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**Just and Unjust Postwar Reconstruction:
How much external interference can be morally justified?**

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Abstract:

The focus of this paper is on the *ethics* of international state-building in deeply divided postwar societies. Several leading international relations scholars have recently argued for the establishment of (quasi-) permanent international trusteeship arrangements over divided postwar societies to overcome centrifugal forces at the domestic political level (Keohane 2003; Fearon and Laitin 2004; Krasner 2004). Yet similar arrangements appear to be highly problematic from a moral point of view. Normative theorists are still far from having developed any systematic normative guidelines for international state-building, and the arguments put forward are often quite impressionistic. In this paper I rely on John Rawls's *Law of Peoples* (1999) to identify a few key normative guidelines upon which a liberal ethics of international state-building could be built. I show that there is a quite sophisticated theory of state sovereignty underlying Rawls's broader argument, from which it is possible to gain a more nuanced understanding concerning the *degree* of foreign intrusiveness that can be justified under different postwar circumstances. In particular, I extrapolate from the Rawlsian argument a normative model of institutionalized 'shared responsibility' between domestic and international authorities for the reconstruction of postwar societies. This model, based on the non-coercive involvement of external experts in the domestic authority structures of postwar societies, is both normatively superior to full-fledged international trusteeship and promises greater success in the long run. In the final part of the paper, I show how the Rawlsian ideal-type of shared responsibility has been approximated (albeit in a very imperfect manner) by several components of the ongoing international peace operation in Bosnia and Herzegovina.

Just and Unjust Postwar Reconstruction: How much external interference is morally justified?

Forcible intervention in the domestic affairs of other states is always problematic, since it conflicts with the most fundamental norms that underpin the modern international system. Most liberal political theorists today would agree that foreign intervention by coercive means can be justified only under truly exceptional circumstances, when it contributes to alleviating the worst instances of human suffering, such as large-scale ethnic cleansing or genocide.¹ Stopping the bloodshed, however, may not by itself be sufficient. Unless viable political and economic institutions are rebuilt once the fighting comes to an end, any peace that is achieved may not be lasting.

The focus of this paper is on the *ethics* of international state-building in postwar societies that are deeply divided along ethnic or sectarian lines. Since domestic political institutions are often extremely weak and barely self-sustaining in similar contexts, the role of international actors becomes paramount. Theorists however are still far from having developed a systematic normative theory of international state-building, and the arguments put forward are often quite impressionistic. Only with the US-led occupation of Iraq in 2003, a tentative debate on the ethics of postwar reconstruction - *jus post bellum* - has slowly begun to emerge. Some authors believe that *faute de mieux*, international state-building after war should be guided by the traditional principles of just war doctrine, such as proper authority, proportionality, and the presence of a 'just cause' – consisting in the vindication of those basic human rights that justified an intervention in the first place (see Orend 2002; Bass 2004). Others have made unusually strong concessions to ethical consequentialism, arguing that the overall justice of a state-building operation is determined primarily by 'the distribution of the benefits it provides' (Walzer 2004: 62).

¹ Walzer (1977: chap. 6) is the seminal reference on liberal just war theory and intervention.

In the pages that follow, I attempt to systematically identify a few key normative guidelines upon which a liberal ethics of international state-building could be built. In the first part of the paper, I review some of the principal challenges of postwar reconstruction in divided societies, with particular regard to the promotion of political order and elite-cooperation under conditions of domestic anarchy. In the second part of the paper, I rely on John Rawls's *Law of Peoples* (1999), to identify a few crucial normative guidelines of *jus post bellum*. I show that Rawls develops, at least implicitly, a quite sophisticated liberal theory of state sovereignty, from which it is possible to gain a more nuanced understanding concerning the degree of foreign intrusiveness that can be justified under different circumstances.

The necessary extent of international authority over postwar societies is a function of domestic circumstances, such as most notably the local root-causes of conflict and the available local capacities for change (Doyle 2002: 74). Meanwhile, from a more explicitly normative viewpoint, the *admissible degree* of foreign intrusiveness can be seen as lying along a continuum that ranges from: (1) coercive military intervention in the case of outright humanitarian emergencies; to (2) significantly less intrusive intervention to *rebuild* a state's domestic sovereignty, once basic security has been reestablished and human lives are no longer systematically threatened; to (3) simple socio-economic and other technical assistance, when viable domestic institutions have been rebuilt and the peace is about to become self-sustaining. In the final part of the paper, I extrapolate from the median category of the above-mentioned normative continuum a model of 'shared responsibility' for postwar reconstruction between domestic and international actors. I argue that once basic security has been reestablished, shared responsibility arrangements - by which internationals become directly involved in the domestic authority structures of postwar societies - are best suited to rebuild legitimate state capacity and make the peace genuinely lasting. The Bosnian Constitutional

Court, composed of both domestic and international judges, is discussed as a concrete and quite successful example of shared responsibility.

