

BETWEEN NON-INTERVENTION AND THE PROTECTION OF HUMAN RIGHTS: A MORAL ARGUMENT IN DEFENSE OF HUMANITARIAN INTERVENTION

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Abstract

Although humanitarian intervention has been a recurrent issue in moral and political philosophy for some years, much disagreement over its moral justifiability persists among scholars. The common denominator of previous views is their reliance on the assumption that solving the moral problem of humanitarian intervention comes down to making a choice between preserving sovereignty or protecting human rights. The present thesis follows a different strategy: it proceeds from an understanding of the moral puzzle humanitarian intervention presents us with by exploring the philosophical underpinnings of sovereignty and human rights. I argue that humanitarian intervention is morally justified when human rights violations are purposive, systematic, extensive, and preventing or ending them represents an emergency, because it aims to restore a genuine form of sovereignty, consistent with its moral rationale (the sovereignty-centered argument). Additional requirements deriving from this purpose further constrain the justifiability of humanitarian intervention.

Keywords: humanitarian intervention, sovereignty, human rights, moral permissibility

1. Introduction¹

Humanitarian intervention represents the infringement of a state's sovereignty through the use of force by an external agent – one state, a group of states, a regional or global organization - with the purpose of preventing or putting an end to grave violations of the human rights of the citizens' of the state whose sovereignty is infringed, without the consent of the said state.² Although the topic

1 This article represents a shortened version of my MA thesis submitted at Central European University and defended in June 2011. I want to express my gratitude to my professors and colleagues, especially to my supervisor, Professor Zoltan Miklosi, for their invaluable advice and support.

2 This definition is modeled after J. L. Holzgrefe. "The humanitarian intervention debate," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003). 18, and Allen Buchanan. *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010), 201. It rules out other forms of international action commonly associated with humanitarian intervention: non-forcible interventions (economic and diplomatic sanctions, symbolic sanctions such as the interdiction to take part in international sports competitions),

has been subject to arduous debate among philosophers, much disagreement over its moral permissibility persists. The high incidence of grave human rights violations the world has witnessed in its recent history forces us to take the problem of humanitarian intervention seriously and come up with a solution to the following question: is humanitarian intervention ever justified, and if so, when? The purpose of this paper is to provide a moral defense of humanitarian intervention.

The philosophical scholarship on humanitarian intervention suggests that solving the moral problem of humanitarian intervention comes down to making a choice between preserving sovereignty and the corresponding right to non-intervention and protecting human rights. I contend that the alleged necessity of this choice is false and propose a different strategy. The view I defend proceeds from an understanding of the moral puzzle humanitarian intervention presents us with, by exploring the philosophical underpinnings of sovereignty and the corresponding norm of non-intervention on the one hand, and those of human rights on the other. I argue that humanitarian intervention is morally justified when human rights violations are purposive, systematic, extensive, and preventing or ending them represents an emergency, because it aims to restore a genuine form of sovereignty, consistent with its moral rationale. Also, given the multiple risks it presents, the justifiability of humanitarian intervention is further constrained by a series of requirements.

The novelty this view brings to the debate is to show that responding to the moral challenge that humanitarian intervention presents us with does not require giving up on either state sovereignty with its norm of non-intervention or on human rights, but instead coming to a proper understanding of their philosophical underpinnings, which are ultimately compatible. Also, it shows that the question of the justifiability of humanitarian intervention cannot be answered in either/or terms, but needs a more nuanced discussion. The sovereignty-centered argument defended here imposes special constraints on the conduct of humanitarian intervention that derive from its purpose, that of restoring a genuine form of sovereignty.

From a methodological standpoint, this paper represents an exercise in "institutional theory": it takes some facts of the world – such as the existence of an international system of sovereign states – as pre-theoretical and begins the argument from there³.

rescue missions in which the intervening state aims to protect its own citizens living on a foreign territory, and cases of civil war and state breakdown when the government or the political elite asks for foreign help to reinstall the social and political order.

3 Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30,(July 2001): 257-296.

The paper is structured as follows: in Section I, I present and discuss the main concepts and theories that constitute the theoretical body of the paper with the purpose to outline and explicate the puzzle of humanitarian intervention; in Section II, I provide a critical overview of the state of the art in the debate over the justifiability of humanitarian intervention; Finally, in Section III, I develop the sovereignty-centered argument, which represents a better equipped justificatory account of humanitarian intervention.

2. The Puzzle of Humanitarian Intervention

In order to be able to spell out the puzzle of humanitarian intervention, a more thorough understanding of the main concepts from which it is composed is required: sovereignty with the corresponding norm of non-intervention and human rights.

One way to conceive of sovereignty is, following John Simmons, as a body of rights that legitimate states have a claim to. These can be divided into three categories, “rights over subjects” – “a set of rights held over or against those persons who fall within the state’s claimed legal jurisdiction”, “rights against aliens” – “rights claimed against those persons without the state’s jurisdiction”, and “rights over territory” – “rights held over a particular geographical territory (whose extent largely determines the scope of the state’s jurisdiction)”.⁴ Table 1 below provides an overview of the main rights that reasonably just states claim to possess.

Among these, the most important rights for the purposes of this paper are the ones in the second category, first and foremost the right to non-interference. This right is formalized in international law through the principle on non-intervention stated in the article 2.4 of the UN Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁵

It is important to note that the principle of non-intervention is a norm of *jus cogens* – the set of highest level norms in international law.

