Eamon Aloyo

A DEMOCRATIC JUSTIFICATION FOR MILITARY AND NONMILITARY HUMANITARIAN INTERVENTION: RECONCILING HUMAN RIGHTS AND COLLECTIVE SELF DETERMINATION

GGI Analysis No. 3/2012

April 2012

The Global Governance Institute
Pleinlaan 5
1050 Brussels, Belgium
Email: info@globalgovernance.eu
Web: www.globalgovernance.eu

ABSTRACT:

This paper presents a novel account of military and nonmilitary humanitarian intervention that unites two central and ostensibly competing strands in the literature on state sovereignty and the moral permissibility of humanitarian intervention. The first account, associated with Michael Walzer, holds that the right to collective self determination is morally important enough to override justifications for intervention except for rare cases. The second, more permissive account, associated with Walzer's critics such as Charles Beitz and David Luban, justifies infringing on state sovereignty under certain circumstances to guarantee human rights. The paper reconcile these two accounts by arguing that if everyone has a right to democracy, then a robust list of rights – what are called basic democratic rights – must be secured to actually guarantee the right to democracy. This provides a qualified justification for intervention grounded in individual rights, and, at the same time, in collective self-determination. To make this argument, it draws on and criticizes aspects of just war theory and the literature on state sovereignty. Because nonmilitary humanitarian intervention may be far less costly in human and material expenditures to the intervener than military humanitarian intervention typically is, whereas military humanitarian intervention may be permissible but not required, many nonmilitary humanitarian interventions are duties. After constructing this moral theory, the paper then considers how it can be legally implemented under current international law.

About the Author

Eamon Aloyo is a Global Justice Senior Analyst at the Global Governance Institute. He holds a Ph.D. in political science from the University of Colorado at Boulder. He welcomes feedback and can be contacted at eamon.t.aloyo (at) gmail.com.[1]

About the Global Governance Institute

The Global Governance Institute (GGI) is an independent think tank based in Brussels. By drawing on the expertise and analysis of its network of senior policy-makers, consultants and scholars from the world's leading institutions, the Global Governance Institute promotes comprehensive research and actionable advice in the fields of:

- Peace & Security
- Global Justice (incl. International Law & Human Rights)
- Environment & Sustainable Development
- Economic Policy
- Forward Studies & Innovation

[1] Eamon would like to thank Dinah Shelton at George Washington University's Law School, George Washington University's CIBER Summer Doctoral Institute, and the participants and professors at GW for their feedback and support. Additionally, he would like to thank Steven Vanderheiden, David Mapel, Michaele Ferguson, Alison Jaggar, and Andreas Kolb for their insightful feedback on this paper. Any mistakes remain his alone.

Our vision is a more equitable, peaceful and sustainable global order based on effective but accountable international organizations, the global rule of law and the empowerment of the individual across borders and cultures. GGI places particular emphasis on the improvement of the United Nations system and its mutual reinforcement with strong regional organizations.

For more information, please visit: www.globalgovernance.eu

Table of Contents

ABSTRACT: 2
About the Author 2
About the Global Governance Institute 2
Introduction 4
The Morality of State Sovereignty and Just Causes for Humanitarian Intervention 5
Undermining the Military vs. Nonmilitary Distinction 8
A Democratic Derivation of Rights as a Justification for Intervention 12
Forfeiting Rights, Unable or Unwilling States, and Intervention 14
Intervention and the Consent of Whom? 16
Are Nonmilitary Humanitarian Interventions Permissible or Required? 18
Nonmilitary Humanitarian Intervention in International Law 19
Objections 22
Conclusion 24
Bibliography 25

Introduction

When is it morally acceptable for some actor or combination of actors – a state, a supranational institution, or others – to intervene in another state's affairs for humanitarian purposes without the target state's consent? Humanitarian intervention means any violation of state sovereignty taken by one or more actors that have protecting human rights as a central reason for violating state sovereignty, where there is substantial evidence of this motive in the outcomes of the intervention (McMahan, 2010, p. 44; Pogge, 2003, p. 93). State, nonstate, and supranational actors can violate state sovereignty by a range of military and nonmilitary means, including through some types of economic sanctions, international criminal law, and more (Miller, 2003, p. 1). Nonmilitary here means nonviolent, even if the nonviolent actions harm or kill people. Aerial bombing, assassinations no matter who commits them, invasions, and the like are classified as military or violent actions. Sanctions, embargos, asset freezes, arrests and the like are nonmilitary or nonviolent, even if they result in death.

The central argument is that even those who believe that the principle of collective self determination weighs heavily against intervention, to be consistent, they should believe that the just cause condition for intervention is met whenever individuals' basic democratic rights are being violated because without the guarantee of such rights, individuals are not able to exercise their right to contribute to collective self determination. This paper argues that individuals must be able to vote in order for there to be collective self determination (Altman & Wellman, 2009, chap. 2). Otherwise, it is not truly *collective* self determination; it is governance by some subset of a population. To a large degree, this reconciles Walzer's views on intervention, which weighs collective self determination heavily, and his critics' views such as those of Charles Beitz, David Luban, and Michael Doyle, who place emphasis on individual human rights. It does so because it shows why the just cause principle is met if individuals are being killed either if one believes collective self-determination or protecting human rights should matter morally more.

Recent events show the urgency of advancing the discussion about nonmilitary and military humanitarian interventions. From 1990 to 2003 the UN Security Council (UNSC), almost exclusively at the behest of the US, imposed deadly sanctions on Iraq against its government's will that quietly killed half a million people and prevented Iraq from rebuilding after the first Gulf War, leaving its economy and infrastructure in ruins (Gordon, 2006, 2010). Just as Iraq did not consent to the sanctions, Sudan neither assented in the spring of 2009 to the International Criminal Court's (ICC) first public arrest warrant for Sudan's president, Omar al-Bashir, nor did Sudan even ratify the ICC's Rome Statute. (Angered by the arrest warrant, Bashir temporarily expelled aid organizations from Sudan, which probably cost lives.) In 2011, NATO intervened militarily in Libya to ostensibly protect civilians, but then did not stop until Qaddafi was captured and killed. Were any of these actions permissible or justified?

Scholars disagree about how to frame the issue of nonmilitary humanitarian intervention (Gordon, 1999, p. 123). To take one example, before WWI, sanctions were widely considered an act of war, but since then they have occupied a controversial penumbra between war and peace (Gordon, 1999, p. 123; Walzer,

1977, chap. 10). Is nonmilitary humanitarian intervention more similar to war, and should we thus apply just war theory to it, or is it more similar to peaceful relations, for instance, diplomacy, and so should we assess it by other criteria than just war theory? The same standards should apply to each. We do not have to choose how to view them because what matters morally is the severity of harms, how many people are affected, and who decides on how to respond to them, not on how the harms are inflicted.

Given these controversies, one might think that interventions should be divided into a few categories such as the following. First, one category could be full-scale military humanitarian intervention where a large number of soldiers invade a foreign country in order to protect innocents. A second sort would involve indiscriminate economic sanctions or other types of nonmilitary humanitarian interventions that adversely affect large numbers of people. A third type would involve limited and infrequent aerial military strikes that kill far fewer people than does the current US drone campaign against militants in Pakistan. The fourth type would include targeted nonmilitary humanitarian interventions such as travel bans, asset freezes, and international arrest warrants that target only a few individuals. One might suspect that such different types of interventions would require a different theory of when intervention of each type is permissible. This is wrong. This paper defends the view that what matters morally for the permissibility of intervention, such as the severity and number of rights violations, respect of just war precepts, and respect for collective self determination, are the same for military and nonmilitary interventions.

The paper proceeds in the following order. It first discusses two leading positions on state sovereignty and its limits, which provides the basis for when military humanitarian intervention is permissible. It argues that when violent and nonviolent violations of state sovereignty should be permissible should be subject to the same criteria. It challenge another widely held tenant of just war theory, last resort, to suggest that in rare cases military intervention may be permissible even when nonmilitary interventions are not. It then presents a novel account of when military and nonmilitary humanitarian intervention is permissible grounded in basic democratic rights. It refutes the objection that states' rights should trump justifications for intervention. It discusses whether consent, and the consent of whom, is necessary for an intervention to be just, and then concludes.