1. The challenges of institutional reconstruction in deeply divided societies

State failure and gross violations of human rights typically go hand in hand. Failed states with their high levels of factional violence and insecurity come frighteningly close to the Hobbesian state of nature, where life is *nasty, brutish, and short*. It is now widely acknowledged that state failure does not merely have dramatic consequences for the directly affected populations - it also seriously undermines broader international peace and stability. Failed states provoke humanitarian disasters; they trigger destabilizing refugee flows; they constitute safe havens for terrorists and other criminal networks; and they provoke wider regional conflagrations sometimes leading to international violence. There is thus a growing sense of urgency concerning the need to do something about state failure, shared by both liberal internationalists and political realists alike. The strengthening of failed states, to be achieved primarily through the reconstruction of viable domestic institutional structures, presents international policy makers with ethical and strategic challenges unheard of since the end of the colonial period. On the one hand, intrusive international measures are often necessary to achieve immediate political stability in failed states torn apart by violent communal conflict; on the other hand, protracted foreign control over key aspects of the domestic political process deprives the local population of the fundamental right to determine its own future, thereby also undermining long-term prospects for sustainable peace. But viable states, let alone stable democracies, cannot be established overnight. In the words of one American analyst, a major strategic insight from recent international state-building operations

is that ‘while staying long does not guarantee success, leaving early ensures failure’ (Dobbins et al. 2004).

Once open hostilities come to an end, faction leaders, but also large numbers of former combatants, may feel that they have potentially much to lose from the newly established peace. Recent evidence from postwar Bosnia, to Afghanistan, and now perhaps Iraq suggests that the successful inclusion of faction leaders and former warlords in government can be crucial to the process of gradual political stabilization. Only in the longer run, once domestic peace has been safely established, may former warlords and other perpetrators of massive human rights violations be brought to justice, if this is demanded by sufficiently large sectors of the domestic population. It appears rather too easy to claim, as human rights activists often do, that there is no peace without justice. The consolidation of peace after civil conflict ‘often means accepting a host of injustices ... although this is an excruciating tradeoff’ (Bass 2004: 404-5).

According to the theory of power sharing or ‘consociational democracy’, a careful design of domestic political institutions should suffice to provide the representatives of all major factions with strong incentives for compromise and moderation. Consociational democracy (Lijphart 1977) essentially relies on the inclusion of political elites from a country’s main ethnic or religious groups within the executive and legislative branches of government. Communal cleavages are thus taken as a given in divided societies, and an attempt is made to manage them peacefully by means of *inclusive governance*. The allotment of public administration appointments according to criteria of group proportionality roughly responds to the same logic. Moreover, each group is typically granted a *veto right* to block controversial decisions, if they are deemed to be contrary to its ‘vital interest’ (Ibid.: 25-42).

However, in deeply divided societies after ethnic or religious war, such institutional mechanisms of conflict regulation are often less than self-sustaining. Far from overcoming the Hobbesian problem of anarchy in failed states and divided postwar societies, consociational

structures may themselves succumb to powerful centrifugal forces. This insight has led theorists of international relations, who have long been familiar with the study of political interaction under anarchy, to become increasingly interested in the challenges of postwar reconstruction. There is an emerging consensus that clearly more intrusive forms of international assistance ought to be devised. Classical notions of sovereignty and non-interference are regarded as a poor basis for policy under similar circumstances, given that the necessary incentives for stabilization cannot typically be provided by the parties within a troubled region itself (see e.g. Keohane 2003; Fearon and Laitin 2004).

The above-mentioned argument put forward by several political scientists reflects an apparently coherent consequentialist line of reasoning: if domestic institutions are not self-sustaining, the necessary incentives for peace should be provided by external authorities in the form of inducements and punishments - *carrots and sticks* - or straightforward external control in the form of international trusteeship. As one political scientist recently put it: 'Sworn enemies, if left to themselves, may not be willing and be able to cooperate, but a judicious mixture of international inducements and compellance may just work to elicit the grudging pragmatism necessary for them' (Bose 2005: 327). A more sophisticated consequentialist argument, however, also needs to factor in the dangers of excessive international control. Where international authorities directly manage significant aspects of the domestic political process in postwar societies, this may leave the local population 'insufficiently prepared for the challenges of self-rule when an [international] administration folds up tent' (Caplan 2005: 109-10). Moreover, where the leaders of rival factions disagree about the most basic objectives, they may face strong incentives to simply strengthen their own position, in anticipation of the eventual departure of international administrators and peacekeepers. Hence, the progressive empowerment of domestic political actors as soon as basic security has been reestablished is not only a valid moral precept; it is also of great consequential importance for the success of international state-building operations.

