



Degree Program in International Relations

Course of International Political Theory

The Ethics of Humanitarian Intervention

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Academic Year 2023/2024

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Introduction

The concept of humanitarian intervention developed as a term in the nineteenth century. It was a product of the evolution of positive law, casting it as a potential exception to the rule of non-intervention. After the end of the Cold War, global conflicts began to take on a more humanitarian outlook, which meant the idea of humanitarian intervention took center stage. Post-Cold War hopes were that the power politics of international relations that had dominated the previously U.S-Soviet-controlled decades would gradually be replaced by politics shaped more by moral and ethical standards. The hopes were that the newly non-polarized United Nations (UN) could act as an intermediary and impose these standards via the UN Security Council (UNSC).

Specifically, the breakdown of the bipolar world order led many to believe that the number of cases of humanitarian intervention would increase. The newly affirmed authority of the UN, based on the rule of law and the principle of collective security, led many to believe that a new era of wholly benevolent, effective humanitarian interventions may be imminent. There was widespread, at least Western, enthusiasm at the prospect of diplomacy and military power being used to protect human rights on a global scale.

Despite the optimism at the start of the post-Cold War period, it quickly became evident that the international climate for humanitarian intervention was not as favorable as hoped. There are potentially many reasons for this. One of the primary ones is the UN's inability to fulfill the role that many hoped, and believed, it was destined to occupy after the end of the Cold War. However, it is also likely that the hopefuls simply underestimated the sheer complexity of intervening in a nation-state's domestic affairs on humanitarian grounds. The possibility of doing so based on moral, ethical foundations has been and continues to be, embroiled in controversy, as it probably will be in the future as well.

The complexity and polarizing nature of intervening on humanitarian grounds means that it is often the subject of vigorous discussion by policymakers and military personnel, with peace and human rights increasingly joining the fray as of late. Nonetheless, despite this controversy, the concept of humanitarian intervention retains advocates because there are instances where it is the *only* measure capable of ending atrocities committed on a massive scale. Deepening the study on the matter is necessary to understand the importance and necessity of humanitarian intervention, along with the dynamics influencing the justification and legitimization of such intervention.

This thesis aims to cast a contemporary light on the morality and ethicality of humanitarian intervention. In doing this, it addresses many of the major actors and institutions shaping the international community in which humanitarian intervention is employed. The thesis is guided by the question of the overall ethical justifiability of humanitarian intervention.

The thesis is composed of four chapters. The first chapter aims to contextualize the matter of humanitarian intervention through a literature review of the principal existing strands of thought informing the matter. Because humanitarian intervention is a form of war, the main components of just war theory (JWT) form the basis of much of this review, with various just war viewpoints examined throughout. Underlining the need for a contemporary lens to examine humanitarian intervention, cosmopolitanism forms one of the subsections, aiding the discussion of the most important elements to consider regarding any intervention on humanitarian grounds.

The second section descends into a discussion of some of the primary underlying points of ethical concern in humanitarian intervention. The discussion is informed by viewpoints of staunch advocates of humanitarian intervention, as well as non-interventionist ones, thus illuminating the difficulty in justifying intervention on humanitarian grounds. Related subjects, such as non-combatant immunity and the issue of sovereignty are addressed, with the latter scrutinized extensively. The latter parts of the chapter aim at constructing a sort of new normative basis for intervention, seeking to strengthen the existing framework governing humanitarian intervention. Finally, the chapter concludes with a discussion of the situations that may rise to the level of supreme emergency, thus permitting actions otherwise outlawed by international law and legal standards.

The third chapter presents the overarching argument of the thesis in response to the research question concerning the justification of humanitarian intervention, namely the liberal case for intervention. At the outset, the chapter delineates the foundational characteristics of the argument, utilizing principles of liberal political and moral philosophy. Similar to Chapter II, this section then examines various capacious views of intervention as well as much narrower ones to help facilitate the construction of the argument. Firstly, this is done by considering and dealing with various potential objections to a liberal approach to intervention. Then, the chapter implements the normative basis established in Chapter II to argue that a certain incremental normative consensus may be evolving in the international community regarding intervention on humanitarian grounds.

The final paragraphs of the third chapter lead the path toward the fourth chapter, which concerns *jus post bellum* for humanitarian intervention. Chapter IV considers various post-intervention dilemmas, namely the difficulty for intervenors to stay and reconstruct or rebuild the target state, without exposing themselves to charges of imperialism. This becomes especially troublesome seeing as under a liberal, cosmopolitan approach to humanitarian intervention, certain *post bellum* pledges may be a direct part of the intervention's original justification. The chapter also proposes a reconceptualization of the principle of sovereignty, as the original Westphalian conception is largely insufficient when applied to contemporary *jus post bellum*. Finally, the chapter considers whether post-intervention *jus post bellum* may eventually evolve into a concept belonging under the umbrella of transitional justice.

Regarding the theoretical basis of the work, it will examine humanitarian intervention in terms of its ethicality, effectiveness, and importance in conflicts characterized by gross human rights violations. Moreover, the pertinent humanitarian conflicts warranting intervention will be evaluated as theatres of confrontation between conflicting powers, such as regional and non-regional agents as well as major global actors.

The theoretical part of the research has been supported by a wealth of literature on the matter. By casting humanitarian intervention in late contemporary terms, the consultation of references has included sources from the late 1970s up until as recent as 2022. One of the most prominent early works that this thesis was supported by is Michael Walzer's "Just and Unjust Wars", which is integral to understanding the principal concepts of JWT. Moreover, several new publications of Walzer also informed various parts of this thesis, as did the theory expressed by John Rawls in his "Law of Peoples".

One of the most important pieces of contemporary scholarship aiding the content of this thesis is Robert O. Keohane and Jeff Holzgrefe's "Humanitarian Intervention: Ethical, Legal and Political Dilemmas". Its contribution to the topic of humanitarian intervention is remarkable, as it traces and dissects the principal matters of intervention superbly. The piece is also informed by the contributions of scholars such as Fernando R. Tesón and Allen Buchanan, who are both equally magnificent contributors. Helen Frowe's "The Ethics of War and Peace: An Introduction" was also considered a good starting point for the research of this thesis, as it meticulously explores significant characteristics of intervention, voluntarily avoiding any further analysis. Finally, the work of Alex J. Bellamy was immensely valuable to this thesis' sections on the protection of human rights, as he excellently captures the intricacies of the duty to protect, for example in his "The responsibilities of victory: *Jus Post Bellum* and the Just War".

Essentially, this thesis aims to inform a debate on the polarizing matter of the ethics of humanitarian intervention. By highlighting viewpoints both positively positioned towards intervention as well as negatively, the thesis facilitates a discussion where the most important factors concerning the justifiability of humanitarian intervention are addressed objectively. Due to the polarizing nature of humanitarian intervention, objectivity is integral to any attempt at synthesizing the intricate components contained within the concept of humanitarian intervention.

CHAPTER I: LITERATURE REVIEW ON HUMANITARIAN INTERVENTION

Introduction: Humanitarian Intervention on the Philosophy Compass

Before proceeding to the intricacies and complexities of the ethical justification of humanitarian intervention, a note on the dichotomy and various taxonomies informing the debate is prudent. The concept of humanitarian intervention is employed in situations where gross human rights violations are ongoing. For this thesis, a humanitarian intervention can be described as follows,

The use, or threat, of force across state borders by a state, or group of states, aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied. (Holzgrefe, 2003, p. 18).¹

Distinguishing between the arguments on the justifiability of humanitarian arguments can be categorized under political realist or liberal views. However, no single dichotomy sufficiently captures the critical distinctive features between the predominant views on the justifiability of humanitarian intervention. Therefore, I will provide an overview of the different approaches differentiating between these preeminent views on intervention based on certain theories surveying each side of various ethical divides.²

The first ethical divide concerns the proper source of moral concern and distinguishes between two different forms of theories: *naturalist and consensualist* (Holzgrefe, 2003, p. 19). According to naturalist theories of international justice, morally binding norms are an intrinsic feature of the world. These global facts possess an innate moral significance that human beings cannot alter. On the other hand, consensualist theories of international justice assert that the moral authority of any given international norm of justice derives from the implicit or explicit consent of the agents subject to that norm (Holzgrefe, 2003, p. 19). According to the consensualist view, norms are therefore actively made by human beings, not merely discovered in unalterable form by them.

One of the guiding theories in the naturalist camp is that of *utilitarianism*, which emphasizes the consequences of a certain action as the preeminent parameter to judge its ethicality and legitimacy. Utilitarianism is both egalitarian and individualist since it specifies

¹ Note however that some of the ideologies and scholars whose views will be examined in this thesis differ slightly from this interpretation.

² Note that a full theoretical, in-depth review of all the potential taxonomies and theories capable of illuminating the discussion on the ethics of humanitarian intervention is out of scope for this particular thesis. Therefore, a select few have been chosen, as these are the most relevant to focus on in this thesis.

that each human action on its own should be the proper object of moral evaluation. Applying the concept of utilitarianism to humanitarian intervention, it follows that the justness of any intervention depends on whether the intervention produces the best consequences for all concerned parties (Holzgrefe, 2003, p. 23). Some utilitarian scholars argue that the use of force for humanitarian ends seldomly produces such a situation, and instead often becomes self-defeating, abetting more loss of life than it was intended to originally relieve.³ Other utilitarianists assert that the non-interventionists are unable to show that a regulated and constrained practice of humanitarian intervention undoubtedly creates worse situations on the whole than what existed before the intervention.⁴

Another important naturalist theory is that of *natural law* which presupposes that humans have certain moral duties under their common humanity. These are supremely relevant to matters of humanitarian intervention, as they, in some cases, concern the duty to intervene (Holzgrefe, 2003, p. 25). Furthermore, natural law establishes a normative ground for intervention not just between people bound by local ties or political community linkages, but between all people, who are bound together by general human and common morality. Dutch jurist Hugo Grotius advocates this view, as he asserts that when a tyrant “should inflict upon his subjects such treatment as no one is warranted in inflicting” other states may exercise a right of humanitarian intervention (Grotius, 1925, p. 584). Contrarily, non-interventionists stemming from natural law theory, such as Kant contend that states are under a duty to refrain from interfering in other state affairs. This duty derives from the same one that individuals are under, requiring respect for each other’s autonomy, as such interference directly opposes the natural liberty of nations and their independence and sovereignty (Holzgrefe, 2003, p. 27).

Social contractarianism, the third pertinent naturalist theory, holds that moral standards become legally enforceable only when the parties to them agree to follow them. (Holzgrefe, 2003, p. 28). However, this consent only exists in idealized situations in which rational, equal, and free, agents agree to the same set of norms, thereby making them morally obligatory. Under social contractarianism, the just cause of humanitarian intervention very much depends on the capaciousness one attaches to the interests of the contracting parties. If one employs a narrow scope, then interventions aimed at halting grievous human rights

³ This is the argument of utilitarianist H. Scott Fairley, in “State Actors, Humanitarian Intervention and International Law: Reopening Pandora’s Box”, *Georgia Journal of Intervention and Comparative Law*, 1980.

⁴ This is the argument of utilitarianist Andrew Mason in “Realist Objections to Humanitarian Intervention” in *The Ethical Dimensions of Global Change*, 1996.

abuses in other countries are likely to be seen as unjust. As Samuel P. Huntington puts it: “It is morally unjustifiable and politically indefensible that members of the U.S Armed Forces should be killed to prevent Somalis from killing one another” (Holzgrefe, 2003, p. 30).

However, employing a broader and more robust view of these humanitarian interests, interventions aimed at ending mass enslavement or genocide can indeed become morally righteous in certain instances. The collectivist assumptions inherent in the theory emphasize the morally binding force of international norms if the relevant representatives of a state would consent to them, by deciding behind a “veil of ignorance”.⁵ This means that the representatives in question know nothing about the particular circumstances of the application of these norms, nor of their own society’s power or strength in comparison to other nations (Holzgrefe, 2003, p. 31).

The primary consensualist doctrine concerning the proper source of moral concern is that of *communitarianism*. Communitarianism asserts that norms have a morally binding force if they are in agreeance with the relevant cultural beliefs and practices of specific communities. Essentially, to a communitarian “justice is relative to social meanings” (Walzer, 1977). Under the guise of communitarianism, moral philosophy morphs into a type of moral anthropology. The inherited cultures of peoples and the result of processes of shared experience between generations of association and mutuality become morally binding because they have produced consent continually throughout the years. To communitarians, humanitarian intervention is justified because it is coherent with these types of inherent cultures belonging to political communities globally. To them, the global culture of human solidarity demands intervention whenever one or more states are engaged in massacres, enslavements, or other types of violence, turning societies into delirious anarchical structures. The critics of communitarianism argue that its moral relativism weakens the overall argument of this particularist theory, while also questioning whether the consent inherent in communitarianism adequately generates morally binding norms.

1. International Law

International law and ethics of war that guide international relations undoubtedly appear as a fundamental reference point for the discussion on the justifiability of humanitarian intervention. De Vitoria asserts that the leaders of states should have authority over subjects

⁵ The Rawlsian idea of the veil of ignorance suggests that individuals should imagine sitting in front of a veil of ignorance, making them unaware of who they are and unable to identify with their personal circumstances. By way of this ignorance, individuals can then more objectively decide how societies should optimally operate.

of other states under certain circumstances: “The world could not exist unless there is some power to deter the wicked and to punish them for harm inflicted on the good and the innocent” (Vitoria, 1991, p. 176)

The chasm between law and common morality is at the heart of the conundrum of humanitarian intervention. United Nations (UN) Charter Articles 2(4), 42, and 51 dictate that states are prohibited from using force “against the territorial integrity or political independence of any state” except in two circumstances: “non-preemptive self-defense and maintenance of international peace with the authorization of the UN Security Council (UNSC)”, or if the UNSC approves the use of force to “maintain or restore international peace and security” (UN Charter, 1945).

However, the application of these exceptional norms has been historically troublesome. The primary reason for this is the second demand of the UN’s Charter-designated system of preventive response. This response system relies on the power of the UNSC, which for decades has been severely restricted because of the vexatious nature of the veto issue.⁶ Consider the NATO-led intervention in Kosovo in 1999. In this case, there had been no armed attack against a UN member and no decision by the UNSC to authorize the use of force. Nonetheless, the consensus of the international community was that events in Kosovo created a threat to peace, which prompted sufficient grounds for intervention. Regardless, when NATO chose to intervene, it violated strict Charter legality, instead relying on moral justification and mitigating circumstances, which from an international law perspective is troubling.

Some scholars have grappled with this exact issue. While the consensus must be that any act of humanitarian intervention is at its most legitimate stage if it is authorized by the UNSC, or the UN General Assembly (GA), this may not be an absolute requirement for legitimacy. If a state, or group of states, uses force to end atrocities when the necessity is evident, and the humanitarian intention is clear, then the state(s) in question are likely to have their action pardoned (Schachter, 1991, p. 126). Utilizing this principle, several independent commissions found that the Kosovo intervention was legitimate, if still not strictly legal. They called for an interpretation of the applicable international law aiming at making it more congruent with international moral consensus and bridging the gap between strict legal

⁶ Scholars widely agree that the current UN veto system is inherently flawed, causing inaction and stillness on the part of the UNSC. For more on this, see Trahan, J. (2022) “Vetoes and the UN Charter: the obligation to act in accordance with the ‘Purposes and Principles of the United Nations’”, *Journal on the Use of Force and International Law*, vol 9 (2), pp. 243-277.

positivism and a common sense of moral justice, and in general between legality and legitimacy.

1.2 Liberal JWT & Humanitarian Intervention: Walzerian view

The legalist paradigm's concept of non-intervention is the most evident means of criticism when it comes to humanitarian intervention.⁷ The necessity of occasionally disobeying the rule that nations should never intervene in the internal affairs of third states is highlighted by JWT. Additionally, JWT scholars stress that although such intervention *may* be justified, this does not immediately imply that all interventions *are* justified. When an intervening party (IP) attempts to influence or modify domestic conditions within a state, they have the burden of evidence. There are two reasons why the burden increases in cases of armed humanitarian intervention: Firstly since such actions are inevitably fraught with overt violence. Secondly, people who live in sovereign states have a right not to be "coerced and ravaged at all", however, if they were to suffer such a fate, it should be at the hands of other members of those states. Outside involvement is typically prohibited since these citizens are members of a single political community with the right to jointly decide their own affairs (Walzer, 1977, p. 86).⁸

To Walzer, the legalist doctrine definitively retains importance in the context of humanitarian intervention, although there are potential noteworthy shortcomings in various areas. Regarding sovereignty, Walzer agrees that the liberty of states is defined as their independence from foreign coercion and control. One must note that although not every independent state is free, the recognition of sovereignty is the only avenue to establish an arena in which full liberty can be manifested. In establishing such an arena, boundaries that cannot be crossed must be set, as must rights that cannot be violated. However, the ban on these boundaries is not one of absolutism. Partly because of the arbitrariness of state boundaries and most notably because of the ambiguous relation of the political community or communities within these boundaries to the government that defends them (Walzer, 1977, p. 89). The difficulty in ascertaining when a community is self-determining to an extent warranting complete non-intervention, is arduous, if not impossible to conclusively reach.

⁷ Legalism is based on the viewpoint that for a society to function, its population must obey a set of strict rules, such as the rule of non-intervention, and heed the advice of those in authority.

⁸ The collectivity inherent in Walzer's argument is part of the second ethical divide, distinguishing between individualist accounts of justice and collectivist ones. Here, Walzer acknowledges that ethnic groups, nations, or states are proper objects of moral concern and therefore warrant rescue by way of international intervention if otherwise justified

Inherently, the concept of humanitarian intervention does possess certain paradoxical features. Intuitively, one would maintain that any act on the part of IP is ‘better’, and most legitimate if it is swift and brief since this would most likely mean the least amount of coercion and ravage for the people of the target state. However, any such brevity in the intervention diminishes its ability to shift the domestic balance of power in any decisive way toward the forces of freedom dramatically. On the contrary, any prolonged intervention potentially poses a great threat to the success of those forces. Moreover, using human rights as the sole justification for crossing the sovereign borders of a domestic state creates a vicious cycle, begetting more violence, thus, running the risk of further undermining human rights while ostensibly attempting to protect them.

We should be cautious when attempting to revise the legalist paradigm, aimed at allowing for humanitarian intervention. In the specific case of the ban on boundary crossings, three cases of potential revisions can be surmised where it is liable to be unilaterally suspended since it does not serve the purposes for which it was established. Firstly, in matters of secession or national liberation, where two or more political communities are engaged in a large-scale military struggle. Secondly, in matters of civil war (so-called counter-intervention). The third case, which is the most relevant for this thesis, concerns the cases where the egregiousness of the human rights violations makes talk of self-determination seem cynical, most aptly in cases of mass enslavement or genocide.⁹ Traditional just war theorists ascertain that one needs to establish a kind of *a priori* respect for state boundaries since they are the primary boundaries of political communities. This is however also exactly why intervention *can* be justified in exceptions to the general rule, where urgency or extremity of a particular situation calls for action on the part of IP. Furthermore, for an intervention to be justified, it must be authorized by the “society of nations”.¹⁰

The argument regarding if and when the justification for humanitarian intervention arises can be made more robust, by constructing a sort of radical break, a chasm, with common nastiness on one side and genocide on the other (Walzer, 2022, p. 30). While any situation is rarely as straightforward as this, endorsing this view momentarily can be

⁹ The first two of Walzer’s revisionist cases for the legalist paradigm very much concern states that are already “fractured” or “broken” – either in the case of secessionist and/or national liberation movements or civil war. While they are interesting, they are not within the scope of this thesis and therefore will not be analyzed to the same extent as the third revisionist criteria.

¹⁰ This is an ambiguous term, which is arduous to grasp and aptly apply in a modern-day setting. In the context of humanitarian interventions, it is understood as a loose configuration of nation-states around the world, which together identify the wrongdoings being perpetrated, thus silently authorizing either unilateral or multilateral intervention.

beneficial. Furthermore, following a stark and minimalist conception of human rights simultaneously makes the case for humanitarian intervention more readily acceptable across the globe. Although not always the case, life and liberty should be commonly conceived globally.

Following such a paradigm, one can surmise that in situations when there is “ethnic cleansing of a province or country or the systematic massacre of a religious or national community” (Walzer, 2002, p. 31), one finds oneself on the genocidal side of the chasm, the side where intervention is needed. In such situations, the suffering of the members of the political community is likely at an intolerable stage. There is no capacity to respond among the people of the community, the victims are vulnerable and weak, while their enemies are cruel, and their neighbors are largely indifferent. This is the exact case warranting intervention. This brings us to the central claim of JWT, which applies to all forms of warfare and can also be used to support the legitimacy of humanitarian intervention. The main claim is that any intervention must be a reaction to events that “shock the moral conscience of mankind” and needs to be undertaken with a realistic prospect of success.¹¹

Even when following a minimalist conception of human rights, where one can be said to simply be enforcing mere decency, situations where intervention is warranted but not carried out occur. Critics of humanitarian intervention use this as a sign of hypocrisy and lack of moral consistency. Rather, one should see it as a sign of the inherent difficulty of humanitarian intervention since no two situations are the same. In each case, any IP must calculate the proportionate risks to the people being rescued, to the people rescuing them, and to everyone else for that matter. Even after such a calculation, very rarely is the decision blatantly obvious to everyone, which is why one must rightly calculate the risks in each situation, and “then we can only do... what we can do” (Walzer, 2022, p. 33).

The “We” in any humanitarian intervention is integral to its efficacy and success, as well as the overall justification for it. While unilateral action in humanitarian interventions may open up allegations of domination and coercion on the part of IP, at times it is the most prudent and indeed most justifiable method for ending atrocities. Specifically, one can think of three distinct cases where the unilateral act of one nation ended atrocities perpetrated by another, which would not have been possible with multilateral backing from the international

¹¹ This old-fashioned-language term guides the just war position on when intervention is justified. Similar to the society of nations, this term references the moral convictions of the international society. This specific term concerns the conscience of ordinary men and women, who, unlike political leaders, do not need to repress their normal feelings of outrage and indignation at times, but are free to view any situation as they see it.

society. Firstly, the Vietnamese intervention in Cambodia in 1979 that overthrew the Pol Pot regime. Secondly, the Indian intervention in East Pakistan in 1971, which ended the Bengali genocide. Thirdly, Tanzania's intervention in Uganda in 1979, disposing of the Idi Amin dictatorship. The great reluctance of third states to send their armies or agents to an organization they do not control means unilateralism sometimes is the preferable method of intervention, especially since it may also be the only capable way to immediately react to "acts that shock the moral conscience mankind" (Walzer, 1977).

The above cases deserve a little more scrutiny. In all three, it was neighboring states intervening in another domestic state's affairs. Momentarily disregarding the severity of the atrocities, their unilateral act may, to some, have signaled their motives not being wholly altruistic. However, the chief concern in these cases was that if any of these interventions had been contingent on UNSC or GA approval, the interventions would almost certainly not have happened. They would have been decided against by majority vote, and the atrocities would have been allowed to continue. Therefore, the only available avenue to halting these atrocities was unilateral action. Since the society of nations tacitly authorized intervention, based on the shocking brutality of the crimes being perpetrated, which surely amounted to "acts that shock...", Vietnam, India, and Tanzania's actions were wholly legitimate, albeit perhaps not wholly altruistic.