4 A. John Simmons, “On the Territorial Rights of States,” *Philosophical Issues* 11 (2001): 300-326, 300.

5 United Nations, *Charter of the United Nations* (San Francisco: United Nations, 1945).

Table 1: The Rights of Sovereign States⁶

Rights over subjects	Rights against aliens	Rights over territory
the exclusive right to make and enforce law within the state's jurisdiction	to non-interference, self-determination	"to exercise jurisdiction over those within the territory"
to be obeyed by the state's subjects	"to do 'business' in the world", including to wage war	"to reasonably full control over land and resources within the territory that are not privately owned"
"to threaten all subjects with the legal use of coercion and use such coercion against non-compliers"		"to tax and regulate uses of that which is privately owned within the state's claimed territory"
		"to control or prohibit movement across the borders of the territory"
		"to limit or prohibit 'dismemberment' of the state's territories"

One point that needs further discussion is what it means for a state to be legitimate and when it can be recognized as such. These issues are captured by the concept of "recognitional legitimacy". According to Allen Buchanan, this is defined by its *function* - "to make or deny judgments about the status of entities in the international legal system", *content* - the body of rights that independent statehood gives a claim to, the most important of which were presented above, and *criteria of application*.⁷ In what regards the latter, there are four traditional ones, stated in the Montevideo Convention (1933), to which the modern legal practice adds a fifth. Accordingly,

an entity is entitled to recognition as a state if and only if it possesses (1) a permanent population, (2) a defined territory, (3) a functional government able to control the territory in question, (4) the capacity to enter into relations with other states on its own account", and if "(5) in coming into being, an entity that claims to be a state [did not breach] a (basic) rule of international law."⁸

6 Ibid., 305-306.

7 Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy and Public Affairs* 28 (Jan. 1999): 46-78, 48-49.

8 Ibid., 49-50.

Buchanan argues for a “justice-based account of recognitional legitimacy”, one that adds to the five criteria noted above “the nonusurpation condition”⁹ and “the minimal internal and external justice condition”. The requirements of minimal internal and external justice are intelligible in terms of basic human rights: an entity that wishes to have a legitimate claim to independent statehood must protect basic human rights within its borders, and refrain from their violation beyond them.¹⁰ We are thus presented with an account of recognitional legitimacy that comprises both descriptive and normative criteria. An entity that only meets the former does not have a legitimate claim to independent statehood and therefore does not have a claim to sovereignty. This position could provide an immediate solution to the problem addressed by this article: a state that systematically violates the basic human rights of its citizens does not have a legitimate claim to sovereignty, which makes military intervention on that state’s territory permissible because no right would be thus infringed. However, there are at least two reasons for being skeptical.

First, the problem of humanitarian intervention arises in the context of an already established system of sovereign states, some of which engage in gross violations of human rights. These states are simultaneously sovereign (at least from a legal standpoint) and internally illegitimate. The question is what justice requires from the international community in such situations: to respect those states’ sovereignty and their right to non-intervention and do nothing except trying by diplomatic means to persuade them to become legitimate, or to infringe their sovereignty and impose sanctions on them, culminating with military intervention in the most serious cases, thus forcing them to become legitimate. Saying that those states do not have a legitimate claim to sovereignty and therefore are not protected by a right to non-intervention is the easy way out, a means to dissolve the problem rather than of attacking it. And if law is to have any relevance for morality, as I believe to be the case, then a moral argument that eludes the legal reality is not one worth considering.

The second reason for rejecting this view has to do with the broader consequences of adopting it. Sovereignty and the right to non-intervention protect states not only from interventions with humanitarian purposes, but also from other forms of international action, such as wars of aggression or peaceful annexations. In the justice-based account of recognitional legitimacy, a state that engages in gross violations of its citizens’ human rights, by not having a claim to sovereignty, is not only liable to humanitarian intervention, but to other practices that sovereignty generally shields states from, practices that we consider impermissible under any circumstances. This means that a persuasive justificatory account of humanitarian

9 “Where institutional resources are available for constitutional change, an entity that comes into being by displacing or destroying a legitimate state by nonconstitutional means is itself illegitimate”. Buchanan, “Recognitional Legitimacy,” 49-50.

10 Buchanan, “Recognitional Legitimacy,” 52.

intervention has to say something about what makes it different from other forms of international action such as aggressive war or peaceful annexation, which turns on our moral reasons for holding sovereignty valuable.

Sovereignty and non-intervention are not solely legal concepts as there are solid, independent moral reasons underlying them. John Rawls, in *The Law of Peoples*, lists sovereignty and non-intervention among the principles of justice that free and democratic peoples would agree upon in the second original position.¹¹ Walzer sees the rights of states (“political communities”) – “territorial integrity and political sovereignty” - as both analogous to and derivative from the rights of individuals within the state.¹² The mechanism of derivation is a “consent of a special sort”, resulting from “a process of association and mutuality, the ongoing character of which the state claims to protect against external encroachment”.¹³ Two points emerge here: first, the primary role of states is to protect the rights of individuals within the state and sovereignty is instrumental to that end; and second, the state is not merely a collection of individuals, but the result of an ongoing “process of association and mutuality”, which individuals come to identify with and value in itself.¹⁴ Sovereignty is instrumental to protecting the intrinsic value individuals assign to their political community too.¹⁵

A similar view stems from the liberal tradition. For liberals, sovereignty and the right to non-intervention reflect and protect individual liberty and dignity. They allow individuals to work out their political, economic, social and cultural life together on their own, without foreign interference. In order for democracy and freedom to be meaningful for the members of a political society, they need to be the outcome of their own actions and deliberation.¹⁶ Both Immanuel Kant and John Stuart Mill consider that foreign intervention in domestic affairs, even in times of deep crises, would undermine the authenticity of the political community and would deny its members the right and capacity to set up the institutions to govern their life

11 John Rawls, *The Law of Peoples: with, The Idea of Public Reason Revisited* (Cambridge, Mass.: Harvard University Press, 1999), 37.

12 Michael Walzer, *Just and Unjust Wars: a moral argument with historical illustrations* (New York: Basic Books, 1992), 53, 58.

13 Ibid., 54.

14 Charles R. Beitz, “The Moral Standing of States Revisited,” *Ethics & International Affairs* 23 (Winter 2009): 325-347, 338.

15 This intrinsic value of the political community has nothing to do with the kind value nationalist and fanatic communitarians assign to it. This value is subjective in the sense that it is as such for the individuals living in the community. The foreigners’ respect of that value derives from the respect owed to the individuals living in the community.