2. John Rawls on state sovereignty and foreign intervention

I contend that several insights for the ethics of postwar reconstruction can be derived from John Rawls's international political theory. Rawls's own definitive statement on international ethics can be found in *The Law of Peoples* (1999), where he extends the hypothesis of a liberal social contract to international society. His theoretical construct in the *Law of Peoples* is clearly modeled along the lines of Kant's argument in *Perpetual Peace* (1795), which contains the famous argument that well-ordered republics ('peoples' in Rawls's own formulation) will establish mutual relations based on law and the abolition of war.² Kant himself favored a strong rule of nonintervention, since he thought that it would afford a polity 'the necessary territorial space and political independence in which free and equal citizens could work out what their way of life would be' (Doyle 1997: 395). Rawls equally values political independence and popular self-determination, but in line with contemporary liberal discourse he thinks that state sovereignty and the duty of non-intervention should not be seen as moral absolutes (Rawls 1999: 89-105). Rawls's objective is to work out from his general framework of political liberalism 'the ideals and principles of the *foreign policy* of a reasonably just *liberal* people' (p. 10). As the argument goes, liberal peoples may legitimately intervene in the domestic affairs of other states, although the admissible range of intervention remains closely circumscribed.

The guiding principles for a liberal foreign policy first emerge from a hypothetical social contract between the representatives of (ideal-typical) liberal states. In accordance with the traditional principles of Rawlsian social contract theory, the representatives of liberal societies are imagined to meet in an 'original position', where they are subject to a properly adjusted 'veil of ignorance.' This implies that they do not know, for instance, the size of the

² Rawls consistently uses the term 'peoples' instead of states, to highlight certain idealized moral characteristics of the parties to his international social contract, which set them apart from the rationally calculating states of realist international relations theory.

territory, or the population, or the relative strength of the people whom they represent. Rawls assumes that all liberal states have a fundamental interest in protecting their political independence, their culture, and the well-being of their citizens. The resulting social contract - the *Law of Peoples* – includes most of the traditional constitutive principles or ‘settled norms’ (Frost 1996) of modern international relations: sovereign independence, a strong *prima facie* duty of non-intervention, and the right to self-defense against foreign aggression. However, these classical Westphalian principles are attenuated by the inclusion of more recent normative concerns, such as the protection of basic human rights, specific restrictions in the conduct of war (*jus in bello*), and the advancement of social welfare (Rawls 1999: 37).

‘Decent nonliberals’ and the centrality of popular self-determination

Following Rawls’s mental experiment, the principles of the Law of Peoples are first adopted at the international level only by the representatives of liberal societies. However, in a subsequent step exactly the same principles would also be adopted by the representatives of so-called ‘decent nonliberal’ societies. A fundamental requirement for societies to qualify as ‘decent’, according to Rawls, is that *effective public consultation mechanisms* exist: different voices need to have an opportunity to be heard, even in the absence of proper democratic institutions. Moreover, decent societies are characterized by a functioning legal system that imposes ‘*bona fide* moral duties and obligations on all persons’ (pp. 65-6), and they respect ‘human rights proper’ - that is the core of urgent human rights contained in the Universal Declaration, such as freedom from slavery, liberty of conscience, and security from mass murder and genocide (p.78).

The Law of Peoples *belongs* equally to both liberal and decent societies. Rawls’s argument is not that once liberal states have adopted the Law of Peoples, they would ‘invite’ decent nonliberals to join a fundamentally liberal scheme. What he wants to suggest is that because both liberal and decent societies are well-ordered, they would subscribe to the same

basic principles of the Law of Peoples (Brown 2002:13). Rawls's inclusion of decent nonliberals in the Society of well-ordered Peoples is fundamentally tied to the liberal principle of toleration: 'If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways of ordering society' (Rawls 1999:59). Several critics have taken issue with this approach, claiming that the scope of acceptability by nonliberals shapes the very substance of Rawls's theoretical construct in *The Law of Peoples* (see e.g. Beitz 2000; Kuper 2000). But it is far from clear that this should undermine Rawls's argument, given that acceptability of the Law of Peoples by decent nonliberals is exactly what Rawls wants to achieve, for good reasons.

By recognizing that decent nonliberal states can be *bona fide* members of the Society of Peoples, they are provided with powerful incentives to reform themselves, and presumably to become increasingly liberal over time. It has been persuasively suggested that a theory of political change is implicit in Rawls's argument: 'Even if we believe, as Rawls clearly does, that the world would be a better place if it was comprised solely of liberal democratic peoples, the question remains of how rightly to go about achieving such an ambitious task' (Jenkins 2005: 2-3). Rawls clearly thinks that decent well-ordered societies have the ability 'to reform themselves in their own way', drawing on their own particular culture and public discourse. We should thus 'not frustrate their vitality', by coercively imposing liberal values upon them from the outside (Rawls 1999:61-2). The Rawlsian approach crucially recognizes that *well-ordered institutions can emerge from within different cultural and religious traditions*. Moreover, the toleration of decent nonliberals and their inclusion in the Society of well-ordered Peoples reflects a fundamental liberal concern with autonomy and popular self-determination. In order to qualify for full respect under the Rawlsian framework, a state must do more than obey certain minimal human rights norms; decent peoples deserve to be fully sovereign only when they are 'genuinely collectively self-governing' (Macedo 2004: 1723). Therefore, far from compromising liberal standards, Rawls's political theory actually secures

space for individuals to 'base their political institutions on *a common good idea of justice to which they subscribe*' (Jenkins 2005: 28, emphasis added).

