

HUMANITARIAN INTERVENTION

Ethical, Legal, and Political Dilemmas

Edited by

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AND ROBERT O. KEOHANE



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The humanitarian intervention debate

J. L. HOLZGREFE

On 6 April 1994, President Habyarimana of Rwanda and several top government officials were killed when their plane was shot down by a surface-to-air missile on its approach to Kigali airport. Within hours, members of the Hutu-dominated government, presidential guard, police, and military started rounding up and executing opposition politicians. The army set up roadblocks at 50 to 100 meter intervals throughout Kigali. The airport was surrounded and sealed. Telephone lines were cut. Military intelligence distributed lists of the government's political opponents to death squads: "every journalist, every lawyer, every professor, every teacher, every civil servant, every priest, every doctor, every clerk, every student, every civil rights activist were hunted down in a house-to-house operation. The first targets were members of the never-to-be-constituted broad-based transitional government."¹

Once the Tutsi leadership and intelligentsia were killed, the army, presidential guard, and the Interahamwe militia, the youth wing of the ruling Hutu party, began executing anyone whose identity cards identified them as Tutsis. When checking identity cards became too time-consuming, they executed anyone with stereotypical Tutsi features. On 9 April, the Interahamwe militia directed by presidential guards hacked to death 500 men, women, and children who had taken shelter in the Catholic mission in Kigali. In another incident, the Interahamwe shot 120 men and boys who had taken

I would like to thank Elizabeth Kiss, Bob Keohane, and Allen Buchanan for their extraordinarily valuable comments on earlier drafts of this chapter.

¹ Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books, London, 2000), p. 127.

refuge in St. Famille Church in Kigali. Soldiers killed any wounded Tutsis who made it to hospital. One killer went so far as to thank hospital staff for providing a “Tutsi collection point.”² The Hutu radio station Radio Télévision Libre Milles Collines coordinated the killing. “You have missed some of the enemies [in such and such a place],” it told its listeners, “Some are still alive. You must go back there and finish them off. . . . The graves are not yet quite full. Who is going to do the good work and help us fill them completely?”³ In Taba, the Interahamwe killed all male Tutsis, forced the women to dig graves to bury the men, and then threw the children in the graves. “I will never forget the sight of my son pleading with me not to bury him alive,” one survivor recalled. “[H]e kept trying to come out and was beaten back. And we had to keep covering the pit with earth until there was no movement left.”⁴

Massacres such as these became commonplace throughout Rwanda. An estimated 43,000 Tutsis were killed in Karama Gikongoro, a further 100,000 massacred in Butare. Over 16,000 people were killed around Cyangugu; 4,000 in Kibeho; 5,500 in Cyahinda; 2,500 in Kibungo.⁵ Other examples are not hard to find.⁶ By early May, one journalist observed that one bloated and mutilated body plunged over the Rusomo Falls on the Kagera River every minute. “Hundreds and hundreds must have passed down the river in the past week and they are still coming. . . . A terrible genocidal madness has taken over Rwanda. It is now completely out of control.”⁷ So many bodies littered the streets of Kigali that prisoners were detailed to load them into dump trucks. As one eyewitness recounted: “Some one flagged [the dump truck] down and dragged [a] body from under the tree and threw it into the . . . truck which was almost full and people were moaning and crying, you

² Ibid., p. 142.

³ Quoted in G. Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Co., London, 1995), p. 224.

⁴ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, Ms Radhika Coomaraswamy (E/CN.4/1998/54/Add. 1), 4 February 1998, p. 10. Quoted in Melvern, *A People Betrayed*, p. 158.

⁵ Alison L. Des Forges, “*Leave None to Tell the Story*”: *Genocide in Rwanda* (Human Rights Watch, New York, c. 1999), pp. 303–594; quoted in Melvern, *A People Betrayed*, p. 200.

⁶ Ibid.

⁷ Richard Dowden, “Sweet Sour Stench of Death Fills Rwanda,” *Independent*, 7 May 1994. Quoted in Melvern, *A People Betrayed*, p. 189.

could see that some were not dead.”⁸ The sub-prefect of Kigali prefecture later admitted that 67,000 bodies were disposed of in this way. In three short months, as many as 1 million Tutsis were shot, burned, starved, tortured, stabbed, or hacked to death.⁹

The international community did nothing to stop the Rwandan genocide.¹⁰ A complete holocaust was only prevented by the military victory of the Rwandan Patriotic Front – a Tutsi guerrilla army based in the north of the country. *But what, if anything, should the international community have done to stop the carnage? Did it have a moral duty to intervene? Did it have a legal right to do so? What should it have done if the United Nations Security Council had refused to authorize a military intervention? If it had a duty to intervene, how could it have overcome the political barriers to intervention? And, most importantly, what measures should be taken to prevent similar catastrophes in the future?*

It is the aim of this chapter to examine some of the answers commonly given to these and other questions. The first section very briefly defines humanitarian intervention. The second section discusses the ethics of humanitarian intervention, distinguishing various theories according to the source, objects, weight, and breadth of moral concern. The discussion focuses on the following ethical theories: utilitarianism; natural law; social contractarianism; communitarianism; and legal positivism. The third section surveys classicist and legal realist readings of the sources of international law with a view to determining the present legality of humanitarian intervention. The literature on the ethics and legality of humanitarian intervention is riven with disagreement. This chapter seeks to identify and critically assess the (often unexamined) moral and empirical assumptions behind these disagreements.

⁸ Interview with Colonel Quist, transcript, tape 28. *Twenty-Twenty Television*, July 1994. Quoted in Melvern, *A People Betrayed*, p. 133.

⁹ Boutros Boutros-Ghali, “Introduction,” *The United Nations and Rwanda 1993–1996* (Department of Public Information, United Nations, New York, 1996), p. 4.

¹⁰ “We must all recognise that . . . we have failed in our response to the agony of Rwanda, and thus have acquiesced in the continued loss of human life. Our readiness and capacity for action has been demonstrated to be inadequate at best, and deplorable at worst, owing to the absence of the collective political will.” “Report of the Secretary-General on the Situation in Rwanda [S/1994/640, 31 May 1994],” *UN and Rwanda 1993–1996*, p. 291. See also Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), pp. 219–30; Melvern, *A People Betrayed*, pp. 186–206.

Definition of humanitarian intervention

What is humanitarian intervention? For the purposes of this volume, it is the threat or use 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.¹¹

In defining humanitarian intervention in this way, I deliberately exclude two types of behavior occasionally associated with the term. They are: non-forcible interventions such as the threat or use of economic, diplomatic, or other sanctions;¹² and forcible interventions aimed at protecting or rescuing the intervening state's own nationals.¹³ I do this, not because the legality or morality of these types of interventions is uninteresting or unimportant, but because the question of whether states may use *force* to protect the human rights of individuals other than their own citizens is more urgent and controversial.

The ethics of humanitarian intervention

Does the international community have a moral duty to intervene to end massive human rights violations like the Rwandan genocide? The arguments for or against the justice of humanitarian intervention are classified in a wide variety of ways. Michael J. Smith distinguishes political realist and liberal

¹¹ I am indebted to Allen Buchanan for his help in formulating this definition of humanitarian intervention.

¹² "Humanitarian intervention should be understood to encompass . . . non-forcible methods, namely intervention undertaken without military force to alleviate mass human suffering within sovereign borders." David J. Scheffer, "Towards a Modern Doctrine of Humanitarian Intervention," 23 *University of Toledo Law Review* (1992), 266; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Transnational Publishers, Irvington-on-Hudson, 1997), p. 135; Fernando R. Tesón, "Collective Humanitarian Intervention," 17 *University of Michigan Law School Journal* (1996), 325–27.

¹³ "I assume that humanitarian intervention . . . is a short-term use of armed force by a government . . . for the protection from death or grave injury of nationals of the acting State . . . by their removal from the territory of the foreign State." R. Baxter in Richard B. Lillich ed., *Humanitarian Intervention and the United Nations* (University Press of Virginia, Charlottesville, 1973), p. 53; Ulrich Beyerlin, "Humanitarian Intervention," in Rudolf Bernhardt ed., 3 *Encyclopedia of Public International Law* (North-Holland Publishing Co., Amsterdam, 1982), pp. 213–14; Natolino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff, Dordrecht, 1985), pp. 89–113.

views.¹⁴ J. Bryan Hehir differentiates moral and legal arguments, whereas Mark R. Wicclair contrasts rule-oriented and consequence-oriented ones.¹⁵ Other scholars categorize the subject in still different ways.¹⁶ All these taxonomies have much to recommend them. Nevertheless, no single dichotomy adequately captures all the important differences between the principal views on the justice of humanitarian intervention. It is for this reason that I shall classify these views according to which side of not one, but four ethical divides they fall.

The first ethical divide concerns the proper *source* of moral concern. *Naturalist* theories of international justice contend that morally binding international norms are an inherent feature of the world; a feature that is discovered through reason or experience. These theories maintain that particular facts about the world possess an intrinsic moral significance which human beings are powerless to alter. In contrast, *consensualist* theories of international justice claim that the moral authority of any given international norm derives from the explicit or tacit consent of the agents subject to that norm. On this view, just norms are made, not discovered. They are the product of consent and so only binding on the parties to the agreement.

The second ethical divide concerns the appropriate *objects* of moral concern. *Individualist* theories of international justice are concerned ultimately only with the welfare of individual human beings. In contrast, *collectivist* theories of international justice maintain that groups – typically ethnic groups, races, nations, or states – are proper objects of moral concern. It is crucial to note, however, that collectivists view groups entirely “in non-aggregative terms, that is, without reference to the rights, interests or

¹⁴ Michael J. Smith, “Humanitarian Intervention: An Overview of the Ethical Issues,” 12 *Ethics and International Affairs* (1998), 63–79.

¹⁵ J. Bryan Hehir, “The Ethics of Non-intervention: Two Traditions,” in Peter G. Brown and Douglas Maclean eds., *Human Rights and US Foreign Policy: Principles and Applications* (Lexington Books, Lexington, 1979), pp. 121–39; J. Bryan Hehir, “Intervention: From Theories to Cases,” 9 *Ethics and International Affairs* (1995), 1–13; Mark R. Wicclair, “Human Rights and Intervention,” in Brown and Maclean, *Human Rights and US Foreign Policy*, pp. 141–57. See also David R. Mapel and Terry Nardin, “Convergence and Divergence in International Ethics,” in Terry Nardin and David R. Mapel eds., *Traditions of International Ethics* (Cambridge University Press, Cambridge, 1992), pp. 299–318.

¹⁶ See Jeff McMahan, “The Ethics of International Intervention,” in Anthony Ellis ed., *Ethics and International Affairs* (Manchester University Press, Manchester, 1986), pp. 24–51; Howard Adelman, “The Ethics of Humanitarian Intervention: The Case of the Kurdish Refugees,” 6 *Public Affairs Quarterly* (1992), 62–87; Pierre Laberge, “Humanitarian Intervention: Three Ethical Positions,” 9 *Ethics and International Affairs* (1995), 15–35.

preferences of the individuals” that compose them.¹⁷ In other words, collectivists hold that groups can have interests independent of, and potentially in conflict with, those of their members.