The Morality of State Sovereignty and Just Causes for Humanitarian Intervention

In just war theory, there are multiple reasons that may qualify as a just cause for a resort to war (McMahan, 2005). This paper, however, considers only what constitutes just causes for humanitarian intervention. Proposals for what qualifies as a just cause for a humanitarian intervention center around two principles, state sovereignty and human rights, both of which are discussed.

The justifications for and limits to state sovereignty are inexorably connected to when humanitarian intervention is permissible. State sovereignty is widely accepted as the supreme authority within a given territory over a certain people (Philpott, 2001, p. 16–7). Purportedly originating with the international law treaties

of Westphalia in 1648, over the centuries sovereignty and the state system has radiated out from Europe to blanket the earth (except Antarctica). Although sovereignty has never been absolute, it has weakened over time (Weiss, 2007, p. 12). Since WWII, human rights norms and law, international law more generally, and reformulations of state sovereignty such as the responsibility to protect (R2P), have further eroded state sovereignty compared with the early 20th century.

If intervention aims at protecting individuals from horrendous human rights violations, why is it so controversial? It seems like intervention should be far less divisive than it is because what should matter is the morality or legality of a policy, and perhaps who decides a policy, but less so the nationality of a decision maker (Luban, 1980a, p. 179). But, as Jeff McMahan puts it, "the principal reason that humanitarian intervention is contentious is that it seems to violate the target state's sovereign right to control its own domestic affairs" (McMahan, 2010, p. 44). This reason, however, just pushes the question back one step, demanding an answer to why a state's sovereign control of its own domestic affairs should be so revered. There are four main responses. One reason is to limit aggression of the powerful (states) against the weak (states). Another is that it permits collective self-determination, which acknowledges cultural, religious, traditional, ethical, and other differences among peoples. Although some such as Robert Goodin and Christopher Wellman call for radically altering if not altogether abolishing state sovereignty, many contemporary theorists accept some states as morally legitimate and only differ in the definition of when a state is legitimate (Goodin, 2007). A third objection to intervention is that it almost always violates some innocents' human rights, which raises the question of proportionality and the principle of discrimination (Hurka, 2005; McMahan, 2009, pp. 18–32). A fourth objection is that undermining state sovereignty would allow for too many interventions. All are potent objections and must be addressed by any theory of when humanitarian intervention is justifiable.

Excluding the strand of political realism that denies morality exists or should play a role in international affairs, there are two broad theoretical positions regarding the moral permissibility of violating state sovereignty. This paper excludes this strand of realism because it is interested in the morality of intervention. The two views that depend on morality use violations of human rights as a trigger for when humanitarian intervention is justifiable, but they diverge on how severe and how widespread the violations of human rights must be in order to have a just cause, as well as the reasons for intervention. My argument suggests that the distance between these two positions is closer than it first seems, but before presenting my argument, it lays out the other two.

First, Michael Walzer is one of the most prominent proponents of the position that holds that collective self-determination matters morally and so state sovereignty should be strong but not absolute (Hurka, 2005; McMahan, 2009, pp. 18–32). Walzer only allows military intervention in extreme cases such as massacres, enslavement, and mass expulsion. By granting states strong but not absolute rights to sovereignty, he places collective over individual sovereignty as more morally important. A state is legitimate on this account if there is a "fit" between the people and its government, by which Walzer means that a state is

legitimate if its people are "governed in accordance with its own traditions" (Walzer, 1980, p. 212). This "rules out intervention in cases of 'ordinary' oppression" because we cannot assume that there is a case of misfit except in the extreme circumstances (Walzer, 1980, p. 212). According to Walzer, foreigners are not in a position to know that there is a bad fit between a people and its government because foreigners cannot garner enough information to make such judgments – except in three cases (Walzer, 1980, p. 218). Notice that Walzer's argument is not that the proportionality condition of just war theory must be met for intervention to be justifiable, but rather that even if it could be met, potential interveners must still refrain on moral grounds if there is sufficient fit between a government and a people because collective self determination is more important than ordinary oppression and human rights violations.

Why foreigners can have enough information in some but not all cases, and only in the cases Walzer suggests, remains unclear (Walzer, 1980, p. 212). Why should foreigners be able to know that slavery, but not run of the mill torture, creates a misfit between a people and their government? Furthermore, knowing that there is everyday torture depends upon foreigners having information, exactly what Walzer says foreigners cannot have. Finally, why, even if there is a "fit" between a people that is ordinarily tortured or often has other serious human rights violated, should this somehow justify nonintervention? Walzer's critics make just such points and endorse a more permissive account than Walzer does.

A related argument objects to intervention on anti-paternalism grounds by relying on an individual or familial analogy. This paper rejects this objection. This objection is based on an anti-paternalism principle. It relies on the Millian argument that even if someone could be made better off if another person directed parts or all of the first person's life, so long as the first person is not violating anyone's rights, the second person should not be permitted to coercively interfere in the first person's life without her consent (Beitz, 2009, p. 334; Luban, 1980b, p. 395). Those defending parents' rights regarding their children make a related point. Imagine that some individuals could nurture children better than some parents. So long as the parents are not violating the children's rights, the anti-paternalist holds, these other people should have no right to interfere in how the child is reared. The same anti-paternalism objection applies to states, this objector to intervention argues. Yet this critic cannot explain the relevant dissimilarity about why rights violations in the individual and familiar analogies, which permit and indeed require coercive action, fails to apply to the case of states. Why should rights violations within a family but not with a state permit or require coercive action? Indeed Mill and other defenders of the individual and familiar analogies argue that rights violations – even of a single person – allow for coercive action up to but no further than that what is necessary to prevent the rights violation. On my account, states, like parents, are allowed to govern just poorly enough so that they do not violate their citizens' or children's rights that are required for collective self determination.

The second, alternative, position on state sovereignty places more value on individual rights than Walzer does, and roughly holds that state sovereignty is only legitimate in so far as it protects individual human rights (Altman & Wellman, 2009; Beitz, 1980, 2009; Bellamy, 2009; ICISS, 2001; Luban, 1980a, 1980b; Wellman,

2012). If, as Dworkin claims, human rights generally "trump" most other considerations, intervention is more easily justified than if one places emphasis on collective self-determination (Altman & Wellman, 2009; Beitz, 1980, 2009; Bellamy, 2009; ICISS, 2001; Luban, 1980a, 1980b; Wellman, 2012). One might think there could be a conflict of state rights and individual rights, but this need not be the case; if states forfeit some of their rights whenever they violate individuals' human rights, there is no conflict. In sum, Walzer's critics' basic argument is that if governmental or nongovernmental agents are violating individual rights, and intervention would prevent a greater number of human rights violations, then intervention could be justified assuming that other just war conditions are met (Luban, 1980a, p. 175). Notice that what matters on this account are human rights. State sovereignty is only instrumentally important.

Undermining the Military vs. Nonmilitary Distinction

Although military might is often considered different in kind from nonmilitary actions, this section argues that at least in the case of humanitarian interventions, it should be considered merely a different way to intervene because military and nonmilitary interventions have similar morally relevant features. In both, large numbers of people can die horrible deaths because of action or inaction taken by other humans, state sovereignty can be violated, individuals' consent can be ignored, and so on. Although violence can be separated from nonviolence, one is not always morally worse than the other.

Despite the two competing positions on the morality of state sovereignty, contemporary just war theorists are generally in consensus about when military intervention is justifiable. The consensus view holds that six conditions must be met for a military intervention to be legitimate (Luban, 1980a, p. 175). First, often termed the "just cause, " military humanitarian intervention is only permissible when there are widespread grave violations of human rights such as genocide and crimes against humanity, and not permissible with only "typical" levels of human rights violations, although this view has been challenged. This is where the debate about state sovereignty comes in. Second, intervention must be proportionate to the harms prevented, which is a comparison of the number of individuals harmed by the war who have not made themselves liable to be maimed or killed, typically innocent civilians, with those likely to be harmed and killed without intervention (Altman & Wellman, 2008, p. 229–31 and passim; Wheeler, 2000, p. 34 and chapter 1). Third, it must be a last resort. Fourth, a competent authority must carry it out and, fifth, it must have a reasonably likely chance of success. Sixth, known as the principle of discrimination, the intervener must distinguish between civilians and combatants and only target combatants who have made themselves liable to being killed (Hurka, 2005; McMahan, 2007, p. 674, 2009, 2010; Mellow, 2006).