Rawls's concern with popular self-determination reflects a traditional liberal uneasiness about notions of foreign political tutelage and coercion. Regardless of whether tutelage is institutionalized domestically (over women or cultural and religious minorities) or internationally (over subject peoples), it deprives individual agents of their capacity for self-expression, reasoned choice, and ultimately of responsible agency. However, Rawls also believes that any state's right to sovereign autonomy and non-interference is ultimately contingent on the fulfillment of certain minimal moral and empirical requirements.

'Outlaw states', or when international coercion becomes morally justified

Rawls first outlines a few key moral requirements that each state needs to comply with in order to truly *deserve* international sovereign recognition and non-interference in its domestic affairs. These requirements go much beyond the dominant legalistic understanding of a state's external sovereignty as the result of mere international recognition. In Rawls's conceptualization, a state's external sovereignty - i.e. the ability to legitimately interact with other states on an equal footing while excluding others from one's own domestic authority structures - is not simply the result of a contingent international agreement: it is the result of a *moral* social contract, which needs to take the interests and legitimate claims of individual human beings into account.

In the Rawlsian argument, states crucially *derive their external sovereignty* - and the related right to non-interference in their domestic affairs - *from their ability to join the Society of well-ordered Peoples*.³ Only well-ordered liberal and decent societies are able to become bona fide members in the Society of Peoples, since they do not have aggressive aims, respect basic human rights, and allow some form of public consultation mechanism to exist. States

³ Rawls clearly specifies that 'people's rights and duties in regard to their so-called sovereignty derive from the Law of Peoples itself' (Rawls 1999: 27).

that are not well-ordered domestically cannot join the Society of Peoples, and therefore do not deserve to be internationally recognized as sovereign equals. Rawls excludes so-called 'outlaw states' from the Society of Peoples on quintessentially moral grounds. He insists that liberal and decent societies do not need to tolerate outlaw states, for good reasons: outlaw states are expansionist and aggressive and they oppress their own citizens; they thus constitute a formidable threat to both international order and the security of individuals. Well-ordered societies can justly go to war against outlaws, when they 'reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw states' (pp. 90-1). Perhaps most alarmingly, however, outlaw states violate even the most fundamental human rights of their own citizens. Somewhat surprisingly, Rawls stops short of developing a systematic moral argument on humanitarian intervention. He nonetheless clearly suggests that there are instances when well-ordered states can legitimately overcome the *prima facie* duty of non-interference in the domestic affairs of other states and coercive intervention becomes justified: when violations of human rights are 'egregious' and the government of an outlaw state does not respond to the imposition of sanctions, forcible humanitarian intervention 'would be acceptable and would be called for' (p. 94, n.6).

Rawls's considerations on the ethics of military intervention appear clearly inspired by Michael Walzer's famous argument as developed in *Just and Unjust Wars* (1977). According to Walzer, military intervention on humanitarian grounds is morally justified only under truly exceptional circumstances, when the violation of human rights on the territory of a given state 'is so terrible that it makes talk of ... self-determination ... seem cynical and irrelevant' (Walzer 1977: 90). Under similar circumstances, a state's *prima facie* right to non-interference in its domestic affairs can be coercively overcome, to stop the large-scale death of innocent human beings. Rawls's conceptual category of 'outlaw states', with their cruel institutions and genocidal political practices, helpfully illustrates the restrictive conditions under which international coercion becomes morally justified. The Rawlsian argument also

crucially anticipates the notion of ‘sovereignty as responsibility’, according to which states are primarily responsible for protecting the lives and security interests of their citizens, but with the same responsibility being transferred to the international community when domestic authorities are manifestly unwilling or unable to comply with their duty (ICISS 2001).

Rawls’s argument on outlaw states, and his elucidation of the conditions under which coercive international intervention becomes morally justified, also yields some important insights for the ethics of postwar reconstruction. Coercive intervention can be justified under a liberal framework only as a means to guarantee the physical security of individuals, by protecting human lives that are immediately and systematically threatened. Applied to the context of postwar state-building, this means that *international coercion can be justified only to enforce or assertively keep the peace*, when a cease-fire is still being consolidated or when any peace achieved is literally falling apart. In other words, the aim of legitimate foreign coercion can only be to either stop an unjust war (including a government’s war on its own people), or to prevent its renewed outbreak in a still very fragile postwar environment. Once conditions of basic security have been (re-)established, and as long as any ceasefire that has been achieved unequivocally holds, reliance by international actors on straightforwardly coercive means would verge on despotic rule and thus be fundamentally unjust.