The third ethical divide concerns the appropriate *weight* of moral concern. *Egalitarian* theories of international justice claim that the objects of moral concern must be treated equally. By this they mean that no object of moral concern should count for more than any other object of moral concern. *Inegalitarian* theories, in contrast, require or permit them to be treated unequally.

The final ethical divide concerns the proper *breadth* of moral concern. *Universalist* theories assert that *all* relevant agents – wherever they exist – are the proper objects of moral concern. *Particularist* theories, in contrast, hold that only *certain* agents – some human beings, but not others; some races, nations, states, but not others – are the proper objects of moral concern.

Readers should bear these distinctions in mind as I survey the principal theories of the justice of humanitarian intervention: utilitarianism; natural law; social contractarianism; communitarianism; and legal positivism.

Utilitarianism

Utilitarianism is the naturalist doctrine that an action is just if its consequences are more favorable than unfavorable to all concerned. For utilitarians, an action’s consequences are everything. Conduct is never good or bad in itself. Only its effects on human well-being make it good or bad. Utilitarianism is naturalist because it holds that human well-being is an intrinsic good. It is individualist, egalitarian, and universalist because, in Jeremy Bentham’s famous phrase, “each is to count for one and no one for more than one.”¹⁸

Most versions of utilitarianism are more precisely formulated than the general principle stated above. First, the nature of well-being must be specified. Most nineteenth-century utilitarians held that acts are good to the extent they satisfy individuals’ preferences. However, some utilitarians, noting people’s propensity to want only what is realistically attainable rather than their actual desires, argue that it is individuals’ objective “interests” or

¹⁷ Fernando R. Tesón, *A Philosophy of International Law* (Westview Press, Boulder, 1998), p. 41. See also Tesón, *Humanitarian Intervention*, pp. 55–61.

¹⁸ Quoted in R. M. Hare, “Rules of War and Moral Reasoning,” 1 *Philosophy and Public Affairs* (1972), 170.

“welfare” rather than their subjective preferences that should be maximized. Second, the object of moral evaluation must be specified. “Act-utilitarians” contend that *each human action* is the proper object of moral evaluation. By this, they mean that a specific act is just if its immediate and direct consequences are more favorable than unfavorable to all concerned. In contrast, “rule-utilitarians” hold that a *specific class of actions* (rules, norms, and maxims) is the proper object of moral evaluation. By this, they mean that an act is just if it conforms to a set of rules whose general adoption increases aggregate well-being more than the general adoption of any other set of rules.

A simple example will illustrate the difference between act- and rule-utilitarianism. Take the question: “Should individuals keep their promises?” Act-utilitarians contend that the morality of keeping a promise depends solely upon whether keeping it would maximize human well-being. Rule-utilitarians, in contrast, argue that individuals should keep their promises if general adherence to the rule “individuals should keep their promises” best promotes human well-being.

As with promise-keeping, act-utilitarians argue that the justice of any humanitarian intervention depends entirely on its consequences. If its effect is to increase aggregate well-being, then it is just; if its immediate and direct effect is to decrease aggregate well-being, then it is unjust. Crudely put, act-utilitarians argue that a humanitarian intervention is just if it saves more lives than it costs, and unjust if it costs more lives than it saves. An act-utilitarian could argue that Tanzania’s intervention in Uganda was just because, by overthrowing the Amin dictatorship, it saved more lives than it cost. For the same reason, an act-utilitarian could argue that India’s intervention in Bangladesh was unjust because “more people died in Bangladesh during the two or three weeks when the Indian army was liberating the country than had been killed previously.”¹⁹

Act-utilitarianism is commonly criticized for asking both too much and too little of people. It asks too much because it obliges us to aid anyone who would gain more from our assistance than we would lose by giving it. Put slightly differently, it obliges us to help others to the point at which our own well-being is reduced to the same level as those whose well-being we are attempting to improve.²⁰ Jeremy Bentham thus writes that it is unjust if a

¹⁹ Thomas M. Franck in Lillich, *Humanitarian Intervention and the UN*, p. 65.

²⁰ Peter Singer, “Famine, Affluence and Morality,” 1 *Philosophy and Public Affairs* (1972), 231.

nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than would produce evil to itself. For example if the given nation, without having reason to fear for its own preservation . . . should obstinately prohibit commerce with them and a foreign nation: – or if when a foreign nation should be visited with misfortune, and require assistance, it should neglect to furnish it.²¹

Act-utilitarianism's extreme altruism is the logical consequence of its individualist, egalitarian, and universalist premises. Such demanding moral obligations, however, are widely considered far beyond the moral capacities of ordinary men and women.

Act-utilitarianism also asks too little because it does not prohibit some actions that seem intuitively quite wrong. Supporters claim that any sort of military action is permissible if it saves more lives than it loses.²² Thus, for example, NATO's killing of ten civilian employees of Radio Television Serbia (RTS) in Belgrade during Operation Allied Force could be justified on act-utilitarian grounds if destroying "a source of propaganda that's prolonging this war and causing untold new suffering to the people of Kosovo" saved more lives than it cost.²³ Act-utilitarianism is thus sharply at odds with the natural law view that some harms (e.g. the torture or execution of prisoners of war, terror bombing, attacks on neutrals, and the like) are forbidden without exception or qualification.

Unlike act-utilitarianism, rule-utilitarianism claims that rules are the proper objects of moral evaluation because, as Robert E. Goodin points out, a significant portion of human well-being comes from coordinating the actions of a great many individual agents.

Often the only way to maximize the utility that arises from my act is by knowing (or guessing) what others are likely to do. But knowing with any certainty is . . . impossible (or impossibly costly) in a world populated by act-utilitarian agents. The best way to coordinate our actions with those of others,

²¹ Jeremy Bentham, "Principles of International Law," in John Bowring ed., *The Works of Jeremy Bentham* (Russell & Russell, New York, 1962), vol. II, pp. 538–89.

²² "[A] military action (e.g. a bombing raid) is permissible only if the utility . . . of victory to all concerned, multiplied by the increase in its probability if the action is executed, on the evidence (when the evidence is reasonably solid, considering the stakes), is greater than the possible disutility of the action to both sides multiplied by its probability." R. B. Brandt, "Utilitarianism and War," 1 *Philosophy and Public Affairs* (1972), 157.

²³ Clare Short, United Kingdom International Development Secretary. Quoted in Derek Brown, "Killing the Messengers," *Guardian*, London, 23 April 1999.

and thereby to maximize the utility from each of our actions as individuals as well as from each of our actions collectively, is to promulgate rules (themselves chosen with an eye to maximizing utility, of course) and to adhere to them.²⁴

If people do not observe the same moral rules, trust will erode and aggregate well-being decrease. Thus, for instance, if the rule “individuals must keep their promises” is not generally observed, economic activity will decline and with it aggregate well-being. At its deepest level, then, act-utilitarianism is inimical to the rule of law. As Michael J. Glennon points out:

While the law may sometimes incorporate cost-benefit analysis in various “balancing tests”, cost-benefit analysis is, at a fundamental level, not law. Indeed, one can question whether a legal system does not admit failure when it adopts case-bound balancing tests, which in their subjectivity and non-universality rob law of its predictability. The case-by-case approach is, *juridically*, a cop-out, and an acknowledgement that no reasonable rule can be fashioned to govern all circumstances that can foreseeably arise.²⁵

Act-utilitarians reply that if the consequences of a specific act (including damage to social trust and therefore future human well-being) are still more favorable than unfavorable to all concerned, then it should be performed. Anything else is “rule fetishism” – the unutilitarian adherence to rules for their own sake. Act-utilitarians thus feel perfectly justified in lying to Hutu death squads about the Tutsis hiding in their basements – even though observing the rule “tell the truth” maximizes utility in all other circumstances.²⁶

For rule-utilitarians, the justice of a humanitarian intervention depends, not on its consequences, but on whether it is permitted or required by a rule that, if followed by everyone, produces the best consequences for all concerned. Unfortunately, though not unsurprisingly, there is considerable disagreement between rule-utilitarians as to which rule satisfies this

²⁴ Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge University Press, Cambridge, 1995), p. 18.

²⁵ Michael J. Glennon, *Limits of Law, Prerogatives and Power: Interventionism after Kosovo* (Palgrave, New York, 2001), pp. 6–7.

²⁶ Rule-utilitarians can respond to this criticism by limiting the application of rules. For example, they may qualify the rule “Always tell the truth” with the phrase “except where doing so will cause the death of innocents.” Act-utilitarians, however, counter that, if such a rule applies to only one act, rule-utilitarianism collapses into act-utilitarianism and, if it applies to a class of actions, it remains susceptible to the criticism outlined above. J. J. C. Smart, “An Outline of a System of Utilitarian Ethics,” in J. J. C. Smart and Bernard Williams eds., *Utilitarianism: For and Against* (Cambridge University Press, Cambridge, 1973), pp. 1–73.

criterion. Some rule-utilitarians – or, more accurately, some writers who use rule-utilitarian arguments – claim that humanitarian interventions fail, on balance, to secure the best consequences for all concerned. H. Scott Fairley, for instance, asserts that “the use of force for humanitarian ends more often than not has become self-defeating, increasing the human misery and loss of life it was intended originally to relieve.”²⁷ Ian Brownlie and Caroline Thomas likewise doubt that the positive consequences of the United States intervention in the Dominican Republic and the Tanzanian intervention in Uganda exceeded their negative ones.²⁸ Other authors make the case that humanitarian interventions reduce well-being by increasing the likelihood of international society “collapsing into a state of war.”²⁹ “Violations of human rights are indeed all too common,” writes Louis Henkin, “and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other.”³⁰ If humanitarian intervention were legal, powerful states would receive “an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or the goal of self-determination.”³¹

²⁷ H. Scott Fairley, “State Actors, Humanitarian Intervention and International Law: Reopening Pandora’s Box,” 10 *Georgia Journal of International and Comparative Law* (1980), 63. See also R. George Wright, “A Contemporary Theory of Humanitarian Intervention,” 4 *Florida International Law Journal* (1989), 440.

²⁸ Ian Brownlie, “Humanitarian Intervention,” in John Norton Moore ed., *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974), p. 224; Caroline Thomas, “The Pragmatic Case against Intervention,” in Ian Forbes and Mark Hoffman eds., *Political Theory, International Relations and the Ethics of Intervention* (St. Martin’s Press, New York, 1993), pp. 93–94.

²⁹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn, Basic Books, New York, 2000), p. 59.

³⁰ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press, New York, 1979), p. 145.

³¹ Oscar Schachter, “The Legality of Pro-democratic Invasion,” 78 *American Journal of International Law* (1984), 649. See also Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1991), pp. 340–41; Ian Brownlie, “Thoughts on Kind-hearted Gunmen,” in Lillich, *Humanitarian Intervention and the UN*, pp. 139–48; Farooq Hassan, “Realpolitik in International Law: After Tanzanian–Ugandan Conflict ‘Humanitarian Intervention’ Reexamined,” 17 *Willamette Law Review* (1981), 862; Jack Donnelly, “Human Rights, Humanitarian Intervention, and American Foreign Policy: Law, Morality, and Politics,” 37 *Journal of International Affairs* (1984), 321–22; Oscar Schachter, “The Lawful Resort to Unilateral Force,” 10 *Yale Journal of International Law* (1985), 294; Ved P. Nanda, “Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention under International Law – Part I,” 20 *Denver Journal of International Law and Policy* (1992), 309; Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Het Spinhuis, Amsterdam, 1993), pp. 30–31.

