

Normative Political Theory

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Governance in areas of limited statehood is a widespread phenomenon, the variety of which raises a host of normative questions. When a state is incapable of providing basic public services such as security, health or education, this is often perceived as state failure. This perception reflects deep-seated assumptions about states and the functions they should fulfill (cf. Rotberg 2004). The research on non-state governance in areas of limited statehood reflected in this handbook questions this view. It highlights that actors other than the local state do and can provide important public services (see particularly chapters 10 Lederer, 11 Beisheim et al., 12 Förster/Koechlin, 13 Börzel/Deitelhoff, and 14 Berti, this volume). In many situations non-state governors – understood to include both private and international actors – already assume functions traditionally assigned to the state. In light of these findings, we should reflect anew on our normative standards. How can we define principles of legitimate governance in a way that does not already presuppose that only the state has a right to rule? And which other actors are at liberty, or even under an obligation, to provide governance services, when state institutions are unable of doing so?

The questions we have just raised are inherently normative. With a few notable exceptions, however, they have been widely ignored by political theorists and philosophers. This is astonishing given their practical significance and the attention they have received in other fields of research. Scholars of international relations, comparative politics, and development studies, for instance, have long examined the causes and consequences of state collapse, as well as the characteristics of governance by non-state and external state actors in areas of limited statehood. The neglect of these topics among political theorists, however, is no coincidence. It reflects the history of normative political theory as a discipline, which developed simultaneously with, and in large part as a response to, the rise of the modern nation-state. The power and authority of the state have thus long been the primary focus of normative political theorizing. As a consequence, most authors conceived of consolidated statehood as a premise for their reflections on the legitimacy of governance. Limited statehood and non-state governance either did not figure at all in these debates, or were seen as theoretically “easy” problems, for the supposedly clear answer to the practical problems of limited statehood was thought to be consolidated statehood.

More recently, though, scholars have become increasingly skeptical of this kind of statism. They began to question the feasibility of state-building efforts (e.g. Lake 2016; see chapters 15 Lake and 29 Brozus et al., this volume) and, even more fundamentally, to emphasize the normative ambivalences of statehood in general (e.g. O'Neill 2001, Trotha 2000). In the second part of this chapter, we show that these ambivalences relate to the defining features of modern statehood. We then distinguish two ways in which normative political theorists have begun to address the phenomenon of governance in areas of limited statehood. Third, we focus on authors who argue for an instrumental understanding of legitimacy. The core idea here is that non-state governance under conditions of limited statehood is legitimate if and to the extent that it contributes to normatively desirable outcomes such as an increase in security. Fourth, we discuss the limits of the instrumentalist approach. In particular, we identify four problems of non-state governance. These concern the definition of goods, the inclusiveness of governance services, the accountability of non-state actors, and the assigning of responsibilities to potential governance actors. Finally, we argue that these limits highlight the need for effective and legitimate public institutions.

Human Rights and the Limits of Statism

The statist view of legitimacy is widespread among political theorists and philosophers. This view suggests that limited statehood is by definition normatively problematic, and that the rebuilding of state institutions is always the right response to it. An implication of this view is that a decisive criterion for the evaluation of governance in areas of limited statehood should always be whether it promotes, or at least does not obstruct, the long-term development of state institutions.

The main argument for statism is that states are, at least in principle, particularly well-suited to realize basic human rights and to facilitate collective political agency (Buchanan 2004, Rawls 1971, Ypi 2008). In the following discussion, we will focus on the former because the fulfillment of basic human rights is, at least rhetorically, universally accepted as the most fundamental standard of evaluation for political orders. The value of states, and the truth of statism, thus depends on the claim that only states can reliably protect and promote basic human rights (see also chapter 21 Berger/Lake, this volume).

Following Henry Shue (1980), Jürgen Habermas (1996), and James Griffin (2008), we define basic human rights as valid claims to goods that are indispensable for living a humane life (e.g. food or shelter), exercising a variety of other rights (e.g. liberty or security), or participating in the political process of establishing and maintaining an entire system of rights (e.g. suffrage, freedom of speech and assembly). Due to the overriding importance of these goods, every single person has a valid claim to secure, affordable and non-discriminatory access to all of them.

In principle, this access can be provided either through direct interactions or through institutional means (Pogge 1992). Interactional approaches hold that (individual or collective) agents are directly responsible for providing basic goods to the needy (Singer 1972). The problem with this view is that it almost always leads to problems of coordination and compliance: If everybody is in principle responsible for the fulfillment of X's human rights, then no-one knows what their specific obligations towards X are and who in particular is to be held accountable when X's rights are not adequately fulfilled. Institutional approaches respond to these twin problems of coordination and compliance by assigning institutional schemes with the tasks of clearly defining and allocating responsibilities among agents as well as monitoring and enforcing their compliance. Consequently, on the institutional view, the duty to assist others in securing access to basic goods is at least in part a duty to support or improve suitable institutions (Buchanan 2004: 85-98, Ladwig 2016, Rawls 1971: 114-17).

