seeking asylum and refugee protection. This deepens the duties of the United States and its allies toward those refugees.

Finally, it is well known that many observers believe there are good reasons to wonder whether national self-interest may not overshadow the duties and prevent the actions advocated here. Nevertheless, the work of Martha Finnemore and Kathryn Sikkink has shown that advocacy for normative standards in some domains of contemporary international politics

has had significant positive impact (Finnemore and Sikkink 1998). The standards of the international law of refugee protection and for the regulation of armed conflict were the result of normative advocacy by groups such as the Red Cross over the past century. More recently, though the ICC is still a developing institution, "normative entrepreneurs" have advanced the effort to hold political leaders accountable for violating normative standards in several international tribunals. This suggests that, contrary to the standard realist argument, ethical standards can come to have real impact on the conduct of nations. There is hope, therefore, that the September 2016 UN Summit on Refugees and Migrants can lead to genuine innovation in the protection of refugees and other victims of war and humanitarian crisis. Normative pressure from nongovernmental bodies, including religious communities and faith-based agencies, can make important normative contributions to action more fully in accord with the responsibilities incompletely sketched in this article.

IV. Conclusion

The refugee crisis that is occurring today means that the high moral value that has been assigned to national borders and state sovereignty in the modern, Westphalian international system must be reassessed. Human rights have been proclaimed as universal norms, and this universality can be supported by secular philosophies such as that developed by Kant and by the major religious traditions of the world, including Judaism, Christianity, and Islam. These rights require that all political actors, both states and non-state agents, refrain from grave abuses of human rights such as war crimes, crimes against humanity, and other abuses that effectively treat people as if they were not human at all. Atrocities such as these are among the major causes of refugee movement and other forms of forced migration today. Acting to prevent such crimes and holding accountable those who nevertheless commit them will be a crucial step in making the global system of refugee protection more adequate. Doing so should be a main objective at the September 2016 United Nations Summit, and elsewhere as well. Similarly, taking positive steps to come to the aid of those who have been driven from home will be essential to a more effective refugee regime. The duty to provide such assistance to those already displaced falls on neighboring countries, on those in the local region, and on the global community as a whole. The responsibility of countries to provide help is proportional both to their proximity to those in need and, more importantly today, to their capacity to provide effective assistance. The rich nations of Europe, North America, and the oil-rich Gulf states thus have urgent duties to assist the very poor countries who are hosting most of the world's refugees today. Developing fair and politically effective ways of assigning the share of the responsibility that different developed nations should carry will be essential to the creation of a more effective refugee system. It will be a great disappointment if the September 2016 meeting at the UN General Assembly fails to make substantial progress on this task. But while the leadership of the United Nations and its constituent national governments is essential, the task is not theirs alone. Many humanitarian NGOs, both secular and faith-based, have broad experience in responding to the needs of the displaced across national borders. These organizations are thus well positioned to help in the development of a system that is more effective. Hearing their voices will be important as revisions in the refugee regime are being considered. It can be hoped that all available practical wisdom will be drawn upon to create more adequate ways of responding to the present crisis. Many millions of lives are at stake.

REFERENCES

Amnesty International. 2015. "'Libya is Full of Cruelty:' Stories of Abduction, Sexual Violence, and Abuse from Migrants and Refugees." London: Amnesty International. https://www.amnesty.org/en/documents/mde19/1578/2015/en.

Appiah, Kwame A. 2006. *Cosmopolitanism: Ethics in a World of Strangers.* New York: W.W Norton.

BBC News. 2011. "Libya Protests: Defiant Gaddafi Refuses to Quit." BBC News, February 22. http://www.bbc.com/news/world-middle-east-12544624.

Benhabib, Seyla. 2004. *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: Cambridge University Press. http://dx.doi.org/10.1017/CBO9780511790799.

Carens, Joseph. 1987. "Aliens and Citizens: The Case for Open Borders." *Review of Politics* 49(2):251-73. http://dx.doi.org/10.1017/S0034670500033817.

Chollet, Derek and Fishman, Ben. 2015. "Who Lost Libya: Obama's Intervention in Retrospect, A Close Call." *Foreign Affairs* 94(3):154-57.