Other rule-utilitarians disagree. Andrew Mason and Nicholas J. Wheeler, to cite only one example, conclude that non-interventionists “are unable to show that a properly regulated and suitably constrained practice of humanitarian intervention would be morally impermissible, or create a worse world than the one we currently live in . . . [A]llowing humanitarian intervention in some cases . . . would promote overall well-being. So far from forbidding humanitarian intervention, consequentialist reasoning will support it . . .”³²

An exasperating feature of the debate within and between act- and rule-utilitarianism is that neither side supports their claims with anything more than anecdotal evidence. A systematic analysis of the welfare consequences of humanitarian interventions and non-interventions is sadly lacking. Until such a study is completed, our ability to judge the merits of the competing utilitarian claims is gravely handicapped.

Natural law

Natural law is the naturalist doctrine that human beings have certain moral duties by virtue of their common humanity. Its basic precepts are discovered through reason and therefore available to anyone capable of rational thought. Like human nature, they are also universal and immutable.³³

For natural law theorists, our common human nature generates common moral duties – including, in some versions, a right of humanitarian intervention.³⁴ Our moral obligations to others, writes Joseph Boyle,

are not limited to people with whom we are bound in community by contract, political ties, or common locale. We are obliged to help whoever [sic] we

³² Andrew Mason and Nick Wheeler, “Realist Objections to Humanitarian Intervention,” in Barry Holden ed., *The Ethical Dimensions of Global Change* (Macmillan Press, Basingstoke, 1996), p. 106.

³³ Natural law is “right reason in harmony with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions . . . we cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it.” Marcus Tullius Cicero, “De Re Publica,” III, xxii, 3: in Marcus Tullius Cicero, *De Re Publica and De Legibus* (Harvard University Press, Cambridge, Mass., 1928), p. 211.

³⁴ Terry Nardin, “The Moral Basis of Humanitarian Intervention,” 16 *Ethics and International Affairs* (2002), 57–70. See also Alan Donagan, *The Theory of Morality* (University of Chicago Press, Chicago, 1977); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980); Robert P. George, “Natural Law and International Order,” in David R. Mapel and Terry Nardin eds., *International Society: Diverse Ethical Perspectives* (Princeton University Press, Princeton, 1998), pp. 54–69.

can . . . and to be ready to form and promote decent relations with them . . . This general duty to help others is the most basic ground within this common morality for interference in the internal affairs of one nation by outsiders, including other nations and international bodies. The specific implications of the general duty to provide help depend on a number of highly contingent factors, including respect for a nation's sovereignty and awareness of the limits of outside aid. But the normative ground is there, and . . . in extreme circumstances it can justify the use of force.³⁵

The Dutch jurist Hugo Grotius is a famous proponent of this view. In *De Jure Belli ac Pacis*, he argues that, where 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.³⁶ Grotius bases this right on the natural law notion of *societas humana* – the universal community of humankind.³⁷ “The fact must also be recognized,” he writes, “that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard of any person whatsoever.”³⁸

Note that Grotius talks of the right – not the duty – of humanitarian intervention. States have a discretionary right to intervene on behalf of the oppressed. But they do not have to exercise the right if their own citizens are unduly burdened in doing so.³⁹ Natural law theorists who defend a duty of humanitarian intervention conceive it as an imperfect duty, like the duties of charity and beneficence.⁴⁰ States may discharge it at their own discretion

³⁵ Joseph Boyle, “Natural Law and International Ethics,” in Nardin and Mapel, *Traditions of International Ethics*, p. 123.

³⁶ Hugo Grotius, *De Jure Belli ac Pacis* (Oxford University Press, Oxford, 1925), Book II, ch. 25, sec. 8, vol. II, p. 584.

³⁷ *Ibid.*, Book II, ch. 20, sec. 8, vol. II, pp. 472–73.

³⁸ *Ibid.*, Book II, ch. 20, sec. 40, vol. II, p. 503.

³⁹ *Ibid.*, Book II, ch. 25, sec. 7, vol. II, pp. 582–83.

⁴⁰ Moral duties are often classified as perfect or imperfect. A perfect duty is one for which there is a corresponding right. For example, if I have a duty not to execute prisoners of war, you, as a prisoner of war, have a right not to be executed. An imperfect duty is one for which there is no corresponding right. “Duties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due. Charitable contributions are more like gratuitous services, favours, and gifts than like repayments of debts or reparations; and yet we do have duties to be charitable.” Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, Princeton, 1980), p. 144. See also David Lyons, “The Correlativity of Rights and Duties,”

and in the manner of their own choosing. The victims of genocide, mass murder, and slavery possess no “right of humanitarian rescue” – no moral claim to the help of any specific state.

Although an imperfect duty of humanitarian intervention comports easily with the belief that states should privilege the well-being of their own citizens over the well-being of foreigners, it can have terrible consequences. “The general problem,” writes Michael Walzer,

is that intervention, even when it is justified, even when it is necessary to prevent terrible crimes – even when it poses no threat to regional or global stability, is an imperfect duty – a duty that doesn’t belong to any particular agent. Somebody ought to intervene, but no specific state or society is morally bound to do so. And in many of these cases, no one does. People are indeed capable of watching and listening and doing nothing. The massacres go on, and every country that is able to stop them decides that it has more urgent tasks and conflicting priorities; the likely costs of intervention are too high.⁴¹

If one is concerned about preventing or stopping genocide, mass murder, and slavery, an imperfect duty of humanitarian intervention will not do. If “persons as such have certain rights,” writes Allen Buchanan, “then surely one ought not only to respect persons’ rights by not violating them. *One ought also to contribute to creating arrangements that will ensure that persons’ rights are not violated.* To put the same point somewhat differently, respect for persons requires doing something to ensure that they are treated respectfully.”⁴² It is not enough for a state to refrain from violating human rights itself. It also must create and participate in international institutions that prevent or stop gross human rights violations wherever they occur. A perfect duty of humanitarian intervention is, in principle, wholly compatible with the precepts of natural law. But in practice no natural law theorists advocate it.

By contrast, many natural law theorists maintain that, far from possessing an imperfect duty of humanitarian intervention, states have a perfect duty of non-intervention. Christian Wolff, Emer de Vattel, and Immanuel Kant, for example, contend that states have a duty to refrain from interfering in each other’s affairs for the same reason that individuals have a duty to respect each

4 Noûs (1970), 45–55; John Rawls, *A Theory of Justice* (Belknap Press, Cambridge, Mass., 1971), pp. 108–17.

⁴¹ Walzer, *Just and Unjust Wars*, p. xiii.

⁴² Allen Buchanan, “The Internal Legitimacy of Humanitarian Intervention,” 7 *Journal of Political Philosophy* (1999), 84. Emphasis added.

other's autonomy.⁴³ "To interfere in the government of another . . ." writes Christian Wolff, "is opposed to the natural liberty of nations, by virtue of which one nation is altogether independent of the will of other nations in its actions . . . If any such things are done, they are done altogether without right."⁴⁴ This argument rests on an analogy between persons and states. "Just as persons are autonomous agents, and are entitled to determine their own action free from interference as long as the exercise of their autonomy does not involve the transgression of certain moral constraints, so, it is claimed, states are also autonomous agents, whose autonomy is similarly deserving of respect."⁴⁵ The collectivist analogy, however, is a poor one. As Charles R. Beitz, Fernando R. Tesón, and many others argue, states are simply not unified agents with unified wills.⁴⁶ Indeed, at no time is this clearer than when a government commits gross human rights abuses against its own citizens.

Social contractarianism

Social contractarianism is the naturalist doctrine that moral norms derive their binding force from the mutual consent of the people subject to them. This mutual consent, however, is not between real people in real choice situations. Rather, it is between ideal agents in ideal choice situations. For social contractarians, norms are morally obligatory only *if* free, equal, and rational agents would consent to them. By defining justice in this way, they avoid the criticism that actual norms are rarely, if ever, chosen freely. It is by idealizing the choice situation that social contractarians ensure that mutual consent is genuine; that it is not the product of force or fraud.

⁴³ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Carnegie Classics of International Law, New York, 1934), ch. I, secs. 256–57, p. 131; Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institution, Washington, DC, 1916), Book I, ch. III, sec. 37; Book II, ch. IV, sec. 54, pp. 19, 131; Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in Hans Reiss ed., *Kant: Political Writings* (2nd enlarged edn, Cambridge University Press, Cambridge, 1991), p. 96; Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* (Macmillan, New York, 1965), part II, sec. 2, subsection 60, p. 123. See also Alan H. Goldman, "The Moral Significance of National Boundaries," 7 *Midwest Studies in Philosophy* (1982), 438–41; Gerald Elfstrom, "On Dilemmas of Intervention," 93 *Ethics* (1983), 713.

⁴⁴ Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, ch. I, secs. 256–57, p. 131.

⁴⁵ McMahan, "Ethics of International Intervention," pp. 28–29.

⁴⁶ Charles R. Beitz, *Political Theory and International Relations* (Princeton University Press, Princeton, 1979), pp. 71–83; Tesón, *Humanitarian Intervention*, pp. 55–100; Tesón, *Philosophy of International Law*, pp. 39–47.

Although social contractarian arguments possess a similar structure, they are far from identical. One area of disagreement concerns the identity of the contracting parties. Some social contractarians contend that norms are just if the *citizens of a state* would consent to them.⁴⁷ Others claim that they are just if the *states* themselves would consent to them.⁴⁸ Still others argue that they are just if all *human beings* would consent to them.⁴⁹ The identity of the contracting parties is important because it affects which norms would be chosen – and hence which are morally binding. For example, if the citizens of a state were the contracting parties, then a duty to maximize the “national interest” would be selected. As Allen Buchanan explains:

The state is understood as the creation of a hypothetical contract among those who are to be its citizens, and the terms of the contract they agree on are justified by showing how observance of those terms serves their interests. No one else’s interests are represented, so legitimate political authority is naturally defined as authority exercised for the good of the parties to the contract, the citizens of this state . . . The justifying function of the state – what justifies the interference with liberty that it entails – is the well-being and freedom of its members. There is no suggestion that the state must do anything to serve the cause of justice in the world at large. What makes the government legitimate is that it acts as the faithful agent of its own citizens. And to that extent, government acts legitimately only when it occupies itself exclusively with the interests of the citizens of the state of which it is the government.⁵⁰

⁴⁷ Richard Cox, *Locke on War and Peace* (Clarendon Press, Oxford, 1960); David Gauthier, “Hobbes on International Relations,” in David Gauthier ed., *The Logic of Leviathan* (Oxford University Press, Oxford, 1969), pp. 206–12; Murray Forsyth, “Thomas Hobbes and the External Relations of States,” 5 *British Journal of International Studies* (1979), 196–209; Hedley Bull, “Hobbes and the International Anarchy,” 48 *Social Research* (1981), 717–38; H. Williams, *International Relations and the Limits of Political Theory* (Macmillan, Basingstoke, 1996), pp. 90–109. See also Thomas L. Pangle, “The Moral Basis of National Security: Four Historical Perspectives,” in Klaus Knorr ed., *Historical Dimensions of National Security Studies* (University Press of Kansas, Lawrence, 1976), pp. 307–72.