Statist theorists argue that states are a well-established and particularly effective institutional solution to this problem of assigning and enforcing responsibilities for the fulfillment of human rights (Goodin 1988). In their view, the state's monopoly of force, its territorial borders, its formal membership rules, and the practice of international recognition uniquely enable the state to create epistemically unambiguous and socially reliable structures of rights and duties (Schmelzle 2015: ch. 4). Statists further point out that their view is not only philosophically attractive but also reflected in current legal and political practice (Beitz 2009). States are the usual target of human rights claims and protests, and public international law assigns to them primary responsibility to protect these rights.

The implications of the statist view for areas of limited statehood are exemplified by John Rawls's *Law of Peoples* (1999). While Rawls explicitly conceived of peoples as the normatively relevant unit in matters of global politics, he always tacitly assumed that these peoples would institutionalize their moral relations through states. Nevertheless, he was not blind to the poor human rights record of many states today. Rawls identified two types of states that fail in that regard: *Outlaw states* that are unwilling to realize the rights of their citizens, and *burdened societies* that are unable to do so. The latter roughly fit our definition of limited statehood

(Börzel and Risse 2013). For Rawls, this distinction has important policy implications. He argues that outlaw states may be pressured into compliance with human rights obligations, whereas burdened societies deserve assistance in (re-)build their institutional capacities (Rawls 1999: §§ 13-15). In other words, for Rawls the adequate answer to problems of limited statehood is state-building.

Pluralist theorists offer two replies to statism: Their first reply accepts that consolidated states might be the ideal institutional scheme for guaranteeing secure, affordable and inclusive access to basic goods but disputes that this ideal should be action guiding under non-ideal conditions. Call this the problem of feasibility. For one thing, pluralists argue that the sobering track record of failed attempts at external state-building should give us caution. State-building, it seems, is a highly unreliable policy option. Moreover, its dim chances of success are also ethically relevant: The provision of basic goods to needy persons is of such great moral importance that feasible but imperfect solutions are preferable to better but more precarious ones (Fuller 2005, Neuhäuser 2017, O'Neill 2001, Sen 2009). If this argument is sound, the realization of human rights in areas of limited statehood should focus on reliably reaching an acceptable baseline of protection, rather than seeking an ideal solution. The pluralist position therefore suggests that instead of taking chances with state-building operations we should encourage powerful non-state actors to assume responsibility for the fulfillment of human rights. These actors can include international organizations (IOs; see chapter 10 Lederer, this volume), business companies (chapter 13 Börzel/Deitelhoff, this volume), nongovernmental organizations (NGOs; chapter 11 Beisheim et al., this volume), 'traditional' authorities (chapter 12 Förster/Koechlin, this volume), and even warlords and rebel groups (chapter 14 Berti, this volume). In any case, the decisive criterion for assigning the responsibility to protect human rights is the capacity to do so effectively.

The second reply by pluralist theorists consists of a more critical review of the modern nation state as such. It contends that the four defining features of statehood – the monopoly of force, a defined territory, a permanent population, and the recognition by other states¹ – bear a unique potential for human rights protection but at the same time explain why states pose the greatest threat to human rights. Call this the problem of ambivalences of statehood.

The first ambivalence arises from the state's monopoly of force. This monopoly is crucial for enforcing collective decisions but also provides the tools for some of the most heinous violations of rights in human history. Beginning with John Locke's (1690) critique of Thomas Hobbes (1651), the danger of misuse of centralized state power led liberal thinkers to argue for a radical curtailment of state authority, the rule of law, and proper checks and balances.

The second ambivalence of statehood results from its territorial nature. Whereas in theory clearly defined territories create unambiguous and thus predictable spheres of authority, in reality state boundaries are often more part of the problem than the solution. They constitute – oftentimes deadly – obstacles for those trying to escape human rights violations elsewhere. What is more, they often cause seemingly irresolvable border disputes, between as well as within states. This second problem is particularly pressing as regards the borders in many post-colonial countries that have been drawn by colonialists irrespective of any local identities and loyalties (see Jackson and Rosberg 1982).

Similar problems arise from the criterion of a permanent population. This criterion can serve as an unambiguous and inclusive solution for determining the social scope of a state's responsibility. In practice, however, as evident from the long history of nationalism, rigid conceptions of citizenship often turned into a pretense to an unjust enforcement of homogeneity (Young 1989). Membership regimes that are supposed to be difference-blind tend to favor the majority population materially and symbolically at the expense of structural minorities (Longo

2001). This might cause deep mistrust resulting in violent struggles and, once again, widespread human rights violations.

A final source of ambivalence is the practice of international state recognition. This practice transforms a political unity into an accepted member of the society of states and thereby grants it the status of sovereign equality and legal personality. By granting states a number of privileges, claims, powers and immunities, this legal standing creates a protected sphere for collective self-determination and agency. Yet, it also provides unprecedented opportunities for abuse and corruption. Thomas Pogge (2002) and Leif Wenar (2016) have written extensively about the disastrous consequences of the state's privileges to dispose freely of natural resources and to borrow money on the international financial markets. These privileges not only facilitate the personal enrichment of officials, they also decouple the government's resources from their state's economic performance. Their most fatal consequence, however, is the tendency to incentivize the violent "capture" of state institutions (Englebert and Tull 2008).