Although many agree that military intervention is only justified when mass atrocities occur or appear imminent, it is not clear why the bar should be so high (Altman & Wellman, 2008; Wellman, 2012). Why should a leader, just because she is a leader, be given immunity from policies that rescue those she abuses from the territory she controls, if she is merely abusing human rights but not committing

mass atrocities? There are at least three main ways that theorists attempt to justify setting the bar so high for political leaders, none of which stand up to scrutiny.

First, leaders, at least democratically representative leaders, supposedly embody the collective will of a people and the collective will trumps what Walzer calls "'ordinary' oppression" or routine human rights violations (Walzer, 1980, p. 218). This argument applies to military as well as nonmilitary intervention. Although at a glance this may seem like a reasonable view, it is implausible. First, there are problems in assuming leaders embody the will of the people, even in a representative democracy. Political leaders often do not keep campaign promises, and so even if they win more than 50% of the vote, their policies may represent merely a minority of those who voted (to put aside for the moment all of those who do not vote). Furthermore, majoritarian and to a lesser extent proportional representation election decision rules often result in a sizable dissenting minority even if politicians do keep their promises. Politicians have to make choices about unforeseen events that few anticipate and about which none can vote until after major decisions have already been made.

An even more decisive objection to the view that protection of human rights should not be enforced through intervention is the following. Even if we put the first objection aside and assume that leaders are always representative of a majority or supermajority, it is not clear how this is supposed to justify nonintervention when they commit ordinary human rights violations. If a police force of a representative (or dictatorial) government unjustly violates the human rights of some, the harms remain morally objectionable and the regime is in that sense illegitimate (Walzer, 1980, p. 218). Just because a decision is made by majority – or unanimously – does not make it permissible.

Second, some argue that because leaders may be institutionally constrained, forcing them to choose among options all of which will harm some people even if one or more choices minimize harms, many of their actions that would otherwise be wrong should be excused. This is what Michael Walzer calls the "problem of dirty hands" (Walzer, 1973). Rulers and their apologists may argue that they should not be liable to intervention so long as they minimize harms. Or they might make an argument more deferent to state sovereignty, prohibiting intervention so long as rulers make the better choice for their citizens even if some are harmed. But even if a leader minimizes harms, that does not explain why a society should be exempt from intervention if the intervention could prevent further harms. A society could still be liable to intervention if individuals' rights are under fulfilled, although if a leader minimizes harms she may not be liable to an intervention that holds her morally or criminally liable for her choices. If these two defenses fail, why else might the bar be set so high?

Third, perhaps the most important reason scholars believe that military intervention is only justified when mass atrocities occur or are imminent is proportionality, which is closely connected to last resort. Military action should only be taken as a last resort and when there are widespread serious human rights abuses because of the grave and almost always widespread harms to innocents that all wars cause (Altman & Wellman, 2008, p. 234–6). In other words, military intervention is only permissible when human rights abuses are widespread because

war itself causes widespread harms to innocents meaning military intervention can only ever be proportionate when there are widespread and serious human rights abuses. "Pinprick" bombings that the US launched against Iraq throughout the 1990s after the first Gulf War or the more recent US drone bombings in Pakistan and elsewhere (which may not be interventions at all since there is at least tacit consent from Pakistan's government) are the exception, not the norm. And even in those cases, innocent civilians are killed regularly. Notice that what matters here is proportionality concerns, and that last resort is only a proxy for proportionality.

Proportionality is additionally a central reason why scholars traditionally separate military from nonmilitary intervention. Nonmilitary action is generally assumed to result in less harm than military interventions. This is true only for some nonmilitary interventions. One example that undermines that view is the sanctions against Iraq. Although not an intervention, Ethiopia's use of food as a weapon illustrates why a stark line between military and non-military action should be rejected. Ethiopia's foreign minster openly stated that "food is a major element in our strategy against the secessionists," in a campaign in the 1980s that killed over one million people by starvation that many incorrectly attribute to drought induced famine (Altman & Wellman, 2008, p. 234–6). Lots of those killed were innocents.

Violent intervention can sometimes harm fewer innocents than nonviolent intervention. An example of this is the no fly zone imposed over northern Iraq after the first Gulf War, which killed far fewer innocents than the sanctions. Some might think that only targeted sanctions are ever permissible. But this does not undermine the point that military actions can sometimes harm fewer innocents than nonmilitary options. The military corollary of targeted sanctions is assassination because it aims at and affects only one or a few of the most responsible persons, not the population at large. Although assassination is widely condemned, Altman and Wellman make a strong case for why it should be acceptable and even preferable to military intervention if the conditions for a just war are met (Meredith, 2005, p. 343). At least in some cases, then, military interventions may harm fewer innocents than nonmilitary ones.

This discussion highlights how the principles of discrimination, last resort, and proportionality, relate to military and nonmilitary interventions and shows why they should *not* be subject to different standards. This section argues further that making a bright dividing line between military and nonmilitary action is morally unnecessary and may even be morally problematic because proponents of maintaining the distinction might suggest that some nonmilitary options are justified when they are not because of the principle of last resort. Against this view, this paper argues that what matters morally are the just war principles of proportionality and discriminating among those who have made themselves liable to harm and who have not, not how harms are inflicted. It is not morally important whether an intervention is done by military or nonmilitary means, but it is important whether it meets the just war requirements, excluding last resort and dependent upon my just cause argument.

Some nonmilitary actions such as broad sanctions are indiscriminate, i.e. they do not differentiate between those who have made themselves liable to harm and those who have not. These groups have traditionally been distinguished as

combatants and noncombatants, although McMahan criticizes convincingly this simplistic view (Lazar, 2010; McMahan, 2009). What matters morally is twofold. First, has the person in question done something bad enough to forfeit some of her rights? Second, are the number and severity of harms against those who have not made themselves liable to harm proportionate? How the person is harmed matters not, although the severity of harm does. Notice that the same argument applies to proportionality. What should matter is, if a person has not done something bad to make herself liable to harm to protect others, are the harms caused by intervention proportionate to the harms prevented? It should not matter morally how these harms are inflicted. The numbers of people harmed and the severity of the harms caused by intervention are the morally relevant factors.

If this is correct, then some military interventions may be permissible even when nonmilitary interventions may not be. For instance, someone might claim that if there were a just cause for a military humanitarian intervention in Iraq in the early 1990s and the other just war criteria were met, given what we know now about the harms done to civilians by the sanctions, the military intervention would have been preferable. Because the Iraq sanctions were disproportionate and indiscriminate, they would be prohibited by an extension of just war theory's criteria to nonmilitary cases. Another way to put my point is to say that the proportionality and just cause conditions cover both military and nonmilitary interventions.

If correct, my argument undermines the "last resort" condition of just war theory.[2] Traditional just war theorists might assume that sanctions must generally be employed, as part of the last resort condition, before war can be justifiable. This highlights a tension within just war theory. The last resort criterion may conflict with the proportionality criterion if one expands the scope of assessment beyond just the effects of war to the effects of sanctions and other nonviolent foreign policy choices a polity can make. The point of the last resort criterion is to prevent a too hasty resort to war because of the unnecessary harms that this would cause. What matters morally are the harms that the last resort condition is meant to avoid. Thus, proportionality matters more than last resort because proportionality covers the harms that last resort is meant to protect (Hurka, 2005, p. 37). The result is that war or violent interventions may sometimes be morally preferable to sanctions or other policies if the war, but not the nonviolent policies, meets the just war criteria (excluding last resort) and especially the proportionality criterion. The last resort criterion is hence superseded by the proportionality criterion. Even if one interprets the last resort criteria as requiring the exhaustion of more peaceful options assuming the other just war precepts are applied to them, this could either not differ from my argument or it could be problematic for the same reasons stated above. It would be problematic if the peaceful means were tried and more innocents were harmed than a violent intervention would have inflicted. This objection could be consistent with my argument if the point of the objection were that whatever the policy – violent or nonviolent – that harm the least number of people necessary to accomplish one's just goals should be used. But then this is no longer last resort as

[2] Thanks to David Mapel for this point.

we know it or as the term implies because some violent actions should be taken on this account before nonviolent ones are.