Extrapolating further from the Rawlsian liberal framework, it appears impossible to justify any direct foreign control over the *values* and *normative structures* that underlie the emerging postwar institutional setup in nonliberal societies. As long as individual human beings are not systematically killed, liberals must limit themselves to persuasion and the provision of incentives short of coercion, by exposing ‘to public view the unjust and cruel institutions’ of non well-ordered societies (Rawls 1999: 93). This normative standpoint is also further underpinned by empirical evidence, which suggests that a liberal and democratic political culture first needs to take root domestically, if it is to become genuinely self-sustaining. The consequentialist argument against the forcible imposition of liberal

democracy abroad has a long pedigree in liberal thought: it was probably developed in its most eloquent form by John Stuart Mill, according to whom unfree peoples subject to despotic rule would have to liberate themselves through their own ‘arduous struggle.’ If representative government were introduced into a country by foreigners, in the absence of clear majority support among the local population, free institutions would not survive for long (Mill 1973: 382). Today, some of the most enlightened liberal constitutionalists warn against the straightforward imposition of ‘free institutions’ in postwar societies on similar consequentialist grounds:

‘Typically, the entities doing the imposing ... will lack the capacity and the will to carry through the imposition in a complete fashion. Having expended their resources in producing a constitutional settlement that guarantees equality and liberty, they are likely to watch from afar, with horror and bad conscience, as those guarantees are ignored by the political elites who actually wield power’ (Feldman 2005: 883).

‘Burdened societies’ and the empirical prerequisites for sovereign statehood

Beyond outlaws, Rawls identifies another category of states that are not well-ordered and thus remain excluded from the Society of Peoples: so-called ‘burdened societies.’ These societies are temporarily excluded from the Society of Peoples for reasons related to the empirical circumstances of their burdened status: to varying degrees, burdened societies lack the cultural and material resources, the human capital, and thus the actual *capacity* to be self-governing (Rawls 1999:106). Although Rawls’s category of a ‘burdened society’ remains rather abstract, I would like to argue that failed states, which have often experienced significant domestic violence along ethnic or religious lines, can be seen as a particularly disadvantaged subset of this category. Postwar societies that are heavily burdened by sectarian divisions are often ‘unable, *due to political conflicts*, to create well-ordered regimes’ (Keohane 2003: 299). Their domestic governance institutions are not necessarily oppressive, but they are extremely weak and unstable, which among other things implies that no

collective political will can be expressed. Failed states are thus unable to deliver to their citizens certain basic public goods that Rawls thinks are required for decency.

Rawls's argument on burdened societies echoes the norms of an earlier sovereignty regime, under which a government's ability to effectively control its territory and to be its own master – *domestic sovereignty* - was seen as an essential condition for the recognition by others of its *external* or international sovereignty. This doctrine, which became formalized into international law in the nineteenth century, stressed three crucial empirical prerequisites for the recognition of sovereign statehood: supreme rule over a given territory; control over its population; and the presence of a stable and effective government. In the mid-twentieth century, with the founding of the United Nations and the growing strength of the decolonization movement, the international recognition of sovereign statehood was then progressively detached from a state's actual capacity to govern itself. This led to the emergence of several formally sovereign post-colonial entities that lacked much of the attributes of empirical statehood; *quasi-states* according to one felicitous formulation (Jackson 1990: Chap. 3). It is only over the past decade or so, with the emergence of state failure as a major international security concern, that theorists and policy makers alike have again come to recognize the crucial importance of domestic or 'empirical' sovereignty as a fundamental prerequisite for international stability and order (see Barnett 1995).

Rawls insists that well-ordered liberal and decent societies have a *duty to assist* their burdened counterparts, so that those can gradually develop just (or decent) domestic political institutions (Rawls 1999: 107). The ultimate goal of international assistance under the Law of Peoples is to help burdened societies to fully develop their domestic sovereignty, so that they will be able to determine the path of their own future for themselves and thus 'become full members of the Society of Peoples' (p. 118). Only at this stage will they have a genuine right to equal international recognition and their *external sovereignty* will have to be unequivocally respected by others. But Rawls also recognizes that there is 'certainly no easy recipe' to help

a burdened society change its political culture and develop the well-ordered institutions that will allow it to become entirely self-governing in the future. Perhaps most significantly, he points out that although monetary assistance is often essential, ‘merely dispensing funds will not suffice’ (p. 108).