16 Michael Doyle, “A Few Words on Mill, Walzer, and Nonintervention,” *Ethics & International Affairs* 23 (Winter 2009): 349-369, 352.

together.¹⁷ Moreover, freedom achieved through the interference of another agent would not last, for people would not value it the same way they would value freedom achieved through their own struggle, and they would miss the political capacities to maintain it.¹⁸ In short, the moral underpinnings of sovereignty and non-intervention are reducible to ideas of human dignity, autonomy, and self-government; they express the idea that the value of a political society stems only in part from the substantive values it embodies - such as democratic principles and various freedoms – the rest deriving from it mirroring the beliefs and desires of its members, which represents the standard of its authenticity and the guarantee of its persistence; sovereignty and non-intervention represent an expression of trust in the equal capacity of human beings worldwide to set up the most appropriate institutions meant to govern their political societies.

These views suggest that the moral rationale underlying sovereignty is individualistic in nature. Following Beitz, three dimensions of this rationale are distinguishable. The first is “strategic”: sovereignty is instrumental for the attainment of values such as individual liberty, dignity, and self-government; moreover, sovereign states represent the best institutional arrangements for the protection and promotion of these values.¹⁹ The second dimension is “developmental”: it is only through their own workings and deliberation that people can develop the capacities required in order to create and sustain effective institutions; moreover, this process ensures the institutions’ authenticity and persistence. The third dimension is “constitutive”: sovereignty protects the distinctive character of the political community, which is constitutive of its members’ identities, and which they come to value in itself.²⁰ This shows us that there is more to sovereignty than the protection of the rights of the individuals living within the states.

The second core concept this paper relies on is human rights.²¹ The philosophical literature roughly distinguishes between two major types of conceptions of human

17 Immanuel Kant, *Perpetual Peace: a Philosophical Sketch* Available at <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>, accessed May 2011; John Stuart Mill, “A Few Words on Non-intervention,” in *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education*, ed. John M. Robson, Introduction by Stefan Collini (Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1984) Available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=255&search=%22A+Few+Words+On+Non-intervention%22&chapter=21666&layout=html#a_809352, accessed February 2012.

18 Mill, “A Few Words,”; Doyle, “A Few Words on Mill,” 352-353

19 See Robert Goodin, “What is So Special about Our Fellow Countrymen?,” *Ethics* 98 (Jul. 1988): 663-686.

20 Beitz, “The Moral Standing,” 338.

21 The legal dimension of human rights is left out due to the space constraints this article is subject to. For a comprehensive and up to date overview of the international human

rights: traditional conceptions and political ones. Traditional conceptions take human rights to be those rights that human beings possess simply by virtue of their humanity.²² James Griffin, one proponent of this conception, sees human rights as being moral rights grounded in the conjunction of two elements: “normative agency”, understood as “our capacity to choose and to pursue our conception of a worthwhile life”, which he believes represent the defining feature of our humanity; and “practicalities” - “human nature” and “the nature of society” – which come into play for reasons of effectiveness, more specifically because normative agency alone “is often not up to fixing anything approaching a determinate enough line for practice”.²³ The sustenance of normative agency requires three things: autonomy, liberty, and welfare. Being autonomous means being left to develop one’s own conception of a worthwhile life without external pressure or control; liberty – understood as negative liberty – is what gives one the necessary space in order to act upon one’s personal conception of a worthwhile life; finally, some minimal welfare – education, health care, resources - is required in order for one’s exercise of autonomy to be meaningful. One important merit of Griffin’s conception is that he succeeds in answering the question about the distinctiveness of human rights. Moreover, it provides a valid test for establishing which of the rights thought of being human rights are genuinely so.²⁴

However, as Barry and Southwood note, this conception is vulnerable to two major objections: first, by taking what the protection of normative agency requires as the proper standard for something to be a human right, Griffin’s conception fails to account for some of the most intuitively plausible human rights, such as the right against racial discrimination;²⁵ and second, “it fails to account for (...) the political aspect of human rights” in the sense that it does not include any sort of “organized political authority” (e.g. the state) that can be held under a duty to protect and promote human rights.²⁶

rights regime, see James Nickel, “Human Rights,” *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Fall 2010 Edition), URL <http://plato.stanford.edu/archives/fall2010/entries/rights-human/>, Accessed May 2011.

22 Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 49.

23 James Griffin, *On Human Rights* (Oxford; New York: Oxford University Press, 2008), 45, 37.

24 Christian Barry and Nicholas Southwood, “What Is Special about Human Rights?,” Review of *On Human Rights*, by James Griffin, and *The Idea of Human Rights*, by Charles Beitz. *Ethics and International Affairs* 25, (forthcoming), 5-6.

25 The argument Barry and Southwood make is that it is not clear in which sense racial discrimination can harm normative agency in such a way as to deny it. One important point here is that Griffin conceives of human rights as what is needed to protect minimally functional normative agency Barry and Southwood, “What Is Special,” 6-7.

26 Barry and Southwood, “What Is Special,” 6-8.

Critical of this latter aspect, political conceptions take the function human rights perform in the international society to be the correct starting point for a philosophical account of human rights. According to Raz, a theory of human rights has two tasks: first, "to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights"; and second, "to identify the moral standards which qualify anything to be so acknowledged".²⁷ Traditional conceptions limit themselves to the second task, which renders them unhelpful in making sense of the contemporary human rights doctrine. In his very short passage on human rights from *The Law of Peoples*, Rawls is the first to describe what is called a political conception. According to him, human rights play three important roles in "a reasonable Law of Peoples":

1. their fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order; 2. their fulfillment is sufficient to exclude justified and forceful intervention by other peoples (...); 3. they set a limit to the pluralism among peoples". These roles mark the distinctiveness of human rights as compared to "constitutional rights" or "rights of democratic citizenship".²⁸

Following Rawls, Raz takes as the starting point of his conception contemporary human rights practice. This provides the solution to the first task: "the dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against the violator in the international arena". From here the solution to the second task follows: "human rights are those regarding which sovereignty-limiting measures are morally justified".²⁹ Beitz's conception is roughly similar: for him the practical role of human rights is the establishment "of a set of norms or the regulation of the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons".³⁰ Etinson notices that regarded this way, human rights establish "a normative division of labor between states as the bearers of primary responsibilities to respect and protect these urgent interests, on the one hand, and the international community (and those acting as its agents) as the guarantors of these responsibilities, on the other".³¹ Consequently, in order for something to qualify as a human right, it must: 1) protect "a sufficiently urgent or important individual interest"; 2) domestic institutions are likely to behave in a way that endangers that interest in the absence of a right to protect it; and 3) the

27 Joseph Raz, "Human Rights without Foundations," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010). 321-338, 327.

