"Climate Change as a Matter of Humanitarian Intervention?"

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[This is the early stage of a new project; any comments, large or small, are welcome]

ABSTRACT: *Scholars and activists alike have argued that climate change can be understood as a human rights violation. Consequently, states can be seen to bear an obligation to mitigate (or if possible avert) any climate scenarios that would result in significant human rights violations. This obligation would most easily be met by entering into a global climate regime that appropriately distributes the burdens of necessary action. However, many states have either refused to enter into such an agreement (or failed to fulfill their commitments under such agreements). While this might be defended as a matter of sovereign prerogative, there is a tension between the respect for sovereignty and need for climate action. I call this the Problem of Non-Compliant States, and seek to address it through the paradigm of humanitarian intervention. By connecting climate change to human rights, and drawing on the Responsibility to Protect norm that developed in the early 2000s, I argue that it is possible to show that the case of climate change can be viewed as a matter of legitimate humanitarian intervention. Such a connection legitimates actions against non-compliant states and offers new insight into how we might proceed in developing a global climate regime.*

Prepared for the Annual Meeting of the
Western Political Science Association (WPSA),
March 28-30, 2013, in Hollywood, CA

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The Problem of Non-Compliant States

On December 12, 2011, just one day after the conclusion of the 17th session of the Conference of Parties (COP17) to the United Nations Framework Convention on Climate Change (UNFCCC), Canada's Minister of the Environment announced that Canada would be formally withdrawing from the Kyoto Protocol at the end of the 2012 (as the treaty required a one-year advance notification of withdrawal). This decision to withdraw from the only legally binding climate treaty was heavily motivated by the fact that doing so would prevent Canada from having to pay nearly C$14 billion in penalties for failures to meet emissions targets.[1] Moreover, as Kent noted at the time, too many of the world's emitters of greenhouse gases are not covered under the treaty:

> Before this week [of the COP17 meeting], the Kyoto Protocol covered less than 30% of global emissions. Now it covers less than 13%--and that number is only shrinking. They Kyoto Protocol does not cover the world's two largest emitters – the United States and China – and therefore will not work.[2]

While this decision was challenged in domestic courts, with opponents of the move arguing "the decision goes against a federal law passed in the House of Commons in 2007 that stipulates Canada has to enforce the treaty," it was ultimately upheld by the Canadian Federal Court.[3] Though other countries have expressed annoyance and displeasure with Canda's decision, they have no general recourse available to them.

This episode highlights two significant features of contemporary international relations that prove problematic for addressing climate change. First, it highlights the priority and freedom states are taken to enjoy as a matter of national sovereignty,

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[1] Peter Kent, "Statement by Minister Kent," 12 December 2011, Foyer of the House of Commons. Text of the statement is available on-line at <http://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=6B04014B-54FC-4739-B22C-F9CD9A840800> (Accessed 6 January 2012).

[2] *Ibid*.

[3] Marianne White, "Kyoto Withdrawal Challenged in Court," *Montreal Gazette*, 14 January 2012; available on-line at <http://www.montrealgazette.com/technology/Kyoto+withdrawal+challenged+court/5995316/story.html> (Accessed 15 January 2012). The law in question is the Kyoto Protocol Implementation Act (S.C. 2007, c. 30), the text of which is available on-line at <http://laws.justice.gc.ca/eng/acts/K-9.5/FullText.html> (Accessed 21 January 2012). The text of the Federal Court's decision in July 2012 upholding the withdrawal from Kyoto as legal under Canadian law is available on-line at < http://decisions.fct-cf.gc.ca/en/2012/2012fc893/2012fc893.html> (Accessed 3 February 2013).

leaving transnational issues to be addressed through a voluntary treaty system. The United States and China cannot be held accountable under Kyoto because the simply choose not to participate, while Canada's exit is a reminder that after original consent to an overarching regime states are still free, at any point to leave that regime. This primacy on state sovereignty is explicit in Article 2 of the UN Charter.[4] This points to the second problematic feature when seeking to address issue like climate change: the lack of a right of intervention. Article 2 excludes any and all forms of foreign intervention, except in those extreme cases authorized by the United Nations Security Council under Articles 39-51 of the Charter.[5] Consequently, should the United States, China, and now Canada, among others, fail to regulate domestic emissions to the level necessary to fulfill the types of emissions reductions under the regulatory framework of Kyoto, there is nothing other states can do, given that the harms from future climate change (and the responsibility for those harms) would seem to *prima facie* meet the traditional guidelines for allowable intervention under the UN Charter.

While the example above links the problem of non-compliance to a particular treaty (which will necessarily be a voluntary agreement), it is more important to address the issue as a matter of non-compliance with the moral obligations imposed on states by the threat of climate change. Assuming states bear moral responsibility for mitigation (e.g. altering the GHG emission levels of its citizens through strict regulation), adaptation (e.g. developing or promoting new technologies to limits its citizens vulnerability to climate change and sharing that technology with others), or a combination of both, many states fail significantly in fulfilling these obligations.[6] This

[4] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; available on-line at <http://www.un.org/en/documents/charter/index.shtml> (Accessed 14 January 2012).