A final point worthy of consideration in the just war paradigm regards the principle of last resort. This concept establishes a moral obligation to resort to non-military actions rather than military force whenever it is possible to do so. While this principle is ostensibly difficult to disagree with when conducting humanitarian interventions in states with ongoing political conflicts, such as Bosnia in 1996, the sort of "lastness" inherent in the principle is a tricky concept. To some just war scholars, "there is always something to do before doing whatever it is that comes last" (Walzer, 2002, p. 35), which means force in humanitarian interventions can almost always be morally banished using the last resort principle. One potential way to augment the last resort principle is by considering the effectiveness of other viable policy options available in a specific situation.

In Bosnia, it has been argued that the West failed its mission miserably. The military observers sent to report on what was happening, together with the UN forces that brought humanitarian relief to the victims, did not impede further killing in the area. One might even contend that the soldiers sent into Bosnia as part of the Western coalition provided a kind of "safe backdrop" for the continued massacre of civilians, by defending doctors and nurses and delivering medical supplies and food to the victims and refugees who kept growing in

numbers (Rieff, 1996). While it can be beneficial to inject soldiers as peacekeepers, this does not reduce the power of the killers and does not solve the crux of the issue. Cynically, one can say that if there is no peace to be had, then peace-keeping is nothing more than an honorable activity, where sometimes, unhappily, it may be better to make war (Walzer, 2002, p. 36).¹²

1.3 Liberal International Justice & Humanitarian Intervention: Rawlsian View

In the “Law of Peoples” (LoP), Rawls uses the term “decent societies” to describe societies in which the values accepted by the majority, often shared religious values, afford these societies certain protections and securities for all the inhabitants in the relevant country (Rawls, 1999). These societies also subscribe to a common good standard of justice, and, quite importantly, they are non-aggressive toward neighboring countries. To be a decent society, a country does not necessarily have to be liberal, although this automatically qualifies it as being decent. Non-liberal countries can also qualify as being decent societies. Therefore, both liberal societies and decent non-liberal societies can agree on the same set of international conventions. In LoP, various restraints on the post-WWII Westphalian model, which grants high degrees of sovereignty to nations, are introduced. These are utilized to make the case for justifiable humanitarian intervention in cases of serious and unamendable human rights violations.

The conundrum of which level of human rights violations is needed to trigger and justify forcible military intervention is analyzed by employing a minimalist view of human rights. This minimalist view is encapsulated in the term “human rights proper”,¹³ which decent societies are required to uphold. This promise to uphold morphs into a shared commitment between liberal societies and decent non-liberal ones, to respect the very idea of the minimalist conception of human rights, which is inferable from the relevant sections of the UN Charter. Entering into this shared commitment grants decent societies justified permission to not tolerate so-called outlaw states, i.e. states that do not follow the same moral code. This permission is two-pronged. Firstly, because outlaw regimes are aggressive and dangerous, thus threatening the safety and stability that decent societies aim to spread globally. Secondly, because reason is dictated by an integral pillar of LoP, the ensuring of long-run well-ordered, decent societies, which eventually can bring all societies to honor the

¹² In this context, war is used to refer to forcible humanitarian intervention.

¹³ In a Rawlsian view, human rights proper are articles 3-18 in the UN’s Universal Declaration of 1948, as well as other rights generated from them, found preeminently in the international conventions against genocide (1948) and apartheid (1973). The minimalist conception that follows can be surmised as “The right to life, liberty, freedom from slavery & serfdom to a sufficient measure of liberty of conscience, to property and to formal equality as expressed by the rules of natural justice”.

LoP and become full-fledged members, thus securing human rights everywhere (Rawls, 1999, p. 92).

Great weight is attached to human rights in this conception of humanitarian intervention. The conception draws on both normative dimensions of human rights as well as their universal reach. However, the problem when attempting to synthesize the protection of human rights and the concept of humanitarian intervention, is that no singular human right is put into practice at a suitable level by literally all peoples (Martin, 2005, p. 447). There is no universal bedrock standard applicable globally, which inevitably further problematizes the difficult question of whether justification can offer sufficient grounds for (forcible) intervention against societies and peoples that do not accept these justifications. Despite these normative shortcomings, one should not necessarily be disinclined to justify forceful intervention when it is deemed necessary by the international community.

However, the definition of when and how human rights violations may warrant armed intervention lacks robustness and specificity.¹⁴ The aptest definition seems to be outlaw states, or “burdened societies”, violating human rights regularly and systematically within their borders. These violations must necessarily amount to a level of egregiousness and graveness that merits forcible humanitarian intervention (Martin, 2005, p. 449). Applying this definition presents the would-be intervener with difficulties. Certainly, cases of genocide, ethnic cleansing, and mass enslavement are egregious human rights violations, warranting forcible intervention. However, it is less clear, to both just war and Rawlsian scholars, whether a regime like the apartheid one in South Africa would justify armed intervention. Most likely, both types of scholars would advocate a full leveraging of the forceful diplomatic, economic, and cultural sanctions against any outlaw state, otherwise engaged in morally decrepit behavior, such as violations of the due process of law. Their approach would thus prescribe that resembling situations to the apartheid regime in South Africa would fall short of justifying forcible humanitarian intervention.

At this juncture, it is prudent to distinguish between mere intervention and forcible, armed intervention. The shared commitment and agreement concerning a common set of human rights between decent peoples and the levels of general enforceability affords them the right to forcibly intervene in certain cases. Nonetheless, the lack of specificity and robustness in the argument as to when this is exactly justified means that the concept merely amounts to

¹⁴ While this is true, one should note that this is partly because of the minimalist conception of human rights of the Rawlsian view. This is done for an array of reasons, most notably to avoid charges of imperialism which more capacious sets and lists of human rights are liable to provoke.

a conventionalist rationale, and not the sought-after normative justification (Martin, 2005, p. 449). However, the rather complex normative foundation of the list of human rights agreed upon by decent peoples does afford individuals, either acting alone or in concert with others, the right to do *something* to halt or reverse severe violations of human rights. Yet, this *something* is normatively dubious and requires an individual moral interpretation on a case-by-case basis as to whether armed intervention can be part of it.

Surmising, one would not be amiss to characterize this conception of human rights and (non)intervention as occupying a middle position between limited and broad interventionism. The line of argument regarding international morality also occupies a middle position on the continuum between the morality of states and cosmopolitan justice (Tinnevelt, 2002, p. 265). According to such a position on the spectrum, the internal sovereignty of states hinges on their respect for human rights proper and the decency of their political regime, since people are acknowledged as the primary normative unit of global morality.

The above leads to an important distinguishing characteristic between the just war and Rawlsian conception of humanitarian intervention. The Rawlsian notion determines that for a moral duty of nonintervention in a state's affairs to exist, that state must be legitimate, thereby establishing a link between international morality and domestic justice. What follows from this line of argument is that there exists *no a priori* respect for state boundaries nor a *prima facie* right to self-determination, which is exactly what just war theorists argue for.¹⁵ In the Rawlsian case, the sovereignty of a state is attached to its ability to protect human rights properly, as well as the decency of its political institutions, thus combining the principles of international justice with the minimal conditions of moral decency. The Rawlsian view of humanitarian intervention must therefore be characterized as slightly broader than the just war paradigm. This line of argument suggests that intervention can be justified in cases where the acts do not necessarily "shock the moral conscience of mankind". Intervention can also be justified in instances where outlaw states are engaged in serious human rights abuses and are unwilling to change their political regime to a more decent one, despite the forceful diplomatic, economic, and cultural measures employed by IP.

Other just war theoretical accounts embody more revisionist characteristics. The theory espoused by these accounts suggests entitling nations with the ability to wage war based on a more cosmopolitan nature of human rights. Rights such as security and subsistence

¹⁵ The original view expressed in "Just and Unjust Wars" has been amended to a certain extent in various columns and articles later on. However, this was the original view expressed in some of the earliest just war works.

are universal and therefore require universalist politics to implement them, even if this means breaking the wall of state sovereignty (Luban, 1980, p. 392). This approach rejects the assumption that the only global community is one made up of nations, and not of humanity. It does so by claiming that nation-states should not be the principal units of moral regard, since this risks neglecting the threat of physical repression to the integrity of political processes (Luban, 1980, p. 394).

1.4 Cosmopolitanism & Humanitarian Intervention

One potential application of cosmopolitan values to the case of humanitarian intervention may lead to the conclusion that the cosmopolitan default position is that a *prima facie* right to intervene exists. A right that any state has to defeat through for example its human rights record. This would be a misrepresentation of the cosmopolitan view on humanitarian intervention. Generally, cosmopolitans agree with the presumptive case against aggression (Fabre, 2012, p. 170). However, the intrinsic value attached to communal sovereignty in the previous sections, which dictates a view always opposed to intervention, is succinctly different from the cosmopolitan view which attaches no such value. Furthermore, a cosmopolitan has a much more robust and capacious view of which human rights violations may sufficiently justifiably trigger armed intervention than non-cosmopolitans. However, *all things considered*,¹⁶ it is not unlikely for a cosmopolitan to agree with non-cosmopolitans that humanitarian intervention is wholly justifiable in only a small minority of instances.

Aside from this slightly paradoxical argument, there are specific points of strength in the cosmopolitan approach to humanitarian intervention. One aspect of this is the focus on the justification for and authorization of members of IP to inflict widespread damage as part of the large-scale military force employed in the humanitarian intervention *for the sake of* the victims in the country at hand. This may seem like a redundant argument and something that has already been granted once justification for intervention is assumed. However, to a cosmopolitan, this would be a mischaracterization of sorts. The belligerents of IP are not automatically entrusted with the right to inflict damage on the part of the victims in the relevant target country (Fabre, 2012, p. 171).

¹⁶ This is a method utilized in “Cosmopolitan War”. Some scholars argue it creates a weakness in the approach since it provides a non-exhaustive list and nonspecific guidelines. In the end, this distances the work from the objective of JWT because it is so detailed and considerate of every small aspect that perhaps pertains to each case.

Cosmopolitan justice solves this problem by way of a Hohfeldian transfer of power,¹⁷ which ensures that a right to kill is not only applicable in the case of one's rights but also extends to matters where it is carried out in defense of the rights of others, in which case the victims transfer the right to rescuers (Fabre, 2012, p. 171). This point is at the crux of the cosmopolitan approach to humanitarian intervention. The cosmopolitan case for intervention highlights the general cross-border duty to assist those in need, which includes the deprivation of fundamental freedoms and essential resources as a result of some other party's dereliction of duty (Fabre, 2012, p. 184).

Cosmopolitans do not recognize or attach any intrinsic value to the state or its boundaries. Furthermore, cosmopolitans adopt a much more demanding view of which violations may justify any type of IP to cross state boundaries to honor their commitment to a political community under threat by way of the Hohfeldian power transfer. While the minimalist view requires acts that either "shock the conscience of mankind" or are "egregious" and "grave" to warrant intervention, the cosmopolitan justice view is succinctly different. This view includes cases where nothing more than a mere threat of lethal violence exists, as well as matters where individuals' civil and political rights are violated (Fabre, 2012, p. 173). Progressive cosmopolitans may even argue that violations of socio-economic rights can justifiably trigger a humanitarian intervention (Stacy, 2006, Elfstrom, 1983). Yet, under the all-things-considered approach, this would most likely not wholly legitimize the intervention.

At this point, it may seem as if the all-things-considered approach authorizes belligerents of IP to wage war for the sake of the victims in the target country any time there is a just cause for the exercise of lethal force. This is however not the case. Instead, the final decision must be a rational weighing up of whether the humanitarian intervention would be a proportionate response to the crisis in question, and whether it has a reasonable chance of success. According to cosmopolitan justice, one should choose to let the victims of egregious human rights violations face their fate if intervening is more likely to prove detrimental to cosmopolitan principles than doing otherwise. Moreover, in certain cases, victims of human rights offenses might have a higher chance of surviving the harshness they find themselves in than any outsiders would have. In such cases, the belligerents of IP are not afforded the ability

¹⁷ The Hohfeldian power is described as an incident that enables agents to alter primary rules, meaning, A has a power if and only if A can alter his/her own or another's Hohfeldian incidents. Cosmopolitan justice uses the Hohfeldian power to extend the right to kill in instances where the victims under perpetration are, for an array of reasons, not able to resist their enemies' cruelties.

to wage war on their behalf. Concerning moral consistency, the decision of whether to intervene or not should also be informed by the “level” of rescue: if the choice is between saving 600.000 people from mass enslavement and 15 million people from starvation, perhaps the latter is most desirable (Fabre, 2012, p. 175).

Seemingly, for the Hohfeldian power transfer to take place, the consent of the victims in need of rescue is required, since there can be no actual authorization without consent. Whether this consent needs to be explicit or whether some type of *presumptive consent* suffices in certain cases is not exactly clear. Some scholars argue that, especially in humanitarian conflicts, implicit consent must suffice because of the general conditions most of the victims of such conflicts find themselves in (Bellamy, 2005, p. 39). The problem of consent is salient in humanitarian conflicts since victims are often subject to severe hardship, depriving them of the physical, material, or psychological means to make themselves heard. Also, victims oftentimes include very young children, who are physically incapable of providing explicit consent. Therefore, it seems apt for IP to presume that if there is good reason to suppose that victims would consent to the intervention if they were in a position to do so, then IP may act as if the victims had explicitly authorized its intervention.

The cosmopolitan presumptive-consent claim has some empirical evidence. For example, the previously mentioned Indian intervention in East Pakistan in 1971. In that case, the millions of Bengali citizens would likely have explicitly called for intervention had they been in a position to do so. Even more likely, the hundreds of thousands of Tutsis and Hutus who were massacred or forced to leave Rwanda during the 1994 genocide would have given consent to any type of IP to intervene, which did not happen as the international community mostly sat idly by. A third empirical case is the Darfurian massacre in 2003-04. Thousands of Darfurians were killed by government-backed Janjaweed militias, which almost undoubtedly would have made the victims give consent to the international community to intervene on their behalf (Fabre, 2012, p. 176).

However, there are inherent difficulties in the presumptive consent claim. Primarily, the difficulties lie in establishing the threshold that the belligerents of IP must respect. This threshold concerns their potential authorization to perhaps do more than simply put a stop to the grievous rights violations being perpetrated by a government. While there is cosmopolitan agreement on the fact that at times presumptive consent exists, the specific extent of it is not entirely clear. Whether it stops at the exact moment that the human rights violations have been halted or whether it can be extended to cases of regime change and the institutionalization of

more democratic structures in the relevant societies is ambiguous.¹⁸ Nonetheless, utilizing the all-things-considered approach, a cosmopolitan would most probably argue that the inherent difficulties in establishing whether IP has authorization to do more than simply put a stop to the rights violations are not severe enough to undermine the claim to intervene in the first place (Fabre, 2012, p. 178). Doing so would impose epistemic requirements on IP of the sorts that no belligerent would be likely to meet. Consider Great Britain in 1939 pre-WWII. In no way could the British government have known whether its population would have endorsed as long a war as WWII turned out to be. Nonetheless, if IP lacks intimate knowledge of the community it is intervening in, it can and should be held to a higher threshold of presumptive consensual evidence. This distinguishes humanitarian intervention from cases of collective self-defense, which are not held to the same high threshold.

The radical egalitarianism¹⁹ inherent in cosmopolitan logic in the context of humanitarian intervention ensures that there exists a special, Lockean relationship²⁰ between individuals and foreign political communities. This means that state borders and boundaries are arbitrary under the duty to intervene when the victims are deprived of fundamental freedoms and vital resources. The cosmopolitan logic of the arbitrariness of political borders also posits that there is no distinguishing character between nearby compatriots and distant strangers. From a moral viewpoint, distance and borders have no bearing on the fundamental human rights of individuals.

As mentioned earlier, humanitarian intervention may not be wholly altruistic at times. Various states or coalitions of states intervening may have some sort of self-governing interest in carrying out the intervention. Nonetheless, to a cosmopolitan, this does not immediately equate to impermissible and illegitimate grounds for the intervention. While solely self-interested motives behind an intervention would of course taint it to a degree where illegitimacy would have to be partially invoked, completely altruistic objectives are not required. The fact that humanitarian intervention does not need to be wholly altruistic to be justifiable draws on the previously discussed case of the Indian intervention in East Pakistan in 1971. In 1971, during the Bengali genocide, Pakistan was repressing autonomous parties in

¹⁸ This point is particularly troublesome for cosmopolitanism, since many cosmopolitan scholars, such as Fabre, argue that post-bellum responsibilities play an important role in the justifiability of humanitarian intervention, as do less radical egalitarianists, such as Michael Walzer.

¹⁹ The egalitarianism described here is part of the third ethical divide, where egalitarian theories of international justice claim that the objects of moral concern must be treated equally, thereby saying that no one specific object of moral concern should count for more than other objects.

²⁰ This Lockean relationship derives from Alain Locke, whose cosmopolitan principles and values of necessity (liberty, equality, fraternity) pervade all political conceptions and communities, thereby forming a special relationship completely irrelevant of boundaries and borders

the East Pakistani region. This repression allegedly posed a threat to India due to the increasing levels of violence in the border region, as well as the potentially uncontrollable influx of refugees that would follow (Fabre, 2012, p. 186). While the Indian intervention was motivated by the Bengali genocide and saving the victims, it served the Indians well too. Since Pakistan is a neighboring state, destabilization close to the Indian border would undoubtedly have had an impact on the Indian state of affairs. However, there is wide agreement as to the fact that these self-governing interests did not, in turn, make the humanitarian intervention unjustified or illegitimate.

To some cosmopolitans, humanitarian intervention can only fulfill its just cause if it puts a halt to the existing grievous rights violations, while simultaneously securing conditions under which the rights of the intervention's beneficiaries can prosper and feel secure in the long term (Fabre, 2012, p. 190). As explained earlier, this view is troublesome to a certain extent, as the extent of the right to kill is ambiguous under cosmopolitan justice values. However, if one chooses to adopt the view of humanitarian intervention as constituting a police operation, conducted by IP (the would-be law enforcers) against the perpetrators of injustice (the criminals), then the morality issue shifts, as the two parties are not on par morally.²¹ This would transform the humanitarian intervention from a potentially lethal conflict between soldiers, who are quite evidently on similar moral footing, to a law enforcement operation with IP as the superior moral party. Furthermore, this view would constitute intervention as a right to stop wrongdoers from violating universal rights and norms, instead of a direct right to kill. However, whether it is possible to secure favorable post-bellum conditions for the victims by the mere authorization to halt existing rights violations is an unappealing argument and a clear deficiency of the police operation model.

As a concluding note on the application of cosmopolitan justice values in the context of humanitarian intervention, one must exercise a fair bit of caution when utilizing certain cosmopolitan concepts in judging humanitarian intervention. The primary point of concern of the explicitly cosmopolitan approach is the all-things-considered approach. The paradoxical nature of this approach to justified action distances cosmopolitanism from the main objectives of JWT. The main purpose must be the creation of a normative framework with precise guidelines able to guide intervention according to a set of principles focusing on justness and

²¹ This type of comparison is also common in JWT. The rationale is that humanitarian intervention comes closer than any other type of intervention to law enforcement. However, since it requires crossing an international frontier, which is ruled out by the legalist paradigm unless authorization is granted by the "society of nations", it becomes a problematic view. Many of the interventions cited as examples of police interventions were carried out unilaterally, which is not a liberal way of applying the rule of law.

fairness in certain situations of humanitarian crisis and need. The urgency of many of the situations warranting intervention is oftentimes very grave, which means there needs to be a sufficient and proper framework, with very little ambiguity. Applying the all-things-considered approach to intervention severely complicates the creation of such a framework, which is why we need to exercise caution when applying it as such.

CHAPTER II: THE ETHICS OF HUMANITARIAN INTERVENTION

Introduction

Despite the underlying differences between the various viewpoints and dichotomies analyzed in Chapter I, it seems certain that under a given set of circumstances, a state, that has not been attacked itself, nor directly in defense of other states, *can* have a right to intervene in the internal affairs of another state. To some scholars, this right may indeed at times morph into a moral obligation or duty to intervene. However, this is not a straightforward argument to make. A communitarian would note that communal integrity and sovereignty should predominantly override the urge to intervene, disregarding the call for an outright duty to intervene. Others would argue that if one were to institutionalize such a duty to intervene, world order would be severely destabilized. Nonetheless, the question of whether a right to intervene can morph into a duty to do so is integral to the overall question of the ethical justification of humanitarian intervention and therefore warrants further scrutiny.

While the words *right* and *duty* are often used interchangeably, it is crucial to create a distinction between the two in the context of humanitarian intervention. It is clearly discernible that there can be situations warranting humanitarian intervention where there is a right to act, but no obligation to do so. This is the case when the risks of incurring large losses of life born by the agents of IP are too great. The Good Samaritan argument further emphasizes this point. In decent societies, passersby are bound to respond in certain situations of distress. For example, imagine a child drowning in a lake, or a stranger is injured by the side of the road. Unanimously, people would for the most part argue that they are obligated to do something to save the child or help the stranger, regardless of whether this would mean they require new clothes or are going to be late for work (Singer, 1995). However, this duty to respond does not entail them risking their lives, as this would be too much to ask. In cases where these risks are clear, the passersby in question certainly have a right to respond, and exercising this right may well be the proper thing to do, however, no moral obligation exists in such a case (Walzer, 2004, p. 15).

2.1 The Moral Right to Intervene

Applying the perspective that risk management of some kind is essential in deciding when a right turns into a moral obligation is extremely relevant to situations of humanitarian intervention. Fundamentally, humanitarian intervention always involves some type of risk for the agents of IP, suggesting that they may not be under a complete moral obligation to act. By taking advantage of this scope would provide IP with the ability to act but also with the option

to decline the risks associated with involvement. Essentially, from this point of view, humanitarian intervention would amount to what philosophers call an imperfect duty: there is widespread agreement that someone should intervene, but who this *someone* should be is ambiguous because no single actor or state can be thought of as morally obliged to intervene (Walzer, 2004, p. 15). As explained in the previous chapter, at times unilateral intervention is most prudent because of the difficulty attached to multilateral action. However, the problematic philosophical conundrum of the imperfect duty can only really be solved by multilateralism, i.e., through some sort of designated responsibility mechanism previously agreed upon through a collectively accepted decision procedure.

A philosophical argument aimed at establishing that a claim of permissibility necessarily entails a claim of obligation could read something like this: if and when there is a right to intervene in the first place, then this signifies that the war (humanitarian intervention) is just because a war can only be just if the costs to the combatants and non-combatants of IP are sufficiently low to be warranted. Accordingly, if the costs are sufficiently minimal, then by implication there is a duty to impose them (Fabre, 2012, p. 179). Advancing this argument, one finds that humanitarian intervention at times may supersede a mere right or even an imperfect duty. The reason for this is the explicit difference in moral urgencies between cases of war and cases of egregious human rights violations, such as massacres or genocides.

Whereas traditional military operations often provoke great uncertainty and complexity regarding the outright consequences, the costs of egregious human rights violations are easier to judge. In a situation such as the Ugandan genocide under the Idi Amin regime, hundreds of thousands of lives were undoubtedly at stake, for no apparent reason.²² Because of this important distinction, comparing nonintervention in the face of ethnic cleansing or mass murder with neutrality during war neglects the paramount differences in moral agency that exist in this chasm (Walzer, 2004, p. 16). The Good Samaritan argument aptly demonstrates this point. In the Ugandan case, the existence of the intervening state was not at risk, suggesting that there may be an obligation for the most capable, or nearest, state to do *something*.²³ However, this potential obligation only pertains to actual states and not the

²² While killing is always wrong, various scholars differentiate between killing for a justifiable purpose, and the massacres and genocides carried out by regimes seemingly for no apparent reason other than maintaining their own power grip on a certain nation and people.