28 Rawls, *The Law of Peoples*, 79-80.

29 Raz, "Human Rights," 328-329.

30 Beitz, *The Idea of Human Rights*, 8.

31 Adam Daniel Etinson, "To be or not to be: Charles Beitz on the Philosophy of Human Rights. Review of *The Idea of Human Rights*, by Charles Beitz," *Res Publica* 16 (June 2010): 441-448, 444.

international community disposes of permissible modes of action whose effective carrying out would lessen the likelihood of that interest to be endangered.³²

Political conceptions fare better than traditional ones in accounting for some widely acknowledged human rights, and, most importantly, by identifying states as the primary duty-bearers, they manage to clarify the political aspect of human rights. However, there are important objections that can be raised against them. Barry and Southwood note two: first, by relying too much on the actual practice, they render human rights dependent upon the empirical facts of the setting in which the practice takes place; second, and most problematically, they blur the distinction between human rights as such and their institutionalized form.³³

Ronald Dworkin raises a third objection, which refers to the threshold political conceptions establish for something to count as a human right. For him, human rights, just as political rights, represent “trumps over otherwise adequate justifications for political action”.³⁴ In Dworkin’s reading, political conceptions locate the distinctiveness of human rights in their acting as trumps over national sovereignty understood in the Westphalian sense. Besides other problems associated with this view, he believes that “the trumps-over-sovereignty idea seems to set too high a bar”, resulting in a very short list of human rights that does not match the lists included in international legal documents and advocated for by international human rights activists. The strategy he suggests for distinguishing human rights from political rights is to shift the level of abstraction:

though people have a political right to equal concern and respect on the right conception, they have a more fundamental, because more abstract, right. They have a right to be treated with the attitude that these debates [about what political rights people have] presuppose and reflect – a right to be treated *as* a human being whose dignity fundamentally matters.³⁵

The latter is, according to Dworkin, “the basic human right”. In this view, violations of human rights are represented by policies that manifestly express the opposite attitude to members of the political community.³⁶

Given the strengths and weaknesses of the two types of conceptions, I would like to propose a mixed conception, one that grounds human rights in a substantive value,

32 Ibid., 444.

33 Barry and Southwood, “What Is Special,” 13-16. Their criticism refers to Beitz’s version. However, I believe it can be extended to the Rawls/Raz version as well.

34 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011), 329, 332.

35 Ibid., 335.

36 Ibid., 332-335.

but takes into account the contemporary practice as well. I shall define this conception along four dimensions proposed by Mathias Risse.³⁷ As such, *the basis* on which individuals possess human rights is their shared humanity, whose distinctive feature is human dignity. Like Dworkin, I understand dignity to require two things: treating individuals' fates as equally important, and "respect for individuals' responsibilities for their own lives".³⁸ I also take *the principle* that generates the list of human rights from Dworkin: human rights are rights to an attitude that is consistent with the two requirements of dignity. In this view, a state violates the human rights of its citizens by pursuing policies and enforcing laws that represent a rejection of their dignity.³⁹ *The list* that this principle generates contains at the minimum the following rights: the right to life (the right not to be killed), the right to physical and mental integrity (against torture and other forms of degrading treatment); rights against discrimination based on race, ethnicity, religion, gender, age, sexual, and political orientation; liberty rights (the right to "freedom from slavery, serfdom, and forced occupation"⁴⁰, freedom of conscience, of thought, of speech, to religious, and political freedom, the right to private property); due process rights; and minimal welfare rights (a right to the means of subsistence, education, health care).⁴¹

Finally, this conception identifies three *agents that are under a duty to protect and promote human rights*: first, there are the states, who hold primary responsibility in this sense; second, the international community acts as guarantor of the protection of human rights, which entails taking up the responsibility to secure human rights when states fail to do so; and third, in a more general and abstract sense, humanity at large, as refraining from participating in unjust institutional schemes, that is, schemes that generate human rights violations, represents the content of the general duties of justice that all human beings owe to each other.

The mixed conception does not entail that humanitarian intervention is justified whenever states do not fulfill their duty to protect human rights. The definition of humanitarian intervention specifically refers to human rights violations as distinct

37 Mathias Risse, "Human Rights as Membership Rights in the Global Order," Paper presented at the John F. Kennedy School of Government, Harvard University, February 19, 2008, in Cambridge, Massachusetts, U.S.A, 5. According to him, a fully fledged conception of human rights consists of four elements: "first, an actual list of rights classified as human rights; second, an account of the basis on which individuals have them (an account of what features turn individuals into right holders); third, an account of why that list has that particular composition, that is, a principle or a process that generates that list; and fourth, an account of who has to do what to realize these rights".

38 Dworkin, *Justice*, 330.

39 *Ibid.*, 335.

40 Rawls, *The Law of Peoples*, 65.

41 I used as sources for the composition of the list Rawls' *The Law of Peoples*; Buchanan's *Human Rights*; and Dworkin's *Justice*.

from mere failures to protect them. The latter may constitute a reason for action on the part of the international community, but not for humanitarian intervention. Moreover, not all violations justify humanitarian intervention. The responsibility assigned to the international community by the mixed conception can be discharged through various forms of action, some of which do infringe on state sovereignty and some others that do not. To put it briefly, while the mixed conception opens the door for humanitarian intervention, additional conditions need to be satisfied in order for it to be justified.