One objection to this argument is that it would make interventions easier to justify, and that this would be abused by the powerful. This is wrong. What it would do is make different types of intervention more permissible and less permissible. It would make some types of nonmilitary interventions *less* permissible than they currently are. For example, the economic sanctions of the 1990s against Iraq would be considered impermissible on my account because they did not meet the proportionality and discrimination criteria. It might make some types of assassinations more permissible, but it would not make typical military humanitarian interventions more permissible. The *jus in bello* proportionality criterion of just war theory requires *minimizing* harms to innocents during an intervention. The proportionality requirement of *jus ad bellum* requires expected interventions to minimize the overall number of people who are unjustly harmed. Of all the options that would cause fewer harms to innocents than doing nothing would, only the option that would cause the least number of harms would be permissible, holding all other things equal. For this reason, military invasions will only be permissible in exceptional circumstances; military interventions inevitably claim the lives of numerous innocent individuals and often there are other options that would harm fewer. If those other options exist, they must be taken.

Next alternatives to both Walzer's and his critics' accounts of when a just cause for intervention is met is discussed. Any such theory must tread gingerly because being too permissive will permit abuse, and being too restrictive will allow states to abuse their citizens, both costing lives. My account draws on, but is separate from, both Walzer's and Walzer's critics' accounts. This paper develops an argument that can justify intervention when actors violate human rights *because* violating human rights undermines collective self-determination. Notice that human rights as well as collective self-determination both still matter on my account, but the reasons why human rights matter and how they relate to collective self-determination is where my account departs from others'.

A Democratic Derivation of Rights as a Justification for Intervention

My theory of humanitarian intervention reconciles Walzer's collective self-determination arguments with his critics who place greater emphasis on human rights. This paper assumes that the only sort of true collective self-determination that is democratic collective self-determination, and that to effectively participate in a democracy every individual must be alive and have some fundamental human rights guaranteed. These rights are termed "basic democratic rights," in tribute to and as an extension of Henry Shue's argument that basic rights are those that are necessary for the exercise of all other rights (Hurka, 2005, p. 37). Basic democratic rights are those rights that are necessary to exercise one's right to democratic participation, not in Shue's sense of being required for all other rights.

Only if one's human rights are guaranteed to some minimal level can one effectively participate in collective decision making. An individual's right to democratic participation has two components. One is a minimal opportunity to exercise political power, which at least requires the opportunity for all adults to

vote. The second is a minimal opportunity to politically influence others. To guarantee this right, other rights must be guaranteed. To illustrate why, an example is helpful. If one starves to death because one does not have a right to subsistence, then one cannot vote and one's right to an opportunity to democratic participation is violated. Here only one part of this argument is emphasized, that being killed or disenfranchised does not allow effective participation in collective self-determination because one cannot vote. For this reason, Walzer's argument undermines itself. Even if one person is killed, she is not able to participate in collective decision making; collective decision making requires every adult having a say in the government. It might seem surprising or counterintuitive that a wrongful death of a single adult would undermine collective self-determination, especially in a large country such as the US, China, or India. But one or more wrongful harms that prevent voting does undermine collective self determination because at that point it is no longer truly collective. This paper does not and need not stake out exactly to what extent one need to have a say in government for it to be collective self determination. All this assumes is that voting requires one to not be unjustly killed or harmed in some other way that prevents voting.

Although for a different reason, my account sides with the critics of Walzer, suggesting that the just cause for intervention is met whenever serious but not necessarily widespread or systematic violations of human rights occur, but also appreciates Walzer's contention that collective self-determination is morally important. Mine is an instrumental justification for why human rights are important, but it does not deny that human rights are intrinsically valuable; that human rights are intrinsically important and instrumentally required to exercise one's right to democracy are not mutually exclusive positions. Another way to put my argument is that *if* collective self-determination matters morally, then the only way to guarantee that they are indeed choices made collectively, and not just made by some subset of the collective, is by guaranteeing everyone's basic democratic rights. The conclusion from this is that whether one values human rights for intrinsic reasons, as Walzer's critics do, or whether one values collective self-determination, as Walzer does, the protection of some fundamental human rights, specifically basic democratic rights, are indispensible on *either* account. The protection of basic democratic rights is a just cause for intervention so long as the other conditions from just war theory are met (subject to the qualifications noted above).

This last point is important to reemphasize in relation to my argument about basic democratic rights because some might again object that my view would permit too many interventions. On my account, even if one person is killed and a second person's life is credibly threatened by her government, the just cause condition would be met – but it does not follow that intervention would then be permissible. The other just war precepts would have to be met, subject to my above qualifications. Rarely if ever would intervention satisfy the proportionality criterion to protect just a few people's lives. But what it might permit or require are other, more creative, sorts of inducements that would incentivize states that violate basic democratic rights to change their policies. And it would still permit armed intervention in extreme cases. Another objection is considered next, namely that states have rights like individuals do, and that in order to justify intervention there

must be some justification for why their rights are forfeited, or can be violated or overridden.

Forfeiting Rights, Unable or Unwilling States, and Intervention

States have two broad ways that they can fail to guarantee their citizens' human rights. States may be unable to do so because of poverty, or a weak or nonexistent central government. Or they may be unwilling to guarantee human rights or actively violate them. But states, like individuals, should possess their rights conditioned on not committing certain morally impermissible. As Nicholas Wheeler puts it, "states that massively violate human rights should forfeit their right to be treated as legitimate sovereigns…" (Wheeler, 2000, p. 12, original is italicized). Embodied by the doctrine of the "responsibility to protect" (R2P), there is an emerging consensus that state sovereignty should be conditioned on states protecting their citizens from mass atrocities (Wheeler, 2000, p. 12, original is italicized). Proponents of R2P hold that just as individuals who do not fulfill their general or special responsibilities towards others can forfeit some of their rights, if states are unable or unwilling to protect those within their borders against mass atrocities, states can forfeit some of their rights.

Actors can forfeit a variety of different rights or bundles of rights depending on their actions or inactions. This is one widely although not universally accepted justification for individual punishment (Boonin, 2008; Morris, 1991). When a criminal is punished for her wrongdoing, the state or the punishing authority can do some things to that individual that would violate an innocent person's rights, but it cannot justifiably do anything at all to the criminal. A robber may be fined or imprisoned but he cannot be tortured or killed, for instance. This is because the criminal forfeits some, but not all, of her rights. Scholars disagree about precisely which rights, if any, can be forfeited for any given offense. Generally, the worse the objectively unjustified harm one inflicts on others, the more rights one forfeits. Paralleling the individual case, states and state actors can forfeit their rights along a continuum. Some state actions or inactions allow violation of state sovereignty, but not punishment or killing of a leader, whereas others permit regime change or arrest of a leader. It would require another article to argue for exactly which rights can be forfeited when, and why, so this assumes with the architects of R2P that actors can forfeit different rights and bundles of rights because of various actions and omissions.

There are at least reasons that individuals can forfeit some of their rights, both of which involve wrongdoing. Individuals can be punished for a wrong they committed in the past without violating that individual's rights. Although some have tried to justify sanctions as forms of punishment or expressions of moral condemnation, what Mark Drumbl calls in a different context "expressivism," these sorts of justifications are unnecessary (Drumbl, 2007, p. 173–80; Gordon, 1999, p. 138–40). The other justification of forfeiting some individual rights is that someone poses an objectively unjustified threat toward one or more other individuals. Violating states and individuals' rights is justified in the latter way, as rescuing those put at unjustified risk (Drumbl, 2007, p. 173–80; Gordon, 1999, p. 138–40). The justification for a state or politician forfeiting some of their rights when they enact

any policy except that which minimizes violations of basic democratic rights resides not in the right to punish, but in the right of others to have their rights secured. The just cause threshold would be met in the vast majority of states because leaders rarely, if ever, act to minimize violations of basic democratic rights.

Not only do many academics, pundits, and practitioners agree on the conditionality of state sovereignty, but also so do many states. As of January 2012, 120 states – more than 50% of the total – have consented to conditionally transferring the legal power to prosecute their own citizens for international crimes to the ICC if the ICC finds states unwilling or unable to fairly try their own citizens. States agreed to a nonbinding declaration in 2005 endorsing R2P, which holds that states have the primary responsibility and the international community has the remedial responsibility to protect if states fail to discharge their responsibilities. For the states that have consented and exactly for that reason, indicting, arresting, and trying nationals of these countries would, on the state centric view, not technically be intervention. But it would be for states that have not ratified the Rome Statute, and perhaps it would be if a government changes its mind about the ICC once its own government officials are indicted.