[5] This claim is based primarily on the explicit nature of Article 2.7: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll." For discussions of Article 2 and its apparent prohibition of humanitarian intervention, see Fernando Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality*, 3rd Edition (Ardsley, NY: Transnational Publishers, 2005), 171-217.

[6] For the purposes of this paper, take this assumption to be true and will not say more about the issue. While the particular approach one takes to assigning responsibility in the case of climate change might impact the thresholds or contexts for legitimate intervention, I take it that the general paradigm of

failure is further amplified due to the transboundary nature of climate change, as the harms from climate change might not actually be felt within the borders of those states that fail to act. However, if states do indeed have legitimate claims to sovereignty that rule out intervention in their domestic affairs (i.e. the regulation of private actions that occur within their borders), then it seems those countries who are fulfilling their moral obligations with respect to climate change have no *prima facie* allowance to intervene in the affairs of those states who are not meeting their moral obligations. I call this the Problem of Non-Compliant States.

One way to address this problem is to attack the claim that those states currently in compliance with their moral obligations do not have a right to intervene in the affairs of those who are failing to meet their moral obligations. In trying to justify the regulation of, or intervention in, the domestic affairs of another country, one might simply argue that climate change cannot be conceptualized as a purely domestic issue. Thus, states have no sovereign claim in this domain (i.e. actions impacting atmospheric conditions), and intervention is justifiable, even under Article 2 of the UN Charter. Steve Vanderheiden offers a clear example of this maneuver:

> Climate policy, it would seem, cannot justifiably be described as purely an internal matter, because GHGs emitted anywhere have the same effects regardless of their geographic origin and therefore have the potential to harm those residing outside of the nation-state's borders. This "spillover" effect turns what might otherwise be an exclusively domestic concern into one in which other states become justifiably interested parties.[7]

When conceptualized this way, sovereignty-based objections to intervention lose their force. However, there still remains the question of at what point states become "justifiable interested parties," since it would seem odd to think that if there were

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humanitarian intervention would still be applicable. My preferred way of addressing state responsibility in the case of climate is through a modified version of Tracy Issacs's approach to collective responsibility through the use of "putative groups" who could plausibly act to avoid a harm, even if they do not actually act, which I presented at the WPSA Meeting in 2012. For Issacs work, see Tracy Issacs, *Moral Responsibility in Collective Contexts* (Oxford: Oxford University Press, 2011).

[7] Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (New York: Oxford University Press, 2008), 86.

significantly low emissions within a country other states would be justifiably interested to the point they are allowed to intervene. This seems to point to the need for an account parallel to the conditions and thresholds of harm that would allow intervention. Thus, if the state is to play a role as a central hub of collective action in addressing climate change, we need an account of the when, how, and why states can legitimately intervene in the regulatory actions of another states. To simply say that climate change is a transboundary problem and thus sovereignty-based objections that create the Problem of Non-Compliant states have no force, is to not go far enough in developing the norms of an ethical climate regime.[8]

Assuming the central role of states, an obvious avenue for addressing the Problem of Non-Compliant States is to link climate change to the norms of humanitarian intervention, showing that the failure to meet one's obligations with respect to climate change meets the criteria for legitimate intervention by others. Determining whether it is reasonable to subsume climate change under the guise of humanitarian intervention is the goal for the remainder of the paper. Ultimately, I hope to show it is not only reasonable to do so, but that thinking about climate change in this way might support the development of a transnational body for organizing intervention in environmental matters.

The Responsibility to Protect and the Permissibility of Ecological Intervention

Following a period of controversial decisions to both engage (e.g. Kosovo in 1999) and not engage (e.g. Rwanda in 1994) in humanitarian intervention, then UN Secretary-General Kofi Annan made a plea to the international community to reach a consensus on a set of norms that balanced respect for sovereignty with respect for human rights. When does the violation of the latter allow for a violation of the former? In response, the International Commission on Intervention and State Sovereignty (ICISS)

[8] I do not mean to imply here that Vanderheiden does not go far enough in his analysis. The quote offered appears in the early stages of his discussion on the issue as a motivating fact for deeper analysis. While recognizing the type of human rights account I base my arguments in this paper on, Vanderheiden offers an alternative account focused on the legitimate domain of political authority (see *Atmospheric Justice*, 84-104). Ultimately, I take it that we agree that in the case of climate change sovereignty is limited to some degree opening the door for justifiable intervention.

was formed by the Canadian government. The commission's report, titled *The Responsibility to Protect* (R2P), set for a view of sovereignty that included with it "a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[9] In fulfilling one's responsibility under the R2P doctrine, the commission made clear that intervention should not be understood solely in terms of military intervention, opting instead to focus on actions "taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective."[10] Thus, while this framework provides norms for military intervention as a last-resort in humanitarian crises, it also sets out criteria for legitimate intervention through sanctions or other non-military means.