²³ Similarly to the ambiguity as to who the *someone* is that should intervene, there is ambiguity attached to what this *someone* can and should do. Normative guidelines for humanitarian intervention are generally too vague to warrant universal application without a thorough case-by-case evaluation beforehand.

individual members of each population. In their case, the same test verifying who is the most capable, or strongest, may ensue when deciding who can and should intervene.

2.1.1 JWT Discussion of Legitimate Authority

The imperfectness of the potential duty to intervene can be questioned. The assumption that the duty to intervene becomes imperfect simply by being unassignable to any specific agent is problematic and raises various issues. The inherent implication is that the duty to protect human rights cannot be competently claimable because it cannot be veritably assigned to specific agents and agencies. The first point of concern is the fact that the duty then becomes a mere “manifesto right” (Bagnoli, 2006, p. 121). Such a right is impossible to efficaciously enforce because, although the claimant has merit in positing it, there is no clear recipient for the claim. Assuming that humanitarian intervention is an imperfect duty allows for the opportunistic use of illegitimate intervention with a limited moral basis, potentially enabling certain polities to intervene as they see fit. Even more importantly, an additional corollary is that neutrality in the face of egregious human rights violations becomes ethically permissible, and not reprehensible or condemnable.

I do not claim that the issue of identifying the proper agency does not arise: it certainly does. However, this method of discernment is a political process concerning proper authority. Regardless of this, a duty must apply to all rational agents. In the case of grave human rights violations, this includes the entire international community, which is compelled by the obligation to *protect* the victims of basic human rights abuse (Bagnoli, 2006, p. 124). In turn, the question becomes how the international community should tackle this collective moral responsibility. However, this question does not include considerations arising from the extensiveness of the duty to protect. Instead, this is a purely political predicament regarding the institutionalization of a response on the part of the entire international community.

While the duty to intervene and protect may be imperfect to some because of the absence of collective institutions capable of aptly responding to the pleas of victims, this does not exempt rational agents in the international community from acknowledging the duty. Instead, the appropriate conclusion must be that the institutions need to be improved. In a moral and ethical sense, this does not exclude states or individual agents from recognizing and obeying the call inherent in the duty to protect. The issue of institutionalizing moral responsibility to intervene is political, and should not dictate how potential addressees of the claim to protect react to pleas for help by victims of gross human rights violations. Moreover, the political aspect of this problem is not dependent on the assumption that humanitarian

intervention is an imperfect duty. It persists even if the duty to intervene is assumed to be a perfect duty catalyzed by general respect for humanity (Bagnoli, 2006, p. 125).

The inherent assertion in the imperfectability claims of the duty to intervene is that since the duty is one of benevolence and charity, neither states nor individuals can be sufficiently compelled to act on its motives. This is because benevolence is a duty of virtue which cannot be coerced. However, while beneficence is the moral ground for respecting and promoting human rights, opposing and resisting violations of fundamental human rights transcends a mere duty of charity. (Bagnoli, 2006, p. 126). In this form, the duty is rooted in the simple respect for humanity, a duty whose execution is ethically compulsory, at least to those who adopt a minimally demanding view of human rights.

To appreciate the tenets of the argument advocating strict adherence to the duty to intervene, one should contemplate what the recognition of humanity encompasses. In a Kantian perspective, humanity is the quintessential cornerstone for inclusion in the moral community, and to qualify for moral personality (Green, Hudson, 1999, p. 364). It is also the element that affords individuals with dignity and makes them “self-originating sources of valid claims” (Rawls, 1980, p. 546). The Kantian moral community is regulated by ethical norms to which all members, who act as autonomous and rational agents, are accountable. Arguing for the protection of basic human rights automatically grants humanitarian intervention normative status as a requirement of morality. Characterizing the protection of human rights as a moral matter is equal to asserting that human rights are universally unalterable, and therefore are enforceable even in polities that do not explicitly recognize them (Bagnoli, 2006, p. 121). Human rights still retain normative power despite the potential lack of regional reinforcement.

One should be wary of the difference between the act of *defending* human rights and that of *promoting* them. According to the Rawlsian conception, defending human rights amounts to a duty of respect. This is because human rights are fundamental principles that warrant a certain ability to represent ourselves as self-originating sources of claims and then to act accordingly on the notion of ourselves that is formed (Bagnoli, 2006, p. 126). Conversely, promoting human rights is an act of charity and beneficence, which is therefore not as robust as the duty to defend them. The difference in motive between the two is pivotal as it governs the measures for pursuing them. Humanitarian intervention is hardly the most apt approach to support a country seeking to promote the political and civic conditions for the fulfillment of human rights. This is a much more complicated undertaking necessitating

enhanced focus on institutionalizing structures, and so forth.²⁴ On the other hand, putting a stop to violations of fundamental human rights is oftentimes most efficaciously carried out by way of chastisement, for example through the military action of humanitarian intervention.

2.1.2 Non-combatant Immunity

In Chapter I, the justification for killing in wars of humanitarian intervention was established. This justification appealed to the rights of victims to defend themselves against their perpetrators in situations warranting intervention. As was explained, these rights of the victims also guaranteed them the ability, vis á vis the Hohfeldian power, to transfer these same rights to their rescuers, either explicitly or tacitly. At this juncture, distinguishing between combatants and non-combatants becomes vital. This distinction quite simply differentiates between individuals actively engaged in the humanitarian intervention, either on the side of IP or as part of the target regime, and those innocent civilian bystanders who are not involved. In wars of humanitarian intervention, the idea of non-combatants retaining civilian immunity from the ongoing, at times necessary killings, is largely agreed upon between scholars. Nonetheless, there may be instances during certain interventions where this non-combatant immunity comes under threat.

Analyzing whether it may be permissible for combatants of IP to kill non-combatant bystanders in the target regime is tantamount to asking whether the victims in the target regime can justifiably transfer the permission and right to kill some of their compatriots in self-defense to IP (Fabre, 2012, p. 198). Generally, the answer to this question is no. However, in extreme cases (such as those of supreme emergency which will be explained later on in this chapter) instances where a right to kill bystanders arises, to thwart a much greater evil, may arise. However, irrespective of the categoricalness of the answer to the question, proportionality considerations are always paramount when considering whether non-combatant immunity can be suspended in certain cases. The crux of the argument concerning non-combatant immunity assumes that since non-combatants are essentially innocent of the wrongful threat to which victims are subject, they have not lost their inherent right not to be targeted.

²⁴ This point is also relevant in *post bellum* situations, as the focus then turns from saving a state's population from imminent danger to supporting and assisting that same state in rebuilding and reinforcing the political and social fabric of its political community. The inherent problem is of course that the motive for the intervening state in the first place was to defend human rights, which means that it is not necessarily capable nor willing to employ the measures needed to promote them.

Some scholars argue that certain situations, falling short of those included under the supreme emergency umbrella, may arise where this right is endangered vis à vis proportionality considerations. In such cases, considerations primarily concern the limits to the sacrifices that individuals of IP can be expected to make for the sake of strangers. In these cases, the proviso is crucial: Imagine a situation in which the only way that an agent of IP can save his own life is by detonating a bomb that will kill one or more of the attackers of the target regime. If this detonation entails the killing or maiming of thousands of innocent civilian bystanders, he is not justified in doing so. On the contrary, if the detonation kills only one innocent bystander, then he may be righteous in detonating the bomb to save his own life (Fabre, 2012, p. 199). This point can also apply in cases where grievous rights violations can be stopped only by acts that may entail the deaths of non-combatants as a foreseen albeit unintended consequence.²⁵

Other scholars reject the tenets of this argument and maintain that non-combatant immunity cannot be suspended regardless of proportionality considerations. One of the arguments opposing the suspension of non-combatant immunity emphasizes that not only should non-combatant lives be spared at all costs²⁶, but the chief aim of the military component of the humanitarian intervention should be to reduce and minimize the loss of civilian lives to the absolute greatest extent possible (Walzer, 1977, p. 103). Moreover, the strategic and operational command units involved in the interventions should factor in this point when preparing the forcible intervention. Even in situations where greater attention to sparing civilian lives increases the risks of additional combatant loss of life, as well as minimizes the overall chances of success of the given mission, it should be the primary objective.

One may note that any discussion on non-combatant immunity is likely to yield substantively and normatively ambiguous results. The complexity of distinguishing between the status of individuals in humanitarian intervention, and balancing this with the overall war effort dictates this ambiguity. However, looking at specific cases of interventions, it is evident how the varying structure of them can have grave impacts on the non-combatant immunity clause. In the three cases mentioned in Chapter I, Cambodia, East Pakistan, and Uganda, the

²⁵ This is an example of an “intent-based distinction” which is integral in judging the morality of war, and thus humanitarian intervention. The distinctive feature of this doctrine is the difference between using innocent lives as a means to an end and on the contrary, doing one’s utmost to spare as many lives as possible, thereby establishing a difference between direct and oblique harmful agency.

²⁶ For the sake of clarity of argument this phrasing is used, although situations of supreme emergency still exist where the non-intended killing of non-combatants may be minimally justifiable.

interventions were carried out on the ground in what can best be described as examples of “old-fashioned war-making” (Walzer, 2004, p. 19). This meant boots on the ground who conducted the vast majority of the work in the intervention, thereby utilizing a hands-on approach with maximum control of the potential consequences stemming from the force employed in the interventions. However, the evolution in war-making means that the methods of intervention are changing. Most notably, technological developments mean that intervening forces have been granted enforceable techniques able to severely minimize the potential loss of life and destruction to their agents.

Ostensibly, this is a positive development. However, it also exposed morally troublesome aspects of modern-day fashion war-making. One example of this is the 1999 NATO-led Operation Allied Force, aimed at halting the humanitarian catastrophe that the international community in large part had failed to avert in Kosovo. This Operation relied on air superiority and drone-and-guided missile systems to help lead its objective. The advantages of the alternative model of intervention utilized in Operation Allied Force were clear: a war fought almost exclusively from the air with technologies designed to reduce the risk of casualties of IP to somewhat near zero (Walzer, 2004, p. 19). While seemingly compelling to any IP, on a moral footing, such an approach seems disconcerting at best and outright undermining to the requirements of *jus in bello* at worst. The most apparent problem stemming from such a method of intervention is the fact any humanitarian intervention carried out entirely from the air cannot possibly be won without attacking civilian targets. While these attacks may not be directed at residential areas, but instead at electrical plants or television stations, innocent lives will nonetheless be endangered, and claims of unethical collateral murder are not unwarranted in some of these cases.

A less obvious problem stemming from such an air campaign, albeit potentially even more troublesome and challenging in the long run, was exemplified in Afghanistan during the 2000s. Although not part of a humanitarian intervention but rather as a response to the 9/11 attack, the drone missile regime employed by the U.S government under then-President George W. Bush, as well as his successor President Obama, is an example of how drone attacks cause collateral damage, which in the Afghani case ran into thousands of civilians. Moreover, certain scholars have constructed the argument that killing with impunity, as was the case in both air campaigns in Kosovo and Afghanistan, hundreds and potentially thousands of more targets are created.²⁷ The unfairness of drone strikes is not lost on the

²⁷ Although more relevant in cases of terrorism, which the U.S was fighting in Afghanistan since the chasm between good and evil is more pronounced in those cases, this point is still valid in cases of humanitarian

populations in question. Albeit more crucial in the case of the “War on Terror”, intervening forces have to be mindful of the potentially cataclysmic consequences to the overall war effort that the unethically of drone strikes, and other alternative methods of intervention disregarding civilian lives in the target state, may prove to have.

Generally, drone attacks aim to exert pressure on a regime engaged in the perpetration of barbaric atrocities against a minority of its citizens. This is done by either threatening or harming the majority of the regime’s population, to which, presumably, the regime’s government remains, at least partially, committed (Walzer, 2004, p. 19). Even when such an approach may work, its legitimacy is severely questionable. At least as long as the possibility of a more specific, less all-encompassing strategic approach, where the forces who are perpetrating the heinous acts are the ones feeling the brunt of the force employed. Principally speaking, non-combatants are immune from direct attack and have to be protected to not become collateral damage. Therefore, soldiers of the intervening forces may have to accept higher risks to themselves to avoid imposing these on the civilian population (Walzer, 2004, p. 20).

2.2 The Moral Relevance of Borders & (conditional) Sovereignty

As noted in Chapter I, the degree of moral importance attributed to national borders has a decisive influence and impact on the view of the legality, efficacy, and overall legitimacy of humanitarian interventions. Generally, pro-interventionists and non-interventionists alike can agree on the moral abhorrence of barbarous and atrocious acts stemming from tyrannical or anarchical regimes carried out against their own populations. However, in defending their view, non-interventionists may resort to arguments and theses of international ethics, placing decisive significance on sovereignty and national borders (Teson, 2003, p. 102). To appreciate this, consider a situation in which a guerilla government in a state is perpetrating heinous acts against a certain ethnic group. The guerilla army is prepared to resist the federal army of the state, which makes it increasingly likely that if the federal government attempts to halt the ensuing massacre, a civil war will break out. At this point, non-interventionists will more than likely not object to the *internal* intervention by federal troops, aimed at halting the massacre and thus thwarting the potential civil war. One would not be amiss to think that non-interventionists, stemming from their mere humanity and decency as individuals, would praise such an intervention.

intervention, where intervening forces still have to be wary of not turning the will of the population against themselves.

Then, picture a scenario similar to this one, in which federal government forces must cross a foreign border to put an end to crimes of a similar nature carried out by a sovereign government in a neighboring state. To a non-interventionist, the act of breaching a national border transforms the humanitarian rescue mission into an unwarranted war rather than a rescue effort (Teson, 2003, p. 103).²⁸ This non-interventionist distinction is rooted in the heightened moral importance they attribute to national borders, as a corollary of the sovereignty principle. However, in the scope and context of humanitarian intervention, attributing this level of moral significance to national borders is not necessarily desirable, nor justifiable. One of the reasons for this is the fact that national borders are the serendipitous outcome of previous events of bloodshed, brutality, and other kinds of morally deplorable and insignificant historical certainties. Moreover, much of the anguish and oppression in the world derives from the excessive and at times hyperbolic influence assigned to national borders. Whether it be cases of discrimination against immigrants, ethnic cleansing, or trade protections benefitting particular special interests, the concept of state, nation, and borders has been historically used to justify all kinds of injustice (Teson, 2003, p. 103).

One could argue that the importance many scholars attribute to sovereignty is linked to the interest in formulating a set of universal human rights. This would afford governments the ability to protect their citizens' rights under this umbrella term, which is the exact situation in which sovereignty matters most. The overarching purpose of sovereignty, in the context of political and territorial authority, is to ensure a government's capability to provide its citizens with the basic living conditions to which all people are entitled (Frowe, 2011, p. 87). Notice that the above explanation hints at sovereignty being *instrumentally* valuable rather than *intrinsically* valuable, since sovereignty is not valuable in and of itself. Instead, the value of sovereignty hinges upon its actual ability to help ensure that citizens' basic human rights are protected and not infringed upon, thereby making sovereignty *conditional*.

One potential way of applying the conditional sovereignty view to humanitarian intervention would suggest that a state that does not sufficiently protect its citizens' basic human rights lacks any sovereign value. Therefore, it forfeits authority over its territory, thereby signifying that other states in the international community do not have to respect its

²⁸ The overall semantics employed when addressing humanitarian rescue and intervention can be confusing at times. Massive human rights violations could well be described as a war in and of themselves, for example, a war of the government against its people. Perhaps the reason this is not the case is because usually part of the population is thought to be an accomplice in the perpetration.

borders as they normally would.²⁹ This view is of monumental importance when applied to cases of humanitarian intervention. The vast majority of scenarios warranting intervention are characterized by a government either intentionally failing to prevent human rights abuses or outright responsible for perpetrating them (Frowe, 2011, p. 87).³⁰ The conditional sovereignty view supposes that a government that fails to protect its citizens appropriately forfeits any potential right to sovereignty. Therefore, other states or coalitions of states would not violate the general sovereignty rights when sending agents or troops across the relevant international border to intervene. Adopting this view would thus, in certain instances, clear the way for legitimate humanitarian intervention to halt gross human rights abuses.

Interestingly, the conditional sovereignty view proves problematic for the conventional idea of what constitutes a state. The idea of a state is commonly connected with the concept of sovereignty, ensuring that no entity can proclaim itself a state if it does not enjoy full rights over its territorial and political authority and integrity. The contingent view of sovereignty expressed above rejects this sort of link in identity, instead alleging that while an entity must be a state to qualify for sovereignty, sovereignty does not necessarily follow from mere claims of statehood (Frowe, 2011, p. 88). Rather, to achieve full sovereignty, a state must adhere to an additional component of governance, the unconditional protection or realization of the human rights of its population. The below excerpt effectively summarizes the connection between state sovereignty and foreign intervention:

A genocide is no less ‘a common threat to humanity’ if it occurs within borders than if it crosses them. The basic principle that should guide international intervention is this: Individual state sovereignty can be overridden whenever the behavior of a state even within its own territory threatens the existence of elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside. State sovereignty, in short, is a contingent value: its observance depends upon the actions of the state that invokes it. Members of the international community are not obliged to ‘respect the sovereignty’ of a state that egregiously violates human rights (Smith, 1998, p. 78).

The appeal of this view is obvious. For one, it provides governments with an incentive to actively seek to protect their populations’ basic human rights, since their own sovereignty

²⁹ It should be noted that this is a quite radical reading of the conditional sovereignty clause. Sovereignty also retains importance in the legal sphere, which means that there are other potential readings of it besides the one proposed by IR.

³⁰ While an epistemic difference exists between these two cases, for the purposes of this thesis, the chasm is largely irrelevant. In cases where the state may merely be failing to protect its citizens’ basic human rights, it should accept assistance from other states, and issues of contravening sovereignty should not arise. If a state refuses such assistance, it is fair to say that it is responsible, as in the first case, for the human rights abuses since it intentionally fails to take the chance to halt them.

rights depend on it. Moreover, it guarantees that sovereignty is not neglected at the cost of rampant killing sprees, where individuals are brutally suppressed and maimed. Simultaneously, it ensures that the moral obligations of individuals extend beyond their immediate community, but also to those suffering deprivation and abuse elsewhere, amounting to what should be a universally recognized moral principle (Frowe, 2011, p. 89). Nonetheless, while conducting humanitarian intervention based on the grounds described above may be wholly *legitimate* in the eyes of many, strict *legality* may be more arduous to ascertain. Nowhere in the human rights treaties utilized globally is there an implication that states automatically invalidate and revoke their claims to sovereignty by failing to protect their citizens' basic rights. Article 51 of the UN Charter, addressing individual and collective self-defense in the event of armed attacks on UN Member States (MS), cannot be allowed to be superseded by any moral reasoning, for this would create dangerous precedents for future exceptions (Frowe, 2011, p. 90). To uphold international law regarding the use of force while allowing for humanitarian intervention, legal justifications must be provided throughout, rather than depending solely on moral precepts.

While the analysis employed in the paragraphs above may seem to hint at a view where there is no respect for national borders, this would be a misrepresentation of sorts and a simplification of the argumentation. However, the primary reasons that persist for respecting national borders do not abrogate or undermine humanitarian intervention in appropriate cases. The first reason exemplifying this regards the legitimacy of the social contract between the citizens of a state. Such a contract implies individuals freely choosing to give up certain rights in exchange for the protection of their most basic human rights, ensured by the state's central authority. The underlying premise of the social contract is that a state, which is the result of the free consent given by autonomous citizens in civil society, must be respected. Not doing so, for example by violating the state borders, would be equal to treating the state and its citizens "as things" (Teson, 2003, p. 103). The inviolability of the borders and sovereignty of a state is contingent on the legitimacy of the social contract and thus both components serve the liberal ends of respecting basic human rights and freedom (Teson, 2003, p. 104). However, if a state government is already treating a group or minority of citizens as "things" by committing heinous and barbarous acts, the moral foundation for the sanctity of national borders is shattered.

A second, less apparent, reason to respect national borders is their beneficial impact in securing the intactness of the social fabric between individuals within and across demarcations of political jurisdictions in certain societies. Essentially, this reason for

respecting national borders is comparable to respecting the demarcation of property rights. This is analogous to allowing states to exclude foreign trespassers who attempt to take advantage of the benefits stemming from the cooperative efforts of the citizens of the state (Teson, 2003, p. 107). Attributing the state with full exclusive jurisdiction over its territory maximizes its global gains, just like giving farmers exclusive property rights over their respective lands eventually maximizes aggregate wealth. While these efficiency considerations regarding respect for national borders may not seem relevant in the case of humanitarian intervention, they are particularly applicable in post-intervention scenarios. Successful intervenors, unlike internal victors, lack the incentive to treat the target country as their own, simply because they do not have long-term property rights over the territory (Teson, 2003, p. 108). Similarly, internal victors possess a much greater incentive to attempt to rebuild some of the political fabric of their society than would outside intervenors – this was the case with the ruling group in Afghanistan in and around 2004.

The reasons stated above point to the need to assign some sort of *instrumental* value to the sovereignty of national borders. However, none of the inherent considerations exclude the legitimacy of humanitarian intervention. The severity and urgency of the cases warranting intervention cannot possibly be outweighed by what are essentially pragmatic considerations. While the respect for and protection of national borders serves to preserve the glue that binds international society, allowing heinous atrocities to continue across borders is a much worse eradicating force of that glue than the infringement of borders. The existence and importance of national borders are largely due to considerations of justice and efficiency, and when these virtues are fragrantly attacked by anarchy and tyranny, invoking the sanctity of borders in a bid to safeguard those same anarchical conditions becomes a futile, and in the end, counterproductive effort.

2.2.1 Political Community & Self-determination

The status of the individuals within national borders is highly relevant in the context of humanitarian intervention. In this respect, self-determination and political communities are two key terms, informing the discussion on the matter. The concept and idea of self-determination is essentially defined by citizens of a sovereign state being members of a single political community, who are entitled collectively to determine their own affairs without any foreign meddling (Walzer, 1977, p. 87). According to the Millian view of self-determination, states should be treated as communities independent of the freedom of their internal political arrangements. Therefore, a state can maintain its right to self-determination even if its citizens

are struggling and exposed to some violations of their basic rights. Furthermore, even if another state or coalition of states intervenes to attempt to better the situation, this would not necessarily be completely feasible. The political freedom of the members of a single political community depends upon the existence of individual virtue, which the force of any type of IP is unlikely to produce (Walzer, 1977, p. 87). From a view of self-determination, a population ruled by an anarchical or tyrannical government finds itself severely disadvantaged since it has never had the chance to develop the necessary virtues for guaranteeing freedom. Nonetheless, only through the doctrine of “self-help”, i.e. the process of an internal struggle by the members of the political community themselves, can they truly find freedom.

The Millian view of self-determination and self-help does not in itself proclaim that humanitarian intervention fails to serve the purposes of liberty. It posits that given what liberty is, any attempt at intervention must necessarily fail in all cases (Walzer, 1977, p. 88). However, communitarianism would have a strong rebuttal to this line of argument. If the government of a state, or whatever relevant dominant force, is engaged in massive, egregious violations of its people’s basic human rights, the appeal to the Millian view of self-determination and self-help is not very alluring (Walzer, 1977, p. 101). Such an appeal concerns the freedom of the entire political community as a whole. However, to attribute it any kind of weight when the very survival and basic, minimal degree of liberty of a considerable number of members of the community is at risk would be a gross misutilization of it. When a tyrannical force in a state is committing heinous acts of enslavement or massacre against a faction of the population, oftentimes political opponents or ethnic minorities, aid from the outside may well be the only source of relief available. Moreover, if a government perpetrates such vicious and inhumane acts against parts of the population, the mere existence of an actual political community, a necessity for the application of the idea of self-determination, is seriously doubtful.

