

Rethinking International Law: Hugo Grotius, Human Rights and Humanitarian

Intervention

by

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Dissertation submitted in partial fulfillment of
the requirements for the degree of Doctor of Philosophy in the Department of
Political Science in the Graduate School
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ABSTRACT

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Abstract

The dissertation takes up the subject of humanitarian intervention in contemporary international law. It identifies a problem, The Dilemma of Humanitarian Intervention, which underlies almost all contemporary theorizing about the subject. In an attempt to find a more palatable means to address the problem of the violation of human rights, the dissertation turns to the work of Hugo Grotius. Through an analysis of international law and its theoretical and philosophical bases, a thorough critique of the state of contemporary international law is made. Using a close-text reading of Grotius, alternative theories are established concerning human rights and humanitarian intervention. The dissertation finds that when the concept of human rights is attached to other normative concepts like moderation or faith, the pressure to resolve all questions of justice in terms of rights can be lessened. Further, if contemporary theorists recognize that the opposition of sovereignty and intervention is a structural and institutional feature of international law, and not a necessary feature of the concept of sovereignty itself, the Dilemma may be overcome by not forcing policymakers to choose either a defense of sovereignty or a defense of human rights.

Dedication

To Lorraine

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1. Introduction

This is a dissertation about humanitarian intervention, the use of military force across borders to prevent or stop the violation of human rights. The work contains two interrelated theses, one normative, and one interpretive.

Normative thesis: Humanitarian intervention is a practice that needs to be cultivated within international law. Contemporary international law has moved too far in the direction of asserting sovereignty as the primary value of international law, to the exclusion of intervention. The willingness to use force to stop the violation of human rights should function as a check on irresponsible state practice.

Interpretive thesis: The work of Hugo Grotius speaks directly to the issues raised in contemporary international legal theory. He, as a founder of international law, is in a position to speak to present-day theorists in a language comprehensible to them, but without the difficulties that now attend the concepts of which he made use, including rights, sovereignty and intervention.

Each of these theses needs to be unpacked, and it is that effort that forms the substantive core of this work. Nevertheless, some clarification is helpful to make the subject matter of the initial theses comprehensible.

1.1 *The Normative Thesis*

The basis of the normative thesis is the conviction that international law since World War II has pursued two divergent aims. The first responds to the nature of World War II as a new and frightening kind of war. Technological advancement meant that aggressive war could be coordinated in a way difficult to imagine; different even than the vicious trench warfare of World War I. Worse, from the perspective of international law, statesmen and policy-makers proved surprisingly willing to use those technological

advancements to morally dubious ends. The excesses of the Second World War are found in events like the destruction of Coventry and Dresden, the sieges of Leningrad and Stalingrad, and the fire-bombing of Tokyo.

These excesses were only symptoms of the problem, in the minds of the framers of post-1945 international law. The problem itself was war, and the inability of the international system to prevent war, or contain it once it had begun. The task of international law, then, was to go back to the conceptual drawing board. The League of Nations, on this common understanding, had failed. The reasons for this failure were not unlike the reasons for the failure of the American Articles of Confederation: power was too diffuse. If the restrictions on war were phrased in stronger terms, with a stronger conviction to prevent war as a means to achieve foreign policy aims, then a new institutional arrangement could succeed where the last had failed.

The language of this new institutional understanding was that of sovereignty. A state had a sovereign right to determine what happened within its own borders. The interference of another state would be not just unwelcome, but illegal. Linking sovereignty to this idea of non-interference would provide a justification that could be accepted by powerful states, which would not want the international institutions disturbing their inner workings, just as easily as by weaker states, who wanted the powerful states to leave them alone.

The second aim of post-World War II international law drew its inspiration from a different set of problems. Where the first aim saw the fact of war as the central problem, the second aim saw the activities happening at the periphery of war as a new and pernicious threat. Central among these was Germany's systematic attempt to exterminate the Jewish people, which caught up all those in undesirable political categories. No less important was the Rape of Nanking and, to others, the suspension of basic rights and liberties for conscientious objectors in England, or the internment of Japanese-Americans. All of these reflected a belief that at least some people may be sacrificed or compromised if it would be politically expedient to do so. In some instances, this meant denying the humanity of those who were abused, killed, or mistreated. In other instances, this meant denying the civil and political rights of those people.