In setting out the norms for *any* form of intervention, R2P seeks to change the terms of the sovereignty-intervention debate away from the "right to intervene" to the "responsibility to protect" in a way that is particularly beneficial for thinking bout climate change. This is because this shift highlights not only the need to focus on the beneficiaries of any action, but also the importance of preventative and rebuilding aspects required to protect human rights.[11] Placing an emphasis on this responsibility to *prevent*, rather than simply reaction to an occurrent harm, sounds in line with the rhetoric surrounding the need for preventative action on climate change now, as opposed to later when it might be too late to avoid significant harms. While we might be able to work to lessen the harms later, if action now could avoid them (or dramatically lessen the future harms), R2P gives us motive to intervene now, rather than latter.

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[9] ICISS, *The Responsibility to Protect* (Ottawa, ON: International Development Research Centre, 2001), viii. The general principles of R2P were affirmed by the United Nations in the 2005 World Summit Outcome Document, Paragraphs 138 and 139, and the United Nations Security Council is Resolution 1674.

[10] *Ibid.*, 8. This serves as an all-encompassing definition comprised of, using Fernando Tesón's typology, forcible intervention (e.g. military action), hard intervention (e.g. economic sanctions), and soft intervention (e.g. mere recommendations); see Tesón, *Humanitarian Intervention*, 173.

[11] ICISS, *The Responsibility to Protect*, 16.

While R2P offers a clear set of norms for humanitarian intervention, its thinking is focused squarely on the protection of human beings from traditional harms and abuses (e.g. genocide). Consequently, it might seem that R2P (or any broad set of norms for humanitarian intervention) cannot say much in the environmental domain, or if it can it would be unlikely for environmental matters to reach the thresholds for action. Against this intuition, Robyn Eckersley has sought to offer an argument analogous to R2P showing that state sovereignty also carries a responsibility to protect the ecology of that state's territory.[12] This leads Eckersley to examine three types of cases involving military intervention addressing ecological issues: environmental emergencies with transboundary spillover effects, crimes against nature that involve serious human rights violations, and crimes against nature without any human rights violations. Ultimately, she concludes that it is likely cases of the first kind can meet traditional moral, political, and legal norms for legitimate intervention, while the second and third prove far more difficult. However, for Eckersley, this difficulty is predominately with respect to the political and legal norms, rather than moral ones.

Rather than remarking broadly on Eckersley's argument, I want to focus on the matter of climate change and where it might lie with respect to the R2P doctrine and Eckersley's notion of ecological intervention. It might seem, especially in light of recent extreme weather events, that climate change would be classified as an environmental emergency with a spillover effect and thus can be considered as a matter of ecological intervention. Or, drawing from recent work linking climate change to human rights, we might place it under Eckersley's second category, again making it a candidate for ecological intervention (assuming we can address her worries about that category's ability to meet typical norms of intervention). However, since Eckersley is interested only in *military* intervention, as opposed to the broader definition of intervention adopted by the ICISS, she rejects climate change as a candidate for intervention:

[12] Robyn Eckersley, "Ecological Intervention: Prospects and Limits," *Ethics & International Affairs* 21, no. 3 (2007): 293-316.

> While global warming, for example, has been designated a "weapon of mass destruction" because its harmful consequences are likely to be at least as severe as those of nuclear, chemical, and biological weapons, the threat is not immediate and military intervention is a singularly inappropriate means of responding to such a complex problem. This is typical of most environmental problems, which are normally diffuse, transboundary, and unintended; evolve and continue over a fairly long time frame; implicate a wide range of actors; and usually require painstaking dialogue to move toward cooperation and resolution.[13]

While this is an accurate representation of the difficulties linking climate change to any theory of military intervention, if we adopt the broader notion of intervention used by the ICISS and apply something akin to the R2P doctrine, we can craft an account of legitimate non-military intervention (e.g. sanctions) as part of the "painstaking dialgou" to address climate change. Moreover, if we adopt this view, as a matter of last resort forcible regulation of emission sources through military operations might prove justifiable, assuming all the relevant conditions beyond just cause can be met.

Operating with this broader understanding of intervention can we reasonably treat climate change as a matter of humanitarian intervention under the norms presented by the R2P doctrine? Doing so requires three key steps: (1) making clear when and why intervention is permissible (or in other word, how sovereignty is limited); (2) making clear how we can conceptualize climate change as a violation of human rights that fits the general paradigm of humanitarian intervention; and, (3) responding to possible objections that climate change as a phenomenon deviates from the harms traditionally considered under the paradigm of humanitarian intervention. I will take up each of these tasks in the remaining sections of the paper. In addressing these tasks, I take it that certain climate scenarios would constitute a serious violation of human rights and states bear a corresponding duty to avoid those scenarios (i.e. if a state does not act to meet its moral obligations in preventing those harmful scenarios, it can be said to have committed a human rights violation).[14]

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[13] *Ibid.*, 295.

[14] I will not focus on defending this claim, though I will offer more details in the next section about how climate change can be linked to human rights.

Motivating Intervention and Limited Sovereignty due to Climate Change

The norms regarding legitimate intervention set forth by R2P present a vision of sovereignty that is limited (at least in terms of external sovereignty) by other values, a view shared by many contemporary political theorists and philosophers.[15] Here, it is important to stress that we are concerned with a normative (*de jure*) understanding of sovereignty, as opposed to a mere descriptive (*de facto*) one.[16] Taking this approach, we are interested in identifying when a state's claim to sovereignty is morally acceptable and correlatively when intervention is morally impermissible. By providing these conditions, we can identify the limits of sovereignty in various domains, particularly the environmental one. From this normative perspective, it should be uncontroversial that for a state to have a legitimate claim to sovereignty, the state itself must possess legitimate authority. Consequently, an account of legitimate political authority must be provided in order to identify the limits of sovereign claims.