⁴⁸ Rawls, *Theory of Justice*, p. 378; John Charvet, “International Society from a Contractarian Perspective,” in Mapel and Nardin, *International Society*, pp. 114–31; John Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, Mass., 1999).

⁴⁹ Beitz, *Political Theory*; Charles R. Beitz, “Justice and International Relations,” in H. Gene Blocker and Elizabeth H. Smith eds., *John Rawls’ Theory of Social Justice* (Ohio University Press, Athens, 1980), pp. 211–38; Charles R. Beitz, “Nonintervention and Communal Integrity,” 9 *Philosophy and Public Affairs* (1980), 385–91; Thomas W. Pogge, *Realizing Rawls* (Cornell University Press, Ithaca, 1989); Thomas W. Pogge, “Cosmopolitanism and Sovereignty,” 103 *Ethics* (1992), 48–75; Charles R. Beitz, “Cosmopolitan, Liberalism and the States System,” in Chris Brown ed., *Political Restructuring in Europe: Ethical Perspectives* (Routledge, London, 1994), pp. 123–36.

⁵⁰ Buchanan, “Internal Legitimacy,” pp. 74–75.

The justice of any given intervention thus hinges on whether it benefits or harms the “national interest.” For writers who define this term narrowly (i.e. as the sum of security and material interests), interventions aimed at ending gross human rights abuses in foreign countries are almost always unjust.⁵¹ Samuel P. Huntington’s assertion that “it is morally unjustifiable and politically indefensible that members of the [United States] Armed Forces should be killed to prevent Somalis from killing one another” is a recent example of this view.⁵² For authors who define “national interest” more expansively (i.e. as the sum of security, material, and what Joseph S. Nye, Jr. calls “humanitarian interests”), interventions aimed at ending genocide, mass murder, or slavery can be morally obligatory in certain circumstances.⁵³ In either case, the interests of the intervening state count for *everything* in assessing an intervention’s legitimacy; the interests of the target state count for *nothing*.

The particularist conclusions of this argument are also inconsistent with its universalist premises. As Allen Buchanan makes clear, this variety of social contractarianism

justifies the state as a coercive apparatus by appeal to the need to protect *universal* interests, while at the same time limiting the right of the state to use its coercive power to the protection of a *particular* group of persons, identified by the purely contingent characteristic of happening to be members of the same political society . . . If the interests whose protection justifies the state are human interests, common to all persons, then surely a way of thinking about the nature of states and the role of government that provides no basis for obligations to help ensure that the interests of all persons are protected is fundamentally flawed.⁵⁴

The widespread appeal of the “national interest” argument rests in large measure on the inegalitarian, particularist view that states should privilege the well-being of their own citizens over the well-being of nameless persons in distant lands. This claim, however, needs to be justified.⁵⁵

⁵¹ Hans J. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (Knopf, New York, 1951).

⁵² Samuel P. Huntington, “New Contingencies, Old Roles,” 2 *Joint Forces Quarterly* (1992), 338. See also Robert H. Jackson, “The Political Theory of International Society,” in K. Booth and S. Smith eds., *International Relations Theory Today* (Polity Press, Cambridge, 1995), p. 123.

⁵³ Joseph S. Nye Jr., “Redefining the National Interest,” 78 *Foreign Affairs* (1999), 22–35.

⁵⁴ Buchanan, “Internal Legitimacy,” p. 79. Emphasis added.

⁵⁵ See below, p. 51.

Other social contractarians claim that international norms are morally binding if *states* would consent to them. The early John Rawls (the Rawls of *A Theory of Justice*), for example, contends that international norms are morally binding if the rational representatives of states deciding behind a “veil of ignorance” – deciding without “knowing anything about the particular circumstances of their own society, its power and strength in comparison to other nations” – would consent to them.⁵⁶ In this “original position,”

the contracting parties, in this case representatives of states, are allowed only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special situation. This original position is fair between nations; it nullifies the contingencies and biases of historical fate. Justice between states is determined by the principles that would be chosen in the original position so interpreted.⁵⁷

Rawls concludes that “the right of a people to settle their own affairs without the intervention of foreign powers” is an international norm that state representatives would consent to if deprived of this information.⁵⁸

Other social contractarians disagree.⁵⁹ They reject the collectivist assumptions of Rawls’s argument in *A Theory of Justice*, claiming instead that international norms are just only to the extent that they would be assented to by *human beings* deciding behind a “veil of ignorance.” These scholars argue that a duty of humanitarian intervention is just because human beings deciding behind a “veil of ignorance” (i.e. deciding in ignorance of the type of state in which they lived) would consent to it. As Fernando R. Tesón explains:

If the parties [deciding behind the veil of ignorance] believed that some societies were likely to be grossly unjust then it is plausible to conclude that . . . they would prefer a principle of limited intervention on behalf of human rights. And this is so because the first aim of the parties in the original position is to see that the fundamental rights of *individuals* within every

⁵⁶ Rawls, *Theory of Justice*, p. 378. ⁵⁷ *Ibid.*, p. 378. ⁵⁸ *Ibid.*, p. 378.

⁵⁹ Beitz, *Political Theory*; Wicclair, “Human Rights and Intervention,” pp. 141–57; Mark R. Wicclair, “Rawls and the Principle of Non-intervention,” in Blocker and Smith, *John Rawls’ Theory of Social Justice*, pp. 289–308; Beitz, “Justice and International Relations,” pp. 211–38; Beitz, “Nonintervention and Communal Integrity,” pp. 385–91; Tesón, *Humanitarian Intervention*, pp. 61–74.

state are recognized and observed. The purpose of the state organization is to protect the rights of individuals. Because the parties in the original position [would] agree to terms of cooperation that are mutually acceptable and fair, the aim of the international community thus created . . . should also be the protection of the rights of individuals, and not the prerogatives of princes. Therefore it is doubtful that the parties in the original position would agree to the unqualified rule of non-intervention that would jeopardize the very rights the original position is primarily supposed to secure.⁶⁰

In recent years, John Rawls has added a lot of communitarian water to his social contractarian wine. He now argues that international norms are just to the extent that the rational representatives of “decent” peoples deciding behind a “veil of ignorance” would assent to them. In *The Law of Peoples*, he maintains that states owe a duty of humanitarian rescue to the citizens of “outlaw” states; that is, to peoples whose governments fail to protect such basic human rights “as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.”⁶¹ But, significantly, he also contends that states do not owe a duty of humanitarian intervention to the citizens of so-called “decent” states; that is, to peoples whose governments guarantee basic human rights, but fail to protect so-called “rights of liberal democratic citizenship,” i.e. rights of civic equality, democratic governance, free speech, free association, free movement, and the like. Violations of these liberal–democratic rights are not a *casus belli*, he reasons, because a duty of humanitarian intervention on these grounds would not be assented to by the rational representatives of “decent” peoples (i.e. peoples who respect human, though not necessarily liberal–democratic, rights) deciding behind a “veil of ignorance.”⁶² This raises the crucial question why “decent” peoples rather than rational individuals should be parties to the original contract. As Rawls simply stipulates that they should, his argument is at best incomplete – at worst arbitrary.⁶³

⁶⁰ Tesón, *Humanitarian Intervention*, pp. 65–66. ⁶¹ Rawls, *Law of Peoples*, p. 79.

⁶² *Ibid.*, pp. 32–33. See also Fernando R. Tesón, “The Rawlsian Theory of International Law,” 9 *Ethics and International Affairs* (1995), 83–99.

⁶³ “This account of decency . . . is developed by setting out various criteria and explaining their meaning. The reader has to judge whether a decent people . . . is to be tolerated and accepted as a member in good standing of the Society of Peoples. It is my conjecture that most reasonable citizens of a liberal society will find peoples who meet these two criteria acceptable as peoples in good standing. Not all reasonable persons will, certainly, yet most will.” Rawls, *Law of Peoples*, p. 67.

Communitarianism

Communitarianism is the consensualist, particularist doctrine that norms are morally binding insofar as they “fit” the cultural beliefs and practices of specific communities.⁶⁴ “Justice is relative to social meanings,” writes a leading communitarian, Michael Walzer.⁶⁵ “There are an infinite number of possible lives, shaped by an infinite number of possible cultures, religions, political arrangements, geographical conditions, and so on. A given society is just if its substantive life is lived in a certain way – that is, in a way faithful to the shared understandings of its members.”⁶⁶ In the hands of communitarians, moral philosophy thus becomes moral anthropology – the discovery and description of the “inherited cultures” that rule peoples’ lives.⁶⁷ These “inherited cultures” are morally binding because they are the product of long processes of “association and mutuality,” “shared experience,” “cooperative activity” – in short, they are binding because they are the product of consent.⁶⁸

A duty of humanitarian intervention is just, according to Walzer, because it “fits” the “inherited cultures” of political communities everywhere.⁶⁹ It is justified, he writes,

when it is a response . . . to acts “that shock the moral conscience of mankind.”
The old-fashioned language seems to me exactly right. It is not the conscience

⁶⁴ Melvyn Frost, *Towards a Normative Theory of International Relations* (Cambridge University Press, Cambridge, 1986); David Miller, “The Ethical Significance of Nationality,” 98 *Ethics* (1988), 647–62; N. J. Rengger, “A City which Sustains All Things? Communitarianism and International Society,” 21 *Millennium: Journal of International Studies* (1992), 353–69; Anthony Black, “Nation and Community in the International Order,” 19 *Review of International Studies* (1993), 81–89; Robert H. Jackson, “Armed Humanitarianism,” 48 *International Journal* (1993), 579–606; David Miller, *On Nationality* (Oxford University Press, Oxford, 1995); David Morrice, “The Liberal–Communitarian Debate in Contemporary Political Philosophy and its Significance for International Relations,” 26 *Review of International Studies* (2000), 233–51; Robert H. Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford University Press, Oxford, 2000), pp. 249–93.

⁶⁵ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basil Blackwell, Oxford, 1983), p. 312.

⁶⁶ *Ibid.*, p. 313.

⁶⁷ Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” 9 *Philosophy and Public Affairs* (1980), 211. See also Walzer, *Spheres of Justice*, pp. 28–29; Walzer, *Just and Unjust Wars*, p. 45.

⁶⁸ Walzer, *Spheres of Justice*, p. 313; Walzer, *Just and Unjust Wars*, p. 54.