How should we decide to what degree it is permissible to infringe on state sovereignty if the state is unable or unwilling to guarantee human rights? This paper suggests that those leaders who choose any policy except those that minimize violations to basic democratic rights can be liable to some type of humanitarian intervention, and the extent of permissible intervention is directly related to the basic democratic rights violations it could prevent, assuming the other just war conditions are met. This can be defended in two ways. First, humanitarian intervention is aimed at changing policy to prevent rights violations and promote collective self determination, but if a policy already minimizes violations of basic democratic rights, the intervention could by definition only do more damage. Second, this argument takes no position on the moral liability of the leaders, though it does suggest that they only forfeit or annul their rights when they decide to follow policies that do not minimize basic democratic rights violations. This would allow intervention even in cases where leaders do not intend to violate individuals' rights because individuals' basic democratic rights are still under fulfilled. In such cases, leaders' moral liability has been circumstantially mitigated. The case may be similar to a driver who through no fault of her own strikes a careless pedestrian who had stepped into the street with too little time for the driver to serve out of the way. Whereas the driver is causally responsible, she is not morally responsible because she was not doing anything wrong, and she could not avoid striking the pedestrian. She was constrained by her circumstances. The precise degree to which moral culpability has been mitigated for the political leader is unimportant here, but they have done nothing, in any case, that forfeits or annuls their personal rights.

Sovereignty of states that are unable to protect their citizens' basic democratic rights should be conditioned on them accepting some forms of development assistance. Such states need not accept all forms of development assistance, however, because some loans may violate more innocents' rights than not taking the loans would. Nor should any and all development assistance be offered, as the record shows that ill-conceived development projects can empower

dictators or even *genocidaires*. The World Bank loan to Chad in the 2000s did unintentionally empower Chad's dictator with over $1 billion per year in oil revenue and the international community unintentionally empowered *genocidaires* in eastern DRC after the 1994 Rwandan genocide (Altman & Wellman, 2008, p. 252; Tan, 2006, p. 92). Because of such failures, improvements in foreign aid must be made before states would have to accept development assistance (Easterly, 2010; "End to World Bank's Chad Oil Deal," 2008; Polgreen, 2008; Polgreen & Dugger, 2006; Terry, 2002; Uvin, 1997). In addition to (conditional) state rights, we should consider whether the consent of those whom intervention is meant to protect matters.

Intervention and the Consent of Whom?

Generally, intervention is defined as requiring a state's dissention. This raises two questions. First, why should consent of the state, i.e., the consent of one or more high ranking individuals, and not the citizens as a whole within the state, matter, especially if the state is nondemocratic? Second, if it is the citizens and not the government of a state that matters, is intervention only justified with the consent of the people, and what percent of the people would have to consent for intervention to be just? (An interesting related question that must be left aside because of lack of space is what procedures should be used to assess who should be enfranchised to vote in such situations.) Leaving aside the important yet difficult question of how citizens could express consent in dangerous situations where they not are free to express their opinions, the first two questions are examined in order.

None of the accounts, including mine, answers the question of whether some group of people must give consent for intervention to be justified and if they must, what percent must assent. The typical discussion of intervention, premised on a dichotomy between state and individual consent, is misleading. State consent is still consent of an individual or normally some small collection of individuals (Wheeler, 2000, p. 22–3). The important questions are what procedures should be taken and who should decide this, *whose* consent should matter, and *what percent of the population's* consent should qualify as sufficient – if any – for intervention to be legitimate. Problems arise for defenders of the consensus view of military intervention once this question is appropriately identified. Why should the consent of a few, privileged, and often illegitimate, rulers, matter? Even if their consent should matter some, why should their views matter more than a state's whole population? Even if a state is a highly representative democracy and not a highly personalized dictatorship, those making decisions are still just a modicum of the general population. From public opinion polling we know that even in the most representative democracies leaders sometimes make decisions that go against a majority of citizens' wishes (more on the distinction between democracy and public opinion below).

Some recent contributors, however, do consider the question of whose consent should matter. McMahan, for instance, argues that at least a majority of likely victims must give their consent in order for military intervention to be permissible (Wheeler, 2000, p. 22–3). Altman and Wellman, conversely, argue that majoritarian consent is not required because if a majority of likely victims were

required to consent, then a majority would hold over the minority the power to have their human rights violated, a morally objectionable position (McMahan, 2010, pp. 48–55).

One might suspect that this paper would make a similar but distinct argument to Altman and Wellman, namely that because basic democratic rights are exactly those that are necessary to exercise a right to democracy, individual consent is impossible exactly when it would be required to justify intervention. But the argument is more nuanced than this. First, consent is different from a right to democracy. Second, if a *demos* is more fairly constituted than how Altman and Wellman suggest, their objection is undermined.

Consent is not the same as the right to democracy. A right to democracy requires the opportunity to influence others to some small degree, but mere consent does not. Someone could sometimes consent to an intervention even when her right to democracy is violated. In the extreme, however, say when people are killed, individuals can neither exercise their right to democracy nor consent. Just as when domestically just one person is killed it undermines collective self-determination, whenever someone is killed in a group of people that should have the right to vote regarding intervention, their collective self determination is undermined. This paper assumes that the dead would have voted for intervention because they would have preferred to not be killed, unless there is overwhelming evidence to the contrary. Duress can undermine consent. This is not always true because even those threatened by a regime may decide that whether they call for intervention or not they will still be threatened. This may have been the reasoning of the Libyan rebels who called for military intervention in 2011.[3] Conversely, when harms may be serious but not life threatening – especially given the mixed record of nonmilitary interventions – the potential intervener should generally seek consent of a majority.

There is no easy answer to Altman and Wellman's cogent fear. When the *demos* is properly constituted, however, namely when victims and potential victims can vote on whether they want intervention, Altman and Wellman's objection is undermined. It is undermined because Altman and Wellman assume that some group of people, say all citizens within a state, would have a say in whether some actor or actors intervene. This simply points out the problem of using as a *demos* a people constituted by citizenship or territoriality. By using actual and potential victims as the *demos*, however, each person who votes would be at risk of harm or already harmed so that their concern that a majority could decide to allow the rights of minority to be violated would be impossible unless they too are willing to put themselves at risk. The opposite to seeking consent from a target population, however, permits the potential intervener to choose when, and when not, to intervene, which can result in tragic consequences. It is not clear which option, letting the majority or the intervener choose, would prevent more rights violations. This is an empirical question, and even if one were to do such a study, it would be highly suspect because it would require counterfactual comparisons. The author is not aware of any such empirical studies. Given these two risky options, potential interveners should generally seek approval of whether and what type of

---

[3] Thanks to Scott Wisor for this point.

intervention those whose basic democratic rights are threatened would prefer. A further safeguard that potential interveners should seek is independent verification through NGOs, other states, supranational actors and independent experts. Only if they are in agreement, should intervention be permissible.

Are Nonmilitary Humanitarian Interventions Permissible or Required?

Generally, justified humanitarian interventions are considered permissible but not required (Altman & Wellman, 2008, p. 242–5). Some, such as Kok-Chor Tan, however, argue that military humanitarian interventions that are permissible are also sometimes required because the extreme human suffering that justifies intervention also generates a duty (Altman & Wellman, 2008, p. 229–31). A main objection to Tan's argument is that war is always costly for those who intervene, including a significant risk of loss of life to those that intervene, considerable financial outlay, and political losses of elected and nonelected leaders if the war goes poorly. Because of these high costs, some argue that states cannot have such a duty (McMahan, 2010, p. 57). This objection generally does not apply to nonmilitary humanitarian intervention because none of the intervening individuals are put in lethal danger, and the financial and political costs are typically far less than those involved in war.

The justification for a general positive duty to intervene, and the objection that it is too costly, is rooted in individual morality. At the local, individual, level, consequentialists and nonconsequentialists alike agree that if a great harm can be prevented at little cost to oneself, one is obligated to take this action. A widely used example is if on a walk you noticed a child drowning in a shallow pond, you would be obligated to plunge in to rescue her, even though you may ruin your clothes or miss an appointment. Because consequentialists such as Peter Singer allow far greater individual costs than do most scholars who defend individual rights, citing a few of the latter supports my point (McMahan, 2010, p. 57). John Rawls argues that everyone has a "duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself" (Rawls, 1971, p. 98). James Fishkin writes, "we would normally assume that if we can save a human life at minor cost, we are obligated to do so" (Rawls, 1971, p. 98). Similarly, Michael Green claims that it is generally accepted that everyone has a positive duty to act if "there is something obvious that I can do at little cost to prevent great harm" (Fishkin, 1982, p. 3).