While there exist a diverse set of conceptions of legitimate authority, an oft-used view is that a state possesses legitimate authority if and only if it respects its citizens fundamental interests or rights (where these might be operationalized in a variety of ways).[17] As Allen Buchanan writes, regarding a contractarian view of the state: "What makes the government legitimate is that it acts as the faithful agent of its own citizens. And to that extent, government acts legitimately only when it occupies itself exclusively

[15] For example, see Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Cambridge: Oxford University Press, 2009), 1-10; Bernd Krehoff, "Legitimate Political Authority and Sovereignty: Why States Cannot be the Whole Story," *Res Publica* 14 (2008), 289-299; and Christopher Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), particularly 204-217. However, this is not only a contemporary claim. The idea that sovereignty is limited has its roots in natural law theorists like Hugo Grotius and the modern liberal tradition beginning with John Locke.

[16] This distinction is made clear by Krehoff: "Sovereignty can be used descriptively to point out the power and recognition a state actually enjoys (its *de facto* authority), but it can also be used normatively to point out either the rules that ought to be applied according to valid law, or the conditions under which we consider sovereignty to be justified from a moral point of view" (Krehoff, "Legitimate Political Authority and Sovereignty," 288-289).

[17] See particularly, Kreehoff, "Legitimate Political Authority and Sovereignty," 283-297; Morris, *An Essay on the Modern State*, 136-171, and Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986). Charles Beitz also ties legitimacy to the protection of human rights in his practice-account of human rights; see his *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

with the interests of the citizens of the state of which it is the government."[18] Adding to this focus on the interests of citizens, Andrew Altman and Christopher Wellman add the explicit mention that legitimacy rests on a particular level of protection of these interests; thus, legitimacy rests "on the ability and willingness of a state to adequately protect the human rights of its constituents and to respect the rights of all others."[19] Given the agreement around the general idea that the state is to act as an agent for the benefit or protection of its citizens, it seems reasonable to adopt a view of legitimacy following in the vein presented above.

This understanding of legitimacy as tied to human rights also explains the general view of humanitarian intervention provided under the R2P doctrine. As long as a state possesses legitimate authority, it has a legitimate claim to sovereignty and thus a right to non-intervention. Given that legitimate authority ceases to exist when a state no longer protects the interests of its citizens, either intentionally or unintentionally (perhaps through lack of ability or a mere failure to recognize the harm), then a state's right to non-intervention simultaneously ceases to exist. Consequently, to show that intervention is allowable in a particular domain requires one to show that the state is failing to protect any relevant human rights or fundamental interests its citizens have within that domain. Moreover, since R2P also requires states to show the same respect for interests to those outside their borders, it would also loose a right to non-intervention if engaged in actions that resulted in a failure to protect the relevant human rights or fundamental interests of those in other jurisdictions. In other words, the state must not engage in activities that show a lack of respect for human rights both at home and abroad. To do so, makes on liable to intervention.

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[18] Allen Buchanan, "The Internal Legitimacy of Intervention," in *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010), 205.

[19] Altman and Wellman, *A Liberal theory of International Justice*, 3. The idea of legitimacy as stemming from the minimal efficacy of the state in fulfilling the basic conditions of justice or human rights is also found in Morris's analysis of the state and Beitz's account of human rights; see Morris, *An Essay on the Modern State*, Chapters 4 & 6, and Beitz, *The Idea of Human Rights*, Chapters 7 & 8. A similar claim is made by Michael Ignatieff, who while tying legitimacy to the assent of the people, remarks that this can only come from the protection of the people's basic rights; see Ignatieff, "Human Rights, Sovereignty, and Intervention," in *Human Rights, Human Wrongs: The Oxford Amnesty Lectures 2001*, edited by Nicholas Owen (Oxford: Oxford University Press, 2003), 58.

Linking the right of non-intervention to a state's ability and/or willingness to protect (or respect) human rights broadly, is particularly beneficial for addressing cases in which the human rights violation or harm in question is not necessarily caused (in a strict or narrow sense) by the state. Take for instance the situation with respect to climate change. Climate change is the result of increased GHG emissions, which are typically the result of citizens' private actions. Moreover, these actions are not done with the direct intent of causing harm to others. Consequently, we might think it odd to claim a state is guilty of any human rights violations that might occur due to climate change. However, under the model stemming from R2P, any state's legitimacy would come from its ability and willingness to protect its citizens from human rights violations. While it is clear the state is not the direct cause, it is also clear that the state is either unable or unwilling to protect its citizens' human rights (or human rights abroad) by regulating their private activities. This failure to regulate can now be seen as a failure to protect, and thus while the state is not directly guilty of committing the act, the state is guilty of allowing the harm to occur. Thus, the state that fails to regulate the emissions of private actors within its boarders to an appropriate degree looses its right to non-intervention due to its failure to protect human rights at home and/or abroad.