⁶⁹ Walzer, “Moral Standing of States,” pp. 211–12; Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Notre Dame, 1994), pp. 15–19; Michael Walzer, “The Politics of Rescue,” 62 *Social Research* (1995), 53–66.

of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of everyday activities.⁷⁰

This global culture of human solidarity demands that states intervene whenever one of their number massacres, enslaves, or forcibly expels large numbers of its citizens or collapses into a frenzied, murderous anarchy.⁷¹ Other communitarians, however, are not so sure. Hedley Bull, for instance, observes that “there is no present tendency for states to claim, or for the international community to recognize, any such right.”⁷²

The principal flaws of communitarianism – its moral relativism and conservatism – are well known and need not be rehearsed here.⁷³ A less well-known, though equally important, failing is that “consent,” as communitarians conceive it, cannot generate morally binding norms. The communitarian conception of consent, writes Gerald Doppelt,

is supposed to refer to a social process in which the activity of individuals “makes” or “shapes” a common life and independent community. But this picture is inherently vague and blurs important distinctions between the radically different terms on which individuals and groups are able to participate in, or influence, the life of a particular society . . . [Wherever societies are divided] into racial, economic, or religious groups with radically unequal political freedoms, civil rights, economic opportunities, living conditions, literacy or health . . . the oppressed group has little, if any, real choice or control concerning the harsh terms of its social participation. At the very least, all reflective people (and nations) distinguish between the social participation of a group or individual based on force, coercion, bare material survival,

⁷⁰ Walzer, *Just and Unjust Wars*, p. 107. ⁷¹ Walzer, “Moral Standing of States,” pp. 217–18.

⁷² Hedley Bull, “Conclusion,” in Hedley Bull ed., *Intervention in World Politics* (Clarendon Press, Oxford, 1984), p. 193.

⁷³ Richard A. Wasserstrom, “Review of *Just and Unjust Wars*,” 92 *Harvard Law Review* (1978), 536–45; David Luban, “Just War and Human Rights,” 9 *Philosophy and Public Affairs* (1980), 160–81; David Luban, “The Romance of the Nation-State,” 9 *Philosophy and Public Affairs* (1980), 392–97; Beitz, “Nonintervention and Communal Integrity,” pp. 385–91; Gerald Doppelt, “Statism without Foundations,” 9 *Philosophy and Public Affairs* (1980), 398–403; Jerome Slater and Terry Nardin, “Nonintervention and Human Rights,” 48 *Journal of Politics* (1986), 86–96; Tesón, *Humanitarian Intervention*, pp. 92–99; Richard Bellamy, “Justice in the Community: Walzer on Pluralism, Equality and Democracy,” in David Boucher and Paul Kelly eds., *Social Justice: From Hume to Walzer* (Routledge, London, 1998), pp. 157–80; Tom J. Farer, “Does Walzer Still Work?” 41 *Public Affairs* (2000), 12–13.

ignorance, or blind habit and another kind which is “free” and approximates a meaningful sense of consent.⁷⁴

Simply put, naturalists claim that communitarianism ignores the warping effects that asymmetries of wealth, power, and status have on expressions of consent. If individuals were truly free to construct their communities as they saw fit, they would choose norms quite different from those thrust on them by the dead hand of tradition.

Legal positivism

Legal positivism, as a normative doctrine, is the consensualist, collectivist view that norms are just if they are lawful; that is, if they are enacted according to accepted procedures.⁷⁵ The content of the norm is irrelevant to its binding force. One has a moral obligation to obey the law *qua* law. As Kenneth Einar Himma explains:

To claim that there is a moral obligation to obey law *qua* law is to claim that a legal standard is morally obligatory . . . *because* that standard is a law; in other words, it is to claim that a proposition of law is morally obligatory *in virtue of* being legally valid. Thus, someone who violates the law commits a moral wrong *in virtue of* performing an act that is inconsistent with the law.⁷⁶

This view is known within legal positivism as the “separability thesis” – the claim that binding laws have absolutely no need to “reproduce or satisfy certain demands of morality, though in fact they have often done so.”⁷⁷

The separability thesis is vigorously contested by naturalists of all stripes. Joel Feinberg, to give only one example, asks: “Why should I have any

⁷⁴ Gerald Doppelt, “Walzer’s Theory of Morality in International Relations,” 8 *Philosophy and Public Affairs* (1978), 20–21. See also Beitz, *Political Theory*, pp. 67–105; Charles R. Beitz, “Bounded Morality: Justice and the State in World Politics,” 33 *International Organization* (1979), 412–14.

⁷⁵ Legal positivism is also an analytic doctrine that seeks to distinguish legal norms from non-legal ones.

⁷⁶ Kenneth Einar Himma, “Positivism, Naturalism, and the Obligation to Obey Law,” 36 *Southern Journal of Philosophy* (1998), 151.

⁷⁷ H. L. A. Hart, “Positivism and the Separation of Law and Morals,” 71 *Harvard Law Review* (1958), 593–629; H. L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1994), pp. 181–82. See also Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979); Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal Systems* (2nd edn, Clarendon Press, Oxford, 1980).

respect or duty of fidelity toward a statute with a wicked or stupid content just because it was passed into law by a bunch of men (possibly very wicked men like the Nazi legislators) according to the accepted recipes for making law?”⁷⁸ A small number of legal positivists concede Feinberg’s point – arguing instead that one has a moral obligation to obey the law *qua* law only if it is enacted according to just legislative procedures.⁷⁹ But what is a just legislative procedure? In international law, “state consent” – expressed in the form of treaties and international custom – is the accepted procedure for enacting legal norms. But is “state consent” a just legislative procedure? Legal positivists could argue that “state consent” is the legally valid (and hence morally binding) legislative procedure because it is the legislative procedure that states recognize as legally valid (and hence morally binding). Such a claim, however, would be self-referential at best – tautological at worst. One could argue with equal consistency that “Nazi Party consent” was the legally valid (and hence morally binding) legislative procedure in Nazi Germany because it was the legislative procedure that the Nazi Party recognized as legally valid (and hence morally binding). To have a plausible normative theory, legal positivists need to justify (i) their collectivist assumption that states are the *proper agents* to enact binding norms, and (ii) their consensualist assumption that actual consent – whose problems we have briefly noted above – is the *proper means* for enacting such norms. To do this, however, they must employ the sorts of naturalist arguments that the separability thesis expressly forbids.⁸⁰

The legality of humanitarian intervention

Legal positivists argue that there is a moral duty to obey the law. But what is the law? According to Article 38(I) of the Statute of the International Court of Justice, international norms are legally binding if they are incorporated

⁷⁸ Joel Feinberg, “Civil Disobedience in the Modern World,” 2 *Humanities in Society* (1979), 43–44. See also Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” 71 *Harvard Law Review* (1958), 630; Jules Coleman, “On the Relationship between Law and Morality,” 2 *Ratio Juris* (1989), 66–78; Tesón, *Philosophy of International Law*, pp. 92–97.

⁷⁹ Himma, “Positivism, Naturalism,” pp. 145–61.

⁸⁰ John Rawls, “Legal Obligation and the Duty of Fair Play,” in Sidney Hook ed., *Law and Philosophy* (New York University Press, New York, 1964), pp. 3–18; M. B. E. Smith, “Do We Have a Prima Facie Obligation to Obey the Law?” 82 *Yale Law Journal* (1973), 950–76; Klaus Füsser, “Farewell to ‘Legal Positivism’: The Separation Thesis Unravelling,” in Robert George ed., *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, Oxford, 1996), pp. 119–62.

in “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law . . .” Although this Statute is technically only binding on the International Court of Justice, it is widely accepted as the authoritative statement of the sources of international law.

International conventions

The Charter of the United Nations

The paramount international convention governing the exercise of armed force in the international community is the Charter of the United Nations. Opponents of humanitarian intervention point to Article 2(4)’s injunction that “[a]ll states . . . refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.” They also note Article 2(7)’s declaration that “[n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”

For most international lawyers, this is the end of the matter. The meaning of the UN Charter is clear. A small, but growing, number of international legal scholars, however, beg to disagree. They advance three arguments aimed at reconciling humanitarian intervention with the UN’s *jus ad bellum* regime.

First, they argue that “Article 2(4) does not forbid the threat or use of force *simpliciter*; it forbids it only when directed against the territorial integrity or political independence of any State.”⁸¹ Thus, if a “genuine humanitarian intervention does not result in territorial conquest or political subjugation . . . it is a distortion to argue that [it] is prohibited by article 2(4).”⁸²

⁸¹ Julius Stone, *Aggression and World Order: A Critique of United Nations’ Theories of Aggression* (Stevens, London, 1958), p. 95.

⁸² Tesón, *Humanitarian Intervention*, p. 151. “Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).” W. Michael Reisman with the collaboration of Myres S. McDougal, “Humanitarian Intervention to Protect the Ibos,” in Lillich, *Humanitarian Intervention and the UN*, p. 177.

Most international lawyers dispute this argument on the ground that the drafters of the Charter clearly intended the phrase “territorial integrity or political independence of any State” to reinforce, rather than restrict, the ban on the use of force in international relations. “If it is asserted,” writes Ian Brownlie, “that the phrase may have a qualifying effect then the writers making this assertion face the difficulty that it involves an admission that there is an ambiguity, and in such a case recourse may be had to the *travaux préparatoires*, which reveal a meaning contrary to that asserted.”⁸³ Oscar Schachter is blunter: “The idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms.”⁸⁴

This debate, like so many in international law, turns on how to interpret the relevant international conventions. There are, broadly speaking, two approaches to the question. The advocates of what Tom J. Farer calls the “classicist view” presume that the parties to a treaty “had an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired or has been replaced by mutual consent.”⁸⁵ In contrast, champions of the rival approach, “legal realism,” see

explicit and implicit agreements, formal texts, and state behavior as being in a condition of effervescent interaction, unceasingly creating, modifying, and replacing norms. Texts themselves are but one among a large number of means for ascertaining original intention. Moreover, realists postulate an accelerating contraction in the capacity and the authority of original intention to govern state behavior. Indeed, original intention does not govern at any point in time. For original intention has no intrinsic authority. The past is relevant only to the extent that it helps us to identify currently prevailing attitudes about the propriety of a government’s acts and omissions.⁸⁶

⁸³ Brownlie, *International Law and the Use of Force*, p. 267. See also Michael Akehurst, “Humanitarian Intervention,” in Bull, *Intervention in World Politics*, p. 105; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 183.

⁸⁴ Schachter, “Legality of Pro-democratic Invasion,” p. 649.

⁸⁵ Tom J. Farer, “An Inquiry into the Legitimacy of Humanitarian Intervention,” in Lori Fisler Damrosch and David J. Scheffer eds., *Law and Force in the New International Order* (Westview Press, Boulder, 1991), p. 186.

⁸⁶ *Ibid.*, p. 186.

If one accepts the classicist view, the illegality of unauthorized humanitarian intervention is patent. If one adopts the legal realist view, however, its legal status depends in large measure on the attitude of the contemporary international community towards it.