Taken together the problems of feasibility and the ambivalences of statehood constitute serious objections against statism. Even if they might not suffice to refute this account entirely, they provide good reasons for examining more closely the pluralists' suggestion to explore the potential of human rights realization by non-state governance actors, particularly in areas of limited statehood.

The Instrumental Case for Legitimate Non-State Governance

The best case for human rights related governance by non-state actors can be made on outcome-oriented grounds. The basic idea here is that non-state governance in areas of limited statehood is legitimate if and to the extent that it improves the human rights situation of the people living in these areas. Conceptually, this implies an instrumental understanding of legitimacy: the "right to rule" is assigned to those governance actors that are expected to produce the best results (Raz 1986, Scharpf 1999, Van der Vossen 2011).

The instrumental approach raises two sets of questions: First, are already existing forms of non-state governance legitimate as institutional ways of realizing human rights? IOs, NGOs, traditional authorities, and transnational companies (TNCs) already engage in various governance activities. What are the normative standards to determine the legitimacy of these actors and their activities? Second, are there further politically influential actors who should be recognized as, or transformed into, governance actors for the sake of more effective human rights realization? Most TNCs, for instance, usually do not conceive of themselves as governance actors. If they engage in practices of governing at all, they are mainly driven by the strategic pursuit of other goals (chapter 13 Börzel/Deitelhoff, this volume). This applies even more obviously to warlords (chapter 14 Berti, this volume). Should actors like these engage in governance at all, and if so, should they be assigned further human rights related governance tasks (chapter 21 Berger/Lake, this volume)?

In order to capture the empirical variance as well as the different normative implications of non-state governance it is furthermore necessary to distinguish two forms of human rights related governance: the provision of public services, on the one hand, and the setting and enforcing of norms and rules, on the other (chapter 1 Börzel et al., this volume). The distinction between providing public services and setting/enforcing norms and rules, in turn, applies to both of the two questions raised in the previous paragraph. This leads us to the following two-by-two table:

Table 28.1: Types of Non-State Governance in Areas of Limited Statehood

	Public Services	Setting/Enforcing Norms
Existing non-state governance	e.g. NGOs	e.g. traditional authorities
Potential non-state governance	e.g. TNCs	e.g. warlords

Existing Non-State Governance to Provide Public Services

In many areas of limited statehood, actors other than state governments already take part in the production and provision of basic goods. Humanitarian aid organizations, for instance, offer shelter, food and basic health services. International and domestic NGOs aim to fill the gap left by states in terms of basic public services, from offering public education to rebuilding public infrastructure (Beisheim et al. 2014; chapter 11 Beisheim et al., this volume). IOs, too, operate in areas of limited statehood with the explicit purpose of engaging in governance (chapter 10 Lederer, this volume). The World Health Organization (WHO) or the World Food Program (WFP), for instance, provide basic health services or ensure access to food and water.

Often, non-state actors command quite considerable resources and thus have a real impact on people’s lives. In 2012, for example, *Medicines sans Frontiers* alone spent more on health-related activities than the governments of mid-sized African states such as Botswana, Cameroon, and Cote d’Ivoire (Rubenstein 2015: 164). Moreover, many humanitarian aid organizations, NGOs, and IOs possess a lot of expert knowledge and are also widely perceived as trustworthy. This makes it possible for them to provide public services efficiently and in a way that is sensitive to local needs and traditions. Crucially, however, they engage in this kind of governance as they see fit. They unilaterally determine which goods are provided, under which circumstances, and to whom. Normally, the recipients have no say in these decisions and cannot rely on the provision of the services. This is one of the reasons, why purely interactional approaches are insufficient and, in addition, institutional mechanisms for determining and implementing duties are required.

Existing Non-State Governance to Set and Enforce Norms

Some non-state actors in areas of limited statehood, such as IOs, engage in governance not only by providing public services but also by setting and enforcing norms. In places such as Kosovo or East-Timor, for instance, the United Nations established International Transitional Administrations (ITAs) that temporarily replaced what little remained of the state. These ITAs explicitly claimed the “right to rule” (Caplan 2005a; see also chapter 15 Lake on trusteeships, this volume).

Probably the most important non-state actors in this regard, however, are ‘traditional’ authorities (Holzinger et al. 2016; see chapter 12 Förster/Koechlin). They usually emerge from within long-established and deep-seated religious or clan structures. In many contexts of limited statehood, traditional authorities provide important welfare services. Moreover, they often also claim a right to set and enforce rules for the members of their own group, and sometimes even for outsiders. This is exemplified in the widespread practice of traditional authorities to adjudicate societal disputes on the basis of religious law (Kötter et al. 2015). A clear advantage of these forms of non-state governance is that they are often perceived as legitimate by the local population and are therefore able to govern quite effectively (chapter 16 Risse, this volume). Nevertheless, a crucial question concerning their normative legitimacy is whether traditional actors sufficiently respect, and adequately protect, the basic human rights of all those willingly

and also unwillingly subjected to their authority. For instance, religious law as applied by traditional authorities in areas of limited statehood often severely and systematically violates the human rights of women and people of different creeds (Rangan and Gilmartin 2002, chapter 16 Risse, this volume).