Empirical evidence suggests that for international economic assistance to make a difference, a society first needs to possess the minimally stable and legitimate political institutions that are necessary to allocate foreign aid effectively. International economic assistance directly delivered to the government of a weak state during an early postwar transition phase, with well-ordered domestic institutions still absent, would risk being utterly ineffective. As the authors of a seminal article on state failure put it more than a decade ago:

‘Donor groups have pooled resources for a particular country and donated humanitarian assistance in response to crises. ... Unfortunately, these methods have met with scant success in failing states, and they will prove wholly inadequate in those that have collapsed. Western aid cannot reach its intended recipients because of violence, irreconcilable political divisions, or the absence of an economic infrastructure’ (Helman and Ratner 1992).

The fundamental normative dilemma for international state-builders at this point is the following: how can international assistance to heavily burdened postwar societies, which still lack any viable domestic political institutions, be made more effective without resorting to straightforward colonial control? I contend that a coherent liberal answer to this question can again be derived from the theory of state sovereignty that underlies Rawls’s contractarian argument. Rawls quite narrowly circumscribes what should legitimately count as a society ‘burdened’ by unfavorable conditions: beyond postwar societies, it seems that only the world’s poorest and highly indebted countries, which are unable to sustain a viable institutional structure and are thus de facto failed states, would safely qualify as burdened under the Rawlsian framework. Still, burdened societies can be safely regarded as morally superior to outlaw states. Contrary to outlaw states, they do not systematically and intentionally violate the basic human right to life of their own citizens.

Until burdened societies develop the necessary institutional structure and the political culture to be fully self-governing, according to Rawls they lack the empirical prerequisites to become bona fide members in the Society of well-ordered Peoples. Hence, well-ordered liberal and decent states are not required to fully respect the external or ‘Westphalian’ sovereignty of burdened postwar societies. Well-ordered states are allowed to interfere in the domestic affairs of their burdened counterparts, with the only goal of helping them to become self-governing in the future. Any straightforward coercion by means of actual or threatened military action cannot be justified, as long as there is no immediate and large-scale threat to human lives. Extrapolating freely from the Rawlsian theoretical framework, I would now like to suggest that for international state-builders to carry out their duty of assistance in an effective, but ultimately non-coercive manner, they ought to *share responsibility for governance and reconstruction* with domestic authorities during a transitional period that may last for several years.

3. ‘Shared responsibility’ with the society of well-ordered states

For those societies where basic security conditions have been reestablished but self-sustaining political institutions are not yet in place, a *non-coercive international presence within domestic authority structures* may be crucial in terms of facilitating an effective allocation of economic aid and the reconstruction of inclusive political institutions. Ideally, the role of international actors in the domestic authority structures of the target state should be formalized in specific ‘shared responsibility’ arrangements. This could create stable expectations that facilitate the explication of governance functions, while also maximizing transparency and improving domestic as well as international accountability. Krasner (2004) has recently developed an original theoretical argument concerning ‘the engagement of

external actors in some of the domestic authority structures' of postwar societies (p. 108).⁴ As possible issue-areas where responsibility could be usefully 'shared' between domestic and international authorities, Krasner mentions ad-hoc institutions for the allocation of revenues from natural resources, the executive boards of central banks, education policy committees, as well as the policy-planning and executive bodies of various postwar ministries. To this one could usefully add various judicial bodies, such as Constitutional and Criminal Courts, as well as executive human-rights commissions, which typically exercise crucial peacebuilding functions in divided postwar societies.

'Shared responsibility' institutions in theory: legitimacy criteria and potential benefits

Ideally, any institutionalized arrangement of shared responsibility for postwar reconstruction and governance would be born of a compact between domestic authorities and some external entity. Krasner usefully highlights that whenever authority and political responsibility are shared between internal and external actors, there should be a formal arrangement 'legitimated by agreements signed by recognized national authorities' (2004: 108). It appears indeed fundamental to the notion of shared responsibility (as opposed to straightforward international control) that domestic political actors do in principle retain the possibility to reject and/or revise any such arrangement, particularly as a postwar society gradually recovers and regains its domestic sovereignty. During the initial postwar reconstruction phase, when domestic actors are heavily dependent on foreign assistance, there will be very strong incentives for them to accept any shared responsibility arrangement proposed by international state-builders. Such arrangements, directly linked to the delivery of international assistance, would thus create virtually self-enforcing equilibriums until postwar

⁴ Krasner refers to the resulting arrangements as instances of 'shared sovereignty', but his terminology is ultimately misleading: while a state's *external sovereignty* can be legitimately compromised or overcome to varying degrees for state-building purposes, it can hardly be shared in any meaningful sense. As for the *domestic sovereignty* of postwar societies, it can by definition not be shared with international actors, given that failed states lack any meaningful domestic sovereignty and it is an important goal of state-building operations to actually help rebuild it.

societies develop the necessary political and economic institutions that allow them to become genuinely self-sustaining.