This section argues, first, that states have the same positive duty if the action they could take would likely prevent great harms and if the state would only bear a small cost, and, second, that often nonmilitary humanitarian intervention meets these criteria. States' seem to accept that they have some positive obligations to some beyond their borders because every rich country gives some foreign aid. Some of this aid is given for humanitarian reasons (Green, 2005, p. 119). What is more, about two thirds of the citizens of rich countries believe that their governments should give even more foreign aid than they currently do (Paxton & Knack, 2008, p. 27).

Unlike military intervention, which poses a risk to the intervening soldiers, the intervening countries' finances, and politicians' tenure, nonmilitary intervention

imposes only relatively small costs. These costs may include staffing time and salaries for administering sanctions, losses in revenues to companies that are prevented from trading and corresponding decreases in taxes. Where, exactly, the line is drawn determining whether something is too costly to meet Rawls's, Fishkin's and Green's standards will remain controversial and cannot be specified in detail here, but surely such minor costs are below the line they had in mind.

A standard objection at the individual level to such positive duties, that might be raised against states as well, is that when the duty is extrapolated globally, such positive obligations become overly demanding (Paxton & Knack, 2008, p. 27). If taken seriously, these duties would conflict with the typical liberal view that the individual is free in the vast majority of her choices to spend her time however she pleases (Cullity, 2004, chap. 6; Fishkin, 1982; Murphy, 2000, chap. 1–2). This is so because as the world currently exists each individual could always, as Singer would have it, be doing more to save others from great need or harm, which would consume one's life (Singer, 1972).

The same objection does not apply to institutions such as states for two different reasons. First, even if powerful states contributed to a nonmilitary humanitarian intervention, they could generally fulfill their other obligations and special responsibilities. None of their citizens would have to risk violent death and relative to a large wealthy country's government budget, the costs would be minimal. Politicians' careers are likely generally less at risk from nonviolent humanitarian interventions than with violent ones, an important practical consideration (Power, 2002). Second, if the positive responsibility to intervene nonmilitarily is too demanding for any given state, the responsibility for nonmilitary humanitarian intervention can and should be shared among various wealthy and powerful states and possibly other actors. How this responsibility should be distributed and why deserves more space than there is sufficient space to explore here (Pattison, 2010). In what follows, this paper discusses how the main argument relates to international law.

Nonmilitary Humanitarian Intervention in International Law

Up to here, this paper has focused on the moral aspects of military and nonmilitary humanitarian interventions, whereas now it turns to the legality of them. Under what conditions would the policy options that my arguments would promote be legal or illegal under international law? This is important to consider for practical purposes and because if the policy implications of my arguments are not legal under contemporary international law, there may be good reasons to reform existing international law.

There are two separate legal questions related to humanitarian intervention. The first is whether the UNSC must approve military or nonmilitary humanitarian intervention for it to be legal. The second question is whether there are other legal limits to either UNSC approved or disapproved humanitarian interventions. Both are discussed. To be legal military humanitarian intervention requires UNSC approval but nonmilitary action does not. This paper argues that military and nonmilitary humanitarian intervention, whether approved by the UNSC or not, can violate other international law, especially that of the ICC. It suggests that in cases

where intervention is legitimate, even if the ICC's prosecutor can indict those who intervened, she should use her powers to not issue arrest warrants for those who initiated and carried out the intervention where there is evidence that all reasonable measure were taken to meet the just war precepts. But it suggests that in cases that UNSC approved intervention would otherwise violate ICL, IL law should change so that the UNSC cannot authorize what are otherwise known as the worst international crimes on earth.

The UN Charter declares that member states enjoy "sovereign equality," placing the domestic affairs of states clearly in the realm of a state's rights (UN Charter 1945: Article 2(1)). Internationally, states are limited in their actions. The UN Charter holds that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" (Article 2(4)). Notice that only military threats and actions, not nonmilitary ones, are forbidden. Neither the UN nor other states can legally "intervene in matters which are essentially within the domestic jurisdiction of any state" (Article 2(7)) – except when the UNSC determines an issue threatens international peace and security.

Although the UN Charter forbids states from using threats or actual uses of force against one another, it grants the UNSC the power to decide when military force *and* nonmilitary means should be used to "maintain or restore international peace and security" (Chapter VII (39, 41-2, quote from 39)). It is explicitly granted the power to "decide what measures *not* involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures" (Chapter VII (41), my emphasis). This gives the UNSC the legal power to sanction nonmilitarily humanitarian intervention as well as the power to mandate states to carry out its wishes. In sum, the UNSC can authorize nonmilitary and military interventions when international peace and security are at risk, although it is legal for states to threaten and carry out nonviolent humanitarian interventions even without UNSC (below the limits of these are addressed).

Although the UNSC is granted the power to determine responses only when there is a threat to international peace or security, it has increasingly made controversial decisions to authorize interventions even when violations of human rights are purely domestic (Macklem, 2008, p. 372). At once an interpretive body, determining what and when a threat to international peace and security exists (UN Charter 1945: Chapter VII (39)), as well as a policy making body, determining what an appropriate response is (Chapter VII (41-2)), the UNSC has broad powers. Because there is no chamber of appeals for the UNSC, in effect it can authorize whatever it would like and claim it does so for legitimate and legal reasons or give no reasons at all, even if it is obviously incorrect or overstepping its mandate. Some have even claimed that *anything* the UNSC does is by definition legal under international law (Macklem, 2008, p. 372), although others have suggested otherwise (Evans, 2008, p. 134; ICISS, 2001, p. 50; Welsh, 2010, p. 423). It may nonetheless be that parts of international treaty law, because its formation is ad hoc, is never comprehensively codified, and enters into force successively, may be in tension or contradict other parts (Gordon, 2010, p. 220–1). This raises a possible

conflict of international laws because the UNSC could legalize some actions that now would be a violation of the international criminal law of the Rome Statute were it not for UNSC authorization. The UN Charter claims to trump other international law (United Nations Charter 1945: Article 103), but it is unclear whether the UN charter has the authority to make this claim, especially regarding *jus cogens* crimes my include the crimes codified in the Rome Statute and which some claim trump other international law (Bassiouni, 1996).

One way that UNSC approved action could violate ICL is by comprehensive non-violent economic sanctions, such as those imposed against Iraq. As others have argued, some nonviolent yet deadly acts constitute a crime against humanity as defined by the ICC (Starr, 2007). This could occur in the following way. Several conditions are required for the ICC's definition to be met. An "attack" must be widespread or systematic, directed against a civilian population, and meet one or more of eleven physical elements as well as a mental element (Rome Statute 1998: Article 7). Of the eleven physical elements, only one must be committed to be convicted of a crime against humanity. One *actus reus* is "other inhumane acts of a similar character [to the other acts listed] intentionally causing great suffering, or serious injury to body or to mental or physical health" (7.1(k)). Death is a "serious injury to the body" or physical health. The ICC defines attack and intent unusually. The Rome Statute defines "attack" as merely the "multiple commission of acts referred to in paragraph 1 [of Article 7] against any civilian population, pursuant to or in furtherance of a State or organizational policy" (7.2(a)). The *mens rea* of the crime is similarly surprisingly low. Intent is defined as "the person means to engage in conduct" and is "aware that it [the *actus reus*] will occur in the ordinary course of events" (30.2(a,b)). The actor must also have knowledge of the policy, and this is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events" (30.2(a)). The US likely met all these requirements by the mid 1990s if not before, as is shown next.