While this understanding of limited sovereignty and allowable intervention in cases where a failure to protect human rights occurs can prove useful in addressing cases where the rights violations are caused by private actions, some still might reject the applicability of such a paradigm to the case of climate change. Earlier I noted that many activists and scholars have linked climate change to human rights, but it is worth expanding on that claim now. Not only do we need to be able to show that the harms of climate change be seen as a human rights violation, but we must also show those harms can meet the threshold resulting in the loss of legitimacy. To do this, will depend on the link between climate change and human rights.

When considering the link between climate change and human rights, it is most helpful to take up the broader link between human rights and the environment. It seems clear that in examining generally accepted human rights (e.g. right to basic

health), the environment plays an important instrumental role in providing the underlying conditions necessary for the fulfillment of these rights. Consequently, one might say that since I need certain environmental conditions to have my moral claims met, I have a moral right to those environmental conditions, as my interest in having my moral claims met would constitute a sufficient interest for generating a right. However, this leaves the following question unanswered: is this moral right to those environmental conditions distinct from other identified human rights or is merely a component of other rights? The two options represent the approaches existent in the literature that directly link human rights to climate change. The first defends a generic "environmental right" that while related to other human rights is distinct from them, and then shows that the effects of global climate change infringe on this right.[20] The second defends the claim that the effects of global climate change violate other established human rights, such as rights to health, food, and so on.[21] However, these approaches should not be understood as mutually exclusive. It is possible to defend a generic environmental human right and show that climate change infringes not only this right, but other basic rights as well.[22]

While both approaches yield the practical benefits that come from linking climate change to human rights, it is vitally important to clarify exactly what right(s) are involved, as this will alter the scope of resultant duties. For example, if climate change

[20] *cf.* James Nickel, "The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification," *Yale Journal of International Law* 18, no. 1 (1993): 281-295; Tim Hayward, *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005); Richard Hiskes, *The Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge: Cambridge University Press, 2009). It should be noted, however, that while all three offer defenses of a generic environmental human right (e.g. a right to an adequate environment) none offer a focused discussion on how the effects of climate change infringe upon that right.

[21] This approach is typified by the recent work of Simon Caney; see his, "Cosmopolitan Justice, Rights and Global Climate Change," *Canadian Journal of Law and Jurisprudence* 19, no. 2 (2006): 255-278; "Human Rights, Responsibilities, and Climate Change," 227-247; "Climate Change, Human Rights, and Moral Thresholds," in *Human Rights and Climate Change*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2010), 69-90; and "Human Rights and Global Climate Change," 19-44.

[22] Vanderheiden seems to take something akin to this route in his recent book by talking of both "environmental rights" and how climate change violates a right to basic health, see *Atmospheric Justice*, 240-252. Additionally, in a footnote in one of his articles, Caney gives the impression he is doing the same thing as Nickel and Hayward, which would place him under this combined approach (see Caney, "Human Rights and Global Climate Change," p. 21). However, I take other rights to be doing all the work in Caney's account and thus confine him to the second approach.

is merely a violation of rights to basic health and subsistence, then there might not be any obligations for keeping the environment in any specific condition or GHG reductions if basic health and subsistence can be met through technological advancements. However, if one holds that there is something like a human right to self-determination or a right to one's homeland, then there might be strong obligations to protect certain geographies through massive attempts at mitigation and aid directed at adaptation in those areas, in order to avoid cases of environmental refugees whose right to self-determination is infringed.[23] Moreover, if one understands climate change as violating a more general environmental human right, this might entail obligations of sustainable development and strong environmental protections that might not exist as components of other established rights.

Fully discussing these matters is beyond the scope of the current investigation.[24] All that is essential here is that a link between climate change and human rights can be defended. While the particular thresholds or contexts for the harms that result in the loss of legitimacy might change under the particular approach one takes, each still allows for climate change to be placed within the notions of legitimacy, limited sovereignty, and intervention presented by the R2P doctrine and norms of humanitarian intervention. Consequently, we have an answer to our first question regarding when and why intervention is permissible in the case of climate change, and have started to move into the second question of how to view the harms from climate change as arising to the level to eliminate a state's claim to legitimacy. Finishing that task will be the goal of the next section.

Construing Climate Change as Meeting the Threshold for Intervention

Having shown in the previous section how any claim of a right to non-intervention is limited by a state's ability and willingness to protect its citizens' human

[23] Wellman and Altman, drawing from the Universal Declaration of Human Rights, talk of such a right as a genuine human right, which could then be used in this type of argument; see their *A Liberal Theory of International Justice*, esp. 2-3 and 10-42.

[24] I have previously taken up a more detailed examination on these matters, see Chapter 2 of my dissertation, "Climate Change and Human Rights: Creating Norms to Govern Earth's Atmosphere" (Ph.D. diss., University of Oklahoma, 2012).

rights, we can turn our attention to the various scenarios in which intervention might be justifiable to help mitigate and if possible prevent seriously harmful climate change. While I will not be able to spell out all the details here, in this section I seek to offer a framework for how it is to be determined if intervention is permissible, coupled with the notion that at least some possible scenarios would meet the threshold for intervention.