Shared responsibility arrangements appear to be crucially justified under the Rawlsian duty of assistance, as long as they remain limited to issue-areas where international actors can provide impartial expertise and mediate effectively between domestic actors, so as to prevent ethnic deadlock and strengthen otherwise fledgling domestic institutions. In order for shared responsibility arrangements between domestic and international authorities to be more than weakly disguised instruments of foreign imperial rule, their institutional setup also needs to be very carefully designed. In particular, assuming that executive decisions within shared responsibility institutions are taken by simple majority rule, international representatives should always occupy less than half of the relevant decision-making posts. Otherwise, foreign representatives will be able to veto any decision they do not fundamentally agree with, imposing a *de facto* system of international trusteeship over significant aspects of the domestic political process.

Formalized shared responsibility arrangements are thus normatively acceptable only when international representatives occupy a minority of the seats in relevant decision-making bodies. Similar institutional arrangements also promise to be politically more effective: foreigners cannot impose their views on controversial issues, but instead need to engage in a process of negotiation and ideally of deliberative interaction to convince a decisive number of their domestic counterparts, whenever they are not simply mediating between domestic views in a neutral manner. If adequately designed, shared responsibility institutions can thus *foster the openness of the domestic political process*, by inducing both internationals and local sectarian representatives to consider the views of others, articulate common ends, and generalize their positions to widen their appeal. Moreover, transitional postwar institutions that foster deliberative interaction between domestic representatives (even when not democratically elected), as well as between domestic and international authorities, can

crucially *increase the prospects that any collective decision will be seen as legitimate*. And because deliberation increases the decision's legitimacy, it also increases the likelihood that the resulting policy will be accepted or at least not actively resisted (Barnett 2006: 98).

Shared responsibility arrangements that institutionalize strategic negotiation and deliberative interaction at the domestic level thus have the potential to crucially strengthen immediate political stability, by reducing the likelihood of zero-sum sectarian politics. In purely strategic terms, as well, less rigid and perhaps even trans-communal voting patterns could be fostered, thanks to internationals holding the crucial 'swing vote' on shared responsibility decision-making bodies. Finally, and perhaps most important, shared responsibility institutions have the potential to improve domestic capacities for self-government in the long run, by spreading precious administrative expertise and facilitating the emergence of a liberal or decent political culture. Ideally, the result would be a progressive de-ethnification of domestic politics in postwar societies, which would make it possible to overcome the inherent institutional rigidities of consociational democracy.

Shared responsibility in practice: Bosnia's new Constitutional Court

Shared responsibility arrangements between domestic and international actors to help rebuild divided postwar societies are not a mere theoretical hypothesis. Similar institutional arrangements already partially underlie the current international peace operation in Bosnia and Herzegovina (BiH), with quite encouraging results. Generally speaking, international state-building in BiH since the Dayton peace agreement (DPA) was signed in November 1995 has been less than an unqualified success. The DPA itself did not result from a decisive military victory by one of the warring parties on the ground; nor was it the consequence of a 'mutually hurting stalemate', where exhaustion of all the main parties involved and the impossibility of major military breakthroughs create strong incentives for a negotiated compromise to emerge. Rather, Dayton represents a typical case of 'enhanced consent' – a

peace agreement hammered out and ultimately signed under heavy international pressure. The price to be paid for reaching an agreement at Dayton, while the situation in Bosnia was still relatively fluid and none of the parties had a strong commitment to peace, was essentially twofold: first, the DPA de facto ratified the results of ethnic cleansing on the ground, with political and administrative functions largely decentralized to autonomous ethnic enclaves and an extremely weak common state at the top; second, the DPA explicitly legitimated the interests of neighbouring states – primarily Serbia and Croatia - in the Bosnian internal order (Woodward 2001).

Two years into the peace implementation phase, the cease-fire in BiH had been secured thanks to a strong international military presence, but there was little progress with regard to rebuilding a self-sustaining and ethnically integrated Bosnian state. Hence, in late 1997 the international society of states decided to strengthen the powers of its ‘High Representative’ in Sarajevo, thus de facto shifting towards a trusteeship approach to speed up the postwar state-building process in Bosnia. The international High Representative has since been able to overrule the decisions of BiH politicians, impose legislation upon them, and even remove them from office whenever he deemed that this would be in the best interest of the Bosnian people. Critics have cogently pointed out that the highly intrusive approach adopted by international state-builders in Bosnia has undermined domestic accountability and crucially inhibited the development of local capacities for peace (see e.g. Chandler 2000). Clearly, the coercive strategy pursued by international state-builders in Bosnia, once the cease-fire was consolidated and human lives were thus no longer immediately at risk, appears to be highly problematic under the Rawlsian liberal framework defended in this paper.