Prior to the sanctions, Iraq imported 70% of its food (Gordon, 2010, p. 21). It is no secret what will happen to a country that imports so much of its food if imports are quickly restricted. By 1991, after the first Gulf War, Iraq's GDP plummeted by 75% and child malnutrition jumped to almost one in three by 1996 (Gordon, 2010, p. 21). Half a million or more Iraqis died who were primarily children during, and which were attributable to, the sanctions (Gordon, 2010, p. 33). These children were civilians, and surely half a million deaths over years qualifies as widespread, so three of the five conditions are met for the ICC's definition of a crime against humanity. Madeleine Albright's infamous affirmative in 1996 in response to a journalist asking her whether she thought the sanctions were worth so many children's lives shows that the highest levels of the US government had the intent and knowledge as defined and required by ICC to qualify as a crime against humanity, at least after that date (Gordon, 2010, p. 37 and n82). Sanctions continued for another 7 years after that infamous comment. This shows that the sanctions met the *actus reus*, intent, and knowledge requirements of a crime against humanity after 1996 if not before. Had the UNSC not authorized them (and had they been implemented after the Rome Statute came into force in 2002), those who imposed them might have violated international criminal law.

Thus the Iraq sanctions were likely legal by the standard of the UNSC approval, and may have been illegal according to ICC (if, counterfactually, it could apply its legal power retroactively and would not be trumped by UNSC approval). Instead of protecting human rights, the UNSC can be manipulated by powerful states to commit – and legalize – actions that would otherwise be prosecutable under international criminal law. What are we to make of this? By the standard of domestic law, generally if any single law prohibits an act, then it is illegal, but it is different when the UNSC takes action. This paradox and controversy is mirrored by UNSC authorizations of military humanitarian intervention. Without UNSC approval, such military humanitarian interventions could be prosecutable under the ICC's crime of aggression after this crime enters into force on 1 January 2017. With UNSC approval, the same action might not be prosecutable.

The relevant and pivotal difference in the domestic analogy is whether the intent of the intervener – and the outcome of the intervention – meet the just war precepts (given the modifications argued for above). Had the UNSC authorized the NATO bombing of Kosovo, for instance, and it was a good faith and executed within the *jus in bello* rules of war, NATO can and should be exempted from the charge of aggression. Although individuals may technically violate the Rome Statute, the prosecutor can and should use discretion to avoid prosecuting justified military or nonmilitary humanitarian interventions. The ICC's prosecutor is granted the power to *not* prosecute suspects when it might not "serve the interests of justice" or the "interests of victims" (Rome Statute 1998: Article 53(1(c)). These phrases are left undefined, giving the chief prosecutor wide discretion to decide when these conditions are met.

To summarize, international law allows nonmilitary humanitarian whether or not the UNSC authorizes it, but it also imposes limits on it. Currently, if the UNSC authorizes any military or nonmilitary humanitarian intervention, many believe it is legal and may trump other international law, but this should be clarified. Only if the modified just war requirements that are argued for here are met should an intervention be legal. Before concluding, some objections are considered.

Objections

One objection to my argument is that it would permit too many interventions in practice, leading well-intentioned leaders who are overconfident in their assessments of success to abuse it, and badly intentioned leaders to lie in order to "dignify the sordid process of international politics" (Gordon, 2010, p. 157). Exacerbating the worry is that more actors have the ability to intervene nonmilitarily because the resources required for nonmilitary actions are more widely available than they are for military interventions. Even with the rise of private military contractors, more actors can intervene nonmilitarily than militarily (Orwell, 1945, p. 958). This raises the question of right authority from just war theory. Who should have the authority and who should decide who has the authority to intervene? Although the UNSC is the closest body in existence that can currently legitimately authorize military or nonmilitary intervention, problems remain with it because it represents the interests of the powerful. Equating legality to legitimacy is an inadequate way of addressing the (Buchanan & Keohane, 2011).

Constructing a legitimate institution that can provide an independent assessment of whether interventions are permissible or required is perhaps the best option, but that provides little guidance for today. My theory has safeguards built into it that should allay some of this objector's fears. First, it applies just war theory precepts, emphasizing especially proportionality and the principle of discrimination, to limit what is permissible and impermissible. The Iraq sanctions, for instance, would be ruled out under my theory. At the same time, it provides enforcement and deterrent mechanisms through the ICC. Another safeguard is seeking the consent of those targeted for intervention under certain circumstances. Finally, as mentioned above, only proceeding with intervention if other actors, such as Amnesty International, Human Rights Watch, other countries, and supranational bodies concur that the intervention is justifiable, should prevent some mistakes. Another way to respond to this worry is to note that my argument says nothing about the degree to which sovereignty must be compromised beyond protecting human rights. Like with federal systems within a state that gives regions a high degree of autonomy, intervention could be extremely limited. On my account, intervention could be limited to protecting human rights while leaving in place all of the other components of collective self determination.

A second objection is that not all military interventions are the same and because of this there should be a different theory for each type (Walzer, 1983). Here, however, this paper argues against separate theories for whether military or nonmilitary humanitarian interventions are permissible. One might think that different sorts of nonmilitary humanitarian interventions should be distinguished because some affect only one or a few people whereas others can destroy a whole country's economy and kill masses. A sanction preventing a single head of state from accessing a bank account and preventing him from traveling to Europe is quite different than broad economic sanctions aimed against a whole country. While true, collecting all sorts of nonmilitary humanitarian intervention together is appropriate because the just cause, proportionality, and principle of discrimination criteria cover all types of interventions. The author sees no reason to add or subtract a criterion for a different type of intervention. Doing so would have morally problematic results. For instance, take the grave damage done to civilians in Iraq by the Iraq sanctions; if proportionality, discrimination, or other just war principles were not applied, these might be justified.

A third objection is that whenever humanitarian intervention is a duty, consent of those that would be rescued is irrelevant.[4] To better understand this objection, consider the following individual analogy. If a lifeguard has a duty to help pull a drowning child out of a pool, the lifeguard does not need consent from the child, or anyone else, before she jumps in to save the child. Notice first that this objection is only relevant if the duty does exist, but is irrelevant if there is only a right to intervene. This objection seems plausible until one considers the plethora of options an intervener has. Even if there is a duty to intervene, the targeted individuals should perhaps have a say in the *type* of intervention. For instance, those

[4] Thanks to Heather Roff for raising this important question at a talk by Jeff McMahan at the University of Colorado at Boulder on or about March 14, 2008.

who would be rescued might prefer a no fly zone to a military invasion, or they might prefer sanctions on a few leaders rather than indiscriminate sanctions on the whole country. Even in the ostensibly most obvious cases of where actors should intervene, such as genocide, *how* to intervene militarily is contentious. A state or an international organization could deploy a significant ground contingent of soldiers, or they could, like NATO did in Kosovo and Libya, decide to only bomb from the air. What is more, it is not clear how interventions should be combined. Perhaps a military intervention should be supplemented with a nonmilitary option, such as the ICC issuing arrest warrants. Thus even if there is a duty and not just a right to humanitarian intervention, a say from those who would be rescued about what *sort* of intervention they would prefer is important. That there are different types of interventions brings us to the final objection.

Conclusion

This paper has argued that nonmilitary intervention and military intervention should be judged by the same criteria, and that protecting basic democratic rights largely reconciles the two main positions on humanitarian intervention. Additionally, intervention is permissible in cases when leaders are unable or unwilling to minimize human rights violations domestically, contingent on guaranteeing the modified just war criteria defended here. This holds whether one views human rights or collective self-determination as more important because certain human rights are necessary to exercise collective self-determination.

We can now return to the opening examples of the Iraq sanctions and the arrest warrant of Bashir. On my account, the Iraq sanctions were clearly impermissible because at their outset it was easily foreseeable and expected that the sanctions would result in widespread and disproportionate violations of basic democratic rights, as they did, and at some point the highest levels of American officials were informed of these widespread harms. These sanctions would have likely qualified as crimes against humanity according to the ICC's definition if, counterfactually, the ICC could retroactively prosecute. Bashir's case is more difficult. Bashir's expulsion of aid agencies in retaliation for his arrest warrant likely cost some people their lives. How should we weigh this staggering death toll against the 98% of Darfuri refugees in Chad who supported the issuing of an arrest warrant in 2009 (Hamilton, 2011, p. 160)? Note that this is support not only for intervention, but the specific type of intervention. Instead of ordering an open indictment of Bashir, the prosecutor should have issued a sealed one. This would have at once responded to the wishes of nearly all Darfuris polled and given Bashir no reason to expel aid organizations. By protecting the basic democratic rights of Darfuris, contributing to general deterrence when Bashir is arrested, and taking Bashir from power where he would be in no position to commit mass atrocities or to expel aid organizations, this option would meet the conditions for a justifiable nonmilitary humanitarian intervention.