It is important to keep in mind that when dealing with climate change, we are typically addressing harms that are, to some extent, temporally distant from us. Thus, when we talk about the harm of climate change, we are talking about the harm of a particular climate scenario. As such, if we are going to think about climate change in terms of human rights violations and humanitarian intervention, we are really looking at future scenarios and asking which scenarios would result in violations and which ones would not. Moreover, we also have to factor in whether any scenario in question would result in human rights violations due to our failed action in the present (or near future) or some failure to act appropriately in the more distant future. Evaluating climate scenarios in this way, we can identify those that ought to be avoided due to the harms they will cause (i.e. those scenarios where the fault lies in our present inaction). By identifying these scenarios, we are identifying those scenarios states must work to not bring into being. Failure by a state to fulfill its moral responsibility with respect to avoiding those scenarios would constitute an unwillingness (or inability) to protect human rights at home and abroad, in which case intervention can be permissible.

So how might we go about identifying such cases? I offer the following as a test for whether violations of human rights occur due to climate change. If we are dealing with the immediate present we would simply examine the ecological conditions within a state and ask whether those conditions allow individuals' human rights to be fulfilled (given plausibly available adaptive technologies). Clearly, if upon examination those individuals' rights are being fulfilled, then that state would have a legitimate claim to non-intervention. If the individuals' rights are not being fulfilled, we then ask whether

they could be met given technologies that are possibly available to that state.[25] If we can identify available adaptive technologies, then as long as the state is willing to implement them it would have a legitimate claim to non-intervention (nor would it have a claim for intervention in any other state's affairs). However, if they are unwilling to put such technologies in place, we would be able to say that they are not protecting their citizens' human rights, thus opening the door for legitimate intervention by other countries to put in place the appropriate adaptive technology. Additionally, if that state did not have the appropriate adaptive technology possibly available to them, but another state did, then the other state would have responsibility to protect the rights of the former's citizens by intervening through the provision and implementation of the necessary adaptive technology.

That said, it seems our primary interest is in analyzing future-orientated scenarios in order to identify whether intervention is permissible in relation to mitigative attempts, as this seems more directly related to the Problem of Non-Compliant States presented at the outset of the paper. In engaging with future-oriented scenarios, we must recognize that we are relying on various projections and assumptions about what the world will be like and build this into our test. Consequently, we have to operate with models that project future conditions—climatic, environmental, but also institutional. Not only are institutional protections necessary for making environmental ones, but these are also essential for identifying whether a projected future rights violation is caused by a failure in the past due to lack of GHG emission reduction or by a failure in the future to implement appropriate institutions or adaptive technologies. This proves significant since intervention in the present would only seem justifiable to avoid those scenarios that will outstrip adaptive capacity, as these are the only scenarios where the moral fault lies wholly in the present. In utilizing

[25] I do not use "possibly available" in a sense of strict metaphysical possibility, but rather a looser notion of what is *reasonably* possible or conceivable given the current state of affairs. To use the language of possible worlds, I would take this use to limit discussion to only close possible worlds. As such, currently, I do not take the institution of communism to be something that is possibly available to the United States. Moreover, I take this use of what is possibly available to fit the approach used by the Intergovernmental Panel on Climate Change (IPCC) in developing their emissions scenarios.

a future-oriented framework in this way, the notion of what is possibly available in terms of institutions and technologies will be based on the underlying storylines that are used to create the particular climate models and projections.

For example, treating future conditions as roughly a continuation of the current status quo (e.g. no robust climate policies, reliance on carbon intensive sources for energy, little regulation, continued population growth), we can project future environmental conditions based on our current trajectory and assess whether individuals in the future will likely have their human rights protected. Since this scenario is based on the current institutional conditions, we can consider those social and political institutions reasonably available to us presently, coupled with a reasonably expect advancement of technology given the institutional context (and the incentives for development within that context). In examining this future, we might find that there will be a relatively low reduction of GHG emissions (i.e. mitigation) and if the limit of possibly available adaptive measures were at some level X (where X is the maximum degree of adaptive capacity), there would be a violation of individuals' human rights. Moreover, such a case would point to the need for emission reductions in the present to respond to that violation, since that would be the only way to move out of the set of scenarios in which human rights are necessarily violated. However, if Y was instead the maximum degree of possibly available adaptive technology, then the violations would be due to failed institutional structures or failures to actually implement technological advancements that should be reasonably available. The difference in these evaluations has to do with whether the individuals in the future, when facing rights violations, could do otherwise and eliminate those violations.

This allows us to identify between two types of scenarios: those in which the fault lies in the environmental conditions (i.e. cases where individuals in the future cannot do otherwise) and those in which the fault lies in a failure to implement the appropriate institutions or technologies to protect human rights (i.e. cases where individuals in the future can do otherwise). Making such a distinction allows us to determine whether the moral fault, and the failure to protect human rights, lies in the

present and is related to mitigation or lies in the future and is related to adaptation. In the former, intervention can be permissible in the present in the case of countries that are not acting to fulfill their appropriately assigned moral role in avoiding such scenarios. In the latter, intervention can only be permissible in the future should a given state fail to implement the appropriate institutions or adaptive technologies among those reasonably available.