Potential Non-State Governance to Provide Public Services

In addition to the non-state actors discussed so far, there are also a number of influential non-state actors in areas of limited statehood that do not provide any human rights related public services, or far less than they could. With regard to these actors, the question is whether there are normative reasons why they should engage in governance, and if so, how they can be induced to do so. From an instrumental perspective, this question is particularly salient in the case of TNCs that are often attracted to areas of limited statehood by rich reservoirs of natural resources and cheap labor (chapter 13 Börzel/Deitelhoff, this volume).

The primary goal pursued by TNCs is economic profit, and it defines most of their activities. Under the particular conditions of limited statehood, however, the pursuit of their own strategic goals often makes it necessary for TNCs to also provide certain public services. Depending on the circumstances, they may have to secure their own facilities and also the residences of their employees. Or they may have to provide a basic level of health services in order to be able to draw on a reliable workforce of sufficient size. Whereas these activities are mostly driven by an economic logic, TNCs increasingly face public demands – by local and/or international actors – for further governance service, such as offering health care (Börzel and Thauer 2013). The usual claim is that TNCs are particularly suited to do so because they have financial resources, expertise and organizational capacities that extend far beyond those of most other actors in areas of limited statehood, including the states themselves.

Potential Non-State Governance to Set and Enforce Norms

Finally, we can ask whether there are further non-state actors who should not only provide public services but also set and enforce norms. This question is particularly challenging with regard to actors that command military power, such as rebel groups and so-called warlords (Reno 1999; see chapter 14 Berti, this volume). As described in the empirical literature, the political and/or economic goals of warlords often lead them to also provide certain politically relevant services. For instance, in order to protect their economic activities, warlords try to defend “their” territory against external threats and to prevent internal unrest. To gain or maintain popular support, they sometimes even provide basic social services. In a very direct way, namely by using brute force, warlords also impose their will on those who live on “their” territory. In fact, the longer “warlords” remain in power, the more they tend to institutionalize their rule (Bakonyi and Stuvøy 2005).

To be sure, in most cases even institutionalized kinds of rule by warlords are highly illegitimate both in procedural and in substantial terms. They tend to be despotic, violent and repressive. Nevertheless, from an instrumental perspective, warlords are also uniquely suited to set and enforce norms in situations where no other actor is able to establish any kind of public order. Moreover, at least in some cases warlords are perceived as legitimate in a way that resembles the empirical legitimacy of traditional authorities. Historically, there have been several cases in which warlords eventually became recognized, by local and international actors alike, as legitimate governance actors, sometimes even entering the state government (Blair and Kalmanovitz 2016).

The Limits of Instrumental Justifications

Instrumental theories of legitimacy conceptualize governance actors as means to specific collective ends (Schmelzle 2011, Van der Vossen 2011). They hold that coercive, or otherwise costly, policy measures are justified only if they achieve societal goals and solve social problems. The overview of actual or potential governance by different types of non-state actors in the last section has shown that these actors can indeed make an important contribution to the realization of human rights. Since the fulfillment of human rights is a fundamental goal of political institutions this record constitutes a strong case for granting non-state actors legitimacy as long as the benefits of their efforts surmount the costs.

Yet, our discussion has also already touched upon a number of normative problems. One set of problems pertains to the legitimacy of already existing forms of governance by non-state actors. They concern the choice of governance services offered, their inclusiveness, and the relationship between the recipients and the governance actors. Another set of problems is associated with the responsibilities of powerful non-state actors who *could* make an important contribution to the realization of human rights but frequently choose not to do so. In this section we will discuss these problems more systematically.

The Problem of the Definition of Goods

According to instrumental theories of legitimacy, governance by non-state actors is justified if it helps to achieve important societal goals. This notion of legitimacy raises two obvious questions: What are the problems that legitimize attempts to govern and what counts as a satisfactory solution? As it turns out, the answers to these questions considerably curtail the scope of instrumental theories of legitimacy.

Easy cases for instrumental accounts are pure coordination problems, such as whether to drive on the left or the right side of the road. In these scenarios, any stable solution to the problem is, almost by definition, in the interest of everyone. A second promising class of cases is the effective provision of basic goods such as food, shelter, and security. As argued above, secure access to these goods is in everybody's vital interest and thus counts as a human right. But the consensus ends quickly when we turn from the abstract description of problems to their interpretation in concrete cases and to the evaluation of possible solutions. For example: What are standard threats to a right in a specific social context? Which solution aligns best with the moral, legal and economic traditions of the recipients? What degree of protection is deemed satisfactory, and which costs are acceptable for those who would have to bear them?

The case of service provision by NGOs is a good illustration for the potentials as well as the limits of instrumental justifications. Usually, there is not a lot of controversy over service provision by aid organizations in case of humanitarian emergencies such as natural disasters. The task is clearly defined as providing means of subsistence, shelter and basic medical services for a limited period of time. Beyond the special circumstances of short-term emergency aid, however, the provision of public services through NGOs is more controversial. There might be disagreement about the value of the services that NGOs provide (e.g. fortified meals, Beisheim et al. 2014), as well as about the mid- and long-term effects of specific modes of provision on local politics and economies (e.g. the dumping of agrarian surplus goods that undermines local industries). These examples demonstrate that an NGO's prioritization of needs and its understanding of the ways local institutions function can differ substantially from the perceptions, expectations, or demands of the addressees. Even well-intentioned aid programs can turn quickly into, or at least be assessed as, illegitimate interventions.