The Millian perspective on self-determination is comparable to the Marxist dictum that “the working class can only be liberated through the workers themselves”, i.e., members of a political community can only be fully freed by means of an internal conflict (Walzer, 1977, p. 88). Just as the Marxist maxim excludes any substitution of spearheaded elitism for the proletariat democracy, the Millian argument prohibits any substitution of foreign intervention for internal struggle. In this view, self-determination becomes the right of individuals to free themselves by their own efforts, while the principle of non-intervention acts as a guarantor, ensuring that their success will not be inhibited or slighted by foreign intervention. At this junction, an important and controversial characteristic of self-

determination must be discussed. An integral pillar in the doctrine of self-determination is the belief that citizens get the government they deserve, or at least, the government for which they are “fit”. The test ensuring that individuals are ready for popular institutions must show that a sufficient portion of the population can “prevail in the contest and are willing to brave labor and danger for their liberation” (Walzer, 1977, p. 88). Mill’s calculous view of political conflict means that he does not think any other party or entity can make the members of a political community succeed in this contest but themselves.

Applied in a contemporary context, this view is both dubious and controversial. The contention that there exists inherent moral value in self-determination and the fortuitous balance of existing political forces in society alone is questionable.³¹ These political processes do not possess intrinsic value on their own, since their value is wholly dependent on a kind of minimal consistency with the imperative of respecting individuals’ minimal liberty (Teson, 2003, p. 105). Moreover, to describe the atrocious and egregious cases of human rights violations that warrant humanitarian intervention as mere processes of self-determination borders on grotesque. So too is the suggestion that, unless in cases of outright genocide or massacre, there is a necessary fit between tyrannical governments and their populations. As other scholars have remarked: “A government fits the people the way the sole of a boot fits a human face: After a while, the patterns of indentation fit with uncanny precision” (Luban, 1980, p. 395).

However, further dissecting the view of self-determination does prove useful to a certain extent. At the core of the self-determination argument is the assumption that humanitarian intervention is always outlawed because freedom has no value unless the victims themselves fight and achieve their liberation. While this argument is normatively problematic (why should freedom be any less valuable if someone else helps a person achieve it?), it does make an important point. The citizens of a failed state, where they are either ruled by a tyrannical government or victimized by fighting and cruel warlords, do have a partial responsibility to help put an end to the predicament they are in. Moreover, the intervenor has a certain right to expect fair and adequate cooperation on the part of the people suffering the brunt of the brutalities. This means aiding in the halting of tyranny, bearing and sustaining the

³¹ The controversy of this claim of the inherent value in self-determination has many historical reference points. For example, nowadays, it is doubtful whether anyone would say that there was anything valuable in the ‘self-determination’ of East Germany, a state largely created by terror and violence. Yet at the time, academics recognized East Germany as a legitimate state because of its political power and proclaimed that it was entitled to all the privileges and prerogatives otherwise associated with statehood. It seems that traditional views of international law sometimes suffer from degrees of moral blindness.

moral and material costs of the intervention, and eventually forging democratic institutions (Teson, 2003, p. 105). After all, the intervention is aimed at bettering their government and their society, which, as mentioned earlier, means that the incentivization is more pronounced on the part of the people targeted by the vicious perpetrations of violence.

A morally problematic epistemic point concerning the view of self-determination is the requirement that the victims of tyrannical or anarchical governments must welcome the intervention. This argument implies that if there is no explicit consent expressed, then this necessarily means that the average citizen in an oppressive regime *prefers* to remain oppressed rather than to be freed by foreigners intervening (Teson, 2003, p. 106).³² One must posit that while this scenario may be theoretically possible, it is not entirely plausible to occur. One could make the case that the only persons whose consent deserves consideration are those who oppose their own government and the potential humanitarian intervention on a moral basis.

Theoretically, it is possible to recognize the cruelty and savageness of a tyrannical regime, but still resist any kind of foreign intervention in their homeland, even if the intervention is carried out with the intent to stop the ongoing killings. Should prospective intervenors listen to such local civic and political leaders' refusal and let it be decisive in the process of determining whether or not to intervene? This is an arduous, perplexing conundrum for would-be intervenors. One line of argument would suggest they should not obey such advice because individuals cannot claim that their communal interests should restrict aid to other individuals. Especially individuals whose lives are severely threatened because of the brutal and heinous violence of the regime, regardless of their complicity. Only the consent of the actual victims targeted by the perpetrators matters when waiving the right to seek aid at a given time (Teson, 2003, p. 107).

2.3 Reforming the International System: Approximating Normativity and Legality

As mentioned in 2.2, allowing for humanitarian intervention requires more than a mere appeal to righteous moral beliefs and principles. To simultaneously preserve the strength and robustness of international law on the use of force, a certain degree of legality is required as the basis for intervention. However, previous cases of intervention show us the inherent

³² The real corollary of the self-determination argument may well be that it does not operate with the concept of tacit consent, which as described in Chapter I, sometimes is the only consent readily achievable in cases warranting humanitarian intervention. Not having the option of tacitly agreeing potentially leads this argument to a premature and faulty conclusion.

difficulty of establishing such bases. For example, the NATO intervention Operation Allied Force in Kosovo in 1999 is generally referred to as a successful and effective example of humanitarian intervention. Nonetheless, scholars also label it as, at least partially, illegal in a strict legalist sense (Holzgreffe, Keohane, 2003, p. 184). This shows the ambiguity of the law on humanitarian intervention since an illegal act may be what is necessary in dire situations of human rights violations. The Kosovo case has led some scholars to suggest that a type of “illegal reform” (Buchanan, 2001, p. 673-705) may be desirable and even required to amend and improve the law on humanitarian intervention while preserving the integrity and virtuousness of the international legal system on the use of force. Such reform inevitably entitles some sort of appeal to morality or justice, which is where the modus operandi of illegal reform encounters its first epistemic objection.

Critics of reforming the system through illegal acts would ask why some individuals should be able to impose their personal or subjective views of justice and morality on others. They would object that those who advocate violating the norms of international law, specifically those who attempt to change the law by violating crucial constitutional features of the international system, are nothing more than parochial zealots who would deny others the right to do what they do (Buchanan, 2003, p. 154). However, the assumption that the only two options are a subjective imposition of personal moral views and rigid conformity to existing legality is erroneous. Assuming that the Kosovo case is an example of trying to illegally reform the international legal system, the agents involved in the intervention sought to break international law to institute a process aimed at fomenting moral rectifications in the system. However, they were not merely appealing to personal views on morality.

Instead, one line of argument suggests that they were relying upon ethical principles already pronounced in the system. Among those sympathetic to the Kosovo intervention, including then-UN Secretary-General Kofi Annan, the intervention was supported by one of the most morally defensible basic concepts in the international legal system, the obligation to defend human rights (Annan, 1999, p. 2) The concept of moral authority is thus not a singular concept, but rather a space in which the chasm between strict adherence to existing international law and imposing subjective ethical beliefs in violation of that law can evolve. Therefore, while it is true that solely personal, subjective moral beliefs are incapable of providing a sound ethical justification for illegal acts of reform, the assertion that anyone who performs such illegal acts is acting purely on a subjective basis is inaccurate (Buchanan, p. 157).

2.3.1 What sort of new norm of Intervention?

Justifiably designating illegal acts as attempts to improve the law on humanitarian intervention requires great attention to the way these acts are specifically characterized. Asserting that the NATO intervention in Kosovo was an act aimed at establishing new norms of humanitarian intervention in domestic conflicts is insufficient to warrant such a justification. This narrow characterization lacks the normative dimension of what essentially made the intervention illegal. This is also what is supposedly able to transform it into an example that establishes a new norm of intervention: namely, the fact that it was undertaken without prior authorization from the UNSC (Buchanan, 2003, p. 165). Endorsing the act as an act of reform aimed at contributing to the creation of a new normative framework, means asserting that the requirement of UNSC authorization is a defect in the international legal system governing humanitarian intervention.³³

Some scholars appeal to the fact that because a regional defensive organization like NATO, which is recognized by international law, carried out the intervention it must at least be more justified than if it had been carried out by a loose coalition of nation-states. This appeal is used to argue that the Kosovo intervention was both legitimate and at least partially legal. However, this appeal to the status of NATO cannot repudiate the accusation of illegality. The UN Charter, namely Articles 51 and 52, makes no permissibility distinction between military action carried out by regional organizations and loose coalitions of states. In both cases, without UNSC approval, such action is only allowed in cases of armed attack against the state itself or a fellow UN MS.

Therefore, the question of whether a customary norm permitting intervention by regional military organizations, qualified under Article 52, would be a moral improvement to the international legal system persists (Buchanan, 2003, p. 166).³⁴ The answer to that question must necessarily be negative. Granting an entity like NATO the right to intervene without UNSC approval under international law would make the norm increasingly liable to abuse.³⁵ There is a distinct difference between claiming that NATO's intervention in Kosovo was

³³ The reasoning behind this is fairly straightforward: since it was the lack of prior UNSC authorization that made scholars define the Kosovo intervention as illegal, declaring it as a justifiable act of reform means agreeing with the fact that the system requiring this prior authorization is inherently flawed.

³⁴ Customary international law, as opposed to treaties, is an informal, unwritten body of rules deriving from the practice of states together with the *opinio juris*, a governmental belief that a specific practice is required by law or is at least relevant to its ongoing evolution. Putative changes are done tacitly by states, by either supporting or opposing a new norm through their practice or statements. For a norm to become customary law, most, if not all, states have to support it, and only very few, if any, can oppose it.

³⁵ To understand this point, imagine the controversiality of China and Pakistan forming a regional security alliance, appealing to this new norm of customary law to attempt to justify an intervention in Kashmir to stop Hindus from violating the rights of Muslims in the part of the region controlled by India.

morally justified as the only option to stop the egregious ongoing human rights violations in conditions where UNSC approval was unobtainable and claiming that the rule requiring UNSC approval is not the most desirable preventative mechanism under present conditions.

One must be cautious when assessing how illegal acts can reform the international legal system, and potentially create new norms of customary international law. One crucial component is the consideration that any act should reflect the importance of satisfying the requirements of the *opinio juris* (Dahour, 1999, p. 14). What this essentially means is that any conscientious reformer must act in ways that ensure an ethically defensible new pattern of state behavior regarding humanitarian intervention can potentially emerge. Furthermore, the behavior should promote a change in consciousness regarding the legal status of the actions performed (Buchanan, 2003, p. 168). The apparent difficulty is that intervenors and reformers, almost exclusively, do not worry about respecting the *opinio juris* requirement before carrying out humanitarian intervention. Still, it is worth scrutinizing how such a process would look since it is integral to potentially creating a new customary, normative international law framework able to effectively govern humanitarian intervention.

Suppose an intervenor, like NATO in Kosovo, wants to transcend beyond simply halting the human rights violations and instead begin a process of legal reform. To do this, post-intervention, steps should be taken to enhance the likelihood that a new norm may materialize. This new norm should be one which a *majority* of states can adequately regard as legally binding, thus meeting the requirements of the *opinio juris*. One of these steps could be the facilitation of an inclusive, legitimacy-conferring process of international dialogue and contemplation. Such a process may devise ways of using or modifying existing international legal procedures and institutions to specify a conscientious description of the proposed new norm. In turn, this may provide the necessary protection in the absence of UNSC authorization of the intervention. Also, a certain type of *lawfulness* may be conferred to the act, thereby increasing its chances of morphing into an actual legal norm (Buchanan, 2003, p. 170).

Critics may object to this process of deliberation on the codification of a new rule of humanitarian intervention by asserting that it has very little chance of actually succeeding. One of the reasons for this is the fact that very few intervening parties concern themselves with the *opinio juris* requirements or the evolution of any type of normative customary law framework before choosing to intervene. However, regardless of the genuine probability of eventual success, there may be significant merit in simply striving to establish codification.

Any type of potential consensus, even if limited, may eventually, via some sort of trickle-down effect, contribute to the subsequent development of a new customary norm.

While the demand that a majority of states support the evolution of a new customary norm through their practices and statements is essential and pivotal to its potential for codification, this need for *state-majoritarianism* can prove to be a deficiency in the overall process. The fact that a majority of states must shift their attitude regarding the legality of intervention without UNSC authorization forms a treacherous path toward reform, one severely vulnerable to the deficiencies of the majority (Buchanan, 2003, p. 171). The most blatant issue in the UNSC, and the most serious obstacle to reforming it, is the regressive behavior of some of its permanent members (P5). However, the problem extends far beyond that. In the world today, numerous states cling assiduously to their power to oppress minorities in their own countries. This severely complicates the process of creating new customary norms concerning the law of humanitarian intervention, thereby reforming the normative framework governing intervention.

Because of this, it may be erroneous to assume that support by a majority of states is an indispensable requirement when attempting to create customary norms that can reform the system and retain moral justifiability. In the current state of global affairs, where many states are not democratic, state-majoritarianism cannot be considered as having the same legitimacy-conferring ability as the specific consent of individuals. Instead, state-majoritarianism can be viewed as a normative device, able to constrain abuses by more forceful and fierce states. However, it is not completely evident that the most prudent way of constraining such states is by utilizing the process of state-majoritarianism under the guise of reforming humanitarian intervention. On the contrary, one might argue that there is value in seeking reform via a coalition of liberal-democratic states. These states would agree on a relatively demanding set of necessary conditions for intervention and hold each other democratically liable on a variety of parameters. Additionally, according to the democratic peace theory, mature liberal democracies very rarely go to war with each other, which fosters peace and enhances global democracy

2.3.2 Exceptional Illegality

The illegal act reform method shows some prowess and ability to positively influence the normative framework governing humanitarian intervention. However, the instant objection to it, concerning the potential perilousness of advancing conceivably destabilizing legal claims, may deter states from utilizing it as an instrument for change of the law of

humanitarian intervention. An alternative method to the illegal reform approach relates to a state's prerogatives prior to intervention. Instead of launching a humanitarian intervention on solely moral justificatory grounds, while disregarding potential claims of illegality, states are well within their right to admit that the intervention will violate international law.

Paradoxically, the effect of such an admission has been shown to strengthen rather than weaken the rules governing humanitarian intervention (Holzgrefe, Keohane, p. 198). In its *Nicaragua* case,³⁶ the International Court of Justice (ICJ) noted that:

The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies like the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law (ICJ, *Nicaragua*, 1986, p. 14)

From this interpretation by the ICJ, it can be deduced that if an intervening state admits that it is breaking international law, the intervention itself is less likely to undermine the existing statutes. The acknowledgment of illegality may even bolster and reinforce the existing rules on humanitarian intervention. Objectors of this approach might assert that it serves to subvert political support of an otherwise morally cogent act. This is because states, or any would-be intervenor, are predominantly hesitant to confess any violation of international law. However, at this junction, the question of whether this approach is not altogether quite similar to the one employed in the case of Kosovo arises. In the aftermath of the intervention, NATO states did not appeal to coherent legal principles when trying to justify the intervention but rather to general ethical foundations.

Evidence of this is apparent when examining the statements of key international leaders in the direct aftermath of the intervention. The US Secretary of State at the time Madeline Albright emphasized that the air campaign part of Operation Allied Force was “a unique situation *sui generis* in the region of the Balkans” and highlighted the need “not to overdraw the various lessons that came out of it” (U.S. Department of State, 1999). Similarly, UK Prime Minister Tony Blair stressed the exceptional nature of the methods of the intervention (UK Parliamentary Debates, 1999). German Foreign Minister Klaus Kinkel underlined the need for the intervention to not constitute any legal precedent for further action in the future (Deutscher Bundestag, 1998).

³⁶ In its *Nicaragua vs. United States* case, the ICJ held that the U.S. Administration under President Ronald Reagan had violated customary international law by intervening in Nicaragua, supporting the Contras movement in their rebellion against the Sandinistas and by mining Nicaragua's harbors.

If adopted, the exceptional illegality process would shift the focus of inquiry in humanitarian interventions to the corollaries of the delict. Arguments concerning the legitimacy of the intervention would be viewed as appeals regarding instances of mitigating circumstances (Chesterman, 2000, p. 213). Precedents of mitigating circumstances being considered in international law cases are numerous, with the *Corfu Channel* case³⁷ as a prime example. In this case, the ICJ held that a declaration of illegality was in itself sufficient as a legal remedy for the wrongful actions, the violation of Albanian sovereignty, perpetrated by the UK (ICJ Reports, 1949, p. 36).

A controversial characteristic of the exceptional illegality method is the higher threshold that intervening states are held to. While the target state perpetrating the initial human rights violations prompting the call for intervention is not expected to admit to its illegal action, the intervening state is. Observers may view it as unfair for an intervening state to have to admit the illegality of its actions when the perpetrators in the target state do no such thing. However, the distinction here is that the intervening forces take the law into their own hands so to say, and even supporters of the right to intervene would argue that those hands should be clean (Holzgrefe, Keohane, 2003, p. 201). This would encompass any admission of a potential lack of legal basis for intervening and a solemn commitment to atone for the potential consequences of the intervention.

2.4. Supreme Emergency

In the context of humanitarian intervention, a supreme emergency is a state of such urgent crisis that enables it to override general war conventions and allow for measures otherwise strictly prohibited. The term was first used by British Prime Minister Winston Churchill in 1939 when describing Britain's predicament before WWII. Churchill utilized the term to emphasize the extraordinary situation Britain was in, where a fear beyond the ordinary fearfulness of war was present, which coupled with a corresponding situation of danger required measures ordinarily banned by war conventions. Essentially, a supreme emergency is defined by two criteria commensurate to the two levels on which the concept of necessity rests. The first relates to the imminence of the danger and the second concerns the nature of the danger (Walzer, 1977, p. 251). Both of these criteria must be sufficiently met if a certain situation is to arise to the level of a supreme emergency.

³⁷ The *Corfu Channel* case was the first public international law case heard before the ICJ and concerned state responsibility for damages at sea. The case set important procedural trends followed in subsequent ICJ rulings, for example on the doctrine of use of force which was used in the aforementioned *Nicaragua* case.

The inherent difficulty posed by this definition regards the disparate characterizations the two sides involved in humanitarian conflicts often have of the situation. One must assume that the target state does not think it poses the same danger that the intervening forces do. This means that the first criterion concerning the imminence of the danger oftentimes is applied without fulfillment of the second criterion. Furthermore, a state of war often serves to polarize the views of each side, making them believe that either side is capable or guilty of committing the unusual and horrifying kind of acts necessary to defend the adoption of the extreme measures warranted by a state of supreme emergency. However, not all humanitarian wars are struggles over fundamental, absolute values where the victory of one side would entitle a human disaster for the other. Therefore, it is necessary to cultivate a cautious skepticism of wartime rhetoric, creating a standard point of reference against which claims of supreme emergency may be judged (Walzer, 1977, p. 253).

While the soldiers taking part in the intervention may be able to sacrifice their own lives to uphold the moral sanctity of the law, they are not in a position to sacrifice the lives of their countrymen in the same vein. When a state of supreme emergency exists, their righteous options are exhausted in the face of ultimate horror. Therefore, they are liable, and partly justified, to act or not to act according to relevant individualized moral urgencies. At this junction, it may seem like it is merely a question of arithmetic. Individuals are not permitted to kill other individuals to save themselves, but for the sake of saving the population, or at least a major part of it, of an entire nation, it is permissible to violate the rights of a determinate but smaller number of people (Walzer, 1977, p. 254).

However, this conclusion raises another issue, since it would unfairly distinguish between large and small nations, since larger nations would be entitled to heightened protection. Rather, it may be said that it is indeed possible, albeit severely undesirable, to live in a world where individuals are sometimes murdered. However, it is intolerable and unacceptable to live in a world where entire populations are massacred or enslaved because the existence and liberty of political communities are the highest values of international society and must be protected at, nearly, all costs (Walzer, 1977, p. 255). The kind of extermination that Nazism brought with it severely threatened these virtues, and one would be foolish to think that similar threats, albeit fortunately on a much smaller scale, are not capable of destroying the social fabric of political communities. For this exact reason, ostensibly morally condemnable acts of the victims of supreme emergency may be wholly excused, if not completely justified, because of the acute profundity of the situation.

Still, some types of guidelines are necessary to direct the actions of a state in such precarious situations. From a prudential perspective, a supreme emergency is a desperate, Hobbesian struggle for survival, in which the primal instincts of both states and their members inevitably kick in (Orend, 2020, p. 149). Nonetheless, these instincts ought to still be governed by ordinances of rational choice, for the sake of the efficaciousness of the acts and their moral footing. Specifically applied to cases of humanitarian intervention, one of these ordinances should be an appeal to the international community. As discussed in the beginning of this chapter, in cases of supreme emergency, the right to intervene held by the international community may well morph into a duty to intervene based on the egregiousness of the human rights violations being perpetrated. The victims in cases of supreme emergency have a self-interest in appealing to the international community for intervention since it will almost undoubtedly be in a better position to efficaciously halt the ongoing violations. However, the reaction of the international community in instances of supreme emergency in recent decades has been both apathetic and nugatory. Cases such as the Rwandan and Darfurian genocides show that if the imminence of the supreme emergency is very near, this appeal may not have more than perfunctory value.

Additionally, any measure undertaken under the guise of a supreme emergency must have a reasonable probability of success. This rule is extremely vital, as it is crucial that measures, that will almost unequivocally be morally condemnable, must be efficacious and make a substantive difference. Some scholars contend that in cases of supreme emergency, a just belligerent may deliberately target innocent enemy non-combatants to weaken enemy morale and thus their overall war effort (Fabre, 2012, p. 180). However, if the deployment of a tactical weapon of mass destruction (WMD) against the enemy front line would be more productive in halting their efforts, then one should certainly refrain from unleashing civilian slaughter. While Churchill asserted that his policy of civilian bombing in WWII was effective because it made Hitler give up his plans of invading the UK, this is only a partial truth. The civilian bombings did not defeat Hitler. What did was constant, prolonged battle tactics, aimed at destroying the Nazi killing machine and disrupting the German industrial supply in the forthcoming years (Orend, 2020, p. 150).

A state of supreme emergency essentially constitutes a catch-22 dilemma. If one chooses to accept that a state of supreme emergency exists, therefore disregarding established war conventions, one violates *jus in bello* requirements and likely commits widespread civilian murder. On the other hand, if one chooses not to act, this hints at liability in the widespread murder of civilian members of one's political community. Adopting this view

necessarily leads to the conclusion that no moral exemption exists regardless of whether a certain situation rises to the level of a supreme emergency. At this moral impasse, individuals must choose whether to act or not. Regardless of their decision, they will end up committing a wrong, through no fault of their own, but simply because the gravity and perilousness of the situation dictates as such.

CHAPTER III: THE LIBERAL ARGUMENT FOR HUMANITARIAN INTERVENTION

Introduction

The liberal case for the moral justification of humanitarian intervention is rooted in the fundamental premise of liberal political philosophy: the assertion that the chief objective of states and governments is to safeguard and secure human rights for their populations. Any state or government that fails to adhere to this purpose is eroding the premier reason that justifies its political power, and therefore surrender its right to protection vis-à-vis international law convention. As was established in Chapter II, to the extent that state sovereignty retains value, it is necessarily of instrumental value and not intrinsically valuable in itself. Since sovereignty advances valuable human ends, anyone grossly violating these ends should not be able to call upon the sovereignty principle for protection, which is a view that most proponents of humanitarian intervention endorse.³⁸ Tyrannical and anarchical conditions necessarily lead to the moral collapse of sovereignty: “In the absence of justice, what is sovereignty but organized brigandage?” (Phillips & Cady, 1996, p. 6).