Working with this framework in mind, we can see its application by considering three distinct cases. For ease, I will assume we are dealing with a world consisting of only three states, A, B, and C:

> *The Case of Adaptive Intervention in the Present:* Environmental conditions are such that climate change has already started affecting the planet. While there have yet to be impacts resulting in human rights violations in A, countries B and C do face conditions resulting in human rights violations. Both countries possess the relevant adaptive technology to address the harms, but only B is willing to (and does) implement them. Consequently, A and B choose to intervene in an attempt to get C to put the appropriate technologies in place.
>
> *The Case of Mitiative Intervention in the Present*: A, B, and C are currently implementing politics that put the planet on course for climate scenario 1 (CS1), which would create a future where the adaptive capacities of A and C would be outstripped, resulting in human rights violations. To avoid this, each country has a moral duty to adopt a set of policies that will collectively produce climate scenario 2 (CS2). This future would avoid the harm of CS1. However, if only two countries follow through with their moral obligations, instead of facing CS2, they will face CS1*, which will still result in the harms of CS1. In response, only A and B put the relevant policies in place, while C fails (either due to unwillingness or inability) to implement the proper regulations. Consequently, A and B choose to intervene in an attempt to get C to put the necessary regulatory policies in place to bring about CS2.
>
> *The Case of Adaptive Intervention in the Future*: A, B, and C are currently implementing politics that put the planet on course for climate scenario 1 (CS1), which would create a future where the adaptive capacities of A and C would be outstripped, resulting in human rights violations. To avoid this, each country has a moral duty to adopt a set of policies that will collectively produce climate scenario 2 (CS2). This future would avoid the harm of CS1. However, if only two countries follow through with their moral obligations, instead of facing CS2, they will face CS2*, which will no longer outstrip the adaptive capacities of A and C. In response, only A and B put the relevant policies in place, while C fails (either due to

unwillingness or inability) to implement the proper regulations. In the future, A implements the appropriate adaptive measures, while C again fails (this time due to unwillingness) to act. Consequently, A and B choose to intervene in an attempt to get C to put the appropriate technologies in place.

In all of these cases, we want to know whether C had a right to non-intervention that would make A and B's actions impermissible. In the first case, it seems fairly straightforward that we would have a case of legitimate intervention. C was simply unwilling to protect is citizens' human rights (regardless of the direct cause of the harm), and thus no longer possessed legitimate authority and a right to non-intervention. The second case proves slightly problematic. As the facts are presented, again it appears as though C is showing an unwillingness to protect its citizens' human rights, legitimizing intervention. However, we might question whether A and B have a right to intervene, especially once we consider that they could have recognizing C's failure to act, adopted even stricter policies in the present and near future that still would bring about CS2. A similar worry might apply to the third case, along with the additional question of whether intervention would be permissible in the present to bring about CS2, rather than CS2*. We might think that if intervention will be legitimate in the future, why not consider it legitimate in the present.

However, these questions do not offer a *prima facie* case against applying a humanitarian intervention paradigm to the issue of climate change. Rather, they point to a need to offer a detailed account of humanitarian intervention that can address the various intricacies posed by climate change. I will not endeavor to take up those matters here, since my goal is to show that it is reasonable to think such an account can be offered and provide a framework sufficient to show climate change can fit within the paradigm of humanitarian intervention offered by R2P and the types of cases when intervention would be permissible under this paradigm. Admittedly, a variety of complex questions remain and at the end of the day these complexities might make providing a complete account too difficult. For the time being, I hope it is clear that such a pursuit would be possible to attempt, and that it could also offer helpful

guidelines for addressing the Problem of Non-Compliant States (assuming the complexities can be addressed to a satisfactory level).

Possible Objections to the Humanitarian Intervention Paradigm for Climate Change

In closing the paper, I want to take up what I take to be three key objections that might be offered against my attempt to apply the humanitarian intervention paradigm to climate change: (1) climate change's lack of a singular source; (2) the temporal distance of most of climate change's harms and human rights violations; and, (3) the uncertainty involved in predicting future scenarios. I have alluded to some of these matters above, but want to close by offering some very brief, focused remarks on why these issues should not be viewed as obstacles to the project.

The first objection stems from the fact that unlike most human rights violations that justify intervention, climate change does not have a singular (or even small collective) source. Consequently, we might think that since we cannot pinpoint the source, how can we hold the state accountable? Here, we benefit from the focus on legitimacy and non-intervention being tied to states' ability and willingness to protect its citizens' rights. Given this account, states lose their right of non-intervention not only when they are the direct cause of the human rights violations, but when they fail to take action necessary to protect their citizens' rights.[26]

Consider the case where a group of private citizens engage in behaviors that directly result (intentionally or unintentionally) in a significant amounts of deaths. The state recognizes this harm, and could take action to regulate its citizens' actions to prevent these behaviors. If the state fails to take such action, then the state loses its claim to non-intervention. It is no longer protecting its citizens' fundamental interests. In this case, not only do we think that the state ought to act, we typically think another state would be justified in intervening in ways that will get the state to either enforce regulations to limit the harmful behavior (e.g. through the use of sanctions) or directly

[26] I take it that this can mean a state loses is normative legitimacy and right to non-intervention even in cases where the state lacks the knowledge of the human rights violation, assuming that it is possibly the state could have been aware given the epistemic context and available information.

stop the harmful behavior (e.g. through military action). To a certain degree, this is an apt description of climate change.