We are now in a position to explicate the puzzle of humanitarian intervention. At the foundational level, sovereignty and human rights express the same moral commitment to human life and dignity. However, practice shows that states often abuse their power by enacting laws and pursuing policies that violate the human rights of their citizens, sometimes in a severe and systematic manner. Such cases represent instances in which the exercise of sovereignty clashes with, on the one hand, its own moral rationale, and on the other hand, with human rights. State sovereignty with the corresponding norm of non-intervention and human rights represent the two most important moral and legal pillars of the contemporary international system.

This is the context in which the problem of humanitarian intervention arises. Answering the question of its permissibility seems to require choosing between the two principles, but either alternative entails indefensible consequences: completely disregarding sovereignty would assert the moral irrelevance of legality and would open the door for other forms of international action – such as aggressive war or unilateral peaceful annexation – that we hold impermissible under any circumstances; refusal to intervene would show disrespect to the life and dignity of those suffering from their human rights being violated and would represent a failure of the international community to act on its responsibility for the fulfillment of human rights. To put it briefly, humanitarian intervention presents us with a serious dilemma without a straightforward solution. This picture is further complicated by the unclear status of humanitarian intervention in international legal texts and its highly selective and arbitrary practice since 1945.

3. The Moral Case for Humanitarian Intervention

Philosophical arguments regarding humanitarian intervention fall, according to Fernando Tesón into three categories: first, absolute non-interventionist arguments hold that intervention is never justified except in self-defense (as a reaction to previous unjustified aggression); second, limited interventionist arguments hold that humanitarian intervention is justified only in the most extreme cases of human rights violations, “such as genocide, mass murder or enslavement”; and third, broad interventionist arguments hold that humanitarian intervention is permissible in a

broader set of circumstances that also include grave human rights violations, “which need not, however, reach genocidal proportions”.⁴² In this section I shall provide a critical overview of the main arguments in the second and third category. I contend that these are unpersuasive, for they tend to elude important aspects of the problem, which makes them vulnerable to serious objections. Their common denominator is working on the assumption that answering the moral challenge humanitarian intervention presents us with presupposes making a choice between sovereignty with the corresponding norm of non-intervention on the one hand, and human rights on the other, which, as shown in the previous section, is mistaken.

3.1 Limited Interventionism

The first argument in this category relies on the notion of the moral duty to obey the law.⁴³ It holds that intervention conducted without proper authorization (illegal humanitarian intervention) is impermissible, for members of the international community (that are also subjects of international law) have a moral duty to comply with international law. This duty is grounded in their acceptance of international norms as binding, either explicitly in the case of treaties, or tacitly in the case of customary norms.⁴⁴ There are at least three possible objections to this view: the first challenges the claim that members of the international community have indeed a moral duty to obey international law; the second challenges the claim that unauthorized humanitarian intervention is illegal from the standpoint of international law; and the third makes a case for “illegal acts of international legal reform”.⁴⁵ I shall focus here solely on the last one.

The third objection follows from an argument proposed by Buchanan for the moral justifiability of “illegal acts of international legal reform”, which he distinguishes from “mere conscientious lawbreaking”.⁴⁶ Given the existing mechanisms for international lawful legal reform,⁴⁷ he argues that “fidelity to law”, understood not merely as obligation to comply deriving from consent but more substantively as commitment to the rule of law, does not rule out illegal acts directed towards improving the system; on the contrary, it may sometimes require them.⁴⁸ However,

42 Fernando Tesón, *Humanitarian Intervention: an inquiry into law and morality* (Irvington-On-Hudson, NY: Transnational Publishers, 1997), 23-24.

43 This argument supports narrow interventionism (and opposes broad interventionism) in a different sense than the rest of the arguments in this category. It is not a certain threshold of human rights violations that establishes when humanitarian intervention is permissible and when it is not, but whether it is conducted with proper authorization or not.

44 Buchanan, *Human Rights*, 303.

45 *Ibid.*, 298-328.

46 *Ibid.*, 299.

47 *Ibid.*, 303.

48 *Ibid.*, 306-315.

it does impose additional burdens of justification. He thus proposes eight “guidelines for determining the moral justifiability of illegal acts of reform”. The first four guidelines specify conditions under which an illegal act of reform “bears a greater burden of justification”:

- 1) “the closer the system approximates the ideal of the rule of law”;
- 2) “the less seriously defective the system is from the standpoint of the most important requirements of substantive justice”;
- 3) “the more closely the system approximates the conditions for being a legitimate system”;
- 4) violation of “one of the most fundamental morally defensible principles of the system”.

The last four guidelines specify conditions under which an illegal act is more easily justifiable:

- 5) “the greater the improvement, the stronger the case for committing the illegal act”;
- 6) likelihood “to improve significantly the legitimacy of the system”;
- 7) likelihood “to improve the most basic dimensions of substantive justice in the system”; and
- 8) likelihood “to contribute to making the system more consistent with its most morally defensible moral principles”.⁴⁹

Buchanan distinguishes between two different justifications given for the NATO intervention in Kosovo: the first claimed that the intervention was illegal, but justified in order to prevent gross human rights violations, whereas the second claimed that the intervention was justified because it was directed towards establishing a new, “more enlightened” customary norm that permits unauthorized humanitarian intervention.⁵⁰ The argument suggested here only defends illegal humanitarian intervention as long as it aims to bring about an improvement in the system, preventing or putting an end to grave human rights violations being only a necessary, but not sufficient reason. I believe the distinction between the two justifications is artificial, for a genuinely humanitarian motivation for conducting the intervention implicitly expresses the judgment that the system is defective, in the sense that it permits such injustices to occur, and therefore that it needs to be reformed by making unauthorized humanitarian intervention lawful.

My argument is that any unauthorized humanitarian intervention represents an instance of an illegal act of reform as long as its motivation is genuinely humanitarian. To sum up, the third objection gives a plausible reply to the argument from the moral duty to obey the law. It states that the idea of “fidelity to law” is not

49 Ibid., 318-319.

50 Ibid., 321-322.

sufficient to rule out illegal acts of international legal reform, of which humanitarian intervention represents an instance, as long as it is faithful to its humanitarian cause. However, it does impose supplementary burdens of justification, which a plausible defense of humanitarian intervention needs to deal with.