Cohen, Roger. 2008. "How Kofi Annan Rescued Kenya." *The New York Review of Books,* August 14. http://www.nybooks.com/articles/2008/08/14/how-kofi-annan-rescued-kenya/.

Deng, Francis Mading. 1996. *Sovereignty as Responsibility: Conflict Management in Africa*. Washington, DC: Brookings Institution.

Finnemore, Martha, and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organization* 52(4):887-917. http://dx.doi.org/10.1162/002081898550789.

Francis, Pope. 2016a. "Visit to Refugees." Speech of Pope Francis at the Mòria Refugee Camp in Lesvos, Greece, April 16. Holy See: Libreria Editrice Vaticana. http://w2.vatican.va/content/francesco/en/speeches/2016/april/documents/papa-francesco_20160416_lesvos-rifugiati.html.

Francis, Pope. 2016b. "Meeting with the People of Lesvos and with the Catholic Community. A Remembering of the Victims of Migration." Speech of Pope Francis at the Presidium of the Coast Guard in Lesvos, Greece, April 16. Holy See: Libreria Editrice Vaticana. http://w2.vatican.va/content/francesco/en/speeches/2016/april/documents/papa-francesco_20160416_lesvos-cittadinanza.html.

Guéhenno, Jean-Marie. 2016. "Conflict is Key to Understanding Migration." Capitals Series: Strategic Europe. Brussels: Carnegie Europe. http://carnegieeurope.eu/strategiceurope/?fa=63578.

Hashmi, Sohail, ed. 2002. *Islamic Political Ethics: Civil Society, Pluralism, and Conflict.* Ethikon Series in Comparative Ethics. Princeton: Princeton University Press.

Hehir, J. Bryan. 1980. "The Just War Ethic and Catholic Theology: Dynamics of Change

and Continuity." In *War or Peace? The Search for New Answers*, edited by Thomas A. Shannon, 15-39. Maryknoll, NY: Orbis Books.

Heyman, Josiah McC. 2013. "A Voice of the US Southwestern Border: The 2012 'We the Border: Envisioning a Narrative for Our Future' Conference." *Journal on Migration and Human Security* 1(2):60-75. http://dx.doi.org/10.14240/jmhs.v1i2.9.

Hollenbach, David. 2014. "Religion and Forced Migration." In *The Oxford Handbook of Refugee and Forced Migration Studies,* edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, 447-59. Oxford: Oxford University Press.

HRW (Human Rights Watch). 2014. *South Sudan's New War: Abuses by Government and Opposition Forces*. New York: HRW. https://www.hrw.org/report/2014/08/07/south-sudans-new-war/abuses-government-and-opposition-forces.

ICG (International Crisis Group). 2015. *South Sudan: Keeping Faith with the IGAD Peace Process*. Africa Report No. 228. Brussels: ICG. https://www.crisisgroup.org/africa/horn-africa/south-sudan/south-sudan-keeping-faith-igad-peace-process.

———. 2016. "The Global Refugee Crisis: Statement by the Board of Trustees of the International Crisis Group." https://www.crisisgroup.org/global/global-refugee-crisis-statement-board-trustees-international-crisis-group.

ICISS (International Commission on Intervention and State Sovereignty). 2001. *The Responsibility to Protect*. Ottawa, Canada: International Development Research Centre. http://responsibilitytoprotect.org/ICISS%20Report.pdf.

ICRC (International Committee of the Red Cross). 1986. "The Fundamental Principles of the International Red Cross and Red Crescent Movement." https://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm.

International Coalition for R2P (International Coalition for the Responsibility to Protect). "The Crisis in Kenya." New York: International Coalition for the Responsibility to Protect. http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya.

John XXIII, Pope. 1963. *Pacem in Terris*. Holy See: Libreria Editrice Vaticana. http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

Kant, Immanuel. 1993. *Grounding for the Metaphysics of Morals*. Translated by James W. Ellington. Indianapolis, IN: Hackett.

Kerwin, Donald. 2016. "How Robust Refugee Protection Policies Can Strengthen Human and National Security." *Journal on Migration and Human Security* 4(3):83-140. http://dx.doi.org/10.14240/jmhs.v4i3.64.