However, one still might object that climate change is not analogous to this scenario since those emitting problematic levels of GHGs might not necessarily be within one's own territory. However, since the account offered here requires the protection of human rights at home and abroad, for any state to be legitimate it must engage in the appropriate regulatory behavior to protect *all* individuals' rights. Thus, even if country A's failure to regulate its own citizens does not result in harms to other citizens of A, intervention can still be justified if that failure to regulate does not also protect human rights abroad. A's legitimacy would still be in question, and the door to intervention open. In fact, in that scenario, we might think that some other country's intervention in A's affairs would be a matter of self-defense. Regardless, it is plausible to think that they type of humanitarian intervention paradigm offered above can address the diffuse nature of climate change and still produce an evaluative mechanism for whether intervention would be legitimate under a particular set of circumstances.

The second objection one might offer against the use of humanitarian intervention in the case of climate change is the temporal distance of the harm. In most cases, mitigative efforts must be undertaken well in advance of when the harm will actually manifest. But, if the harm is not imminent, we might think intervention is impermissible. Conseuqently, it is important to show that principles of intervention allow not only for pre-emptive action (i.e. action taken in advance of an imminent threat), but also preventive action (i.e. action taken in advance of a non-imminent threat). Various scholars have recently argued that preventive action can indeed meet the criteria required for legitimate intervention or self-defense (at least according to traditional just war theory), and I will not offer any extensive comments on this literature.[27] Rather, I use this literature to point to the fact that time does not seem to be morally relevant, compared to one's knowledge and the probability of the threat.

[27] For those arguing for the permissibily of preventive action see especially, Allen Buchanan, "Justifying Preventive War," *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010), 280-297; Allen Buchanan and Robert O. Keohane, "The Preventive Use of Force: A

Writing about military actions, Jeff McMahan bases his defense of preventative action on the notion that any defensive action is itself preventative. One cannot defend against a harm that has already occurred or is presently occurring. However, "[o]ne can, of course, defend oneself against the *continuation* of harm that is being caused by an attack in progress, but it is still only harm that one *will* otherwise suffer that one can defend oneself against."[28] McMahan goes on to note that what appears to be relevant in the cases of self-defense and preventive action is a matter of the probability of the harm; in the former the probability is particularly high, while the later presumably has a low enough probability to make defensive action impermissible. This focus on probability of the harm is echoed by Ernest Partridge when writing about the rights of future generations. As Partridge concludes, "foresight, capacity, and choice, not time (however long) are the morally relevant factors here."[29] Consequently, it seems that if the models we are using provide us with a high enough level of confidence that avoidable harms *will* occur, then we would have a case of preventative action that would be just as legitimate as cases of stopping present harms.

Thus, if climate change is to fit under the paradigm offered here, we must show our objector that the probabilities of harm are high enough, under the models being considered, that it legitimates action no differently than cases of present or even imminent harms. However, this turns us to the third and final objection I seek to take up: uncertainty that exists within climate modeling and projections. If our confidence in climate projections and the models used to evaluate future scenarios is too low, it would seem the probability of harm will not be able to meet the levels needed for preventative action. Given the various uncertainties that exist, both with respect to physical properties of the atmosphere as well as estimates about the technologies

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Cosmopolitan Institutional Proposal," *Ethics & International Affairs* 18, no. 1 (2004), 1-22; Whitley Kaufman, "What's Wrong with Preventive War? The Moral and Legal Basis for the Preventive Use of Force," *Ethics & International Affairs* 19, no. 3 (2005), 23-38; and Jeff McMahan, "Preventive War and the Killing of the Innocent," in *The Ethics of War: Shared Problems in Different Traditions*, eds. Richard Sorabji and David Rodin (Burlington, VT: Ashgate, 2006), 169-190.

[28] McMahan, "Preventive War and the Killing of the Innocent," 172.

[29] Ernest Partridge, "On the Rights of Future Generations," in *Upstream/Downstream: Issues in Environmental Ethics*, ed. Donald Scherer (Philadelphia, PA: Temple University Press, 1990), 48.

possibly available within various scenarios, we might think our confidence will not meet the requisite standards.

However, it seems to me that this is not an objection to the use of the humanitarian intervention paradigm, but rather an empirical question about whether the criteria for permissible intervention are met. Obviously, showing all the criteria to be met would require a far more detailed account than I have offered here. Additionally, such an account would rest heavily on empirical matters related to the various scientific models that would have to be employed. It could reasonably be the case that the models, as they currently exist, would not provide the backing for legitimate intervention, yet with further refinement they might. Consequently, as with the other objections, I take it that they might make it more difficult to show the conditions for legitimate intervention are met in the case of climate change, but they do not in and of themselves show the paradigm cannot be employed and tested.