Another version of narrow interventionism relies on the idea of the rights of sovereign states. Advocates of this view – that Altman and Wellman call the “consensus” – hold that, although non-intervention ought to be the norm, exceptional human rights violations can justify humanitarian intervention.⁵¹ The value of state sovereignty is central to the consensus. As Walzer puts it, the rights of a political community – “territorial integrity and political sovereignty” – derive their force from the special kind of contract that lies at the foundation of the political community, understood as an ongoing “process of association and mutuality”.⁵² The special nature of the political community, which is not paralleled in the international society, results in an asymmetrical relationship between the conditions of internal legitimacy on the one hand, and external legitimacy on the other.⁵³ From here follows the apparent paradox of an internally illegitimate state that still retains its external legitimacy.

However, when the “unfit” between people and government is radical, states cease to possess external legitimacy, and “the rules of disregard” apply. One of these holds that “states can be invaded and wars justly begun [...] to rescue people threatened with massacre.”⁵⁴ As such, humanitarian intervention is permissible “when it is a response (with reasonable expectations of success) to acts that ‘shock the moral consciousness of mankind’”.⁵⁵ These include massacre, enslavement, and massive expulsion.⁵⁶ The rationale for the rules of disregard is that such violations are praiseworthy or at least not condemnable because “they uphold the values of individual life and communal liberty of which sovereignty itself is merely an expression”.⁵⁷ Other scholars endorsing the consensus view establish as threshold for humanitarian intervention human rights violations that amount to “supreme humanitarian emergency” like genocide, “state-sponsored mass murder” and “mass

51 Andrew Altman and Christopher Heath Wellman, “From Humanitarian Intervention to Assassination: Human Rights and Political Violence,” *Ethics* 118 (Jan. 2008), 228-257, 231.

52 Walzer, *Just and Unjust Wars*, 53-54.

53 Internal legitimacy refers to the relationship between the state and its citizens, whereas external legitimacy points to the moral and legal standing of the state within the international society (Walzer 1980; 1992).

54 Walzer, *Just and Unjust Wars*, 108; Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” *Philosophy and Public Affairs* 9 (Spring 1980): 209-229, 216-218.

55 Walzer, *Just and Unjust Wars*, 107.

56 Walzer, “The Moral Standing,” 218.

57 Walzer, *Just and Unjust Wars*, 108.

population expulsions by force⁵⁸, or “the gravest crimes” – less than genocide, but more than ordinary oppression.⁵⁹

The consensus view, and in particular Walzer’s argument offer the most promising strategy for a justificatory account of humanitarian intervention. However, there are two difficulties with the argument. First, Walzer seems to attach an intrinsic value to “communal liberty”, one that is independent of the value the members of the political community assign to it. Elsewhere, he notes that individual lives may sometimes be sacrificed for the sake of “communal liberty”.⁶⁰ The question is to what extent this is permissible, and what happens when an overwhelming majority decides that the existence of a small minority (defined, say, in terms of sexual orientation) undermines “communal liberty” and the government starts enacting laws that discriminate against them. Obviously, there is no “radical unfit” between people and government for the latter has the support of a large majority of the former. The problem, as I see it, is that Walzer’s argument tolerates the violation of the human rights of small minorities as long as those are endorsed by a majority of the people in the name of “communal liberty”. This leads us to the second problem, namely the kind of human rights violations that justify humanitarian intervention.

Specifically, advocates of the consensus view limit themselves to vague, rather metaphorical expressions and some specific examples. If humanitarian intervention is only justified in those cases that are explicitly stated, then the bar is too high; if it is justified in more circumstances, than the consensus view does not provide us with any test principle. I believe drawing a principled line between violations that justify intervention and violations that do not is an important task of a justificatory account of humanitarian intervention. Such principled distinction needs to be rooted in a coherent conception of human rights. I contend that the argument from the rights of states fails to provide a successful justification of humanitarian intervention.

3.2 Broad interventionism

Broad interventionist arguments revolve around the claim of symmetry between internal and external legitimacy: whenever a state violates the basic human rights of its citizens, it ceases to be internally legitimate and thus forfeits its external legitimacy as well. The most defensible formulation of this position belongs to, I believe, Fernando Tesón. His argument begins with the claim that, read in light of the appropriate moral and political philosophy, state practice and international

58 Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford : Oxford University Press, 2000), 34 in Altman and Wellman, “From Humanitarian Intervention to Assassination,” 230.

59 Terry Nardin, “Humanitarian Imperialism: Response to ‘Ending Tyranny in Iraq,’” *Ethics and International Affairs* 19 (2005): 21–26, 22 in Altman and Wellman, “From Humanitarian Intervention to Assassination,” 230.

60 Walzer, *Just and Unjust Wars*, 54.

legal documents entail a customary norm of humanitarian intervention, understood as the right of states to engage in such acts.⁶¹ The “ethical theory of international law” Tesón defends can be summarized as follows: 1) governments are agents of the people, both domestically and internationally; as such, their rights in the international society are derivative from the individual rights of their subjects; put differently, the moral justification of states rests on their protection of the human rights of their citizens; 2) when governments fail in performing this task, humanitarian intervention is justified, provided certain conditions are met – a) it “must be aimed at dictators for the purpose of putting an end to human rights violation”, b) must be “governed by the interplay of the principles of proportionality and restoration of human rights”, c) “the victims of oppression must welcome the intervention”.⁶² As discussed before, it is not true that when states violate the human rights of their citizens sovereignty is completely undermined, for there are grounds other than the protection of human rights for valuing sovereignty.⁶³

But there are other reasons why this view is untenable. These concern Tesón’s general strategy and hold that an ethical approach does not provide valid moral and legal guidelines for interpreting international law. First, the argument works against a significant amount of the recent scholarship in the philosophy of international law, which tries to cut off international law from morality and bring it closer to the status of a proper legal system.⁶⁴ Second, the argument relies on an interpretive strategy which is highly contestable. What this argument suggests is a “moral reading” of international law, which is a dangerous path. It is dangerous because reading international legal texts and state practice in light of what they ought to mean often comes down to reading them in light of what we want them to mean, and by “we” I mean the majority, or a very powerful minority, neither of them with any moral authority (if such entity exists).⁶⁵

61 Tesón, *Humanitarian Intervention*, 11-15.

62 *Ibid.*, 117-129.