From this premise, a set of moral assumptions flow. The most important one outlines the obligation, dependent on situational circumstances, to rescue victims of anarchical and tyrannical states and governments, if it can be done at a reasonable cost to the interveners. A posteriori, this obligation and right to rescue victims morphs into a right of humanitarian intervention, independent of national borders and other factors because human rights are rights held by individuals on account of their mere personhood and thus cannot be denied. Therefore, the liberal argument in favor of humanitarian intervention necessarily advocates that a duty to intervene in certain instances does exist. The duty is however dependent on the egregiousness and gravity of the human rights violations, reasonable chance of success, and other relevant factors.

The liberal case for humanitarian intervention advocated in this chapter has two components. The first part is the judgment that the perpetration of governmental tyranny and state behavior in situations of extreme anarchy are serious types of injustices toward individuals. The second component of the argument is the inference that, contingent on crucial confining restraints, outside intervention is, at a minimum, morally admissible and legitimate. The first part of this argument is the least controversial. Even hardline, ardent non-

³⁸ For further references on this matter, see Caney, S. (2000) “Humanitarian Intervention and State Sovereignty” in Andrew Walls *Ethics in International Affairs*; and authors cited therein.

interventionists would mostly not disagree with the conclusion that the situations that proponents of humanitarian intervention argue warrant intervention are ethically abhorrent. Rather, the disagreement concerns the second component. Opponents of humanitarian intervention contend that foreign parties may not help stop the injustices, while advocates claim that they are vindicated in doing so.

The specific point of contention regards the forcible, military component of humanitarian intervention, referred to as 'hard interventions' (Teson, 2003, p. 95). Proponents of hard intervention argue that the justification for the universal safeguarding of human rights is most aptly evaluated as part of a continuum of international behavior. These individuals, who adopt and defend a more capacious list of human rights, assert that the majority of the rationales that justify humanitarian intervention are wholly similar to the reasons justifying interfering with agents responsible for injustices and abhorrent behavior to aid victims of their wrongful behavior.

On the contrary, opponents of hard intervention argue that humanitarian intervention is not part of such a continuum. Instead, they argue it belongs to the category of outright war, which is a distinctive and unique case of violence, and not merely a more brutal and savage form of human behavior, that is nonetheless morally justifiable at times. The adversaries of this type of intervention do not include war in a continuum of state action, and thus also reject the Clausewitzian notion that war is the continuation of politics by alternative means (Teson, 2003, p. 95). This view is intuitively appealing since there is something terrible, and awesome, about war since it is the supreme form of violence. This is also why individuals who are committed to human rights may be opposed to humanitarian intervention since they think of war as the most grotesque devastation of human life, and that it can never be right to encourage war, even in cases where the objective is to save other people's lives.

Following this line of thinking, a minimal understanding of human rights seems desirable. Adopting a view of narrow core values reduces the possibility for individuals to wage war on the whole. This view is consistent with the desire to avoid the vicious cycle of waging war in the name of human rights, which is inherently paradoxical because war can never be beneficial for human rights. However, as was mentioned in Chapter I, in situations where, based on the cruelty and savageness of the involved actors, peacekeeping activities are nothing more than honorable undertakings, unhappily, making war may be the preferable option.

This is not to say that proponents of justifiable humanitarian intervention argue that war is generally a preferable option. One of the most evident and apparent postulations in

international ethics must be the obvious fact that war is a horrendous and appalling undertaking. Nonetheless, the claim that war is always immoral regardless of its objectives is erroneous. The erroneousness of this objection to humanitarian intervention is rooted in the counterintuitive nature of the only philosophically coherent argument against humanitarian intervention: the pacifist position, one that simply opposes all violence.³⁹ Instead, one should aim to construct a sort of equilibrium between the commitment to peace and the commitment to protecting and defending human rights. The liberal argument for humanitarian intervention presented in this chapter will outline that humanitarian intervention can, in rare cases, be morally and ethically justified, while still maintaining of course that war is generally a bad thing.⁴⁰

3.1 Principles of Liberal Political and Moral Philosophy

As noted above, the rationale behind the liberal case for humanitarian intervention rests on principles of moral and political philosophy, conveying the justification of political power and thus the intent behind the creation of the state. According to the Kantian conception of the state, a liberal state is justified as an institution conceived by ethical autonomous agents and is defined by a constitution defining the powers of governments consistent with respect for individual autonomy (Teson, 2003, p. 96). As the first component of the liberal argument for humanitarian intervention posits, anarchy, and tyranny are the two apogees at each end of a spectrum of what can best be described as political coercion. Anarchical conditions are marked by too little government, resulting in a complete absence of social order, inevitably leading to a Hobbesian war of all against all. Tyranny is a case of too much government, where governmental power is abused, essentially betraying the state's *raison d'être*, namely the protection of its citizens' safety and dignity.

Balancing the equilibrium on this continuum is crucial to fostering and maintaining social order, thus ensuring the protection of human rights and pursuing individualistic goals in life. In the extreme and rare cases where outside intervention is warranted, humanitarian intervention can be an instrument to help shift the quantum of political freedom in the continuum of political coercion to the desirable center, away, on the one hand, from the acute lack of social order in anarchies and, on the other, from governmental repression of individual

³⁹ For a defense of the pacifist position, see Holmes. R. *'On War and Morality'*, 1989.

⁴⁰ It should be noted at this point that it is not the contention of this thesis to suggest that opponents of humanitarian intervention are pacifists. Their hostility to intervention is not based on a general rejection of war, since many of them support the use of force in self-defense authorized by the UNSC. Part of the rest of this Chapter will examine some of the reasons for their opposition to intervention.

liberty in tyrannies (Teson, 2003, p. 97). Living in anarchical and tyrannical conditions exposes individual citizens to gross human rights violations, as well as depriving them of their right and ability to pursue independent objectives, which imposes a prima facie duty on others to help them (Sherman, 1998, p. 103). If egregious violations of basic civil and political rights are being perpetrated, this in turn generates onuses on others, be it states, coalitions, or international organizations, to ensure that the respect for these rights is reinstated (Pogge, 1994, p. 89). Not dissimilar to warranted revolutions, humanitarian interventions are sometimes necessary to create a modicum of liberty and decency, which sometimes can only be achieved via forceful measures. Critics of humanitarian intervention, generally, would not object to this specific component of the liberal argument for intervention. Rather, they are concerned with the ostensible moral importance of national borders and state legitimacy/sovereignty.

The issue of state legitimacy is often a component included in debates regarding the legitimacy of humanitarian intervention. The Rawlsian view asserts that a state does not necessarily need a thick liberal account to qualify as legitimate. As long as states fulfill some minimal functions, making them ‘decent’ societies, liberal states have to respect these non-liberal states. Accordingly, these states are protected from foreign intervention because a safeguarding armor of legitimacy derives from the minimal functions fulfilled by the non-liberal state governments. This armor persists independent of the government’s lackluster enforcement of liberal principles and doubtful command of their citizens’ fidelity.

While the issue of state legitimacy is important in its own way, it is largely irrelevant to the debate on the legitimacy of humanitarian intervention. The problem of which states and governments qualify as decent parts of international society is a related, but separate question, impertinent to the question of the conditions for the legitimacy of humanitarian intervention. One should be wary of any type of conflation of the two issues, as this will at times misdirect and misinform the debate on the legitimacy of humanitarian intervention.⁴¹ While the illegitimacy of a government is a necessary condition for the permissibility of humanitarian intervention, it is by no means sufficient grounds on its own. One can posit that a non-liberal, illegitimate government should not be treated as a member of the international community while arguing that intervention in that government’s state would be wrong. Only the most

⁴¹ It must be noted that Rawls does not go as deep into the issue of humanitarian intervention as other scholars, which is why one should proceed with caution when presupposing his views on the subject. However, it is fair to assume that the conclusion in the above paragraph and the natural inference would naturally flow from Rawls’ previous line of argument.

egregious cases of human rights violations warrant humanitarian intervention, where intervention may “move the quantum of political freedom in the continuum of political coercion away from either anarchy or tyranny” (Teson, 2003, p. 97).

The collapse of political legitimacy is thus not a sufficient criterion to warrant intervention. However, the reasoning behind the decision *not* to intervene will never be because of the need to respect the sovereignty of the target state. Other reasons may however deem intervention impermissible, such as proportionality considerations and the reasonable chance of success of the intervention. A liberal conception of state legitimacy may also suggest to the potential intervenor that any act of intervention should include a commitment to promote human rights and not merely to restore them. This potential rather capacious requirement of intervention may be risky, however. Promoting and defending human rights are far from the same thing and fall into distinct categories of duty. Assisting a government in promoting the political and social conditions necessary to fulfill human rights cannot be efficaciously carried out by warfare: it is a much more intricate undertaking requiring many separate activities and institutionalizing efforts (Bagnoli, 2006, p. 126).

3.1.2 Relativist objection

Some people object to the usage of foundational principles of liberal moral and political philosophy to address humanitarian intervention. The argument against the construction of a liberal argument allowing for permissible humanitarian intervention asserts that the world is too culturally and ideologically diverse to apply any one philosophical viewpoint. Because many people reject liberal principles, attempting to utilize liberal philosophy is a disproportionately biased undertaking. Opponents of the liberal argument would claim that different ethical traditions need to be drawn upon to analyze international problems. This claim is grounded in the belief that while the outcome of an analysis using Western liberal principles may be beneficial for those who accept these principles, it would not be good for those who do not (Teson, 2003, p. 99).

This belief is, at least, partially erroneous. It conflates the issue of the origin of a political theory with the problem of its justification. If a philosophical judgment that all persons have rights is logically sound, then it follows that it is universally sound. Whether the historical origin of such a judgment is Western or something else is largely irrelevant. Choosing to object to liberal principles on the mere basis that they are Western is equal to committing the genetic fallacy of confusing the problems of historical origin and justification noted above. *A priori*, the moral or empirical truth of a postulation is rationally independent

of its origin, which is exactly why liberals can acknowledge that the views they defend are Western, while still maintaining the superiority of their views (Teson, 2003, p. 100).

Objectors of the liberal argument may think that a comparative ethical analysis of the different traditions of thought is required to identify if there is a global overlapping consensus on moral solutions to international problems. The liberal notion defended here is partly cosmopolitan and thus renounces any efforts at establishing political virtuousness in overlapping consensus, as it rejects such arguments *ad populum* (Teson, 2003, p. 101). Furthermore, any objection regarding the lack of overlapping consensus between ethical theories seems unconvincing when applied to the first part of the liberal argument for humanitarian intervention regarding the moral abhorrence of anarchical or tyrannical situations warranting intervention. Any theory claiming to be religiously or ethically reasonable *must* agree with the determination that situations of widespread torture, mass murder, or crimes against humanity are morally abhorrent.

While theoretical differences are to be expected in many aspects, the moral egregiousness of these types of acts should not be a matter of arduous contention. What is at stake is not mere discrepancies in conceptions of what is right or concerning the importance of religion, civil deliberation, or free marketplaces in political life. No sensible political or ethical theory should be able to accept the exercise of governmental tyranny or state behavior in situations of extreme anarchy which foments the breakdown of social order and disregard for human rights. If they can condone such situations, then one can rightfully assert that they forfeit their claim to any strain of plausibility or reasonability (Teson, 2003, p. 101).

Any potential reliability on such moral theories able to justify egregious human rights violations would undoubtedly epistemically undermine the argument of any critic of humanitarian intervention. One should not need any previous exposure to or expertise in the field of comparative ethics to ascertain that any kind of situation warranting humanitarian intervention vis-à-vis the first part of the liberal argument is morally insufferable. The crux of the liberal argument ties together the moral abhorrence of specific situations under all types of ethical theory, and the fact that those situations occasionally warrant humanitarian intervention. However, it is possible to agree with the first part of this approach but not the second. Other non-liberal theorists may argue that the moral abhorrence of a situation does not necessarily justify humanitarian intervention and that this leap is an example of the biasedness inherent in the liberal commitment to human rights. Further reasons may be the moral distinguishing characteristics between national citizens and foreigners or the sacredness of borders (Teson, 2003, p. 101)

Proponents of the liberal argument would reject these notions of biasedness and may respond that the non-liberals could not possibly claim that the abhorrent atrocities are justified and that what they value must therefore be something else. To this, non-liberals may counter that while the acts are morally abhorrent under their non-liberal principles, those same principles prohibit foreign intervention of any kind. Non-liberal non-interventionist views of international ethics thus try to divide and dissociate domestic from international legitimacy, albeit quite unconvincingly. Nonetheless, if non-liberals subscribe to the view that the situations *potentially* justifying intervention are abhorrent, then the supposed biasedness of liberal interventionists immediately dissipates. In cases where there is agreeance on the moral abhorrence of situations, non-liberals must present bases surpassing mere apprehension concerning autonomy and rights when questioning the legitimacy of humanitarian intervention (Teson, 2003, p. 102).

3.1.3 International Law & Global stability objections

Another potential objection to the liberal case for humanitarian intervention derives from the maxim of international law simply stating that governments intervening by force violate an essential principle of the international legal system. Although anchored in international law, this argument has a moral footing, since it presents an ethical reason to comply with international law, even when doing so yields unwanted and even abominable results. The logic of this argument is fatally defective. Firstly, it relies on a decidedly ambiguous presupposition. The determination that humanitarian intervention is forbidden by international law hinges upon an interpretation of state practice primarily guided by state-oriented principles. Opponents of humanitarian intervention have objected that proponents of the liberal argument engage in a biased, value-oriented examination of customary and treaty law (Brownlie, 1973, p. 139). However, at the very least, one can say that state practice is undecided and wavering on the matter of humanitarian intervention. Therefore, any reading of state practice must rely on some type of extra-legal values.

In the context of humanitarian intervention, state practice cannot and does not automatically generate a legal rule or principle. Instead, previous diplomatic practice must be understood according to modern empirical and ethical beliefs concerning the objectives of international law. Adopting this view, the positivist repudiation of humanitarian intervention becomes decidedly less objective. It is instructed by a core set of principles that prioritizes the safekeeping of political regimes and their governments over the preservation of human rights.

Furthermore, the international law objection to humanitarian intervention exposes a moral legal predicament. No one can or should dispute the fact that international law forbids the use of force generally. Nonetheless, the types of tyrannical or anarchical situations that may justify intervention reveal other egregious transgressions of international law, such as mass murder, genocide, and so forth. In the majority of situations where intervention is pondered, the choice is not simply between violating international law or abiding by it. In these cases, whatever the choice may be, some basic rule of international law will end up being tolerated. If the choice is to intervene and put a stop to the egregious human rights violations, ostensibly this violates the general ban on war. Refraining from intervening is equal to tolerating the violation of other states of the general prohibition of abhorrent human rights offenses (Teson, p. 109).

Seemingly, the duty to obey international law, then, does not aid the non-interventionist in his argument against the liberal case for intervention. Either he is forced into a dubious conclusion that an international war is decisively worse than anarchy or tyranny at all times or a similarly doubtful distinction between acts and omissions. The crucial basis for settling this clash of values in support of humanitarian intervention stems from utilizing the conditional sovereignty view introduced in Chapter II, where sovereignty is understood as an *instrumental* good, as a means to a more principal end. It is necessary to adopt this view as abominable human rights violations are not only an evident onslaught on the mere decency of persons but also an outright betrayal of the concept of sovereignty itself (Teson, 2003, p. 110).

Because of this, non-interventionists find themselves in a perplexing predicament. One solution is to express the belief that there is some sort of intrinsic value to the principle of sovereignty instead of mere instrumental value. However, this will lead to a questionable conclusion that the ban on intervention has nothing to do with the principle of respecting persons, thus forcing non-interventionists to invoke completely discarded organicist conceptions of the state (Beitz, 1979, p. 69). Another solution is to concede that sovereignty is purely instrumental to the recognition of other human virtues. If non-interventionists choose this view, they must show that the human values supported by sovereignty ultimately justify permitting the gross violations to continue at present – an ominous undertaking. Nonetheless, non-interventionists must concede that it is impossible to detect any type of priority of sovereignty in anything *internal* to the target state. Therefore, the case against humanitarian intervention must necessarily depend upon the significance of sovereignty for ends *external* to the target state (Teson, 2003, p. 111).

One argument highlighting the potential external importance of sovereignty concerns the possible threat humanitarian intervention poses to global stability and the overall system of states. The idea is that humanitarian intervention challenges this stability in a two-fold manner. Firstly, by the actual act of intervention, and secondly by establishing a potentially perilous precedent that may be highly likely to be abused by belligerent, violent states. Therefore, the tenets of humanitarian intervention, irrespective of governmental rationale, will promote global chaos, which is even less preferable than an unjust order in various places of the world (Teson, 2003, p. 109).

This argument is unconvincing. One of the reasons is that the tyranny and anarchy present in the situations prompting intervention are just as, if not more, likely to create chaos and instability as the act of humanitarian intervention itself. The global stability objection neglects this decisive fact. The reasoning behind this oversight is theoretical: statism sees states as the only pertinent components of international relations, thus disregarding inter-state dealings. Non-interventionists use this view of the state to claim that as long as there is perceived order within states, then it is acceptable to disregard the internal happenings of those states. Compelling evidence points to the contrary, as there is a definitive causal relationship between internal unrest and international perilousness. This evidence should prompt anyone preoccupied with long-term global stability to favor a general prohibition of war as well as a doctrine aimed at protecting human rights, including a suitably restrained right of humanitarian intervention (Teson, p. 111)

The idea that allowing humanitarian intervention may create dangerous precedents for aggressive states to abuse is understandable. However, the evidence, or lack thereof, of this suggests that this claim is implausible. While there have been cases where the intervenor was not acting wholly altruistically, this does not strengthen the argument of non-interventionists in this context. They argue that governments will use the precedent of intervention to carry out bogus and fallacious interventions, masking their true spurious motives, and thus endangering global stability. This has not been the case over the last two to three decades. The interventions, for example, in Somalia, Kosovo, and Rwanda cannot be said to have rattled the world order, nor set a precedent that outlaw states have used to their advantage afterward. Many would claim, albeit perhaps not non-interventionists, that these interventions improved things, on the whole (Teson, p. 112).

Regardless of their efficacy, humanitarian interventions have very rarely, if ever, made matters worse. When they fail, as they will undoubtedly do at times, anarchy and tyranny have been allowed to continue unhampered, but have not produced the sort of chaos that non-

interventionists may fear. There is a clear reason as to why this is. Intervening is very costly for a government or coalition of states, which means there are ample disincentivizing grounds for engaging in any intervention on the part of the intervenor. For NATO, intervening in Kosovo was quite costly, especially in economic regards. Moreover, if a system of states were to break down because of humanitarian interventions, essentially spurred on by the tyrannical and anarchical conditions of those states, perhaps that is not a universally undesirable thing. In itself, the death of a state is never intrinsically bad. Think of East Germany and to an extent the Soviet Union. Instead, it is the death of the citizens of states that is the truly abominable thing (Teson, 2003, p. 114).

3.2 Rights of the Innocent

While there is undoubtedly a need for a limited right of intervention, the conceptual structure of the liberal argument for humanitarian intervention is crucial. For humanitarian intervention to be truly liberal, it must aim to *maximize* human rights adherence. The intervenor is, nonetheless, bound to follow the restrictive parameters for intervention set by the *doctrine of double effect*. According to this doctrine, there are few, very limited cases in which the killing of innocents is legitimate. An act which leads to the deaths of innocents is admissible only if three conditions are satisfied:

1. Good consequences follow from the act (such as the killing of enemy soldiers in a just war)
2. The actor has good intentions. The actor aims to achieve good consequences and there is no intention to kill non-combatants, which would be a bad consequence
3. The good consequences of the act supersede and outweigh the bad consequences (the doctrine of proportionality)

(Teson, 2003, p. 116)

The most important contribution of the doctrine of double effect in the context of humanitarian intervention is thus to distinguish between acts with intended bad consequences and those with unintended bad consequences. The former risks exposing the actor to ethical culpability. The latter, dependent on the surrounding circumstances, may exonerate the actor and excuse the act's bad consequences. It follows that unintended damage, such as civilian casualties, caused by a humanitarian intervention may, dependent on the specific

characteristics of the situation,⁴² be morally permissible. Essentially, the liberal conception of humanitarian intervention boils down to an action with efforts intended to maximize universal protection of human rights, while being ethically constrained by the forbiddance of intentionally targeting innocent persons. The proportionate accidental killings of innocent individuals, albeit indirectly engendered by the intervenor, do not automatically denounce the intervention as unethical. Instead, humanitarian intervention perceived as a virtuously restricted form of assistance to others understands and acknowledges that causing injury to innocent people can be justified in so far as one does not intentionally *will* this harm upon them (Teson, 2003, p. 115).

Objectors may ask whether authorization to take innocent lives can be granted based on the restoration of human rights and justice. This is a fair question. However, the question must be answered in the affirmative. The intervenor is not just merely bettering the world in a general sense, along with saving already endangered lives because of the tyrannical and anarchical conditions. Although the prospect of saving lives is itself normatively compelling, the restoration of justice and rights serves a larger purpose. A purpose that all justified political institutions, most notably the state, have in common. Restoring respect for human rights and general justice transcends the mere objective of helping people. Reviving minimally just institutions and customs is *normatively privileged* irrespective of the promotion of regular welfare (Teson, p. 117). Whereas humanitarian aid merely transiently alleviates some of the tendencies of tyranny and anarchy, humanitarian intervention can, in the best cases, afford a state the opportunity to restore its autonomous, self-regulating institutions. This is not only the proper thing to do for that community, but it also confronts a root cause of the problem that prompted the intervention, thereby hopefully disincentivizing further foreign involvement.

A related question to the justifiability of killing innocents in otherwise just humanitarian interventions is that of the potential culpability of choosing *not* to intervene. An often-cited non-interventionist rebuttal to such a suggestion focuses on the moral distinction between acts and omissions. In the context of humanitarian intervention, the non-interventionist argument against such culpability would cite the intervenors as *directly causing* the death of innocent persons, while claiming that those who choose not to intervene

⁴² One must analyze the specific circumstances of independent situations before it is directly discernible whether a moral difference exists between causing an undesirable result with direct intention and causing it with oblique intention. The distinction in moral accountability is not universally present. Nonetheless, it is appealing to suppose that such a distinction exists in all cases of humanitarian intervention, as the opposite risks forcing a conclusion that, counterintuitively, all wars are morally banned.

do not cause the crimes. This position is intrinsic to a general concept stating that killing is morally worse than letting die. Even if this non-interventionist position on the moral status of acts and omissions is considered true, the argument only concerns the permissibility of abstaining from intervening, not the legitimacy of humanitarian intervention as a whole (Teson, 2003, p. 118).

On the matter of humanitarian intervention, the usefulness of utilizing the acts and omissions doctrine is doubtful. One may agree with the non-interventionist position, recognizing there is a valid, moral distinction between the two. However, all it proves in cases of humanitarian intervention is that the actor who declines to intervene to halt the ongoing abominations is not as ethically condemnable as the tyrant perpetrating the violence. This fact does nothing to vindicate the non-intervenor from the entirely separate accusation of having failed to aid others in need.