Thus, an enormous potential for disagreement exists even over policy measures that aim at ending basic human rights violations, such as preventable malnutrition (chapter 23 Liese, this

volume). Hence, the “circumstances of politics” (Waldron 1999: 99-103) apply here as well: there is a need for social coordination through collectively binding rules, but disagreement about the content of these rules. In situations like these, instrumental justifications for governance are simply not applicable. Instead, legitimate governance can only be justified through fair procedures.

The Problem of Inclusiveness

A closely related problem concerns the question of inclusiveness. Non-state governance actors usually decide unilaterally which groups of people and which types of problems they want to address. This raises the question of the criteria non-state actors should apply for choosing between potential beneficiaries. Are children rights NGOs, for example, at liberty to offer educational opportunities exclusively to children? Or is a mining company justified in providing health care only to its employees, even if they could support the entire community where its mine is located? Under conditions of consolidated statehood, the unambiguous answer to both questions would be “yes”. NGOs and companies are private actors that are free – within certain legal limits – to choose which services they provide to whom and how much of their resources they invest towards this cause.

This points to an important difference between public and private actors as concerns their institutional roles. Public actors, such as states, are perceived by their subjects and the international community as having the institutional purpose to realize their citizens’ human rights (Beitz 2009). This purpose determines, at least in part, the nature and addressees of public services and also the amount of resources spent on their provision. The adequate fulfillment of human rights, in turn, is part of the justification of public authority and counts as a necessary condition for its legitimacy. This institutional role makes it possible to ascribe norms of impartiality and inclusiveness to public actors that we cannot simply extend to private organizations with different purposes and responsibilities. A case in point are companies that have the primary institutional purpose of generating profit for which they are responsible towards their shareholders (Friedman 1970). As a consequence, companies tend to provide governance services only insofar as they coincide with their business interests (Thauer 2014; chapter 13 Börzel/Deitelhoff, this volume).

The problem with this rather discretionary approach to non-state governance is that it leaves many needy and vulnerable persons unprotected. Individuals whose needs do not fit an NGO’s mission statement or do not coincide with a company’s interests are, systematically, out of luck. The question is then, whether normatively speaking the institutional roles of non-state governors are modified by conditions of limited statehood. Are they under an obligation to offer governance services on a more impartial and inclusive basis if state institutions are unable to attend to the basic needs of their people?

We can take the normative expectations that apply to short-term humanitarian aid as an indicator that the answer is “yes”. Emergency aid is regulated by a rather strict code of conduct² that is based on the principles of impartiality and neutrality (Rubenstein 2015: ch. 6). This can be explained by the degree to which recipients depend on foreign aid for their mere survival. The fact of dependency restricts the latitude of aid organizations and commits them to rather strict standards of impartiality and inclusiveness.

Maybe similar arguments can be made with regard to areas of limited statehood if we construe at least the most severe cases as permanent humanitarian emergencies. Jennifer Rubenstein, for example, maintains that the responsibilities of international NGOs like *Medicins sans Frontiers* approximate those of government institutions insofar as a NGOs’ “decisions about resource use resemble those of conventional governments” in terms of their importance

for the provision of governance services (Rubenstein 2015: 167). O’Neill (2001) and Neuhäuser (2011, 2017) make similar arguments with reference to TNCs. They defend a capacity based approach according to which, under conditions of limited statehood, an actors’ capacity to protect human rights suffices to assign it the responsibility to do so.

There are, however, three problems: First, it is quite unrealistic to expect the transformation in particular of TNCs into proper governance actors (see also chapter 13 Börzel/Deitelhoff, this volume). We may well pontificate that TNCs are under an obligation to become semi-public institutions in order to provide basic goods, but given the incentives of cooperate leaders and shareholders this will surely not happen on a large scale. On the contrary, stricter expectations regarding the provision of governance will most likely lead many TNCs to withdraw from areas of limited statehood. Political efforts should therefore concentrate on creating incentives (e.g. through legislation, public procurement and tax subsidies) and using market mechanisms (“naming and shaming”) to influence TNCs to protect human rights.

Second, transferring the responsibility to govern to private entities transfers the authority to do so as well. This is problematic as long as these actors still remain private entities that are not accountable to the subjects of their considerable power and could theoretically withdraw from their governance activities at any time. Recipients of governance would then at best gain access to basic goods, but they would still lack an effectively enforceable right against the providers.

Third, in order to ensure inclusiveness and a fair distribution of responsibilities, it would be necessary to coordinate the activities of different non-state governors. This would make meta-governance institutions necessary, which coordinate the governance efforts of non-state actors; we will turn to these kinds of institutions below.