The second way many legal realists have sought to reconcile humanitarian intervention with the UN's *jus ad bellum* regime is to claim the phrase "or in any other manner inconsistent with the purposes of the United Nations" permits unauthorized humanitarian intervention where the Security Council fails to realize one of its chief purposes – the protection of human rights.⁸⁷ According to W. Michael Reisman, if the Security Council had functioned as originally designed,

it would have obviated the need for the [unauthorized] use of force. States with a grievance could have repaired to the Security Council, which could then apply the appropriate quantum and form of authoritative coercion and thereby vindicate the rights it found had been violated. . . . But the security system of the United Nations was premised on a consensus between the permanent members of the Security Council.⁸⁸ Lamentably, that consensus dissolved early in the history of the organisation. Thereafter . . . [p]art of the systematic justification for the theory of Article 2(4) disappeared.⁸⁹

⁸⁷ "The purposes of the United Nations are . . . [t]o achieve international co-operation in . . . encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 1(3)). "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all" (Article 55). "All members shall pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55" (Article 56).

⁸⁸ Reisman's assumption that the UN security system presupposed a continuation of the wartime alliance between the United States, the United Kingdom, the Soviet Union, France, and China is not without its critics. "During the formation of the United Nations," writes Judy A. Gallant, "numerous states initially hoped to eliminate the veto but quickly understood that it was a precondition to ensuring the very existence of the United Nations. The veto power was the cost that the less influential nations paid for the inclusion of the five major powers in the new collective security system." Judy A. Gallant, "Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order," 7 *American University Journal of International Law and Policy* (1992), 898–99.

⁸⁹ W. Michael Reisman, "Criteria for the Lawful Use of Force in International Law," 10 *Yale Journal of International Law* (1985), 279–80. See also Stone, *Aggression and World Order*, pp. 43, 95–96; W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, New York, 1964), p. 259; Richard B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives," in Moore, *Law and Civil War*, p. 230; W. Michael Reisman, "Coercion and Self-determination: Construing Charter Article 2(4)," 78 *American Journal of International Law* (1984), 642–45; Daniel Wolf, "Humanitarian Intervention," 9 *Michigan Year Book of International Legal Studies* (1988), 368.

On this view, if the Security Council fails to end massive human rights violations, states may do so without authorization.⁹⁰

Classicists respond by noting that the negotiating history of the Charter supports the contention that the conjunction “or” in the phrase “or in any other manner inconsistent with the purposes of the United Nations” was meant to supplement, rather than qualify, the prohibition on the unauthorized use of armed force. In other words, the drafters of Article 2(4) intended to ban states from using force *against both the territorial integrity and political independence* of other states *and* in any other manner inconsistent with the promotion of human rights.⁹¹ They also note that the contrary interpretation has twice been rejected by the International Court of Justice.⁹²

Once again, if one accepts the classicist view, the illegality of unauthorized humanitarian intervention is clear. If one adopts the legal realist view, however, its legal status depends in large measure on the international community’s current attitude towards such interventions. This is examined below.⁹³

The third way legal realists seek to legitimate humanitarian intervention is through an expansive interpretation of Article 39 of the UN Charter. This article states that the Security Council may authorize the use of force in response to “any threat to the peace, breach of the peace or act of aggression.” Legal realists argue that this article, by giving the Security Council jurisdiction over any “threat to *the* peace,” rather than over any threat to

⁹⁰ “The deterioration of the Charter security regime has stimulated a partial revival of a type of [unauthorized] *jus ad bellum* . . . Nine basic categories appear to have emerged in which one finds varying support for [unauthorized] uses of force. They [include] . . . humanitarian intervention.” Reisman, “Criteria for the Lawful Use of Force,” p. 281. See also Tesón, *Humanitarian Intervention*, pp. 157–62; David M. Kresock, “‘Ethnic Cleansing’ in the Balkans: The Legal Foundations of Foreign Intervention,” 27 *Cornell International Law Journal* (1994), 234–37.

⁹¹ “The delegate of Brazil adverted to the possibility of a restricted interpretation of the phrase. The United States delegate ‘made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase “or in any other manner” was designed to insure that there should be no loop-holes.’” Brownlie, *International Law and the Use of Force*, p. 268, n. 6; Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, Philadelphia, 1996), p. 73. Even as notable a proponent of humanitarian intervention as Anthony A. D’Amato concedes the drafters of the Charter intended to ban forcible self-help in defense of human rights. Anthony A. D’Amato, *International Law: Process and Prospect* (Transnational Publishers, Dobbs Ferry, 1987), p. 54.

⁹² *Corfu Channel Case (Merits)*, ICJ Reports, 1949, p. 35; *Nicaragua v. US (Merits)*, ICJ Reports, 1986, p. 97.

⁹³ See below, pp. 46–49.

international peace, permits it to intervene to end human rights violations that lack transboundary effects.⁹⁴

Once again, classicists beg to differ. Massive and pervasive human rights violations, writes Lori Fisler Damrosch,

do not necessarily entail threats to peace and security . . . Economic sanctions and other nonforcible measures are quite acceptable methods for enforcement of the full range of international human rights law, whether or not the human rights violations in question endanger international security. States may adopt such nonforcible measures of their own or through collective mechanisms, including those sponsored by the United Nations as well as by regional organizations. But there is no clear authority to be found in the UN Charter for transboundary *uses of force* against violations that do not themselves pose a transboundary threat to peace and security.⁹⁵

This view, as Damrosch herself acknowledges, is difficult to defend on purely legal grounds.⁹⁶ First, the records of both the Dumbarton Oaks and San Francisco Conferences plainly show the drafters of the UN Charter wanted the Security Council to have wide discretion in determining the existence of any threat to the peace.⁹⁷ Second, and more importantly, the Security Council itself rejects it. The UN's interventions in Somalia (1992), Rwanda (1994), and Haiti (1994) all support the contention that the Security Council presently believes it is empowered under Chapter VII of the UN Charter to authorize the use of military force to end massive human rights abuses.⁹⁸

⁹⁴ "[T]he decision of the Security Council on what constitutes a threat to international peace and security is a political one and subject to its political discretion." Malanczuk, *Humanitarian Intervention*, p. 26; Jost Delbrück, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations," 67 *Indiana Law Journal* (1992), 898–99.

⁹⁵ Lori Fisler Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights," in Damrosch and Scheffer, *Law and Force*, p. 219.

⁹⁶ "My concern about using the Security Council or the General Assembly in the kinds of situations under discussion relates not so much to the constitutional law of the UN Charter as to the wisdom of starting down this road." *Ibid.*, p. 220.

⁹⁷ "[A]n overwhelming majority of the participating governments were of the opinion that the circumstances in which threats to the peace or aggression might occur are so varied that [Article 39] should be left as broad and as flexible as possible." US Department of State, *Charter of the United Nations: Report to the President on the Result of the San Francisco Conference (1945)* (Greenwood Press, New York, 1969), p. 91. See also Jochen A. Frowein, "Article 39," in Simma et al., *Charter of the UN*, pp. 607–08.

⁹⁸ Humanitarian interventions in Liberia (1990), northern Iraq (1991), southern Iraq (1992), and Sierra Leone (1998) neither support nor undermine the proposition that the UN has a right to use military force to end massive human rights abuses. In all four cases, the Security Council acquiesced in, rather than formally authorized, the use of armed force to protect human

In Somalia, for example, the Security Council determined that the civil war was “a threat to international peace and security.”⁹⁹ To be sure, the collapse of the Somali state produced refugee flows that affected neighboring countries. But, as Sean D. Murphy notes,

the Security Council’s resolution made no mention of refugees, and the subsequent intervention was not designed simply to repatriate those refugees. The primary focus of the intervention under UNITAF was, rather, to open food relief lines into Somalia so as to prevent widespread starvation and disease among Somalis *in Somalia* . . . [O]ne benefit of these actions was the creation of conditions for the repatriation of Somali refugees, but to cast the intervention as designed wholly or predominantly to address that issue would be incorrect.¹⁰⁰

In Rwanda, the Security Council likewise determined that the massacre of up to a million Tutsis constituted “a threat to peace.”¹⁰¹ And while it parenthetically noted the “massive exodus of refugees to neighbouring countries,” the Security Council’s preoccupation was with ending the “acts of genocide . . . *in Rwanda*”; “the ongoing violence *in Rwanda*”; “the continuation of systematic and widespread killings of the civilian population *in Rwanda*”; and the “*internal* displacement of some 1.5 million Rwandans.”¹⁰² Again, no impartial observer could conclude that the Security Council thought that it was only the transboundary effects of the Rwandan genocide, rather than the genocide itself, that permitted it to intervene.

Finally, in Haiti, the Security Council determined that the “deterioration of the humanitarian situation in Haiti, in particular the continuing escalation . . . of systematic violations of *civil liberties*”¹⁰³ constituted a “threat to peace” in the region.¹⁰⁴ In addition, although it expressed grave concern

rights. Security Council Resolution 688, UNSCOR, 2982nd mtg., 5 April 1991; Security Council Resolution 788, UNSCOR, 3138th mtg., 19 November 1992; Security Council Resolution 813, UNSCOR, 3187th mtg., 26 March 1993; Security Council Resolution 1156, UNSCOR, 3861st mtg., 16 March 1998; Security Council Resolution 1162, UNSCOR, 3872nd mtg., 17 April 1998; Security Council Resolution 1181, UNSCOR, 3902nd mtg., 13 July 1998.

⁹⁹ Security Council Resolution 688, UNSCOR, 2982nd mtg., 3 December 1992.

¹⁰⁰ Murphy, *Humanitarian Intervention*, pp. 286–87.

¹⁰¹ Security Council Resolution 929, UNSCOR, 3392nd mtg., 22 June 1994.

¹⁰² Security Council Resolution 925, UNSCOR, 3388th mtg., 8 June 1994; Security Council Resolution 929, UNSCOR, 3392nd mtg., 22 June 1994, para. 3. Emphases added.

¹⁰³ Security Council Resolution 940, UNSCOR, 3413th mtg., 31 July 1994. Emphasis added.

¹⁰⁴ Fernando R. Tesón contends that “the Security Council did *not* determine that the situation in Haiti constituted a threat to international peace and security while asserting that it was acting under Chapter VII.” Tesón, “Collective Humanitarian Intervention,” p. 358. This claim is mistaken, as the relevant sections of Security Council Resolutions 841 and 940 plainly show:

for the “desperate plight of Haitian refugees,”¹⁰⁵ there is little evidence that it thought that these transboundary effects alone, and not the “climate of fear” created by the “illegal de facto regime,” gave it the right to intervene.¹⁰⁶

The Charter’s drafting history and recent Security Council practice thus strongly support the legal realist contention that UN-sanctioned humanitarian interventions are lawful exceptions to the Charter’s general prohibition of forcible self-help in international relations.¹⁰⁷

Human rights conventions

The UN Charter’s apparent ban on unauthorized humanitarian intervention does not mean that states are free to treat their own citizens as they wish. To the contrary, most states are signatories to conventions that legally oblige them to respect the human rights of their citizens.¹⁰⁸ Nevertheless, the mere existence of these obligations, as Jack Donnelly observes,

“*The Security Council . . . [d]etermining that . . . the continuation of this situation threatens international peace and security in the region . . . [and a]cting, therefore, under Chapter VII of the Charter of the United Nations . . . [d]ecides . . .*” “*The Security Council . . . [d]etermining that the situation in Haiti continues to constitute a threat to peace and security in the region . . . [and a]cting under Chapter VII of the Charter of the United Nations authorises Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership . . . [and] the prompt return of the legitimately elected President . . .*” Security Council Resolution 841, UNSCOR, 3238th mtg., 16 June 1993; Security Council Resolution 940, UNSCOR, 3413th mtg., 31 July 1994.