These problems had historical precedent, including the controversy over the Armenian genocide that immediately followed World War I. The problem here was not war, but the willingness of policy-makers to set aside the humanity or the rights of people when honoring those rights was inconvenient. The task of international law, on this view, was to define and delimit a sphere of rights that could be said to belong to all people solely in virtue of their humanity. This human rights project had two aims: first, to make difficult or impossible the exclusion and persecution of a people based on some fact of their identity that set them apart from others. Whatever the sphere of rights was,

it must apply to every person without exception. Second, the human rights project aimed to set this sphere of rights apart from the usual arguments over politics, justice, rights, or goods. A human right ought to be an obvious right, one that is especially hard to deny. Establishing a list of rights that met these criteria would be a good first step to preventing a repeat of the horrors of the Holocaust.

These two aims became embodied in different laws: the first in the UN Charter and the second in the Universal Declaration of Human Rights. Both spawned a large amount of subsequent law, and institutions to interpret, carry out, and enforce that law. Between these two aims, however, there lies a tension: sovereignty aims for the ability of states to conduct their internal affairs however they desire. The human rights project will argue that the internal affairs of all states must meet some basic minimal standards in order to be acceptable. The nature of politics being what it is, this tension has erupted time and again into conflict and disagreement about the purpose of international law.

Take, for example, the instance of a state that, for whatever reason, has enacted a policy that will result in the systematic destruction of a people-group. Which aim of international law should a state follow? If it respects the principle of sovereignty, the leaders of that state will often be criticized for failing to take their moral duty seriously. If those state leaders defend the principles of human rights, they will often be criticized for undermining international institutions and the principle of sovereignty. Indeed, something like this pair of conditionals describes the reaction of the international law

community to the actions of the United States during the human rights crises in Rwanda and Kosovo in the 1990s. This is the Dilemma of Humanitarian Intervention, to which we will return in chapters 4 and 5.

The normative thesis of the dissertation, then, is the conviction that the balance of international legal theory has swung too far in favor of the principle of sovereignty. Work must be done to permit humanitarian intervention in a wider variety of cases than are presently allowed.

1.2 The Interpretive Thesis

The interpretive thesis requires slightly more explanation. Hugo Grotius was a Dutch polymath of the early 17th century. He gained his fame from his poetry and plays; law was a side project for much of his early career. In 1625 he produced a book called *De jure belli ac pacis*, or *The Rights of War and Peace*. The book was an instant sensation and, along with Grotius' other work, retained a substantial influence on European intellectual life well into the early 20th century. It was *De jure belli* that earned Grotius the title "the father of international law."¹

De jure belli is a book famous for frustrating the efforts of those who try to understand it. In the first place, it is very long: it runs 800 pages or more, depending on

¹ The best narrative of the life of Grotius remains Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of International Law* (New York: Oxford University Press, 1917). More recent biographies that focus on the intellectual dimensions of Grotius' work include Charles S. Edwards, *Hugo Grotius: The Miracle of Holland* (Chicago: Nelson-Hall, 1981) and Edward Dumbault, *The Life and Legal Writings of Hugo Grotius* (Norman: University of Oklahoma Press, 1969).

the edition.² He preferred a style of reference radically unlike either the medieval scholastics from which he drew, or the modern political theory that was growing up around him. Where Machiavelli might choose a well-placed example to underline a point, Grotius would choose four—or twelve—drawn from different historical periods, or from radically different authors with very different aims in their own work. Further, though he considered his own style to be primarily geometrical, Grotius did not proceed directly through his arguments, as though giving a proof. Instead, he preferred to hold different opinions, examine them, and consider whether they could resist all possible objections before finally giving his consent to one viewpoint.

The world in which Grotius wrote bears strong resemblance to the 21st century world. Economically, his era was one of rapid global expansion, which created new sources for conflict and disagreement. In his early career, while he worked various governmental jobs in Holland, he was often responsible for defending Dutch colonial practices. Holland, as a late entrant to international commerce, often had to deal with the monopolizing practices of other states, and their willingness to defend their monopolies

² The most famous, though by no means first, complaint about Grotius' style was lodged in Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946), 311: "To that seemingly deficient and artificial construction of the treatise [*De jure belli*] there must be added a defect of method which, apparently, has no redeeming feature.... The fact seems to be that on most subjects which he discusses in his treatise it is impossible to say what is Grotius' view of the legal position." However fatal this methodological confusion may be, it does not prevent Lauterpacht, in the latter half of the essay, from identifying eleven principles that may be drawn from Grotius' work. The principles, perhaps unsurprisingly, bear a strong resemblance to those features of international law most important to Lauterpacht. He is neither the first nor the last reader of Grotius to use methodological confusion as a pretext to read the work in a manner suiting his interests. The best collection of these misreadings is in Renée Jeffery, *Hugo Grotius in International Thought* (New York: Palgrave Macmillan, 2006).

by use of force. His earlier work on international law, *De jure predae*, or *On the Law of Prize*, set out general principles to guide interaction both with native peoples and other Europeans who were attempting to open or monopolize markets.