63 Tesón later revised this argument by acknowledging that a state being internally illegitimate does not constitute a sufficient condition for intervention. However, if intervention is not justified against a particular illegitimate state, it is not for reasons of sovereignty, but for different ones (Fernando Tesón, “The liberal case for humanitarian intervention,” in *Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003). 93-129, 99). Even in this amended version, the argument is still vulnerable to the objection against the general strategy Tesón employs.

64 See Samantha Besson and John Tasioulas, Introduction to *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010). 1-27, 1-19.

65 See Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” in *A Matter of Interpretation: federal courts and the law; an essay by Antonin Scalia; with commentary by*

Third, the weakest point of the whole idea of humanitarian intervention is its practice. The establishment of a new norm of customary law requires the practice to meet two criteria: "general observance" and "widespread acceptance that it is lawful".⁶⁶ Given the highly selective and arbitrary exercise of the alleged "right to humanitarian intervention", it is difficult to show that the practice meets the first criterion. It is even more difficult to show that it meets the second, given the continuous refusal of the Security Council and the General Assembly to recognize its lawfulness either ex-ante or ex-post. Finally, even states that did intervene on the territory of other states where governments were massacring their citizens were reluctant to invoke a right to unauthorized humanitarian intervention, instead justifying their actions on other grounds^{67, 68}. In short, broad interventionist arguments also fail in successfully defending the moral justifiability of humanitarian intervention.

4. The Sovereignty-Centered Argument

The argument for the moral permissibility of humanitarian intervention follows from the discussion above. Given the kind of moral considerations that underlie sovereignty, when states grossly and systematically violate the human rights of their citizens, that is, they pursue policies that are manifestly inconsistent with the principles of dignity, they also act against the moral rationale of sovereignty. Although they become internally illegitimate, states retain residual sovereignty, which still gives them a claim against foreign intervention. The mixed conception of human rights defended here holds that, when states do not successfully discharge their duty to protect the human rights of their citizens, the international community, through its agents, bears residual responsibility in this respect. The international community has at its disposal a variety of possible modes of action, whose appropriateness and permissibility depend primarily, but not exclusively, on the kind of human rights violations that characterize a specific case.

When the violations are purposive, extensive, systematic, and require urgent action in order to be stopped or prevented, the appropriate mode of action is that of humanitarian intervention. What makes humanitarian intervention permissible in

Amy Gutmann et al., ed. Amy Gutmann (Princeton, N.J.: Princeton University Press, 1997), 3-48, 37-41.

66 Holzgrefe, "The Humanitarian Intervention Debate," 46.

67 See examples in Holzgrefe, "The Humanitarian Intervention Debate," 48-49 and International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), 49-76.

68 Holzgrefe, "The Humanitarian Intervention Debate," 46-49.

such circumstances (unlike aggressive war or peaceful annexation) is that, although it represents an infringement of the residual sovereignty states retain, it is consistent with, and is conducted in respect of, its moral rationale. In this view, humanitarian intervention can be seen as a safety mechanism the international community disposes of, that can be rightfully used in order to prevent or put an end to human right violations that satisfy the abovementioned criteria.

An analogy with medical science can be used in order to make the argument more clear. Suppose the political community is something like the human body and sovereignty something like the immune system. Normally, the immune system is very valuable, for it protects the body from infections. As such, we believe it is something worth keeping intact. However, there are rare, but dangerous cases when the immune system becomes overactive, turns against the body and starts destroying its cells and tissues. In such cases the appropriate treatment consists of immunosuppressants, which weaken the immune system, thus containing the damage.

The rationale behind the treatment is that, by suppressing the immune system, it saves the cells and tissues and restores the normal functioning of the body. Given the risks of this treatment, additional protective measures need to be taken, such as keeping the body in a completely sanitary room, for with the immune system suppressed, the most banal infection can become fatal. I believe gross and systematic human rights violations are similar to autoimmune diseases. Sovereignty, something that we normally hold valuable, goes astray and turns against the very things it is supposed to protect. Humanitarian intervention is like the immunosuppressant treatment: by infringing on sovereignty, it aims to restore the normal functioning of the political community. Because of the dangers it poses, protective measures need to be taken in order to make sure it does not undermine the political community.

Given the highly destructive nature of military interventions, additional conditions need to be met in order for the action to be justifiable.⁶⁹ First, intervention needs to be genuinely humanitarian in purpose. This ensures that it is consistent with, and is conducted in respect of the moral rationale of sovereignty. Given the facts of world politics and national interest that remains the main determinant of the external behavior of states, an alternative and less demanding condition could suffice: intervention need only to be primarily and predominantly humanitarian.

⁶⁹ Most of these conditions figure in other accounts of the justifiability of war in general and of humanitarian intervention in particular (see for example: Walzer, *Just and Unjust Wars*). However, I give them a personal interpretation in light of the account defended here.

I shall illustrate the point with an example. Suppose you are walking on the street and from one of the houses you hear a child crying from being beaten by her parents. Suppose you heard from the neighbors that the parents regularly beat their child for no good reason. You consider this to be a good enough reason to infringe on their property rights, break into the house, stop them and report them to the police. Suppose now that you know the parents because you used to go to school together. You strongly resent them because back then they were often bullying you. So, although your main motivation is saving the child (you would do it even if the parents were strangers to you), you also take great pleasure in humiliating the parents. I believe saving the child is still permissible, even required in this circumstance. Similarly, in the case of intervention, it does not matter if the agent that intervenes has subsidiary reasons, as long as these reasons do not work against the moral rationale of sovereignty.