¹⁰⁵ Security Council Resolution 940, UNSCOR, 3413th mtg., 31 July 1994.

¹⁰⁶ Security Council Resolution 841, UNSCOR, 3238th mtg., 16 June 1993.

¹⁰⁷ While it is widely accepted that the UN Security Council can authorize humanitarian interventions, there is considerable disagreement about whether a state or group of states claiming to be acting pursuant to *implied* or *ambiguous* Security Council authorizations is acting lawfully. See Thomas M. Franck, “Interpretation and Change in the Law of Humanitarian Intervention,” ch. 6 in this volume; Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime,” 93 *American Journal of International Law* (1999), 124–54.

¹⁰⁸ These include: Covenant to Suppress the Slave Trade and Slavery (1926); Convention on the Prevention and Punishment of the Crime of Genocide (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); International Covenant on Economic, Social and Cultural Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); Optional Protocol to the International Covenant on Civil and Political Rights (1966); American Convention on Human Rights (1969); Convention on the Elimination of All Forms of Discrimination against Women (1979); African Charter on Human and Peoples’ Rights (1981); United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); United Nations Convention on the Rights of the Child (1989). For texts see Ian Brownlie, *Basic Documents on Human Rights* (3rd edn, Oxford University Press, New York, 1992).

does not imply that any international actor is authorized to implement or enforce those obligations. Just as in domestic politics, governments are free to adopt legislation with extremely weak, or even non-existent, implementation measures, states are free to create and accept international legal obligations that are to be implemented entirely through national action. And this is in fact what states have done with international human rights. None of the obligations to be found in multilateral human rights treaties may be coercively enforced by any external actor.¹⁰⁹

It has been suggested that the Genocide Convention (1948), by enjoining its signatories to “prevent and punish” the “crime of genocide,” may be the exception that proves this rule.¹¹⁰ But, as the text of that convention makes clear, the only way in which the contracting parties may legally prevent acts of genocide is by calling upon “the competent organs of the United Nations to take such action as they consider appropriate.”¹¹¹ Such an “enforcement” mechanism clearly does not establish a right of unauthorized humanitarian intervention.

In sum, the most important source of international law, international conventions, seems to permit the UN Security Council to authorize humanitarian interventions by its members. More controversial, however, is the claim that it also allows unauthorized humanitarian interventions.

Customary international law

Some scholars argue for the continued existence of a customary right of unauthorized humanitarian intervention.¹¹² According to them, state

¹⁰⁹ Jack Donnelly, “Human Rights, Humanitarian Crisis, and Humanitarian Intervention,” 48 *International Journal* (1993), 623. See also Jack Donnelly, *International Human Rights* (Westview Press, Boulder, 1993), pp. 57–97.

¹¹⁰ Scheffer, “Towards a Modern Doctrine,” p. 289; United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article I. Julie Mertus goes further: “If the target state is party to any of the relevant human rights conventions, or if the human right can be said to be customary international law applicable to all states, humanitarian intervention can be grounded or categorized as a means of enforcing these obligations on behalf of victims.” Julie Mertus, “The Legality of Humanitarian Intervention: Lessons from Kosovo,” 41 *William and Mary Law Review* (2000), 1773.

¹¹¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article VIII.

¹¹² Richard B. Lillich, “Forcible Self-help by States to Protect Human Rights,” 53 *Iowa Law Review* (1967), 334; Jean-Pierre L. Fonteyne, “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter,” 4 *California Western International Law Journal* (1974), 203–70; Lillich, “Reply to Ian Brownlie,” pp. 229–51; Michael

practice in the nineteenth and early twentieth centuries established such a right; a right that was “neither terminated nor weakened” by the creation of the United Nations.¹¹³ This right remains so secure, they argue, that “only its limits and not its existence is subject to debate.”¹¹⁴

Classicists contest this view on two grounds. First, they contend that the handful of pre-Charter humanitarian interventions (Britain, France, and Russia in Greece [1827–30]; France in Syria [1860–61]; Russia in Bosnia-Herzegovina and Bulgaria [1877–78]; United States in Cuba [1898]; and Greece, Bulgaria, and Serbia in Macedonia [1903–08, 1912–13]) were insufficient to establish a customary right of humanitarian intervention.¹¹⁵ Indeed, such a right was not even invoked, let alone exercised, in the face of the greatest humanitarian catastrophes of the pre-Charter era, including the massacre of 1 million Armenians by the Turks (1914–19), the forced starvation of 4 million Ukrainians by the Soviets (1930s); the massacre of hundreds of thousands of Chinese by the Japanese (1931–45); and the extermination of 6 million Jews by the Nazis (1939–45). It may also be noted that there is little or no evidence that the international community considered such a right legally binding (*opinio juris sive necessitatis*), a *sine qua non* of customary international law.¹¹⁶

J. Bazylar, “Re-examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia,” 23 *Stanford Journal of International Law* (1987), 547–619.

¹¹³ Reisman, “Humanitarian Intervention to Protect the Ibos,” p. 171.

¹¹⁴ International Law Association, *The International Protection of Human Rights by General International Law* (Interim Report of the Sub-Committee, International Committee on Human Rights, The Hague, 1970), p. 11, quoted in Fonteyne, “Customary International Law Doctrine,” pp. 235–36. See also M. Ganji, *International Protection of Human Rights* (Librairie E. Droz, Geneva, 1962); Nanda, “Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti,” p. 310; Bazylar, “Re-examining the Doctrine,” p. 573; M. Trachtenberg, “Intervention in Historical Perspective,” in Laura W. Reed and Carl Kaysen eds., *Emerging Norms of Justified Intervention* (Committee on International Security Studies, American Academy of Arts and Sciences, Cambridge, Mass., 1993), pp. 15–36; Barry M. Benjamin, “Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities,” 16 *Fordham International Law Journal* (1992–93), 126.

¹¹⁵ Brownlie, *International Law and the Use of Force*, pp. 339–41; Thomas M. Franck and Nigel S. Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force,” 67 *American Journal of International Law* (1973), 279–85; Brownlie, “Humanitarian Intervention,” pp. 220–21; Beyerlin, “Humanitarian Intervention,” p. 212; Ronzitti, *Rescuing Nationals Abroad*, pp. 89–93; Malanczuk, *Humanitarian Intervention*, pp. 7–11.

¹¹⁶ J. Charney, “The Persistent Objector Rule and the Development of Customary International Law,” 56 *British Yearbook of International Law* (1985), 1–24; R. Bernhardt, “Customary International Law,” in Bernhardt, 1 *Encyclopedia of Public International Law*, pp. 898–905; G. Danilenko, *Law-making in the International Community* (Martinus Nijhoff, Dordrecht, 1993), pp. 81–109; Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon

Second, classicists contend that, even if one concedes that a customary right of humanitarian intervention existed in the pre-Charter era, it did not legally survive the creation of the UN's *jus ad bellum* regime. If one accepts the strictures of classicism, the only way such a right could have endured was if it were a peremptory international norm (*jus cogens*), i.e. a norm that was "accepted and recognised by the international community . . . as a norm from which no derogation is permitted."¹¹⁷ Yet, as noted above, there is considerable doubt as to whether such a right even existed, let alone possessed the status of a peremptory international norm. Indeed, the very establishment of the United Nations, with its ostensible ban on unauthorized humanitarian intervention, is strong *prima facie* evidence to the contrary.

Of course, the burden of proving the continued existence of a customary right of unauthorized humanitarian intervention is lightened considerably if one accepts a legal realist interpretation of the UN Charter. In addition to avoiding the need to show that the doctrine of humanitarian intervention was a peremptory international norm in the pre-Charter period, one may point to a number of post-Charter interventions – the United States in the Dominican Republic (1965); India in East Pakistan (1971); Vietnam in Kampuchea (1978–93); Tanzania in Uganda (1979); ECOWAS in Liberia (1990–95); Britain, France, and the United States in Iraq (since 1991); ECOWAS in Sierra Leone (since 1998); and NATO in Kosovo (since 1999) – as evidence of its continued existence.

Yet having to meet a lighter burden of proof is not identical to actually doing so. Classicists still note that this alleged right lacks the two recognized attributes of a binding international norm: general observance and widespread acceptance that it is lawful (*opinio juris sive necessitatis*).¹¹⁸ In support of this contention, they point to the highly selective exercise of the right of unauthorized humanitarian intervention in recent history. No

Press, Oxford, 1998), pp. 4–11; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, Cambridge, 1999), pp. 129–203.

¹¹⁷ Vienna Convention on the Law of Treaties (1969), Article 53. See also Jochen A. Frowein, "Jus Cogens," in Bernhardt, 7 *Encyclopedia of Public International Law*, pp. 327–30; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus, Helsinki, 1988); G. Danilenko, "International Jus Cogens: Issues of Law-making," 2 *European Journal of International Law* (1991), 42–65.

¹¹⁸ Franck and Rodley, "After Bangladesh," p. 296; Ian Brownlie, "Non-use of Force in Contemporary International Law," in William E. Butler ed., *Non-use of Force in International Law* (Martinus Nijhoff, Dordrecht, 1989), pp. 25–26; Farer, "An Inquiry into the Legitimacy," pp. 192–95.

state or regional organization, for example, intervened to prevent or end the massacre of several hundred thousand ethnic Chinese in Indonesia (mid-1960s); the killing and forced starvation of almost half a million Ibos in Nigeria (1966–70); the slaughter and forced starvation of well over a million black Christians by the Sudanese government (since the late 1960s); the killing of tens of thousands of Tutsis in Rwanda (early 1970s); the murder of tens of thousands of Hutus in Burundi (1972); the slaying of 100,000 East Timorese by the Indonesian government (1975–99); the forced starvation of up to 1 million Ethiopians by their government (mid-1980s); the murder of 100,000 Kurds in Iraq (1988–89); and the killing of tens of thousands of Hutus in Burundi (since 1993). But while the classicists are correct to highlight the selective exercise of this putative right, their argument, as Dino Kritsiotis notes,

misconceives the theoretical and traditional understanding of humanitarian intervention in international law, which has been framed as a *right* of states and not as an *obligation* requiring action. Inherent in the very conception of a right is an element of selectivity in the exercise of that right. This is in keeping with the right-holder's sovereign discretion to decide whether or not to exercise the right in question and commit its armed forces to foreign territories and explains why it is the right *of* – rather than the right *to* – humanitarian intervention that has taken hold in practice as well as legal scholarship.¹¹⁹

Because the doctrine of unauthorized humanitarian intervention is a permissive rather than a mandatory norm, the selectivity of its exercise is no barrier to its being a customary international law.