Politically, Europe after the Peace of Augsburg and before the Peace of Westphalia was in a condition of near-permanent war. Europe had fractured into different political units that espoused different variations on Christianity, with different theories of the role of government and war, and there appeared to be little hope of finding any general principles on which all parties could agree. That is to say, the condition of Europe was of a contentious pluralism in which religious differences drove the argument as much as did disparate political beliefs.³

1.3 How Useful Can Grotius Be?

There are two traditional misunderstandings of Grotius that it is important to correct in order to assess his value for the contemporary world:

Grotius is writing only to a Christian audience. This misreading has its basis in fact, since Grotius was himself a Christian and took his primary audience to be Christian.

However, given the historical period in which he writes, the very concept of a 'Christian' writer or a 'Christian' audience is more complicated than it might at first seem. His

³ Gary Bass has recently made a similar argument, though one that begins at a significantly later historical period. By the time intervention is being considered in the 19th century, sovereignty has already hardened into something close to its contemporary form. Therefore an earlier historical period will provide a better place for critique. See Gary J. Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (New York: Alfred A. Knopf, 2008).

religious belief, or that of his belief that makes it into his writing, can be divided into two phases. In the early phase, he made his name as perhaps the most prominent Arminian in the Netherlands. The Arminians were a group of Reformed, Protestant Christians, whose principal rivals were the Calvinists. The main theological issue between the two parties concerned soteriology, or the means by which a person could become a Christian and thus be saved. Their theological debate had a political dimension in the Netherlands, where the majority of the population was Calvinist and the elite was primarily Arminian. The Calvinists wanted to make their viewpoint the established religion of the Netherlands, and leave most matters of church government up to individual congregations. The Arminians, Grotius included, wanted the government to control all the individual churches in order to enforce a policy of tolerance, allowing Arminian and Calvinist churches to exist side by side. The issue came to a head during the Synod of Dordt, which served as a near-complete victory for the Calvinist side. Grotius' patron was killed and he himself was sentenced to life imprisonment.

Through the efforts of his wife, Grotius escaped, and this inaugurated the second major period of Grotius' religious thought. Though foreshadowed in works like the earlier *Meletius*, Grotius dedicated most of his energy to showing that there was a common core of Christian beliefs despite stark confessional differences. He avoided using figures likely to spark argument, never citing Luther or Calvin and rarely citing

Aquinas. For the most part, he restricted his discussion of Christian examples to the first 500 or 600 years after Christ. Grotius' use of Christianity is best understood, then, as an attempt to build unity where none existed in his contemporary environment. He could not assume that his audience would agree with his interpretations of religious history or sacred texts. In addition to this he appealed to ancient history and other religious and philosophical traditions in building his argument. Grotius does not assume an acceptance of Christian truth as the basis for his system. In his time, this was a means of trying to achieve consensus; for contemporary readers, this means he does not require an extensive set of metaphysical beliefs to be compelling.

Grotius writes as a believer in natural law. Like the first misconception, this view has its basis in the reality of Grotius' thought. He does use the law of nature at key points in his argument, and he associates with, and borrows from, key figures in the natural law tradition. However, the Grotius literature has devoted too much energy to the question of whether he 'secularizes' natural law, or turns from an emphasis on natural law to an emphasis on natural rights. Natural law is most important for Grotius at the beginning of his argument, when he wants to set out the basic terms under which the discussion of war will take place. From natural law, he deduces only two principles: self-preservation and sociability. Any other principle attributed to natural law comes inductively. This is an important shift in the evidentiary basis for the law of nature that will be discussed at more length in Chapter 2.

When it comes to the actual discussion of the various principles surrounding war, the law of nature makes infrequent appearance, especially in comparison to the other two sources of law he recognizes, the law of nations and the particular moral commands of religious or philosophical viewpoints. The underlying reason for this is an echo of the reason the term 'Christian' can only be imperfectly applied to Grotius' work: Grotius cannot proceed under the belief his audience shares his assumptions. The most critical argumentative device he uses is the historical example. An example, or several strung together, allows him to make a point about the right principle to draw from all the cases without connecting that principle back to a deeper set of beliefs to which someone might object. The same people who cannot agree on what the general principles of Christianity are would be unlikely to agree on what constitutes 'natural,' especially given the propensity to let self-interest complicate the question.