Consider the Srebrenica genocide committed in 1995. Bosnian Serb troops raided the city, while several hundred Dutch peacekeepers sat idly by and watched (Simons, 2001). The Bosnian Serbs abducted between 7.000-8.000 men and boys, and ended up killing almost all of them (Simons, 2001). While this fact in itself is shocking enough, the brutality and shock of the genocide perhaps obscured another equally shocking fact. The area was supposed to be a protected UN haven. The UN commander for Bosnia at the time, General Bernard Janvier, nonetheless disregarded several forewarnings by the peacekeepers and abstained from ordering the NATO air strikes they were requesting. General Janvier was in a position to save the thousands of victims but chose not to act. Since the General had the necessary authority and capability to understand the severity of the situation, one can say that he is guilty of omission (Will, 2001). Although General Janvier is of course not as culpable as the Bosnian Serb field commander who carried out the massacre, he is still blameworthy, primarily because he was capable of moral choice.⁴³

Apart from blaming individuals, the concept of non-intervention may also be at fault for the Srebrenica genocide. Those believing in dangerous ideas may cause great harm when implementing them, as can be said to be the case for General Janvier, who most likely was a proponent of the non-intervention principle and invoked it in Bosnia. The ethical question is not whether one is prepared to engage in a war, entailing all the terrible consequences all wars encompass. Rather, the question is whether one should act to put a halt to internal barbarities while being aware that critical moral damages will follow.

⁴³ This is a phrase introduced during the Nuremberg trials in the aftermath of the atrocities of WWII, essentially distinguishing between high-level ranking officers guilt and that of lower ranked personnel.

3.2.1 Excusable Breach approach

Potentially ‘excusing’ humanitarian intervention, as derived from the doctrine of double effect, also applies to cases where an intervenor may potentially be exonerated from breaking the rules of the UN Charter. The excusable breach approach acknowledges that humanitarian intervention can indeed be considered illegal without a UN mandate. However, it argues that breaking the rules of the UN Charter may be ethically and politically warranted in specific extraordinary instances.⁴⁴ The method of excusable breach is not unique. Other international institutes have argued for various other ways of pardoning otherwise illegal humanitarian intervention, describing them as “emergency exits” from the rules of the UN Charter (Danish Institute, 1999, p. 116).

There is, however, an immediate concern in utilizing this method to justify interventions before they are initiated. Breaking existing UN Charter law needs to be justified by exceptional necessity, and therefore any factors vindicating such future violations are challenging to identify beforehand. One line of defense of the excusable breach method argues against formulating a doctrine for emergency exits from the law because “necessity knows no law” (Danish Institute, 1999, p. 127). The exceptional conditions of each scenario must be tackled and managed on a case-by-case basis.

As opposed to the evolution of a new customary norm through illegal reform explained in Chapter II, there is a distinct appeal of the excusable breach. This approach envisages no new legal rules concerning the governing of the use of force. Contrarily, it illustrates the distinctive upsides of the existing legal framework with no focus on revolutionizing it. It merely emphasizes the extraordinary character of admissible non-mandated humanitarian intervention. Furthermore, it avoids the potential problems of premature codification of a new legal norm. Although the potential benefits of seeking codification introduced in Chapter II are valid, there are issues in seeking such codification.

Any choice to forcibly intervene for humanitarian purposes will undoubtedly include an intricate and context-distinct weighing of principles. Guiding principles, such as the primary role played by the UNSC, the general prohibition on the use of force, and, most importantly, the fundamental protection of human rights. Attempting to settle clashes between such principles theoretically beforehand in a didactic formulation is highly unlikely to adequately delineate ways to deal with the chaotic, complex, and unknown ways in which

⁴⁴ The term excusable breach is used to underline the fact that interventions without a UN mandate does violate the legal norms of the UN charter, but that the intervenor should not necessarily be sanctioned for breaking them.

disputes arise. The ambiguous historical record of humanitarian intervention dictates caution concerning attempts to preliminarily detail the circumstances in which states are justified in using force.

3.2.2 Internal Legitimacy of Intervention

An often overlooked, but rather important characteristic of the legitimacy of humanitarian intervention is how a liberal government can justify humanitarian intervention to its own citizens. According to some liberal conceptions of the state, humanitarian intervention may be a dubious undertaking. One such understanding may suppose that the state is a mere instrument for advancing the interests of its population. In this view, the state would only be merited in solving specific inadequacies transpiring in the state of nature, such as ones forged by the individual correction of wrongs. This perspective amounts to what some scholars term the “discretionary association” view of the state (Buchanan, 1999, p. 71). Under this view, governments do not have the power to enlist the common resources of the state for the sake of humanitarian intervention, because the state is not indebted to foreigners. Thus, if the government of a state did engage such resources, it would be defying its fiduciary duty. According to the discretionary association view, proper state practice is solely focused on its fiduciary duty to its citizens, with no focus on potential worrying oppression in other countries.

Others reject this position, instead advocating for the presence of a natural obligation to bring about the incorporation of all peoples in fair arrangements. To these people, the world endorsed by the discretionary association view is an unappealing one. Instead, states should also be perceived as instruments of righteousness, that can be ‘used’ to protect and restore human rights in other societies, as long as this is not done at an unreasonable cost to themselves. However, even if one adopts such a state view, the question of how governments can compel their citizens to fight for the freedom of foreigners persists. Liberal beings retain a right to absolute discretionary control over their option to use violence in self-defense, a demand that humanitarian intervention rarely meets (Teson 2003, p. 126).

A potential answer to this is that the responsibility to assist victims of unjustness in other societies introduces, similarly to self-defense, problems of joint action. This line of thinking could conceivably justify governments to coerce their own citizens to fight for the liberty of foreigners. Regardless of this, there is a solution to this coercion problem. If a government sends voluntary soldiers before resorting to conscription then that eliminates the problem of coercion. While conscription may be needed in national defense matters,

exemplified in various EU countries after Russia's invasion of Ukraine, matters of humanitarian intervention are different cases. The duty on the part of a liberal government to protect human rights around the world is not an absolute one. It must resonate with other moral-political deliberations, such as the requirement to recognize non-opportunistic exercises of individual self-rule. One way to accomplish this is by resorting to the use of voluntary armed forces in humanitarian interventions (Teson, 2003, p. 127).⁴⁵

3.3 Reconceptualizing Humanitarian Intervention

In section 2.3 of this thesis, it was suggested that a normative basis for humanitarian intervention may be reached via certain illegal acts able to reform the international legal system governing the use of force. In section 3.2.1, the excusable breach approach was used to show an alternative method able to potentially allow for justifiable intervention in the face of extraordinary necessity outside the scope of existing law. In reality, the normative status of humanitarian intervention is probably in the middle of a continuum, with the evolution of a solid customary international legal norm of intervention on one end and the excusable breach advocating the need for illegal intervention at times of exceptional necessity on the other (Stromseth, 2003, p. 247). This position shows enforces the fact that one should not attempt to formally draft a doctrinal framework aimed at conciliating the principles of human rights with the non-intervention norms of the UN Charter. Instead, one should strive to identify concepts and recurring foundational aspects in state practice, thus informing future cases of intervention. Simultaneously, this may strengthen the role and competence of the UN, and regional institutions, enabling facilitatory work with local organizations to thwart and counter human rights offences.

It is unclear whether a decidedly lower threshold regarding the evolution of customary norms of a humanitarian character is emerging. The exact perimeters of the potentially emerging norm are still unclear. However, this should not be surprising nor especially unsettling. In the process of the development of new customary norms, periods in which old norms are slowly eroding while new norms are strenuously appearing are normal. In such periods, it is expected that apparent excusable breaches may preempt the actual advancement of new legal norms (Stromseth, 2003, p. 249).

⁴⁵ Many of the justified humanitarian interventions in the last decades have been carried out by NATO, which does not utilize a conscription method for their forces. Therefore, the issue of coercing citizens to fight for the freedom of others may be a moot point at times.

While the specific contours of a new norm of humanitarian intervention are unclear, one aspect of it seems to be quite certain: any norm permitting humanitarian intervention in exceptional circumstances without prior UNSC approval is likely to emerge *without* a change in the express language of the UN Charter. One apparent reason for this is the simple fact that the UN Charter has not been amended for 50+ years, as the last amendment took place in 1973. This makes it highly unlikely that a contentious matter such as humanitarian intervention would prompt any type of amendment process under Article XVIII. Moreover, it may not be entirely desirable to achieve any sort of normative change in intervention via modifications to existing legal rules. Attempts at such alterations may risk aggravating and compounding the already intense differences of opinion on matters potentially prompting humanitarian intervention. Thus, such endeavors may end up having a destructive rather than constructive effect on the likelihood of preventing the tyrannization of civilian populations. The polarizing nature of the issue of humanitarian intervention may even suggest that efforts to create a legally binding, standardized doctrine of criteria for intervention may negatively influence the prospect of cooperation on the matter in the UNSC (Danish Institute, 1999, p. 119).

3.3.1 Gradual creation of Normative Consensus

Specific characteristics of any developing norm concerning the justifiability of humanitarian intervention are still ambiguous. However, features of a normative consensus advocating a right of humanitarian intervention in unequivocally extraordinary cases may be gradually emerging. The advent of norms concerning human rights protection was very much spurred on by the experiences of the international society in Rwanda in 1994 and Kosovo in 1999. These events triggered certain normative developments, such as the Responsibility to Protect regime (R2P), which was adopted by the UN in 2005, the establishment of the International Criminal Court (ICC) in 2002, and the commissioning of protection as a foundational mandate of various international organizations and NGOs. These developments, among others, have led to the establishment of certain shared expectations between members of international society regarding the responsibilities to protect and prevent world populations from mass murder and genocide. Among these shared expectations is the pledge that those who have the ability and authority to protect civilians from such crimes (primarily, but not exclusively, the UNSC) must act in ways commensurate to that pledge (Bellamy, 2015, p. 16).

These developments have undoubtedly changed the way that humanitarian intervention is seen and debated in the international community. The shared expectations have

also influenced the politics of humanitarian intervention in a variety of ways. One of the most important examples of this came in 2011. As a response to the Libyan Civil War, the UNSC crossed a critically important political threshold, when it authorized the use of force against Libya, a UN MS, for humanitarian purposes. The effect of these developments on the politics of protection has also impacted the purposes of humanitarian protection. In the last decade, various UN agencies, such as the UNHCR, which is in charge of the protection of refugees and the safety of internally displaced persons, have received specific mandates of protection. One corollary of this is the demand that they place “human rights up front” (HRuF), an approach employed by the UN in the 2010s, in the aftermath of the humanitarian disaster in Sri Lanka (Bellamy, 2015, p. 25). Particularly significant, the UNSC has shown its expanding readiness to grant coalitions and ‘blue helmet’ peacekeeping operations the ability to use all required means, including the use of force, to protect civilian populations from gross human rights violations.

Since norms set expectations of proper behavior, they are more noticeable when they are violated than when they are obeyed. Despite the positive progress of the UNSC, it has failed in the case of Syria, where it has seemed helplessly divided, and definitively incapable of leading a prompt and convicting response. In the aftermath of its initial failings, several other UN agencies and institutions heavily criticized the UNSC for its lackluster reaction to the Syrian crisis. A UNHRC Commission as well as the UN General Assembly argued that the UNSC bore responsibility for allowing the war crimes and crimes against humanity to continue (Bellamy, 2015, p. 26). The preparedness and inclination of other UN agencies to publicly criticize the UNSC is clear evidence of the emerging common expectations within the international society. The UNSC has a premier duty to actively protect populations from war crimes and egregious atrocities, which means that it is justifiable to denounce the Council when it fails to perform its proper function.

The most obvious proof of wider conceptions of humanitarian protection emerging as international norms has been the near-habitual international responses to crises of protection, as well as the condemnatory responses to clear failures to act. Moreover, it can be seen in the developing tendencies of states, including the P5, to recognize positive responsibilities in this regard. The UK, the U.S., and even China have issued statements in the last decade, affirming the duty of the international community, with the UNSC as the principal, but not exclusive, authority to do everything it can to protect populations at risk. Despite these positive developments, the exact contours of an emerging humanitarian norm are difficult to determine. Partly because the most appropriate *modus operandi* is rarely clear, and partly

because decisions are always informed by their circumstances. In reality, the chief responsibility of any emerging norms is to inspire *consideration* of taking action to protect civilians from mass atrocities and genocide: a “responsibility to try” as former UN Secretary-General Ban Ki-Moon put it (Bellamy, 2005, p. 31).

The evolution of the politics of protection, which has seen protection move from an exceptional activity only employed in the face of massive emergencies to a stalwart of global governance, has greatly impacted the politics of humanitarian protection. For one, it has made it increasingly difficult for the international society to justify inaction in the face of genocide or mass murder. Moreover, it has meant that judgments concerning humanitarian intervention very seldomly are made in cases where the international society is not already deeply involved in, and completely aware of, the need to protect civilians from human rights violations.⁴⁶ In the 2010s, the UN also seemed to regain, at least some of the credibility and authority it lost in earlier decades. Firstly, during the Libya crisis, there was no suggestion that the West may potentially intervene without a UNSC mandate. Additionally, with the rise of the Islamic State (IS), states have been cautious to legitimize intervention solely on principles found in the UN Charter, such as the right to collective self-defense and not the R2P regime, for example. Together, these two facts seem to indicate the arrival of a new “global covenant” on human protection – one which acknowledges the right and responsibility of international society to defend civilians from genocide and mass atrocities, but which places this shared effort decisively within the UN Charter’s rules (Bellamy, 2015, p. 32).

The critical political threshold that the UNSC crossed in 2011 when it sanctioned the use of force in Libya is possibly the clearest sign of a normative evolution concerning the ethics of humanitarian intervention. Although the Council had approved the use of force in similar situations before, Resolution 1973, authorizing the use of force, was markedly different. This was the first time in history that the UNSC approved using force for humanitarian protection purposes without the permission of the *de jure* authorities of the target state. Earlier resolutions had come close to crossing this line, such as Resolution 929 and 940, the first issued during the Rwandan genocide and the second used to expel the military junta in Haiti. However, in both these cases, the Council was acting with the consent

⁴⁶ This point is especially crucial. It largely dismantles the previous non-interventionist argument, that humanitarian intervention should be banned because it may be used by governments or a coalition of states to further their own motives and therefore may set unwanted precedents. With these new emerging norms governing humanitarian protection, this is practically impossible and a moot point, as well as an invalid argument.

of the *de jure* authorities of both the interim Rwandese government and the Haitian President, who directly called for intervention in a letter to the UNSC (Bellamy, 2015, p. 32). Therefore, by not requiring the consent of the Libyan government, the Council progressed into unknown political terrain by authorizing the use of force with the principal aim of protecting a civilian population.

Examining the specific context of the threat to the Libyan population allows one to see why the UNSC probably had no choice but to cross its own critical threshold. It further underlines the point made earlier that it is the extraordinary conditions of each situation potentially meriting forcible humanitarian intervention that informs the final decision of whether or not to intervene. In the Libyan case, there seemed to be a certain coalescing between the evolving human protection norms, with a range of contextual characteristics present, and the generally shared understanding that the use of force was the only decisive way to protect Libyans, especially those in Benghazi, from the impending danger. As must always be the case in situations where humanitarian intervention is debated, crucial factors specific to the scenario in Libya played a key role in facilitating consensus regarding intervention. Among these were the explicitness of the peril of the massacre in Benghazi, the utterly dreadful international perception of the Gaddafi regime, and the lack of other feasible measures to protect the Libyan population (Bellamy, 2015, p. 32).

These factors, coupled with what was eventually deemed a plausible military course of action, created what some scholars have termed a degree of “normative capture” for UN MS. (Bellamy, 2015, p. 33). The emerging normative agendas, commitment to the protection of civilians, and the R2P regime, which almost all MS had publicly endorsed meant that there was no credible opposition to Resolution 1973. The MS who were skeptical about the authorization of the use of force therefore abstained, recording their skepticism, but did not attempt to block the Resolution, thereby clearing the way for use of force. However, it should be noted that this type of normative capture was partially unique to the Libyan case. Not since the Rwandan genocide in 1994 had a regime so definitively demonstrated its intent to commit crimes against humanity publicly. Gaddafi lauded his intent to massacre his people multiple times. When Benghazi, the insurgency stronghold, looked set to topple into the hands of a regime with an abominable human rights record, Council members who were apprehensive about using force were incapable of proposing a persuasive alternate method of protecting the endangered Libyan civilians (Bellamy, 2015, p. 33).

The only other option for Council members disinclined to authorize the use of force was to trust that the Libyan regime would exercise some degree of restraint. However, the

rhetoric of the Gaddafi regime, openly swearing to execute any opponents of the regime, as well as Gaddafi's unwillingness to respond positively to diplomatic petitions from the UN Secretary-General among others, all signals were pointing to the contrary. The absence of alternative viable policy recourses, coupled with the lucidity and imminence of the threat to the Libyan population, meant that any Council members who would have publicly opposed the Resolution would have exposed themselves to a great contradiction with their previous declarations of principle regarding protection purposes. Therefore, the normative developments in the politics of humanitarian protection played a direct role in the passing of the decisive Resolution 1973. Undoubtedly, MS would have found it a lot easier to potentially obstruct collective action, thus undeniably endangering the lives of many civilians of the Libyan population, without the evolution of this normative framework governing the use of force (Bellamy, 2015, p. 34).

3.3.2 Effectiveness of the Intervention

Any normative debate on the ethical justification of humanitarian intervention is incomplete without considering the effectiveness of using military force for humanitarian purposes. First and foremost, the intervention must have a reasonable chance of success, which can essentially be outlined as causing more good than harm. To this end, the military course of action proposed must be credible and largely plausible, as it was in the Libyan case. Any type of legitimate intervention must also have an adequate expectancy of succeeding in halting the wrongdoings that prompted the intervention. Moreover, the means utilized during the intervention must comply with the regulations of armed conflict. The risks and consequences of the intervention must also be compatible with the urgency and gravity of the situation it seeks to ameliorate. While it is impossible to completely control the unfolding of volatile situations involving egregious human rights violations, any intervenors aimed at being effective must act based on logical assessments of risk and let those guide the *modus operandi* of the intervention (Stromseth, 2003, p. 268).

Following the guidelines outlined above does not guarantee success, however. At times, the specific circumstances of conflicts will mean that the perpetrators of the violence can simply flee into neighboring states or border areas and wait for the chance to continue their hostilities. This was for example the case in Sierra Leone back in 2000 (Bellamy, 2008, p. 617). In situations such as these, halting atrocities and averting their instantaneous resurgence post-intervention requires a solid, durable political strategy for confronting the rudimentary cause of the conflict, and perhaps a longer-term presence in the area. At this

juncture, the problematic question arises of whether justified humanitarian intervention ought to have a reasonable chance of success in preventing the recurrence of the atrocities it seeks to halt in the aftermath of the intervention.

The intuitive problem addressed by this question is evident. Military force is definitively more apt at stopping ongoing atrocities than it is at dealing with the underlying reasons that caused the atrocities (Stromseth, 2003, p. 269). However, at times, military force is nonetheless the principal, and perhaps only, way to stop the atrocities being perpetrated, such as in Rwanda, or the only foreseeable avenue to avert the imminent threat to a population, such as in Libya. The egregiousness of the human rights violations may well be enough to justify intervention in the first place, as was the case in both Rwanda and Libya. Yet, effectively managing to halt these atrocities does not automatically qualify intervenors as competent actors in the realm of ensuring the future prosperity of a population, or an entire target state.

History suggests that the minimum requirement for intervenors should be a credible strategy for stopping atrocities, *and* for exiting in circumstances severely minimizing the probability of their resurgence.⁴⁷ Immediate success of an intervention can be judged upon whether the target state is better off post-intervention, *vis-à-vis* the probable circumstances without the intervention, while the intervenors do not incur unacceptable losses. Much more challenging is the concept of longer-term success. This transforms the matter of effectiveness from a conceptual question to a fundamental one, concerning the means, competence, and overall political resolution. The long-term success of any intervention heavily depends on whether there is a shared international commitment to dedicate satisfactory resources to accomplish any extensive future goals. Oftentimes, the urge to help civilians in need is “a mile wide and an inch deep” (Stromseth, 2003, p. 270) – the impulse to assist does not necessarily entail an accompanying inclination to dedicate forces or supply resources needed to respond successfully to the violations and their principal causes.

If this potential disinclination ends up resulting in a failed intervention, this may have far-reaching consequences going beyond the mere failure of that singular intervention. There are empirical examples of how intervention failures lead to spillover effects on other potential interventions. For example, the difficulties of the Somalian intervention engendered such

⁴⁷ Although not a case of post-humanitarian intervention, failure of this was exemplified during the Iraq War in the early 2000s. The Americans had a clear plan for their initial military course of action but were grossly unprepared for what came after. This led then US Secretary of State Colin Powell to ascertain that if you break down a government, a regime, then you are responsible for it. “If you break it, you own it”.

seriously hostile reactions in the Congress of the United States that when the Rwandan genocide happened, any potential political will generated by the atrocities in Rwanda was stymied by the non-interventionist hardliners, whose policy position had been vindicated in Somalia (Stromseth, 2003, p. 270). Undoubtedly, past and present UN, and other, led interventions play a critical role in informing the willingness of other states to engage in future interventions. For this exact reason, even a liberal approach to humanitarian intervention must at times exercise caution when deeming which situations are likely to benefit from humanitarian intervention. Potentially, not only must the circumstances allowing for successful intervention be present, but a commitment to persevere must also be capable of being sustained post-intervention

CHAPTER IV: POST-INTERVENTION *JUS POST BELLUM*

Introduction

The discussion concerning *Jus post bellum* was originally conceptualized as part of just war thinking, dealing with the moral rules that govern the period in the aftermath of war. Today, where wars of humanitarian intervention are becoming more common, and desirable to some, *jus post bellum* has become part of the debate regarding the justification of humanitarian intervention. The debate concerns the implications of an ostensibly just humanitarian war in the *ad bellum* for *jus post bellum*. One line of argument may assert that the potential injustice of a war's beginning definitively implies greater post-war responsibilities. On the other hand, even a truly justified war fought on humanitarian grounds may imply added duties, both during and certainly after the conflict it aims to address. However, staying put post-intervention exposes intervenors to potentially dangerous claims of being occupational powers.

Perhaps this is the reason why the original legal doctrine dictating humanitarian intervention asserted that the principal and sole aim of intervenors must be to simply stop the killings or atrocities that are going on. By doing so, the intervenors are firmly adhering to international legal standards, disproving any potential claims that their motives are not humanitarian. The original logic was that they did so by moving in as swiftly as possible to deter or defeat the perpetrators of injustice, rescuing the victims, and then leaving the target state immediately after (Walzer, 2002, p. 23). Thus, any type of attempt to deal with the post-intervention consequences or deciding what to do with the agents of the target state, cannot and should not be the work of foreign intervenors. Instead, the people of the target state should be allowed to reconstruct their common, civil life without meddling. The likely severely distressing crisis they have just lived through should not be seen as an occasion for foreign control.

While this conventional logic seems appealing, its application can potentially prove more troublesome. In conflicts where the extent and depth of the underlying causes of the struggle, such as cultural or ethnic divides, the instant withdrawal of the intervening forces may have catastrophic consequences for the victims of the conflict. Either the original perpetrators of violence will resume their atrocities or certain fractions of victims may resort to some type of self-justified vigilante chastisement, which may prove equally deadly (Walzer, 2002, p. 24). Another scenario where the quickly in and out method may prove troublesome is if the target country finds itself in the hands of guerilla forces and warlords

post-intervention. The police and army of the state may have been defeated or simply non-existent. In situations such as these, exiting the target state immediately post-intervention becomes an option of legal virtue at the expense of moral and political effectiveness (Walzer, 2002, p. 25).