Specific aspects of the Bosnian experience, however, have produced quite encouraging results and appear perfectly compatible with the Rawlsian liberal approach to postwar state-building. This is particularly the case for certain pioneering ‘shared responsibility’ arrangements that have been set up in specific issue-areas to strengthen

domestic governance functions and to prevent domestic decisional deadlock. The Dayton peace agreement explicitly foresaw the setup of several transitional arrangements that implied a sharing of responsibilities between representatives of Bosnia's main ethnic communities, on the one hand, and international actors, on the other. For instance, a transitional Human Rights Chamber was established to address human rights violations committed on the Bosnian territory during the war. The Chamber was intended to work according to the principle of shared responsibility for a five-year transitional period (subsequently renewed for another three years), with part of its members appointed by an international organization - the Council of Europe (OHR 1995: Annex 6). Other shared responsibility institutions established on a temporary basis in postwar BiH were the first governing board of the country's central bank, and a provisional electoral commission charged with the organization of the country's first postwar elections. However, the most significant shared responsibility institution established in postwar Bosnia has undoubtedly been the country's new Constitutional Court.

The establishment of a new Constitutional Court operating according to the shared responsibility principle is foreseen by the Bosnian constitution itself, which constitutes an integral part of the Dayton peace agreement. Nine judges, all of them 'distinguished jurists of high moral standing', are appointed to the Court for a non-renewable five year term (OHR 1995: Annex 4). Of the Court's nine judges, six are selected by Bosnia's domestic legislatures, while the remaining three judges are internationals appointed by the Strasbourg-based European Court of Human Rights (they cannot be citizens of Bosnia-Herzegovina or any neighboring state). The Bosnian Constitutional Court probably comes closest to the ideal type of shared responsibility between domestic and international actors: since the international judges are numerically in the minority, they have never been able to impose their views. Experience does indeed suggest that the international judges have usually behaved as committed *advocates* of their respective positions, trying to persuade other members of the

Court as well as the larger Bosnian public. (Both dissenting and concurring opinions of individual judges are made public).

According to one former international judge on the Court's bench, the anticipation of public dissent has usually led the majority to take 'special care in argumentation', which has 'indeed had an overall positive effect on the Court' and led to the emergence of a quite unique deliberative culture (Marko 2004: 33). Unlike several of Bosnia's more traditional postwar institutions, the Constitutional Court was never subject to ethnic paralysis, thanks to the effective mediating role of its three international judges. Quite on the contrary, the court has played an important role in trying to gradually overcome the deep ethnic fragmentation of the country's institutional structure that resulted from the war. The Dayton agreement itself had in many regards only ratified the results of three years of ethnic cleansing, which led to a de facto partition of the country into autonomous ethnic enclaves. The Constitutional Court has now challenged several aspects of this institutional setup in their constitutionality, by promoting instead a more acceptable liberal framework of minority rights (Issacharoff 2004).

The experience of the Bosnian Constitutional Court suggests that complex shared responsibility arrangements can work effectively even under the most difficult circumstances and without relying on explicit external coercion. If adequately designed, shared responsibility arrangements can have an overall beneficial impact on the development of sustainable domestic institutions in divided postwar societies, not least by fostering a well-ordered political culture of compromise and open deliberation. The preliminary evidence from Bosnia and Herzegovina warrants a more serious consideration of shared responsibility arrangements between domestic and international actors as a viable policy-option to help rebuild self-sustaining representative institutions in divided postwar societies.

4. Conclusion

The rebuilding of sustainable domestic institutions in the aftermath of violent communal conflict confronts international policy-makers with extraordinary normative and strategic challenges. On the one hand, intrusive international measures are often necessary to achieve immediate political stability in failed states torn apart by violent communal conflict; on the other hand, protracted foreign control over key aspects of the domestic political process compromises liberal principles of autonomy and popular self-determination, thereby also undermining local capacities for peace.

Rawls's liberal theory of state sovereignty, and his elucidation of the conditions under which foreign intervention can be seen as legitimate, constitute a formidable intellectual resource to start developing a more sophisticated and nuanced approach to the ethics of international state-building. Rawls fundamentally shows that liberal peacebuilders can justly rely on coercion and political control only under exceptional circumstances, when human lives are immediately and systematically threatened on a large scale. Under all other circumstances, international peacebuilders have a *duty to assist burdened postwar societies* to rebuild their domestic sovereignty in a non-coercive manner. International state-builders ideally ought to share responsibility for postwar reconstruction, by institutionalizing their transitional role within the domestic authority structures of postwar societies. This would create stable expectations and promote a more open political process, which could crucially facilitate the explication of governance functions and prevent ethnic deadlock in divided societies. In the longer run, shared responsibility arrangements between domestic and international actors - like those that partially underlie the current international peace operation in Bosnia and Herzegovina - can also fundamentally contribute to the emergence of a liberal or decent political culture that will make the peace truly self-sustaining.

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