The Problem of Control and Accountability

The last two sections have already shown that purely instrumental theories of legitimate governance face two problems: First, instrumental modes of justification have a limited scope since they are not applicable as soon as there is widespread disagreement about the nature and recipients of governance services. Second, they tend to create situations of unchecked power since they transfer the authority to govern to resource-rich non-state actors that remain, at least in part, private entities.

Both problems point to the same ideal solution: Democratic institutions that enable both the fair and equal participation of the governed in the formulation of policy goals, and the effective control of the rulers by the ruled. Under conditions of limited statehood, however, the democratic control of non-state actors is usually not an option. Consequently, in most cases the quest for effective means of participation and control is a search for second-best solutions (Rubenstein 2007).

The problem of accountability of non-state actors within areas of limited statehood is similar, in that regard, to the difficulty of holding global governance institutions accountable (Grant and Keohane 2005). Coming from this debate, Leif Wenar (2006) discusses the accountability of development NGOs – who, at least rhetorically, embrace the participation of the governed emphatically (see also chapter 11 Beisheim et al., this volume). Wenar points out that stricter regulation and standards of evaluation have increased the “upward accountability” towards donors, contracting authorities and regulating bodies considerably. Increasing the “downward accountability” towards the governed, however, has been less successful: Despite the rhetoric of stakeholder involvement, participatory development and local ownership, aid recipients have at best a limited influence on the setting of standards and the evaluation of

programs and usually lack the power to sanction inadequate performances completely (Rubenstein 2015, Wenar 2006).

Another example for checking the power of external actors can be found in the debate on large-scale UN-missions that claim the authority to set and enforce norms (Jacob 2014: 121-26, see chapter 15 Lake, this volume). These interventions are characterized by stark power asymmetries between external actors and local populations that make the question of how to hold governance actors accountable particularly pressing. In response, Richard Caplan (2005b) emphasizes the fundamental requirement of transparency and describes different ways in which local actors can be included in the daily operations of IOs, for example as employees or as members of a formal consultative council. Jarat Chopra and Tanja Hohe (2004) extend this latter aspect by arguing for “participatory interventions” that provide the recipients of development aid with institutionalized mechanisms for effective participation. But they also note the danger of thereby inadvertently strengthening illegitimate power relations on the ground, since the parties most likely to participate are “strongmen” and local elites.

The limited success of such efforts has systemic causes: External governance actors – whether state or non-state – have to balance their “downward” accountability towards the governed with their “upward” accountability towards donors, contracting authorities and regulating bodies, their states of origin, shareholders, and so forth. Often, their financial and legal existence depends on complying with standards set by these principals. This leaves little room for accommodating the interests and preferences of the governed and makes it almost inconceivable to grant them sanctioning power. Given these structural problems, the problems of control and accountability can only be solved by fundamentally altering to whom duties of accountability are owned: Away from the principals and towards the governed. This shift would in turn at least partly transform non-state actors into public actors.

The Problem of Assigning Responsibilities

The fourth problem concerns the question of whether and under what conditions it is obligatory for an actor to provide governance services. It is mostly uncontroversial by now that private companies have a moral duty to respect human rights. To this end, in 2011 the United Nations Human Rights Council endorsed the “Guiding Principles on Business and Human Rights.” These principles, which draw on important conceptual work by John Ruggie (2007), emphasize the primary responsibility of states for the protection of human rights but also demand an additional “corporate responsibility to respect human rights”. Another question, however, is whether private companies also have a duty not only to refrain from violating human rights (which they still do all too often) but also to actively provide certain governance services (chapter 13 Börzel and Deitelhoff, this volume).

Above, we mentioned one answer to this question proposed by authors such as Neuhäuser or O’Neill. Their capacity-based approach holds that the ability to protect human rights determines the extent of the responsibility to do so. This approach renders an actors’ original institutional role and organizational purpose irrelevant for its human rights obligations (O’Neill 2001: 193). In a recent contribution to this debate, Neuhäuser (2017) has related this larger debate on the moral responsibility of companies to the more specific debate on limited statehood. He argues that an instrumentalist understanding of our human rights obligations requires us to depart from an exclusively state-centered understanding of human rights protection in areas of limited statehood. If assigning private companies the responsibility for protecting human rights is likely to provide the best available outcome, then in principle we should do so.

There are, however, several problems with this approach (see Karp 2014: ch. 5, Schmelzle 2015: ch. 4): First, the distribution of human rights-related responsibilities solely on

the basis of capacities might be unfair to potential responsibility-bearers since it fails to take their individual projects, purposes and other responsibilities into account. Second, this mode of allocation undermines already institutionalized structures of responsibility by letting actors who are officially responsible off the hook if they are not the most capable actors in their jurisdiction. Third, since the responsibility to govern also implies the right to do so, capacity-based approaches not only allocate responsibilities, but also political authority. This might be counter-productive, if the authorized actors are unwilling to use their power for the purpose of protecting human rights, and illegitimate, if the underlying power structures are unjust.

Drawing on these types of arguments, David Karp (2014) has recently presented a different approach for assigning human rights obligations to non-state actors. He argues that the responsibility to protect human rights should be assigned to all actors that qualify as *public*, and only to those. An actor becomes a public actor if it exercises *de facto* political authority (Karp 2014: 6). The exercise of *de facto* political authority, in turn, has empirical and a normative components: *De facto* political authorities (a) provide collective goods for a community, (b) are expected by the community to do so and (c) accept their political role voluntarily.