Liberal accounts justifying humanitarian intervention must, to some extent, incorporate *post bellum* deliberations in their justification of the initializing of any humanitarian intervention. However, the degree to which this is done is heavily debatable. Critics of any such accounts may argue that the potential new norms of intervention introduced in CH III mask an attempt at reestablishing a form of Western hegemony, characterized by an increasing insertion into the affairs of troubled, vulnerable states. Any such claim defies the argument that new norms of intervention can indeed successfully combine humanitarian concerns with the protection of rights such as (instrumentally valuable) sovereignty, freedom, and liberty. Nonetheless, a discussion of the status *jus post bellum* is undoubtedly pertinent and needed in any modern-day attempt at justifying humanitarian intervention.

4.1 *Post bellum* Considerations

The widely accepted consensus among *jus post bellum* scholars is that if a humanitarian intervention forces the collapse or overthrow of a target state's government, then the intervening "victors" seize the responsibilities of the fallen government (Bellamy, 2008, p. 615). There are however varying accounts of this specific acquiring of governmental responsibility. Some interpretations assert that it only applies in cases where a humanitarian war has been waged to end a genocide. The reason for this is that any failure to invest in attempts at reconstruction is suggestive of a lack of genuine humanitarian concern at the base of the original intervention. This view resonates with the belief that it is the humanitarian outcomes of a particular intervention that largely condition its legitimacy, not the motivations behind it (Wheeler, 2000).⁴⁸ This view was further permeated by the International Commission on Intervention and State Sovereignty's (ICISS) notion of a duty to rebuild after an armed intervention has taken place (ICISS, 2002).

An alternative perspective regarding the duty to assume governmental responsibilities post-intervention is based on the changing character of war and peacemaking. At the start of

⁴⁸ This view argues that outcomes are important in and of themselves. An alternate, but similar view, argues that they are important since they are highly indicative of the degree of investment and preparation of any intervening actor's intentions.

the twentieth century, the vast majority of wars were generally settled by some type of negotiation, either bilateral or multilateral, or by the defeat and capitulation of one or more of the aggressors, thereby resulting in overthrow or occupation. Since the end of WWII, war-terminating methods have however become much more diffuse. Even more pronounced since the end of the Cold War, individual states, temporary coalitions, and various international institutions have intervened as peacemakers with considerably higher frequency. New norms of peacemaking transcend mere measures aimed at enabling belligerents to reach a compromise. Instead, this new type of peacemaking includes respecting human rights, constructing political institutions, punishing offenders, and promoting economic, social, and legal reconstruction. This view is implicitly grounded in the outlook that peace is best understood as the obtainment of certain societal goods and affirms that anyone who claims the role of peacemaker automatically attains the responsibility to construct positive peace (Bellamy, 2008, p. 616).

This conception has also been partially institutionalized by the international society's principal bodies for peace and security matters. When, in 2005, the UN established its Peacebuilding Commission (PBC), it was one of the only elements of the reform negotiations that received universal support and garnered wide consensus (Bellamy, 2008, p. 616).⁴⁹ While there are still examples of the UN-run transitional governments today, a norm dating back to various trusteeships in the 1950s, the establishment of a peacemaking body like the PBC is a step in the direction of formalizing the notion that the international community is collectively responsible for rebuilding states post-armed humanitarian intervention. Crucially, this responsibility may not even be contingent on whether the international society's institutions played a part in prompting, or intervening, in the conflict which caused the original intervention.

The increased focus on wars of humanitarian intervention in the post-Cold War era calls for a reevaluation of the previous, traditional model of post-war justice. Many debates applying the classical view of *post bellum* in post-intervention situations set the pre-war/intervention *status quo* as the definitive normative standard. Essentially, this idea was driven by the goal of trying to ascertain the justice of the war purpose, which constituted a

⁴⁹ The PBC was established as an intergovernmental advisory body of the UN whose aim is to support peace efforts in countries previously affected by conflict. It was jointly established by the UNSC and the UNGA, and it strives to propose effective strategies for post-conflict peacebuilding and recovery, pooling together all the relevant actors and resources.

kind of retrograde responsibility (Teitel, 2013, p. 338). However, a modern-day conception of *jus post bellum* undoubtedly differs from this traditional account in several ways.

Firstly, the principal concern of the traditionalist view of *jus post bellum* is evolving. Today, instead of a retrospective focus and undertaking, the concept is used in a wider framework, encompassing a bunch of responsibilities, relating not just to the past, but also to the present as well as aims for a hopefully peaceful future. Undoubtedly, the aegis or matter of *post bellum* has developed and expanded immensely (Teitel, 2013, p. 339). In a contemporary context, the contours of *post bellum* in *jus post bellum* are becoming increasingly blurry. The murkiness of these parameters is primarily because of the many persistent, pervasive conflicts ongoing today, where there is no clear end or objective. Since many of these conflicts are not supremely concerned with democratization or state-building, the specific meaning of *post bellum* is becoming less clear.

4.1.1 Moral hazards of occupation and Imperialist charges

Although widely required by liberal accounts of humanitarian intervention, establishing a presence in broken target states post-intervention is not without danger. At times, it subjects intervenors to allegations of imperialism and occupation, reminiscent of Western powers throughout the nineteenth and twentieth centuries. However, from a maximalist perspective on war termination,⁵⁰ the distinction between an occupational power and the simple assumption of governmental powers by the intervenors is largely obsolete in a modern-day context. There are two primary reasons for this. Firstly, the augmentation of the state in a modern view, as well as its expanded role in society, makes it arduous to determine which areas of administration should remain outside of the scope granted to the post-intervention occupier.⁵¹ Secondly, it can be argued that occupiers have never truly behaved neutrally towards the population of the appropriate target states. The 1907 Hague Regulations, governing the customs of the annexation of land in war times, were not respected by the big, liberal powers and therefore cannot be said to have reached the status of

⁵⁰ In war-termination, there are two primary ethical orientations informing the discussion: minimalism and maximalism. The former approach narrows the scope of *jus post bellum*, focusing on the restoration of peace and the prevention of future hostilities. The latter underlines the importance of certain political objectives via military triumph and the use of force, while also emphasizing the need for conscientious state-building.

⁵¹ A further corollary of this point is the fact that the Hague regulations were significantly biased in favor of occupiers. Essentially, they were entitled to describe any area as being of 'public concern', thereby enabling them to legislate in any area they wanted to intervene in. The broad definition of public order meant that the occupiers went well beyond simply tempering respect for the domestic law according to international standards.

customary law and should therefore not aid reflection on the legitimacy of peace (Bellamy, 2008, p. 617).⁵²

At this juncture, it is evident that the distinction between occupation and the assumption of governmental control seems insupportable. Nonetheless, the post-intervention occupying forces still must protect the civilians of the occupied area. Thus, it follows that the intervenors must have some type of authority to assume transitional authority in the area. This shift is visible in the Fourth Geneva Convention. Article 47 of this Convention firmly places the protection of civilians ahead of the safeguarding of sovereign authority, as it insists that occupants of occupied sectors must not be deprived of their rights (Bellamy, 2008, p. 617).⁵³ Furthermore, the Convention generates a variety of positive rights and duties on the part of the intervenors. For example, Article 51 facilitates the care for and education of children, Article 56 makes intervenors responsible for food and medical supplies, and Article 59 obligates them to enable various schemes of relief when pertinent. These Articles unmistakably generate an array of positive duties, that go beyond simply restraining the behavior of the intervenors towards the civilian population.

Advocates of the minimalist conception of war termination may argue that words like “facilitate” and “enable” could be emblematic of the creation of negative duties, simply meaning to not prevent the distribution of these goods. However, there is clear evidence in the Convention that the intent behind the Articles transcends such a view. Firstly, the Convention comprises a process that enables occupying powers to rescind or nullify the law of the occupied area if it poses a ‘threat to security’ or jeopardizes the application of the Convention (Article 64) (Bellamy, 2008, p. 618). Secondly, the *travaux préparatoires* of the negotiations concerning these rights indicate that the increased responsibilities were understood as positive duties at the time. The clauses surrounding the positive duties were the subject of some controversy when they were discussed in 1947 – a US Delegate objected that the clauses were perhaps too favorable for occupied populations, as he meant that the problems of China could be solved by establishing similar conventions and then convincing another state to occupy it (Bellamy, 2008, p. 618).

⁵² The lack of respect for the Hague Regulations is best exemplified by the behavior of Great Britain before and during WWII. Britain used various arguments to nullify the laws of the Regulations, by for example concluding separate agreements with ‘local elements’ and legalizing claims to sovereign authority (obtained through ‘unconditional surrender’) in vanquished enemy states.

⁵³ It should be noted that Article 47 of the Geneva Convention fits both a maximalist and minimal conception of war-termination. The minimal view is that it restricts the occupiers from violating the rights of victims, and the maximalist reading is that affords positive duties to assume transitional authority.

The maximalist account of war termination does pose some problems in the sphere of *jus post bellum* for humanitarian intervention, however. Specifically, the maximalist position can be cast as rather vague in terms of the relation between *jus post bellum* and the overall legitimacy of humanitarian intervention. Does an otherwise justified and successful intervention to rescue victims of genocide become illegitimate if the intervenors refuse to undertake governmental control afterward? Note that previously in this chapter, it was theorized that in cases such as this, a pledge to rebuild is highly indicative of the intervener's intentions. Not committing to reconstruct and build the peace may therefore be seen as a sign of self-interested intentions by the intervenors. The problem with this viewpoint is that it supposes that either the intervener has the wherewithal to carry out maximalist responsibilities, or that only those who have are righteous in potentially intervening (Bellamy, 2008, p. 620).

The question is whether the latter recommendation to drastically reduce the number of agents who may justifiably save victims in danger is desirable. Consider the Rwandan genocide. It can hardly be argued that it would have been preferable to disqualify the Rwandese neighbors from intervening militarily to stop the killings because they may not have been able to forge a long-term stable period of peace. This example introduces another exception to maximalist responsibilities: supreme humanitarian emergencies, a concept that was introduced in Chapter II. In cases where the use of military force is the sole viable way to stop ongoing atrocities, aggressive war may be legitimate regardless of the aggressors' devotedness to maximalist *jus post bellum* (Bellamy, 2008, p. 621).

In an attempt to solve the challenge of self-interest in preliminarily authorizing humanitarian intervention mentioned above, some scholars have proposed placing the prerogative of intervention onto a specific set of agents (Knotter, 2022, p. 92). These agents would comprise wholly liberal democracies, with a tested track record of human rights protection, allowing and enabling them to uphold a certain standard of civilization wherever those standards have been violated (Buchanan & Keohane, 2004). Establishing a narrow core of states capable of intervening "properly" would divide the world into separate zones, with liberal democratic, i.e., "decent" states, navigating in a sphere freed from failed or outlaw states. Their ability to intervene with military force for humanitarian purposes would be institutionalized into a segmented international legal system.

However, merely hypothesizing such a construction presents the exact critique that was presented at the beginning of this chapter – the fact that humanitarian intervention, as a concept, revives (neo-)imperial and (neo-)colonial power relations between the globally

“civilized” and “uncivilized” (Knotter, 2022, p. 93). Constructing the argument for a new internationalist doctrine of humanitarian interventionism characterized by a narrow core of liberal states able to act as “guardians of morality” necessarily exposes the argument to critiques of a new type of imperialism. Nonetheless, certain scholars have explicitly called for such a doctrine, arguing that a new type of imperialism would be acceptable in a world where human rights protection and cosmopolitan values are supremely important (Cooper, 2002). This type of doctrine would inevitably mean getting used to certain ideals of double standards, whereby specific states would enjoy enhanced legal and moral authority over others, transforming them into global peacemakers of world affairs. This is a dubious proposition, as it allows the claims of imperality and occupational desires to go unchecked, thus tempering the appeal of any such approach.

4.1.2 Mission Creep – the Libyan case

While it is arduous for humanitarian intervenors to adequately judge how any intervention will be able to deal with the *post bellum* conditions, they must be aware of the initial *modus operandi* of the intervention and its specific criteria for success. However, at times, interventions are prone to the ostensibly opportune volitions that present themselves throughout the intervention. An example of this is Libya in 2011. The initial stages of NATO’s intervention were undoubtedly concerned with the protection of Libyan civilians, aimed at halting the impending massacre of Benghazi, and thus consistent with UNSC Resolution 1973. However, at a certain point during the intervention, NATO’s aims seem to have evolved from protecting civilians to directly overthrowing the Gaddafi regime – a case of mission creep, a gradual shift in objectives during a military campaign. While this is understandable given the sheer despicability of the Gaddafi regime, it is normatively troublesome. Particularly because in the specific case of Libya, certain evidence seems to suggest that the new, primary aim of overthrowing the Libyan regime came at the expense of civilians (Kuperman, 2013, p. 113).

Evidence appears to indicate that less than a month into the intervention, NATO carried out actions directly aimed at fostering regime change, such as attacking retreating Libyan forces, thus not a threat to civilians.⁵⁴ Moreover, NATO forces bombed locations in Gaddafi’s hometown, Sirte, presumably because residents there were supporters of the

⁵⁴ A New York Times article from 27 March 2011 states that government troops, retreating south and west from Ajdabiya were attacked, and, in some cases, forced to abandon their vehicles and equipment, presumably to avoid being further targeted by allied warplanes.

regime, but not because they posed a threat to civilians (Kuperman, 2013, p. 113). Instead of pursuing a cease-fire, for example, by establishing a no-fly zone over Libya, NATO troops chose to attack Libyan forces, trying to repel any potential support for the Gaddafi regime inside Libya. Furthermore, NATO and its allies assisted Libyan rebels, who were very sympathetic to the overthrow of the regime. This assistance of the rebels probably served to extend the humanitarian war, amplifying the suffering of civilians, thus severely inhibiting any potentially peaceful path out of the situation (Kuperman, 2013, p. 114).

One of the clearest examples of developing mission creep happened when the UK deployed military experts in Eastern Libya, with the intent of advising anti-Gaddafi rebels. The international society quickly described this as a clear sign of the goal of the intervention transforming into one of strengthening the anti-Gaddafi uprising, thereby enhancing the chances of an overthrow of the regime. Moreover, the U.S. government under President Barack Obama covertly approved many of the measures aimed at bolstering the capabilities of the rebels. Early on in the intervention, President Obama signed an intelligence document approving covert aid to the rebels (Kuperman, 2013, p. 114). At the time of the UNSC's authorization of force, the U.S. was also in the know about Egypt's funneling of weapons to Libyan rebels. At the start of April, two weeks after UNSC authorization on March 17'th, British military forces were aiding the rebels in their efforts to build a command headquarters and defense structure (Kuperman, 2013, p. 115). Operatives from Britain, Italy, and France later acknowledged in front of a UN panel that they were actively training rebel forces in Western Libya (Nakhoul, 2011).

While one may be able to find some legitimate reasons for arming Libyan rebels in the original intent of the intervention, NATO and its allies certainly missed an opportunity to use their leverage as the intervention, and conflict, digressed. When the Libyan government sought out the prospect of peace talks, the rebels repeatedly denied any involvement. On multiple occasions, Jalil expressed the disinclination of the rebels to engage in any such talks until Gaddafi had been ousted from power. Nonetheless, NATO continued providing military aid to the rebels, despite their repeated rejections of the Libyan government's willingness to talk and potentially broker a ceasefire. It is impossible to know whether Gaddafi would have honored such an agreement, although one may doubt it based on the heinousness of his regime. Nonetheless, if NATO's primary goal throughout the intervention had been the protection of civilians, it should, and would, have conditioned its aid to the rebels on their genuine assessment of the offers from the Libyan regime (Kuperman, 2013, p. 117). However, there is no evidence to suggest that NATO attempted to utilize its leverage in this

way during the conflict. Contrarily, all reports from the intervention signify that NATO's chief aim became the direct overthrow of the Gaddafi regime. These efforts can potentially have intensified and prolonged the conflict inside Libya, thus amplifying the danger Libyan civilians were in.

The dangers of mission creep are related to the maximalist conception of war termination explicated earlier. Humanitarian intervention with the aim of regime change is most certainly characterizable as an aggressive war. When a war is waged to enhance regional security and peace by removing a regime that threatens that peace, the aggressors must satisfy maximalist responsibilities in the *post bellum* period. While the NATO intervention in Libya was authorized by the UNSC, it is highly doubtful whether the authorization of the UNSC extended to outright regime change. Justifying regime change within a normative order must include an assertion that the justice of that cause is so persuasive that the conventional legal rules should be disregarded (Kuperman, 2013, p. 124).

Maximalist responsibilities deriving from aggressive wars to enact regime change include the duty to ensure that revenge killings are halted and to assist in the institutionalization of security and democracy structures. However, NATO, initializing the intervention with the short-term goal of saving the population of Benghazi from being massacred, was ill-prepared for such long-term commitments. The evidence of this is clear. In the immediate aftermath of the rebels' success in October 2011, deposing and killing Gaddafi, the perpetration of reprisal killings began. Rebels tortured, beat up, and indiscriminately detained thousands of what they suspected to be Gaddafi supporters. A Human Rights Watch official depicted the situation in post-war Libya as embodying "a trend of killings, lootings, and other abuses committed by armed anti-Gaddafi fighters who consider themselves above the law" (Kuperman, 2013, p. 125). Part of this trend included rebels deporting more than 30,000, the majority of them black, residents from the Northwestern Libyan town of Tawerga, accusing them of being mercenaries for the Gaddafi regime.

The consequences of the racial violence were magnified in the months following the rebel victory. Many innocent migrant laborers, entering Libya after the end of the conflict, became singled out by ordinary Libyans, who felt that they were somehow responsible for a conflict they had no part in. In April 2012, 6 months after the killing of Gaddafi, a Human Rights Watch report stated that racial abuses in Libya, especially in the Northwest area where Tawerga is located, were persisting and "appeared to be so widespread and systematic that they may amount to crimes against humanity" (Kuperman, 2013, p. 126). Despite the

atrociousness of the Gaddafi regime, that scale of ethnic or racial violence never occurred inside Libya during his reign.

Post-intervention, Libya was left in a vulnerable state of security. Ostensibly, NATO did not adequately prepare the subsequent post-Gaddafi government to handle institutionalizing structures able to guide the democratization and securitization processes within the country. The new government failed to disarm and subjugate the various militant groups that arose during the protracted nature of the conflict. This failure produced a dangerous environment where fatal turf wars between opposing tribes and leaders have taken place. One example of this was in March 2012, when battles between rival tribes in the South led to 147 deaths (Kuperman, 2013, p. 126). The power vacuum after the end of the civil war also allowed for the rise of various extremist, radical Islamist groups, the dangers of which were highlighted in September 2012, when the U.S. Consulate in Benghazi was attacked, killing four diplomats. Even in the capital Tripoli, where the government's grip on security should have been most developed, rogue militias captured important NTC military facilities, challenging their governance.

The determining factor in the Libyan case was that Gaddafi had not actually explicitly targeted civilians, but merely threatened, albeit rather vehemently, to do so. If a state directly targets innocent civilians, as was the case during the Rwandan genocide, the dilemma of justifying regime change dissipates, because such egregious violations clearly constitute crimes against humanity and therefore dignify overthrowing the responsible regime. Nonetheless, the deliberate slaughter of civilians is not common across all civil conflicts prompting calls for intervention. Oftentimes, such cases are similar to the Libyan one, where non-combatants are threatened, and caught in the crossfire, but not directly targeted. In the vast majority of these cases, intervention is justified based on protecting civilians but not to overthrow a regime.

Thus, it is evident that post-bellum lessons from Libya must focus on the potentially harmful consequences of an expanding objective during interventions. A partial reason why mission creep can become dangerous is the inherent demonization that intervening forces employ to justify the evolving objective. Demonizing the target state nonetheless severely compromises the prospects of negotiating a peace settlement later on in the conflict, which oftentimes is the shortest way to stop the violence and halt the killing of non-combatants.⁵⁵

⁵⁵ This is a general point, applicable in various cases of potential mission creep. In the specific case of Libya, a potential explanation as to why NATO was reluctant to broker a peace deal may have been because of a desire to avoid a post-intervention peacekeeping role, which may have been necessitated by a power-sharing deal.

Another example of this dangerous dynamic is Syria, where calls for humanitarian intervention in 2011 firmly developed into demands, primarily from the U.S., that President Bashar al-Assad resign. Once again, the U.S. coordinated with other countries, such as Qatar as was the case in Libya, to arm Syrian rebels, laying the grounds for further escalation, and critically exacerbating the danger to civilians (Kuperman, 2013, p. 136).

One potential solution to the danger of providing maximalist *jus post bellum* duties to aggressors unwilling or unable to execute them is to combine a maximalist and minimalist approach to war termination. However, any such attempt inevitably ascertains that the justice of humanitarian war is uncontested, which is rarely the case. If the justice of aggressive war is contested, attempting to fulfill the maximalist conditions for peace may only serve to amplify the wrongness of the intervention in the minds of those who initially questioned the bases for war. However, separating questions concerning the justice of war from those about the justice of peace can help to abrogate this issue. The best example of this is perhaps the Iraq War in 2003. Although the vast majority of the international community agreed that the war was unjust,⁵⁶ those who opposed the intervention also opposed the early withdrawal of troops. The main reason for this is the fact that by launching the war, essentially effecting regime change, the interveners necessarily acquired certain duties to the Iraqi people. This view is logically untenable if one alleges that *jus post bellum* is intrinsically linked to *jus ad bellum* and agrees with the fact that the Iraq War was unjust. If this is the case, then the peace that the coalition forces were trying to create, must, fundamentally, be unjust (Bellamy, 2008, p. 620).

4.2 Political Authority and Sovereignty in the Post-Intervention Period

The main objective after humanitarian interventions must necessarily be to establish some type of legitimate political authority in the target state. To efficaciously do this, some type of “unbundling” of sovereignty may well be necessary (Keohane, 2003, p. 276). The idealized Westphalian conception of sovereignty, implying exclusion from an area of external control, needs to be distinguished from alternate types of sovereignty, grounded on legal status, domestic authority, and other factors. Oftentimes, the troubled nature of the states in which humanitarian intervention is directed means that perhaps domestic and legal sovereignty is more desirable than the Westphalian conception. Additionally, the external sovereignty referred to by the Westphalian model should be viewed as a relative matter.

⁵⁶ Because evidence today shows that Saddam Hussein was not harboring WMDs, the international society has by and large condemned the intervention in Iraq as unjust and illegitimate, since it did not meet the demands of protecting neither Iraqi nor global citizens from imminent danger.

Troubled states should not aspire to the traditional ideal type of sovereignty advocated by the Westphalian model, as they may not be feasibly positioned to reach such a level (Keohane, 2003, p. 277).

While this perspective advocates certain gradations in sovereignty, it does not propose to completely abandon it. Contrarily, the state must continue to be the primary unit of protection and collective action. However, a certain reconceptualization of troubled societies and states is needed. This new conception must focus on the state's ability to maintain internal order while being able to engage in international cooperation, without enjoying the classic rights of exclusivity which is traditionally connected with sovereignty. Adopting this new perspective will enhance the chances of reconstructing troubled states, while also constraining the autonomy of those states (Keohane, p. 278).