The task of showing that a right of unauthorized humanitarian intervention possesses the second attribute of a customary international norm (widespread acceptance that it is lawful [*opinio juris sive necessitatis*]) is more difficult. The long list of UN General Assembly resolutions rejecting such a right argues strongly against this claim.¹²⁰ In 1999, for example,

¹¹⁹ Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention," 19 *Michigan Journal of International Law* (1998), 1027.

¹²⁰ "No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965), GA Res. 2131, UNGAOR, 20th sess., UN Doc. A/6220 (1965).

"Armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." Declaration on Principles of International Law concerning Friendly

that august body passed, by a vote of 107 to 7 (with 48 abstentions), the following denunciation of NATO's intervention in Kosovo:

*The General Assembly . . . Reaffirming . . . that no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights . . . [and] Deeply concerned that, despite the recommendations adopted on this question by the General Assembly . . . [unauthorized] coercive measures continue to be promulgated and implemented with all their extraterritorial effects . . . Rejects [unauthorized] coercive measures with all their extraterritorial effects as tools for political or economic pressure against any country.*¹²¹

More significantly, even states that have intervened to end heinous human rights abuses have been loath to invoke a customary right of unauthorized humanitarian intervention to defend their actions. India's ostensible justification of its invasion of East Pakistan was self-defense.¹²² Vietnam claimed that it was responding to a "large-scale aggressive war" being waged by Cambodia.¹²³ Tanzania defended its overthrow of the Amin regime as an appropriate response to Uganda's invasion, occupation, and annexation of the Kagera salient the preceding year.¹²⁴ ECOWAS's justification of its invasions of Liberia and Sierra Leone was that it was invited to intervene by the legitimate governments of those states.¹²⁵ NATO defended Operation Allied Force on the grounds that it was "consistent with" Security Council

Relations and Cooperation among States (1970), GA Res. 2625, UNGAOR, 25th sess., UN Doc. A/8028 (1970).

"The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country." Declaration on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (1991), GA Res. 46/182, UNGAOR, 46th sess., UN Doc. A/RES/46/182 (1991).

¹²¹ GA Res. 54/172, UNGAOR, 54th sess., UN Doc. A/RES/54/172 (1999).

¹²² Akehurst, "Humanitarian Intervention," p. 96; Franck and Rodley, "After Bangladesh," pp. 276–77; Ronzitti, *Rescuing Nationals Abroad*, pp. 96, 108–09; Wil D. Verwey, "Humanitarian Intervention under International Law," 32 *Netherlands International Law Review* (1985), 401–02.

¹²³ Foreign Ministry Statement (6 January 1979), quoted in Murphy, *Humanitarian Intervention*, p. 104. See also Gary Klinton, *Vietnam's Intervention in Cambodia in International Law* (Australian Government Publishing Service, Canberra, 1989), pp. 15–33.

¹²⁴ Ronzitti, *Rescuing Nationals Abroad*, pp. 102–06; Hassan, "Realpolitik," pp. 859–912.

¹²⁵ Murphy, *Humanitarian Intervention*, pp. 146–58; Karsten Nowrot and Emily W. Schabacker, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone," 14 *American University International Law Review* (1998), 321–412;

Resolutions 1160, 1199, and 1203.¹²⁶ It is irrelevant that these justifications are specious if not false. What is noteworthy is the fact that the states concerned felt they could not appeal to a right of unauthorized humanitarian intervention to legitimate their actions. If there is presently a right of unauthorized humanitarian intervention, it is a right that dares not speak its name.¹²⁷

In sum, even if one accepts legal realism's relaxed attitude to the sources of international law, it still takes a highly selective reading of those sources to conclude that a right of unauthorized humanitarian intervention is presently legal. One must bear in mind, however, that demonstrating that unauthorized humanitarian intervention is illegal is not, unless you are a legal positivist, the same as proving that it is immoral.

Conclusion

Having surveyed the principal arguments about the morality and legality of humanitarian intervention, let me conclude by offering the following three observations.

First, any attempt to separate legal questions from moral ones is doomed to failure. Take, for example, the debate between classicists and legal realists. This debate is ostensibly about how best to identify state intent. Classicists aver that it is best found in the plain meaning of international conventions. Legal realists claim that it is best distilled from the widest range of relevant

J. Levitt, "Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone," 12 *Temple International and Comparative Law Journal* (1998), 333–75.

¹²⁶ Wheeler, *Saving Strangers*, pp. 275–81.

¹²⁷ Belgium was the lone NATO member to claim that Operation Allied Force was a legitimate exercise of a customary right of humanitarian intervention. "NATO, and the Kingdom of Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe, acknowledged in Security Council resolutions. To safeguard what? To safeguard, Mr. President, essential values which also rank as *jus cogens*. Are the right to life, physical integrity, the prohibition of torture, are these not norms with the status of *jus cogens*? They undeniably have this status, so much so that international instruments on human rights (the European Human Rights Convention, the agreements mentioned above) protect them in a waiver clause (the power of suspension in case of war of all human rights except right to life and integrity of the individual): thus they are absolute rights, from which we may conclude that they belong to the *jus cogens*. Thus, NATO intervened to protect fundamental values enshrined in the *jus cogens* and to prevent an impending catastrophe recognized as such by the Security Council." "Public sitting held on Monday 10 May 1999, at the Peace Palace, Vice-President Weeramantry, Acting President, presiding in the case concerning *Legality of Use of Force (Yugoslavia v. Belgium)*." Available at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm> (5 March 2002).

sources. Still one cannot help feeling that the debate is, at a deeper level, about quite different issues. Classicists claim that international law is the lone, best, hope of stopping powerful states from running amok, and view legal realist attempts to weaken its already all-too-feeble restraining effects with barely concealed horror. Legal realists, for their part, fear that international law, in the hands of classicists, risks becoming an irrelevance at best, and a hindrance at worst. They worry that, in a rapidly changing world with precious few resources for legal reform, past expressions of state intent will become obstacles to new expressions of state intent. The relative merits of these two views, however, cannot be decided *a priori*. They depend instead on the character of the system's powerful states and the types of international reform those states are trying to pursue. Legal realism is unquestionably more appealing when the international system is dominated by liberal democracies pursuing a human rights agenda. By the same token, classicism is more appealing when the international system is dominated by totalitarian and authoritarian states pursuing imperialist policies. My point here is that, even in the selection of interpretive methods, legal positivists cannot avoid making moral judgments.

Second, much theorizing about the justice of humanitarian intervention takes place in a state of vincible ignorance. All too often, the empirical claims upon which different ethical theories rest are little more than guesswork. To be sure, the task of testing a claim that this or that humanitarian intervention will (or would) affect human well-being in this or that way is fraught with methodological and practical difficulties. To begin with, there is the problem of identifying a humanitarian intervention's direct and immediate consequences – let alone its peripheral and remote ones. Next, there is the problem of determining how these consequences affect human well-being. While these problems are formidable, they are not insurmountable. One can crudely measure how a humanitarian intervention will affect human well-being by comparing the number of people who actually died in a similar intervention in the past with the number of people *who would have died had that intervention not occurred*.¹²⁸ One way of testing this counterfactual proposition is to (i) find out how mortality rates changed in the course of the humanitarian catastrophe; (ii) discover where

¹²⁸ James D. Fearon, "Counterfactuals and Hypothesis Testing in Political Science," 43 *World Politics* (1991), 169–95; Philip E. Tetlock and Aaron Barkin eds., *Counterfactual Thought Experiments in World Politics: Logical, Methodological and Psychological Perspectives* (Princeton University Press, Princeton, 1997).

in the catastrophe's "natural" course the intervention occurred; and (iii) compare the actual post-intervention mortality rates with the projected ones. If the latter exceed the former, then one can reasonably conclude that the humanitarian intervention (and any others like it) is, on utilitarian terms, just; if the former exceed the latter, then one can assume that the reverse is true. Given the importance of various factual claims to both defenders and critics of humanitarian intervention, empirical studies of this kind are absolutely essential if these disagreements are ever to be resolved.

Finally, most disagreements about the justice of humanitarian intervention are caused less by differing conceptions of the *source* of moral concern than by differing conceptions of the proper *breadth* and *weight* of that concern. As we have just seen, some naturalists support a duty of humanitarian intervention – others do not. Some consensualists support a duty of humanitarian intervention – others do not. Identical meta-ethical premises simply do not generate identical, or even broadly similar, ethical conclusions. But, as we have also just seen, similar views about the proper weight and breadth of moral concern *do* produce similar ethical conclusions. Most egalitarians and universalists, for instance, strongly favor a duty of humanitarian intervention, while most inegalitarians and particularists strongly oppose it. The justice of humanitarian intervention thus seems to turn on how one answers the following questions:

What should the breadth and weight of one's moral concern be?

Should it extend beyond one's family, friends, and fellow citizens?

Should it extend to those nameless strangers in distant lands facing genocide, massacre, or enslavement?

Should the needs of these strangers weigh as much as the needs of family, friends, and fellow citizens?

Inegalitarian-particularists reply that we owe a greater duty of care to our family, friends, and fellow citizens than we owe to nameless strangers in distant lands. This view is intuitively appealing – within limits. Egalitarian-universalists respond that all human beings have a right to life and liberty. Duties to family, friends, and fellow citizens are owed once this moral minimum is secured. This is intuitively appealing – again within limits. Is there any way to reconcile these conflicting moral feelings?

One possible solution is offered by Robert E. Goodin who argues that the inegalitarian-particularist – or "special" – duties we owe our families,

friends, and fellow citizens are simply the ways in which the egalitarian-universalist – or “general” – duties we owe humanity are assigned to particular people.¹²⁹

A great many general duties point to tasks that, for one reason or another, are pursued more effectively if they are subdivided and particular people are assigned special responsibility for particular portions of the task. Sometimes the reason this is so has to do with the advantages of specialization and division of labor. Other times it has to do with [irregularity in the distribution of] the information required to do a good job, and the limits on people’s capacity for processing requisite quantities of information about a great many cases at once . . . Whatever the reason, however, it is simply the case that our general duties toward people are sometimes more effectively discharged by assigning special responsibility for that matter to some particular agents . . . The duties that states (or, more precisely, their officials) have vis-à-vis their own citizens [therefore] are not in any deep sense special. At root, they are merely the general duties that everyone has toward everyone else worldwide. National boundaries simply visit upon those particular state agents special responsibility for discharging those general obligations vis-à-vis those individuals who happen to be their own citizens.¹³⁰

But Goodin also recognizes that if states are unwilling or unable to protect the lives and liberties of their citizens – if they degenerate into anarchy or tyranny – then the duty to safeguard these rights reverts to the international community.¹³¹ In other words, if the duties we owe to families, friends, and fellow citizens derive their moral force from the duties we owe to human beings in general, “then they are susceptible to being overridden (at least at the margins, or in exceptional circumstances) by those more general considerations.”¹³² A very strong case can be made that humanitarian catastrophes such as the Rwandan genocide are just these sorts of “exceptional circumstances.”

¹²⁹ Goodin, *Utilitarianism*, p. 280. ¹³⁰ *Ibid.*, pp. 282, 283.

¹³¹ *Ibid.*, pp. 284–87. ¹³² *Ibid.*, p. 280.