In the case of TNCs in areas of limited statehood, the last element is crucial. If companies really exercise authority, they inherit the responsibility to actively protect human rights. Yet, as Karp notes, “In practice, many TNCs will either fail to attain this kind of authority, or else will give it up once it is made clear to them that, along with political authority, comes a set of non-discretionary human rights responsibilities that will severely curtail their capacity to pursue their other ends and projects” (Karp 2014: 149). If TNCs act as political authorities, then they assume certain human rights related obligations. They are, however, under no obligation to accept the role of a public actor in the first place (for an empirical evaluation see chapter 13 Börzel/Deitelhoff, this volume).

Karp rightly argues that the mere capacity to protect human rights is not a sufficient criterion for assigning the responsibility to do so. His publicness approach is an important step forward insofar as it emphasizes that the responsibility to protect human rights is a public political role that presupposes some form of normative relationship between governance actors and beneficiaries. It has, however, one important problem of its own: It depends on the willingness of private actors such as TNCs to transform themselves into public actors by not only providing public goods, but also by accepting the institutional role of having the responsibility to do so in an inclusive and non-arbitrary way.

Public Institutions: The Solution?

The problems discussed in the previous section show the shortcomings of non-state governance and of instrumental accounts of legitimacy more generally. The problems of how to define the relevant goods and how to control the power of non-state actors most clearly indicate the limits of such accounts. When disputes arise over the outcome to be achieved or the means by which to provide it, an instrumentalist justification is no longer feasible. After all, the very standard by which to evaluate the actions of governance actors is then put into question. In the absence of substantial agreement on the outcomes to be achieved, governance thus also requires a procedural justification. The problem of limited inclusiveness and the problem of motivating actors to provide certain governance services, moreover, indicate the need for actors that have the institutional role to provide governance services in an inclusive and reliable manner.

These limits of instrumental accounts of legitimacy have informed much of our thinking about the legitimacy of states. Ideally, states offer a solution to both types of problems: They make political participation and public accountability possible, and they imply strong role obligations to act inclusively, impartially, and reliably. In principle, the state provides an attractive

model for overcoming the deficiencies of purely instrumental legitimacy. The promotion of legitimate statehood as far as possible therefore remains an important normative goal (see above).

Given the ambivalences of statehood as well as the all too obvious failures of state-building interventions, however, the international community also needs consider alternative paths of increasing the legitimacy of governance in areas of limited statehood. One way to do so would be to transfer certain features of statehood to other actors without thereby transforming them into full-blown states. Following Karp (2014), we assume that the normative attractiveness of state institutions primarily flows from their public character and that it is also possible for non-state actors to adopt public roles. But what exactly does it mean for an actor to occupy such a role? And under what conditions do private actors become at least partially public agents?

Generally speaking, roles are normative tools that assign bundles of rights and responsibilities to role-holders in order to achieve some role-specific purpose or function (see Hardimon 1994). Roles are usually constraining and empowering at the same time: They confer upon role-holders specific rights and authorities, but they also establish lines of accountability and regulate the use of these rights.

The purpose of public roles is the provision of public goods. Holders of public roles are defined as agents of the public and subject to the standards of evaluation that it sets. This principal-agent relationship is consequential for the substantial and procedural norms that govern their conduct. With regard to substantive standards, public agents are bound by norms of impartiality, inclusiveness, and reliability that do not apply equally to private actors. What is more, public agents are also subject to mechanisms of accountability and participatory procedures that empower the public to define the tasks, rights, and duties of role-holders and to control the conduct of individual agents.

The substantial and procedural norms that regulate the conduct of public agents seem a promising remedy for the problems of governance by non-state actors described above. Participatory mechanisms and norms of public accountability address the two problems of how to define the relevant goods and how to control the actions of non-state governance actors. They help to mitigate the power asymmetries between those governing and those governed and promote the active involvement of the latter in determining the relevant goods and services. The standards of impartiality, inclusiveness and reliability in turn ensure that neither decisions regarding whether to provide governance services in the first place nor decisions regarding the scope and mode of distribution depend on the arbitrary will of governance actors.

How, then, can non-state actors transform or be transformed into public agents? Drawing on a classical distinction by Kurt Baier (1972, see also Neuhäuser 2011: ch. 4) on types of gaining responsibility, we can distinguish between three ways of how a (potential) governance actor can become a public role-holder: By *assuming* a public role, by being *saddled with* such a role by dire circumstances, or by having such a role *assigned* to through a political process. All three ways are relevant for areas of limited statehood.

The first way of becoming a public role-holder is through voluntarily assuming such a role. An actor assumes a public role if it declares itself to be a public agent that is accountable to the public and acts in its name or at least claims the right to set and enforce binding norms. In areas of limited statehood these strategies are highly relevant for non-state armed groups such as warlords, rebel groups, or secessionist movements that seek to gain international recognition (Krieger 2015, chapter 14 Berti, this volume). Even if these actors are usually more interested in the rights of public agents than in the corresponding duties and responsibilities, the international community may nevertheless be well advised to use its most powerful incentives for fostering such a transformation. Recognition and access to the resources of the international

system could be made conditional on whether armed groups accept the responsibilities of public roles and recognize principles of public accountability and basic norms of inclusiveness and reliability.