1.4 Problems with the Normative Thesis

The normative thesis could be subject to its own misunderstanding:

The answer is simply a matter of designing better institutions. The UN Charter and the Universal Declaration, as well as the law and institutions that follow each, are well-designed documents. Each, at least in part, succeeds in achieving the aims for which it was set up, the sovereignty of states and the human rights project, respectively. The problem is not the institutions, but the attempt to realize two contradictory aims at the same time. This is not to say that there are no institutional implications when one

applies Grotius' theory to contemporary international law. One of the aims of the final chapter will be to indicate some areas ripe for further re-examination when Grotius' theory is taken as the starting point. The primary goal of this work is to see the problem correctly. Grotius' theory, because it is not bound to take the conditions of the post-1945 world as normative, allows contemporary theorists to see some elements of difficulty that would otherwise remain obscured. The most important work is to clear away the conceptual confusions that mark much of contemporary theorizing, in order that better work might follow in the future.

1.5 Summary of the Argument

The dissertation has four substantive chapters. The first two consider theories of rights, first from the perspective of contemporary international law, and then from the perspective of Grotius' theory.

Chapter 2 begins by establishing three criteria by which to judge whether a theory of human rights can successfully guide the formation of a list of human rights and the institutions to support those rights. The three criteria are respect for a plurality of beliefs about rights and the good; the ability to separate basic human rights claims from those aims of politics that are important, but not basic; and the ability to say something useful about the political conditions that bring about the need for a theory of human rights in the first place. I create a typology of approaches to human rights, focusing on the work of three philosophers in particular: James Griffin's attempt to find

a broad-based grounding for human rights, Charles Beitz's attempt to defend human rights law as it now stands, and James Nickel's attempt to split the difference and offer a theory of human rights that neither depends on a particular grounding nor issues in a determinate set of institutions. All three approaches are unable, at various points, to fulfill the three criteria. The work of Larry May offers a model as a possible way to meet all three criteria.

May's theory is built on a theoretical superstructure provided by Grotius. Chapter 3 examines Grotius' own theory of rights. I advance the novel claim that Book III of *De jure belli*, often ignored by interpreters, offers the most complete account of Grotius' treatment of rights. Grotius offers a theory which de-emphasizes rights within a normative system. Rights are not the only consideration in politics; by removing the pressure to make every normative claim a rights-claim, Grotius can address the problem of rights inflation. By pointing to other normative concepts, like moderation and interpretive charity, Grotius can address problems typical of contemporary rights theories. Grotius' theory, as developed out of Book III, is then compared to two more typical accounts of Grotius offered by Brian Tierney and Richard Tuck. These two approaches, though they shed light on Grotius' place in the history of ideas, miss the importance of Book III and thus offer a distorted view of Grotius' theory.

The problem of human rights is not simply a problem of designing an appropriate theory and set of institutions: human rights have to compete with

sovereignty and its place in international law. Chapter 4 looks to contemporary theorizing on humanitarian intervention. In particular, I focus on what I call the Dilemma of Humanitarian Intervention, which poses sovereignty and intervention as mutually exclusive concepts. In the chapter, I show how widespread agreement on the kind of legal solution that would be needed and the Dilemma itself are deeply ingrained in contemporary theory, so deeply ingrained that even those who oppose the current, sovereignty-friendly, approach to international law, accept the Dilemma as a basic fact of the world not open to interpretation. I also consider two other issues with direct bearing on humanitarian intervention that are often neglected in legal discussions of the issue, the problem of rhetoric in politics and the divide between nationalist and cosmopolitan theories of responsibility.

Chapter 5 explicates Grotius' theory by demonstrating, first, what is unique about his theory of sovereignty. The run of chapters at the end of Book I of *De jure belli*, which take up whether war can ever be acceptable, the nature of sovereign authority, the question of resistance, and the question of intervention, show Grotius developing a concept of sovereignty very close to the contemporary theory, but without the assumption that sovereignty also implies non-intervention. Through a close examination of those texts, as well as the second half of Book II where Grotius returns to the topic of intervention, it becomes evident that it is at least possible to hold both a strong theory of sovereignty and a theory of intervention. Chapter 6 concludes by re-asserting the

importance of overcoming the Dilemma. If a theory such as Grotius' is at least possible, regardless of whether his particular theory succeeds or fails, then it provides a number of new avenues for research. Questions that are, on contemporary international law, taken to be closed may be re-opened. I propose a possible future extension of Grotius' theory on Contemporary International Law.