Bibliography

Altman, A., & Wellman, C. (2008). From Humanitarian Intervention to Assassination: Human Rights and Political Violence. *Ethics*, *118*(2), 228–257. doi:10.1086/526543

Altman, A., & Wellman, C. (2009). *A Liberal Theory of International Justice*. Oxford University Press, USA.

Bassiouni, M. C. (1996). International Crimes: Jus Cogens and Obligatio Erga Omnes. *Law and Contemporary Problems*, *59*(4), 63–74.

Beitz, C. (1980). Nonintervention and Communal Integrity. *Philosophy & Public Affairs*, *9*(4), 385–391.

Beitz, C. (2009). The Moral Standing of States Revisited. *Ethics & International Affairs*, *23*(04), 325–347. doi:10.1111/j.1747-7093.2009.00227.x

Bellamy, A. J. (2009). *Responsibility to protect: the global effort to end mass atrocities*. Polity.

Boonin, D. (2008). *The Problem of Punishment* (1st ed.). Cambridge University Press.

Buchanan, A., & Keohane, R. O. (2011). Precommitment Regimes for Intervention: Supplementing the Security Council. *Ethics & International Affairs*, *25*(01), 41–63. doi:10.1017/S0892679410000018

Cullity, G. (2004). *The Moral Demands of Affluence*. Oxford University Press, USA.

Drumbl, M. A. (2007). *Atrocity, Punishment, and International Law*. Cambridge University Press.

Easterly, W. (2010, November 25). Foreign Aid for Scoundrels. Retrieved March 21, 2012, from http://www.nybooks.com/articles/archives/2010/nov/25/foreign-aid-scoundrels/

End to World Bank's Chad Oil Deal. (2008, September 10).*BBC*. Retrieved from http://news.bbc.co.uk/2/hi/business/7608163.stm

Evans, G. (2008). *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*. Brookings Institution Press.

Fishkin, J. (1982). *The Limits of Obligation*. Yale University Press.

Goodin, R. (2007). Enfranchising All Affected Interests, and Its Alternatives. *Philosophy & Public Affairs*, *25*, 40–68.

Gordon, J. (1999). A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions. *Ethics & International Affairs*, *13*(1), 123–142. doi:10.1111/j.1747-7093.1999.tb00330.x

Gordon, J. (2006). Accountability and Global Governance: The Case of Iraq. *Ethics & International Affairs*, *20*(01), 79–98. doi:10.1111/j.1747-7093.2006.00004.x

Gordon, J. (2010). *Invisible War: The United States and the Iraq Sanctions*. Harvard University Press.

Green, M. (2005). Institutional Responsibility for Moral Problems. In A. Kuper (Ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (1st ed., p. 117–34). Routledge.

Hamilton, R. (2011). *Fighting for Darfur: Public Action and the Struggle to Stop Genocide*. Palgrave Macmillan.

Hurka, T. (2005). Proportionality in the Morality of War. *Philosophy & public affairs*, *33*(1), 34–66.

International Criminal Court. (1998). *Rome Statute*

ICISS (Ed.). (2001). *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty*. IDRC Books.

Lazar, S. (2010). The Responsibility Dilemma for Killing in War: A Review Essay. *Philosophy & Public Affairs*, *38*(2), 180–213. doi:10.1111/j.1088-4963.2010.01182.x

Luban, D. (1980a). Just War and Human Rights. *Philosophy & Public Affairs*, *9*(2), 160–181.

Luban, D. (1980b). The Romance of the Nation-State. *Philosophy & Public Affairs*, *9*(4), 392–397.

Macklem, P. (2008). Humanitarian intervention and the distribution of sovereignty in international law. *Ethics & International Affairs*, *22*(4), 369–393.

McMahan, J. (2005). Just Cause for War. *Ethics & International Affairs*, *19*(3), 1–21.

McMahan, J. (2007). Just War. In R. E. Goodin, P. Pettit, & T. W. Pogge (Eds.), *A Companion to Contemporary Political Philosophy* (2nd ed., p. 669–77). Wiley-Blackwell.

McMahan, J. (2009). *Killing in War* (1st ed.). Oxford University Press, USA.

McMahan, J. (2010). Humanitarian Intervention, Consent, and Proportionality. In A. Davis, R. Keshen, & J. McMahan (Eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (pp. 44–72). Oxford University Press.

Mellow, D. (2006). Counterfactuals and the Proportionality Criterion. *Ethics & International Affairs*, *20*(04), 439–454. doi:10.1111/j.1747-7093.2006.00044.x

Meredith, M. (2005). *The Fate of Africa: A History of Fifty Years of Independence*. PublicAffairs.

Miller, R. (2003). Respectable Oppressors, Hypocritical Liberators: Morality, Intervention and Reality. In D. K. Chatterjee & D. E. Scheid (Eds.), *Ethics and Foreign Intervention* (p. 215–50). Cambridge University Press.

Morris, C. (1991). Punishment and Loss of Moral Standing. *Canadian Journal of Philosophy*, *21*(1), 53–79.

Murphy, L. B. (2000). *Moral demands in nonideal theory*. Oxford University Press, USA.

Orwell, G. (1945). Politics and the English Language. *Essays* (p. 954–67). Everyman's Library.

Pattison, J. (2010). *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?* Oxford University Press, USA.

Paxton, P., & Knack, S. (2008). *Individual And Country-Level Factors Affecting Support For Foreign Aid*. World Bank Publications. Retrieved from http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-4714

Philpott, D. (2001). *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations.* Princeton University Press.

Pogge, T. (2003). Preempting Humanitarian Interventions. In A. Jokic (Ed.), *Humanitarian Intervention: Moral and Philosophical Issues* (pp. 93–108). Peterborough: Broadview Press.
Polgreen, L. (2008, September 11). World Bank Ends Effort to Help Chad Ease Poverty. *The New York Times*. Retrieved from http://www.nytimes.com/2008/09/11/world/africa/11chad.html
Polgreen, L., & Dugger, C. W. (2006, February 18). Chad's Oil Riches, Meant for Poor, Are Diverted. *The New York Times*. Retrieved from http://www.nytimes.com/2006/02/18/international/africa/18chad.html
Power, S. (2002). *A Problem from Hell: America and the Age of Genocide*. Basic Books.
Rawls, J. (1971). *A Theory of Justice* (Revised.). Belknap Press.
Singer, P. (1972). Famine, affluence, and morality. *Philosophy & Public Affairs*, *1*(3), 229–243.
Starr, S. (2007). Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations. *Nw. UL Rev.*, *101*, 1257.
Tan, K.-C. (2006). The Duty to Protect. In T. Nardin & M. Williams (Eds.), *Humanitarian Intervention: NOMOS XLVII* (pp. 84–116). New York University Press.
Terry, F. (2002). *Condemned to Repeat?: The Paradox of Humanitarian Action*. Cornell University Press.
United Nations. (1945). *The United Nations Charter*.

Uvin, P. (1997). *Aiding Violence: The Development Enterprise in Rwanda*. Kumarian Press.
Walzer, M. (1973). Political Action: The Problem of Dirty Hands. *Philosophy & Public Affairs*, *2*(2), 160–180.
Walzer, M. (1977). *Just And Unjust Wars: A Moral Argument With Historical Illustrations* (3rd ed.). Basic Books.
Walzer, M. (1980). The Moral Standing of States: A Response to Four Critics. *Philosophy & Public Affairs*, *9*(3), 209–229.
Walzer, M. (1983). *The Spheres of Justice: A Defense of Pluralism and Equality*. Basic Books.
Weiss, T. (2007). *Humanitarian Intervention: Ideas in Action* (1st ed.). Polity.
Wellman, C. (2012). Debate: Taking Human Rights Seriously*. *Journal of Political Philosophy*, *20*(1), 119–130. doi:10.1111/j.1467-9760.2011.00407.x
Welsh, J. M. (2010). Implementing the "Responsibility to Protect": Where Expectations Meet Reality. *Ethics & International Affairs*, *24*(04), 415–430. doi:10.1111/j.1747-7093.2010.00279.x
Wheeler, N. J. (2000). *Saving Strangers: Humanitarian Intervention in International Society*. Oxford University Press, USA.