Retaining a classic unitary approach to sovereignty in post-intervention situations is untenable.⁵⁷ The most foundational problem with such an approach is the creation of victor's justice situations. Any faction in a state that is the first to declare control of an area may acquire the ability to perpetuate its control by suppressing potential opponents. In post-intervention troubled states, spaces are often divided along ethnic lines. This means that dishonorable leaders of a majority ethnic group may be able to institutionalize their power and mobilize their politics, along ethnic lines. Demagogic leaders of this faction, by appealing to the hatred or fear of the other group, can thus sustain and maintain their indiscriminate rule (Keohane, 2003, p. 279)

The severity of the predicament the intervening powers face in post-intervention situations is compounded by the insistence on a unitary conception of sovereignty. This view of sovereignty establishes self-determination, meaning restoring complete sovereignty to the troubled state, as the primary objective of the intervention. However, full sovereignty excludes the idea of an external authority, which is exactly what troubled societies need. An external authority structure affords the people of such a society the capability to act collectively, which they in many cases want to do but are simply unable to because the necessary trust and reliability do not exist in the state. The primary debilitating issue in troubled societies is the incapability of its people to act in concert, which essentially renders them powerless. Adopting a unitary concept of sovereignty only serves to reinforce these conditions (Keohane, 2003, p. 282).

⁵⁷ An empirical example of this is the intervention in Kosovo.

Limiting the classical Westphalian conception of sovereignty undoubtedly requires robust and capable international institutional structures. These institutions must be part of a structure that all major, key actors acknowledge and fully accept.⁵⁸ Crucially, any such international institutionalizing attempt must derive from a set of rules, practices, and norms, within which the new entity's position is not anomalous. The new leaders of the state will be increasingly more likely to consent to curbs on their sovereignty if the surrounding area's sovereignty is limited too. Part of this approach is principally normative. While the concept of unitary sovereignty should be largely discarded, Westphalian sovereignty should be viewed more as a continuum than a finite concept (Keohane, 2003, p. 287).

In such a conception, external authority installations occupy a certain role in the decision-making procedure of all states. If robust supranational authority structures exist, a certain degree of less sovereignty is acceptable to states. This is because they are safeguarded by their embroilment in more regional structures, as well as by the constitutionalization of these installations. A willingness to accept less sovereignty should therefore not necessarily be viewed as a sign of weakness. Instead, it may be a sign of strength, entirely compatible with continuous international legal sovereignty, as well as domestic sovereignty, characterized by the preservation of coherent, conscious ordering of internal authority relations (Keohane, 2003, p. 288).

There is unfortunately little evidence of any universal consensus regarding any limitations of sovereignty, especially in the sphere of security matters. China and Russia are most certainly disinclined to follow any such logic. Many developing countries are also fearful of placing explicit restrictions on their domestic, external, and interdependence sovereignty. However, Europe does have a compact set of practices, rules, and structures potentially useful in such regard. Some of these organizations have by some scholars been described as "normative intermediaries" (Keohane, 2003, p. 290). Examples of these institutions are the Organization for Security and Cooperation in Europe (OSCE), the European Stability Pact, and the EU itself. Standards for state behavior, most notably towards minorities, are part of all these institutions' DNA. Importantly, the support of powerful members of these organizations generates incentives, positive as well as negative, for implementing these standards (Keohane, 2003, p. 291).

⁵⁸ Although not in the aftermath of a humanitarian intervention, the establishment of the Federal Republic of Germany in 1954 is an empirical example of this. The Paris Agreements prevented Germany from developing biological, nuclear, or chemical weapons and designated German military forces to NATO's command structure. Thereby, West Germany became a "semi-sovereign state".

Incentives are crucial. Institutions rely on them, which is no exception in the case of those institutions aimed at unbundling sovereignty. Generally, guiding incentives must come from the outside, as they cannot be supplied by the actors within the troubled region itself. Instead, they should derive from states that are sincerely willing to involve themselves in the region, committing their resources, albeit conditioned on the construction and safeguarding of the needed institutions.⁵⁹ Because of this, simply setting up international institutions limited to troubled areas, such as Central Africa or the Middle East, would most likely be a futile undertaking. One cannot expect institutions in these parts of the world to internally facilitate the unbundling of sovereignty.

These institutions need outside support. However, this type of external support must not be of the distant and unenthusiastic sort. Indifferent powers do not possess adequate incentives of their own to remain involved. There are numerous examples of disinterested powers conducting failed humanitarian interventions in the past, for example, the U.S in Somalia in 1993, which retreated quite suddenly after a small number of its forces were killed. Having an interest in conflicts, succinctly different from the non-interventionist critique of a self-interest, can prove to be a stabilizing factor. This was the case in the early 2000s in the Balkans, where the U.S had pronounced interest in NATO's operation leading to some type of political security, primarily because it was interested in preserving NATO as its customary military link to Europe (Keohane, 2003, p. 292).

These crucial interests that spark incentives are not exogenous or inherent. Instead, they are created by steadfast action, including institution-building initiatives. Any transformation of global security politics, including the politics of humanitarian intervention, happens incrementally. An empirical example of this is the progressive expansion of the EU. The EU relied on the foundational structure of previous negotiations and structures, forged by earlier institutional developments. The EU's gradual growth is emblematic of how institutions depend on reliable existing institutions. This is true in the sphere of organizational support, as well as concerning interests generated by earlier organizations. Institutions are not merely created: they grow out of existing structures (Keohane, 2003, p. 291).

Easily inferable, institutions and interests are intimately connected. This connection eliminates the risk of any contradiction between an institutional approach to post-intervention politics and any type of liberal approach. It is perfectly plausible for international institutions to bolster domestic sovereignty while compelling states to renounce any claims of

⁵⁹ In the case of West Germany, the arrangements would not have been feasible had it not been for the greater, largely beneficial institutional structures that Germany was accepted into after 1954, such as NATO and the EU.

Westphalian sovereignty. This approach is compatible with liberal accounts, which emphasize domestic politics, by presenting a view of the future highly appealing to democratic publics. Also, it is largely consistent with a classical realist account. It provides rulers with the prospect of future reinforcement of security and influence gains from humanitarian intervention (Keohane, 2003, p. 292).

4.2.1 Troubled States and Restoration of Sovereignty

While democracy is undoubtedly a positive thing in the long term, there are intrinsic difficulties in applying it in the short term. This is especially true when democracy is introduced to a troubled society with various repressed ethnic tensions. This type of rapid democratization may have explosive consequences in the short term. It was this type of democratization that allowed ethnic demagogues to take hold in the Balkans in the post-Cold War period, mobilizing nationalist anger along ethnic divides, thus driving the Balkans towards state fragmentation (Ignatieff, 2003, p. 301).

In many parts of Africa, not only is state fragmentation occurring, but outright state failure is happening in many countries. In the early 2020s, “failed states”,⁶⁰ or at least states bordering on failure, include Afghanistan, Yemen, South Sudan, Syria, and more. These states all present a cluster of human rights calamities: ethnic or religious massacres, endemic banditry, rape as a weapon of war, and enslavement of their populations. Many of these failed states have been experiencing failure of their state apparatus for decades. One of the primary, non-political, reasons for this is the endless supply of profitable resources that rival gangs or militias often have access to, like diamonds, oil, cocaine, and so on. Civil wars in many of these states are therefore allowed to persist for many years because the resource base permits it. Paradoxically, the paramount role of key commodities like oil and diamonds in the pathogenesis of these states indicates that they should be at the forefront of global policies attempting to prevent state failure (Ignatieff, 2003, p. 304). However, this is not the case universally.

Many failed states share a supremely important characteristic: they no longer possess a monopoly of the legitimate means of violence, and thus no longer fulfill the classic Weberian definition of a state (Ignatieff, 2003, p. 305). This type of uncontrolled violence in these states threatens the social fabric and human rights of the civilians living in the various

⁶⁰ Although much critiqued and criticized, the notion of “failed states” remains relevant in contemporary academic and public debates. Many debates utilize the idea of a failed state to legitimize external intervention, which can be dangerous. This thesis employs the term to show why such failed states do not disappear, and why the international community should think differently about the ongoing events in these states.

societies. The question of how an external state can potentially enable the civilian population of another state to restore a legitimate monopoly on the means of violence is a difficult one to answer. A related question concerns the desirability of attempting to rebuild failed states, along the same borders, with the same populations, and the same basic prerogatives as states. Assuming that the aim of rebuilding failed states should be to restore complete Westphalian sovereignty within their borders is erroneous. If these states fail to fulfill the central sovereign function of establishing and preserving a monopoly of the means of violence, what type of sovereignty is there to rebuild? (Ignatieff, 2003, p. 306).

Perhaps there are lessons to be drawn from the modern-day perception of sovereignty among the stronger states in Europe and North America. Looking at these states, generally, the strength of a particular state is not primarily dependent on the components of Westphalian sovereignty, such as full international legal personality and non-interference. Rather, a strong state is reliant on pooling and sharing some of the attributes associated with traditional Westphalian sovereignty. The number of European states satisfying the final element of full Westphalian sovereignty, the ability to protect themselves against foreign aggression, is relatively limited.⁶¹ Even those who retain such a capacity only do so because of their alliance with the U.S., who has been the guarantor of European security for several decades. Similarly, Canada depends on the U.S. for protection. However, whatever it may be perceived that the Canadians lose in strict terms of sovereignty, they gain through efficient governance. A mere 1 % of Canadian GDP is used for defense purposes, which allows the country to focus its spending on other features, such as publicly funded healthcare, which is exactly what provides a key part of its national independence vis-à-vis the U.S (Ignatieff, 2003, p. 313).

Applying these facts to the experience of poorer, weaker states reveals an immediate policy relevance. This is due to the ostensible paradox between the multilateral deterioration of sovereignty and the apparent success of efficient governance. This shows that the future for smaller, weaker states does not reside in the principles of Westphalian autonomy, such as autarchy and national self-reliance. Rather, it lies in pursuing as many strong, reliable security alliances as possible. If possible, these states should transfer the expenses of security to a more prosperous, and potentially richer, neighboring state, as well as seek customs and commercial ties with richer neighbors. An empirical example of a successful case like this is

⁶¹ It should be noted that while this statement is still true, the security situation in 2024 has surely changed the security situation of Europe. A return of Westphalian sovereign elements may potentially be in the cards since both the Ukrainian invasion and the Israeli-Palestinian war have forced many of the larger European states to rethink their national security capacities.

Croatia. The previously troubled Balkan state became a NATO member in 2009 and an EU member in 2013. This demonstrates how largely eliminating the costs of defense and opening up a continental market for one's population can move a once-troubled state toward a position as a prosperous member of the international community, whose population can live and work anywhere in Europe (Ignatieff, 2003, p. 313).

The fact that devolution of sovereignty can lead to increasingly successful governance has some immediate lessons for less successful states in regions like Central Africa and the Middle East. The primary one is that they have undoubtedly been cursed by an ideological lineage of nationalism inherited from previous generations (Ignatieff, 2003, p. 314). The leaders of those generations aspired, through nationalist movements, to a model of Westphalian self-reliant autarchy, which the previous analysis shows is not desirable in an increasingly globalized and interconnected world. Instead of striving to strengthen their domestic sovereignty, weaker states should aim at bolstering their competencies as instruments of governance, enabling them to present their populations with decent economic prospects and respectable everyday services. The days when nationalism represented a longing for Westphalian sovereignty in vulnerable areas of the world, should be passé.

The proximity to powerful, more prosperous neighbors is unquestionably a positive feature for weaker, less powerful states prone to state fragmentation or failure. However, it is not necessarily in the prerogative of stronger states to simply allow weaker states to join their institutionalized structures. While Croatia did manage to join the EU as mentioned above, it is currently the only one of the seven Western Balkan countries to join the EU. The others are still being "gradually supported" in their efforts to join the Union. The primary aim of stronger states is to prevent chaos in weaker states in relative proximity to their borders. However, at times, an equally strong desire exists to deny entry rights to people from these weaker states for the sake of insulating the stronger ones. However, as evidenced by happenings inside the EU in the last decade, this strategy is error-prone in the long term. When strong states have borders with weaker ones, immigration flows, crime problems, and potential drug traffic will inevitably have negative effects on the stronger state if the weaker state is left to itself (Ignatieff, 2003, p. 315).

Rebuilding poorer, weaker states can therefore be said to be a two-way street. The weaker states have to be convinced that it is in their best interest to cooperate with more prosperous ones. Stronger states need to be provided with an incentive to take the risk of reconstructing unstable neighboring countries. For these incentives to arise, the stronger states

need to have some kind of interest in the rebuild. Completely neutral humanitarianism is rarely viable, or desirable (Ignatieff, 2003, p. 316).

4.3 Post-Intervention Justice as a concept of Transitional Justice

A final, alternative view of post-intervention *jus post bellum* casts it as a potential component of transitional justice. Newer types of wars of humanitarian intervention seem to be largely animated by values of freedom, liberalization, and so on. Therefore, the aegis of *jus post bellum* may be moving in a direction of eventual overlap with the objectives of transitional justice (Teitel, 2013, p. 339). Post-war justice is no longer confined to the strictly punishment-oriented view of the legalist paradigm, nor the restitution and the restorative dimension of earlier models of *post bellum* consideration. Instead, the post-war justice issue is being recast in terms of justice as a form of transitional security, which could therefore bring it under the umbrella of transitional justice. The emerging view is that there are duties that follow even when a war of intervention is justified.

The increasing blurriness of the endpoint of conflicts and the starting point of post-conflict situations means that the entire concept of *post bellum* seems partially inadequate in a modern-day context. Transitional justice is arguably more extensive because it incorporates rationales surpassing those concerned with a war's beginning and matters of retributive and restorative justice arising afterward. While *jus ad bellum* was traditionally solely concerned with the beginning of a war and its initial legitimization, that has evidently changed today. Furthermore, the increasingly ubiquitous involvement of various courts and tribunals in *jus post bellum* matters requires a notion of proportionality that is not solely political but also jurisprudential (Teitel, 2013, p. 341). Justice has transformed into a shared international commitment, which itself informs the required new meaning of the conception of proportionality.

The constitutive elements and practice of the ICC are reflective of this needed change. While traditional post-war judgments were definitively disjointed from the end of the war and focused on the accountability of one state, i.e., the victor, nowadays prosecution is contemplated evenhandedly regardless of which side of the conflict a state was on. Moreover, very seldom are verdicts handed down differentiating states based on their ethnic or nationalist characteristics. This development depoliticizes and embeds a perpetual approach to the concept of *jus post bellum* (Teitel, 2013, p. 341). The punishment is becoming increasingly individualized, and not collective. This poses the fundamental challenge for *jus*

post bellum as potential criminal justice: how is individualized punishment capable of addressing the systematic wrongs of war waged collectively? (Teitel, 2013, p. 342).

According to formal international criminal justice law, criminal prosecution involves investigation and prosecution conducted by the ICC and ad hoc tribunals. This could be applicable in cases of *jus post bellum*. However, many of the failed states that are the subjects of humanitarian intervention are not party to the Rome statute and therefore do not fall directly within the jurisdiction of the ICC (Ashley, 2022, p. 397). Examples of such states are Syria, Yemen, and South Sudan. The constitutional elements of the Rome Statute do outline one way in which individualized punishment can be coupled with the collective, as individuals, under Article 12, may be subject to prosecution. However, this prosecution is dependent on the individual being a national of a state party to the Rome Statute, so this does not solve the problem of the failed states that are not. However, the UNSC may direct cases to the ICC Prosecutor, while mentioning that those states are not signatories to the Rome Statute and therefore are not forced to collaborate (Ashley, 2022, p. 397).

Another potentially viable option to include *jus post bellum* considerations under the umbrella of transitional justice is to create ad hoc tribunals. This happened in the cases of Rwanda, the International Criminal Tribunal for Rwanda (ICTR), and the former state of Yugoslavia, the International Criminal Tribunal for the former Yugoslavia (ICTY). Such tribunals afford courts the limited capacity to seek to provide the justice and resolution that victims search for (Ashley, 2022, p. 397). To complement this approach, restorative justice components, such as truth and reconciliation commissions, could also be set up. However, any attempt at embedding *post bellum* considerations in the concept of transitional justice has risks. Firstly, restorative justice mechanisms may be viewed as merely political tools, aimed at giving credibility to the post-conflict governments and thereby allowing them to consolidate their control. Secondly, empirical evidence hints at a deeply questionable relationship between truth and reconciliation in these matters (Ashley, 2022, p. 398)

There are examples of the UN adopting international legal mechanisms aimed at establishing impartial and independent accounts of potential crimes committed in humanitarian conflicts. One example is the International Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syria (IIIM), which was adopted in 2016 (Ashley, 2022, p. 397). The hope was that such a mechanism could allow the Syrian community to reacquire some trust in international society. However, severe challenges of funding as well as accusations by some UN MS that the mechanism is merely a political ploy

have meant that the desired effects of the mechanism have been minimal (Ashley, 2022, p. 398). Still, the establishment of such a mechanism could be a shaping element of future structures further institutionalizing *jus post bellum*.

Any such institutionalization would have to deal with the potentially complicated matter of third-state liability. In many cases of gross human rights violations, countries like the U.S. are supplying military equipment and operational support to one side. This is the case in the Israeli-Palestine War, where the U.S. is a key ally of Israel. If Israel were to be brought to justice for its ostensible human rights violations of the people of Gaza, the U.S. could be deemed a state with derivative responsibility under the threshold requirements of Article 16 of the Articles on State Responsibility (Ashley, 2022, p. 398). Moreover, the specific manufacturers of the military equipment used in conflicts may be implicated, which would further complicate the proceedings. Any new approach to post-conflict transitional justice is therefore not straightforward. Determining which states fall within the jurisdiction of a court or ad hoc tribunal, derivative responsibility, or liability of third states would have to be discussed. This would most likely be met with at least some type of opposition from some of the P5 of the UNSC. Additionally, the non-state actor liability of companies providing materiel to the conflict would have to be considered too (Ashley, 2022, p. 399).

Conclusion

This thesis has aimed to examine the ethical and moral justificatory grounds for intervening in conflicts based on humanitarian grounds. It has done so by consulting various sources that highlighted differentiating viewpoints, thereby succinctly informing the discussion. Firstly, the study found it important to delineate some of the major theoretical strands of thought that are particularly significant when considering humanitarian intervention. By exploring these, a theoretical basis was established which the following sections then used to further their analysis of the ethical justification of humanitarian intervention.

Crucial ethical components of humanitarian intervention were analyzed accordingly, such as non-combatant immunity, the moral relevance of borders, and self-determination. Through the composite analysis, a paradox became clear. Adopting a minimal view of human rights is ostensibly desirable since this largely avoids the vicious cycle of waging war in the name of human rights. The principal claim of international ethics must be that war, in itself, is horrendous, which is why it should be avoided whenever remotely possible. Nonetheless, the cruelty and savagery of certain regimes mean that forcible action may at times be necessary. Peacekeeping missions, with all their diplomatic and economic coercive powers, are and should be the first option consulted. However, if there is no peace to be had, peacekeeping can be a futile undertaking, and waging humanitarian may be the preferable way forward.

Therefore, this study underlined the necessity of following a liberal, cosmopolitan approach to allow for humanitarian intervention. The overarching guidelines of this approach concern the strict necessity for intervention, ensuring that only in situations of genuine threat to a civilian population, intervention is used to prevent humanitarian crises. Moreover, the response to the crisis must follow the principle of proportionality and be commensurate with the severity of the relevant situation.

The need for such a liberal approach is underlined by the atrocities allowed to happen in the 1990s, namely the Rwandan genocide and the Srebrenica massacre. These atrocities tempered the post-Cold War optimism and enthusiasm regarding the prospect of an increase in the number of effective interventions grounded in the rule of law and the principle of collective security. Fortunately, these horrifying episodes led to certain changes in the normative framework governing humanitarian intervention. These included the establishment of the ICC in 2002 and the adoption of the R2P regime in 2005.

Synthesizing and contextualizing these events, the analysis of this work showed a potentially evolving customary, normative framework potentially able to govern the ethical justification of intervention more effectively. One crucial empirical sign of this was the UNSC's authorization of the use of force in Libya in 2011. For the first time, the UNSC authorized the justified use of force against a target state without the permission of that state's *de jure* authorities.

While this was undoubtedly a positive step for the UN, the analysis of this study shows questions remain regarding the desired legitimate authority role of the organization. Most notably, this is caused by the inertia of the P5 and the stillness created by the veto rule in the UNSC. However, the normative framework development governing intervention has ameliorated the process of authorizing and justifying intervention in the UN. The shared commitment that the development has caused among states in the international community means that a degree of normative capture is likely to arise in cases of gross human rights violations. This was for example the case in Libya where UN MS were forced to back the Resolution authorizing the use of force to avoid contradicting their public position on intervention.

The latter part of the thesis seeks to reconceive the legitimization and justification of humanitarian intervention as a whole. The analysis carried out suggests that any liberal approach to intervention must include considerations of *jus post bellum* when aiming to justify intervention. This part of the work addresses a certain gap in the literature, by reconceptualizing the approach legitimizing intervention. One part of this concerns the rejection of the ideal asserting that the *status quo ante bellum* should necessarily be a desirable normative benchmark. This consideration underlines the vastly expanding nature of the aegis of *post bellum* in a modern conceptualization of humanitarian intervention.

The entirety of the analysis of the thesis highlighted a need to reconceive the concept of sovereignty. In the first sections of the work, it became evident that sovereignty necessarily must retain *instrumental* value rather than any intrinsic value in and of itself. This must be the case since egregious human rights violations warranting intervention not only directly endanger the decency of populations, it also completely betray the whole concept of sovereignty. Therefore, sovereignty must be seen as a means to a more principal end. The latter sections of the study furthered the reconceptualization of sovereignty. By considering the structure of political authority post-intervention, the work showed that the traditional

concept of Westphalian sovereignty is ill-suited for application in the modern politics of humanitarian intervention. One line of argument presented in the study asserts that the model of Westphalian self-reliant autarchy may be partially reliable for the failure of certain states, by inspiring the leaders of those countries to attain a level of sovereignty undesirable in a global and interconnected world.

Overall, the findings of this thesis cast humanitarian intervention in a contemporary light, underlining the evolution of the framework governing the use of force for humanitarian purposes. However, any normative framework potentially able to effectively govern this use of force must be reinforced by the practice of states. Institutions and organizations are important; however, it is the states that are party to them that decide how the future politics of humanitarian intervention will be shaped. In this regard, as also outlined by the final paragraphs of the study, incentives are paramount. This is the case both for the weaker states who are potential targets for humanitarian intervention and the potentially intervening stronger states.

This importance of incentivization emphasizes the incredibility of one particular non-interventionist argument against a liberal approach to intervention; namely, the demand that intervenors be completely neutral and impartial to the conflict warranting intervention. This type of neutrality is not only largely implausible but also dangerous when considering *jus post bellum* commitments. A strong, disinterested state is much more liable to leave the target state in a bad way than a state with incentives to better civil conditions within the state.

As briefly mentioned towards the end of the study, incentives for the international community to involve itself in the affairs of certain failed states are present. Key commodities like oil, certain metals, and other valuable natural resources are often in abundance in these states. This is also the reason why civil conflict is often so prolonged in these states since the resource pool is largely inexhaustible. The principal role of these resources in the pathogenesis of failed states should provide actors in the international community with ample incentive to concern themselves with the affairs of those states.

The thesis by no means exhausts the debate of justifying and legitimizing humanitarian intervention. The evolution and subject matter of the issue are simply too rapid and grand. Nonetheless, the thesis does inform the discussion in various important ways. What is clear is that the institutionalization of an effective framework with proper legitimate authority capable of justifying intervention vis-à-vis the rule of law and principle of collective security needs to be further reinforced in the future. Undoubtedly, human rights need to be at the forefront of every decision-making process conducted in conflict zones

shaped by instability and violence. However, one must also remember that peace is not necessarily the complete absence of conflict. Peace, in a contemporary conception, is shaped by the ability to respond to conflict in effective manners with the appropriate means, thus ensuring the least amount of collective civilian damage and casualties.

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