2. The Problem of Contemporary Human Rights

Human rights are an important part of contemporary thinking on international law. Both parts of the term are intended to do important work: human rights are human *rights* because they identify the claims that individuals can make against their state.

Human rights are *human* because they focus on protections and abilities that should be given to all people, regardless of their political, social or economic circumstances. This idea has immense intuitive appeal and has been the focus of a concentrated legal effort over the last 70 years that aims to identify and enshrine all such rights in international law. However, because human rights have such an immediate and intuitive appeal, many rights beyond a minimal set have begun to be included in international documents. As difficult as the attempt to ensure that states respect the most basic human rights, the addition of further rights makes the task even more difficult.

Various philosophers have attempted to solve this problem, commonly termed 'rights inflation' or 'rights proliferation,' by appeals to various theories that claim the ability to separate the basic and proper human rights from those other claims that, while important, do not have the status of human rights. The work of James Nickel, James Griffin, and Charles Beitz constitute a typology of approaches to this problem of rights inflation, focusing on the principles guiding rights, the philosophical grounding offered for rights, and the legal institutions that enshrine and enforce human rights. Each of

these approaches has difficulties that render them unable to control rights proliferation and offer a convincing, political useful account of the nature of human rights.

2.1 Optimism and Pessimism about Human Rights

Human rights matter because they identify something that many people recognize, whether they associate themselves with religious or philosophical traditions or no tradition at all: that every human being has value. Some elements of this fact change over time, including who qualifies as a human being and the manner in which they are valued. Nevertheless, the human rights project remains the primary way to recognize and establish this value, and see that good conduct towards human beings is enforced.

A one-paragraph history of the human rights project might go something like this:

The human rights project began as World War II drew to a close. Aware of the extreme costs of the war, and with a dawning consciousness of the depths of the Holocaust, a group of forward-thinking lawyers, politicians, and philosophers assembled. Their task was to formulate a list of the basic rights of man, the minimal standards necessary to treat human beings in a decent way. The list became the Universal Declaration of Human Rights, and was passed by the United Nations in 1948. It was a groundbreaking document, the first codification of human rights into international law. In the time since then, those rights have been extended, in treaties covering civil and political rights, social and economic rights, rights against torture, group rights, women's rights, children's rights. Though there have been some unfortunate weakness or lapses in the system, it is safe to say that the average citizen of the average state is under more legal, political, and cultural protections than at any time in human history.

The paragraph is my invention. It is nevertheless also shorthand for a very common view of human rights, even within the scholarly and political communities that

concern themselves with human rights. This view is popular and does identify at least some of what makes the legal enforcement of human rights important; the view also has a number of flaws.

This chapter is concerned with identifying those flaws. First, I will use the work of some prominent contemporary advocates of the human rights project to establish its potential, and show the extent to which this view contrasts with a more pessimistic interpretation of the failure of human rights law. The pessimistic view offers a first glimpse at the challenges any theory of human rights must face. From this I will draw three criteria on which to judge whether a human rights theory can do the necessary work. Second, one of these challenges is rights proliferation. Rights proliferation occurs when important or desirable goals of social and political life are confused with the essential prerequisites for a minimally decent human life. James Nickel offers a theory to combat rights inflation that neither provides a grounding for human rights nor specifies how those rights should be prioritized in political institutions. Third, I will examine various attempts to ground human rights in an account of human nature, focusing on the work of James Griffin. His work attempts to solve the problem of rights inflation by solving a related problem, the indeterminacy of 'human rights.' Fourth, I will turn to institutional theories, devoting my attention to Charles Beitz's work on human rights. Unlike many other approaches, he insists that a theory of human rights must begin from the legal institutions now in force. All of these approaches have difficulties that render

them unable to serve as full theories of human rights. Finally, in the work of Allen Buchanan and especially Larry May, we will see substantial progress made towards human rights norms that can reliably serve as the basis for political institutions and practice.