Second, intervention needs to be a measure of last resort. This condition may seem redundant given the kind of human rights violations that justify humanitarian intervention, but it is important that agents of the international community carefully weigh different forms of action against each other. It may happen that, due to exceptional circumstances, although the rights violations are of such nature that they justify intervention, other modes of action could be just as effective. Third, the intervention needs to be proportional to the danger it aims to contain. Again, this may seem redundant, for humanitarian intervention is by definition an extreme response to an extreme situation. However, different cases pose different challenges, so the scale of the intervention needs to be proportional to the expected scale of retaliation from the part of the state on whose territory the intervention is carried out. Fourth, the intervention needs to have reasonable expectations of success.⁷⁰

What makes humanitarian intervention different from aggressive war or peaceful annexation is that it aims to give the political community back to its members. I propose this to be the standard of success. But what does it mean? First, it must

70 This requirement is susceptible to two objections. The first holds that only military powerful states can justifiably carry out humanitarian intervention for military might is essential for success. The second holds that in this account intervention against militarily powerful states could be impermissible for the expectations of success in these cases are reasonably low. I contend the two objections are legitimate; however, their source is located in the facts of world politics and global power distribution and they threaten to undermine the philosophical account defended here only to the extent that the latter fails to consider the former. Although I agree that a comprehensive account of humanitarian intervention ought to consider these problems, it is outside the scope of the present thesis to do so, which is a serious limitation I acknowledge. The recommendation here is that insofar as it is possible, it is morally preferable that intervention be multilateral, that is, carried out by a group of states or a regional or global organization, which would, I believe, partly secure this account against the two objections.

actually prevent or put an end to the human rights violations that triggered the intervention. This generally requires removing those in power from office. But this does not suffice, for a void of political power and the subsequent struggles to fill it in are highly likely to degenerate into further human rights violations. So in some way, the international community must do something to assist the state in its transition to a just political regime. Fifth, a further requirement derives from the purpose of humanitarian intervention: when all other conditions are met and there are alternative ways of conducting the intervention, the preferred strategy should be the one that maximizes the prospects of restoring sovereignty in the shortest feasible period. As such, strategically destroying essential infrastructure or vital resources should be avoided to the greatest possible extent. Lastly, a desirable, but not obligatory condition: when it is possible, the intervention should be multilateral – conducted by a group of states, a regional or global organization – rather than unilateral, that is, conducted by a single state. This would further insure against the risk of abuses.

One aspect needs further exploration, namely which human rights violations count as serious enough as to justify intervention. As noted earlier, a state violates the human rights of its citizens by pursuing policies and enforcing laws that represent a rejection of their human dignity. Two features of violations are implicit in the definition: they are purposive and systematic. This rules out failure to protect human rights due to lack of knowledge or institutional capacity. Violations being systematic means two things: they are part of state policy, explicit or implicit, legally formalized or not; and state capacities (institutional, financial) are used towards their purpose. A further requirement is that violations need to be extensive, meaning that they affect either a significant number of the entire population, or all (the large majority) of a specific group of the population, defined in terms of race, ethnicity, religion, gender, age, sexual or political orientation.⁷¹ The last requirement is that preventing or putting an end to them needs to represent an emergency.

This means two things: first, that immediate action is required; and second, that in the absence of such action, the lives of the individuals suffering from the violations would be damaged in a way that is irreversible, irreparable, and cannot be compensated for. The most obvious examples of human rights violations that justify intervention are those given by the majority of scholars and formalized by international law: genocide, ethnic cleansing, enslavement and mass deportation.

71 This is a numerical criterion against which an important objection can be raised. Especially in societies that undergo civil war, or suffer from extreme poverty, it is difficult to know the exact number of human rights violations that can be attributed to government action. Again the moral justification proposed here is susceptible to this objection insofar as it fails to take into account a series of practicalities that a comprehensive justificatory account of humanitarian intervention should consider.

Also, the extensive use of torture as a means of interrogation counts in this category. It should be noted that the kind of violations that justify humanitarian intervention concern more than one right. For instance, genocide or ethnic cleansing represents the violation of the right against racial or ethnic discrimination and at the same time of the right to life, against torture, or against certain fundamental freedoms.

To conclude this section, I point out the strengths of the sovereignty-centered argument. First, it takes international law seriously. Unlike other views that settle for simply disregarding sovereignty when states grossly violate the human rights of their citizens, the present argument shows that even when states engage in such actions, we still have reasons to care about their sovereignty, and humanitarian intervention is justified precisely because it is consistent with those reasons. This brings us to the second strength, namely that it provides a principled distinction between humanitarian intervention on the one hand, and aggressive war or peaceful annexation on the other, thus explaining why in cases of gross human rights violations the former is justified, whereas the latter are not. Third, the sovereignty-centered argument provides a principled distinction between human rights violations that justify humanitarian intervention and those that do not, which is rooted in a conception of human rights. For these reasons, I believe the present argument is more successful than the ones previously discussed in making a moral case for humanitarian intervention.

5. Conclusions

This article aimed to offer a moral defense of humanitarian intervention. The strategy adopted was to begin by exploring the philosophical underpinnings of sovereignty with the corresponding norm of non-intervention on the one hand, and human rights on the other, in order to arrive at a proper understanding of the moral challenge humanitarian intervention presents us with. It was shown that at the foundational level the two notions express the same moral commitment to the protection of individual life and dignity. As such, when states gravely violate the human rights of their citizens, sovereignty clashes with both human rights and its own moral rationale. The sovereignty-centered argument suggested regarding humanitarian intervention as a safety mechanism that the international community possesses in order to deal with instances when sovereignty goes astray and betrays its moral function. Its thrust was that humanitarian intervention, unlike other forms of international action, is justifiable because it is consistent with, and is conducted in respect of the moral rationale of sovereignty.

Also, given the multiple risks it involves, the justifiability of humanitarian intervention is constrained by meeting certain requirements that derive from its purpose. Of course, a philosophical account of humanitarian intervention does not settle the issue, for there are serious legal and political considerations that need to

be addressed in order to get a comprehensive account. In this sense, this paper suffers from important limitations. However, it was not my purpose here to settle the issue once and for all and the solution to the puzzle of humanitarian intervention defended here is only meant to shed more light on the topic and open avenues for further inquiry.

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