Being saddled with a public role through the force of dire circumstances is the second way of becoming a public agent. One example that we already touched upon are cases of humanitarian emergencies. If an actor finds itself in a situation in which the very survival of many depends upon its actions, then this alters its responsibilities and possibly also its rights at least for the duration of the emergency. Genuine humanitarian crises can push every type of actor into a public role and alter its rights and responsibilities accordingly. This implies, for example, that TNCs lose their right to exclude outsiders from their health care facilities in cases of emergency. Extended too far, however, this principle has two major flaws: It tends to distribute power and responsibilities unjustly and creates adverse incentives to disengage from instead of engaging in areas of limited statehood.

Finally, public roles can be assigned through political processes. A standard case of such assignments, at least in consolidated states, is the election or appointment of candidates for public roles through established legal procedures, whereby the rights and responsibilities of private and public actors alike are determined by political institutions. The process of defining and assigning powers and responsibilities within an institutional system can be defined as meta-governance (cf. Wolf 2006). This is a classic example of what political theory takes to be a prerogative of states. The obvious problem for areas of limited statehood, however, is that domestic institutions are usually incapable of effective meta-governance. Under these conditions, it is in principle conceivable that other actors step in. For example, some of the activities that IOs pursue in areas of limited statehood can be understood as meta-governance, too. The coordination of donors, the efforts to hold TNCs accountable to human rights standards or to even the attempts to include non-state armed groups into the regime of humanitarian law can all be understood as examples of this practice (see chapters 10 Lederer and 27 Krieger, this volume).

An important alternative to the assignment of public roles through international organizations is the treatment of specific actors simply as if public roles were officially assigned to them. Communities can try to persuade – or pressure – non-state actors into accepting public responsibilities, norms of inclusiveness and reliability, and structures of public accountability. One example is the practice of either persuading or “naming and shaming” TNCs into accepting stricter corporate social responsibility standards (Spar and La Mure 2003, Winston 2002; see chapter 13 Börzel/Deitelhoff, this volume).

All in all these different ways of transforming non-state actors in public agents will not be applicable to every case of limited statehood, nor will they be able to solve all of the problems that we identified above. And even if applied successfully the result will not be equivalent to an effective and legitimate state. Nevertheless, these strategies provide viable routes for making non-state governance more just and more legitimate under severely non-ideal conditions.

Conclusions

The need for meta-governance most clearly proves that sufficiently functioning states still have an important role to play in effective and legitimate governance. Does this in the end mean, however, that governance in areas of limited statehood is nothing more than a temporary placeholder for governance by government? For the two reasons discussed above, this would be a fallacy. First, state-building is time-consuming and unreliable at best, and external actors evidently have a poor record in positively contributing to it (see chapters 15 Lake and 29 Brozus et al., this volume). On that ground alone, we should also be interested in the actual and potential

contributions of non-state actors. We should take governance in areas of limited statehood seriously as governance *sui generis* instead of focusing exclusively on the ideal end state of a consolidated democracy under the rule of law. In extreme cases, there will simply be no alternative to the voluntary contributions of non-state-actors, if any basic goods shall find their way to any of those who need them urgently. Even an uncontrolled and fragile provision of these goods might then be better than no provision at all. This is the true core of the instrumentalist approach. But we should also be aware of trade-offs. Measures that might improve the human rights protection of some people in the short term might at the same time contribute to a further weakening of already fragile state structures.

Second, given the ambivalences of statehood, rebuilding such structures is not an end in itself, nor is it always desirable. It is only an aim worth striving for if it is sufficiently likely to result in a strong yet responsible statehood. State institutions must be sufficiently centralized in order to prevent, or to end, social fragmentation and to solve problems of meta-governance. Yet at the same time, states must have formal and informal mechanisms of power-sharing and of checks and balances including the rule of law (Acemoglu and Robinson 2012; chapter 2 Krasner, this volume).

In areas of limited statehood, however, states are often particularly ill-suited for implementing power-sharing and accountability. At least of equal importance are societal sources of accountability: civil society actors, independent media and sometimes even strong and charismatic personalities who represent traditional authority structures (Siegle 2012). Such sources are of utmost importance during the long and open-ended processes of strengthening statehood, and, for the reasons already mentioned, they would still be important, if such processes finally succeed. As a consequence, assuming a strategic choice between state building and governance building is misleading (see, however, chapter 29 Brozus et al., this volume). We are not faced with a general alternative to contribute either to state building or to societal mechanisms of responsible governance. If external actors can contribute anything at all to improve the human rights situation under conditions of limited statehood, they are well advised to do the one without neglecting the other.

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Notes

1 These features draw on the criteria for statehood laid down in the Montevideo-Convention on the Rights and Duties of States from 1933.

2 “The Code of Conduct of The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief” regulates the disaster response work of hundreds of NGOs.