Ki-moon, Ban. "Remarks on Forced Displacement: A Global Challenge". Washington, DC: UN News Centre. http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2997#.V0DRKCMrIb1.

Kuperman, Alan J. 2015. "Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure." *Foreign Affairs* 94(2):66-77.

Lemann, Nicolas. 2014. "A Call for Help: What the Kitty Genovese Story Really Means." *New Yorker*, March 10. http://www.newyorker.com/magazine/2014/03/10/a-call-for-help.

Marfleet, Philip. 2006. *Refugees in a Global Era.* New York: Palgrave Macmillan.

Martin, Susan F. 2010. "Rethinking the International Refugee Regime in Light of Human Rights and the Global Common Good." In *Driven From Home: Protecting the Rights of Forced Migrants,* edited by David Hollenbach,15-33. Washington, DC: Georgetown University Press.

Nkulu-N'Sengha, Mutombo. 2011. "Religion, Spirituality, and R2P in a Global Village." In *Responsibility to Protect: Cultural Perspectives in the Global South*, edited by Rama Mani and Thomas G. Weiss, 25-63. New York: Routledge.

Nussbaum, Martha C. 2002. "Patriotism and Cosmopolitanism." In *For Love of Country,* 2-17. Boston: Beacon Press.

———. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership.* Cambridge: Belknap Press of Harvard University Press.

Panel of Experts on South Sudan. 2015. "Interim Report of the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206." South Sudan Humanitarian Project. http://www.southsudanhumanitarianproject.com/reports/docr-532/.

Pictet, Jean. 1979. "The Fundamental Principles of the Red Cross: Commentary." International Committee of the Red Cross. https://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm.

Pius XI, Pope. 1931. *Quadragesimo Anno*. Holy See: Libreria Editrice Vaticana. http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html.

Robertson, Geoffrey. 2006. *Crimes against Humanity: The Struggle for Global Justice*, 3rd ed. New York: The New Press.

Rummery, Ariane. 2015. "Greater Support in Countries of First Asylum Needed to Stem Refugee Outflows." Edited by Jonathan Clayton. UNHCR. http://www.unhcr.org/55ddd2c86.html.

Rupp, George. 2016. "Rethinking the Assumptions of Refugee Policy: Beyond Individualism to the Challenge of Inclusive Communities." *Journal on Migration and Human Security* 4(3):76-82. http://dx.doi.org/10.14240/jmhs.v4i3.63.

Sacks, Jonathan. 2003. *The Dignity of Difference: How to Avoid a Clash of Civilizations,* rev. ed. New York: Continuum.

Shue, Henry. 1980. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy.* Princeton: Princeton University Press.

Simon, John, Charles W. Powers, and Jon P. Gunnemann. 1972. *The Ethical Investor: Universities and Corporate Responsibility.* New Haven: Yale University Press.

UNGA (United Nations General Assembly). 2005. "2005 World Summit Outcome." UN Doc. A/60/L.1, 60th Sess. http://www.globalr2p.org/media/files/wsod_2005.pdf.

UNHCR (United Nations High Commissioner for Refugees). 2015. *Global Trends: Forced Displacement in 2014.* Geneva: UNHCR. http://unhcr.org/556725e69.html.

UNHRC (United Nations Human Rights Council). 2014. "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic." A/HRC/25/65, 25th Sess. http://www.abc.net.au/mediawatch/transcripts/1408_un.pdf.

Walt, Stephen M. 2015. "Don't Give ISIS What It Wants." *Foreign Policy* 16, November. http://foreignpolicy.com/2015/11/16/dont-give-isis-what-it-wants-united-states-reaction/.

Walters, LeRoy. 1971. *Five Classic Just War Theories: A Study of the Thought of Thomas Aquinas, Vitoria, Suarez, Gentili, and Grotius*. PhD Dissertation. Yale University.

Walzer, Michael. 1977. *Just and Unjust Wars: A Moral Argument with Historical Illustrations* New York: Basic Books.

Weiss, Thomas G. 2014. "Military Humanitarianism: Syria Hasn't Killed It." *The Washington Quarterly* 37(1):7-20. http://dx.doi.org/10.1080/0163660X.2014.893171.