The pertinent question is whether or not to view the development of human rights law as an advance, after World War II, or whether to see it as obscuring critical questions that can raise doubt about its efficacy. Human rights are still violated, sometimes quite flagrantly, without enforcement or punishment. Then again, the very existence of human rights standards brings about a language in which violations can be noticed, and a response demanded. The plausibility of both these interpretations leads to both optimistic theories of human rights that downplay the difficulties associated with the human rights project, and pessimistic theories that sometimes despair of making any advancement whatsoever. In the space between these two approaches, it is possible to see what is expected of a theory of human rights, and what it is reasonable to expect theory to do in this case.

The work of Mary Ann Glendon on the Universal Declaration of Human Rights and Samantha Power on the Genocide Convention are good examples of the optimistic view. Both are serious, sophisticated works; the primary interest of both is explaining how their respective laws were substantial achievements, not without flaws, but forming definite positive steps. Both also have to do some considerable work to make the laws

they discuss into landmarks, which includes neglecting or overlooking some valid criticisms of what human rights law has been able to do.

The optimistic approach has a hesitancy to address the conditions under which various human rights documents have emerged.

[Jacques] Maritain [20th century Thomist philosopher in charge of organizing a philosophical consensus around a list of rights which was to become the Universal Declaration] and his colleagues did not regard this lack of consensus on foundations as fatal. The only feasible goal for the UN, he maintained, was to achieve agreement ‘not on the basis of common speculative ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action.’ If there are some things so terrible in practice that virtually no one will publicly approve them, and some things so good in practice that virtually no one will oppose them, a common project can move forward without agreement on the reasons for those positions.¹

Though Glendon notes the difficulties that went into the formation of the Universal Declaration, the notes of caution are generally placed aside in favor of stronger rhetoric about its impact.²

Hersch Lauterpacht, one of the great international lawyers of the 20th century, devoted his attention after World War II to human rights. He favored what he called a ‘bill of human rights,’ which would enumerate the rights held by individuals against

¹ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 77-78. This was far from the only source of difficulty. As Glendon demonstrates, it was far from clear when the work of assembling the Declaration began whether it was supposed to cover only a minimal set of rights and protections or to be a collection of all possible rights to which a person might make a claim. That particular conflict was never resolved, as Glendon discusses at 53-72.

² “This book is the story of how the idea of an international human rights standard [n.b., in light of Lauterpacht’s critique, that she does not refer to it as a law] became a reality, of the obstacles it overcame, and of current threats to the Declaration’s brave attempt to improve the odds of reason and conscience against power and interest.” Glendon, *A World Made New*, xix.

their state, and include legally enforceable mechanisms to ensure those rights were being upheld.³ His advocacy of a legal solution along these lines made him a sharp critic of the Universal Declaration of Human Rights. For Lauterpacht, the most important feature of the Universal Declaration was its lack of legal status. None of the rights claimed are enforceable. In fact, writing in 1948, he recognized that the lack of legal status was an important and intended feature of the Declaration.⁴ As a practical matter, the situation of the average citizen of the average state in the world changed not at all as a result of the Declaration's passage.

Lauterpacht's pessimism is in stark contrast to Glendon's view. On her telling, the Declaration is important as the first attempt to bring the concept of human rights into international consciousness.⁵ From the perspective of moral theory, the Universal Declaration is an unadulterated good. To pass it through the United Nations General Assembly means that states were prepared, for the first time, to countenance the language of human rights. Without this particular document, there would be no human rights project that could receive further elaboration. From a legal perspective, the 'soft' status of the Declaration poses no difficulty. It is in the nature of international law to

³ Hersch Lauterpacht, *International Law and Human Rights* (New York: F.A. Praeger, 1950), 313-394.

⁴ *Ibid.* 397ff: "The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal responsibility to respect the human rights and fundamental freedoms it proclaimed." The pages that follow are an extended list of statesmen quoted saying exactly what Lauterpacht claims they said.

⁵ Glendon, *A World Made New*, Preface, 235-242.

develop over time, to progressively cover more topics under binding legal forms.⁶ Depending on the school of international law to which one subscribes, the Universal Declaration, though not a legal document, could have served as an indication of an emerging custom of acknowledging human rights, perhaps of the kind that is binding on states regardless of whether they consent to the custom itself. Alternatively, the Universal Declaration could provide the map on which later legal documents could work. For philosophy, the Universal Declaration functions as a kind of Rawlsian overlapping consensus. All people, or at least groups of people, can endorse the set of rights listed in the Declaration, but there is, as Maritain quipped, no requirement that people agree as to why these rights are on the list. Further effort can be done to refine this global *sensus communis*, but it represents fertile ground for future work.

Yet for all this, Lauterpacht's argument remains: what moral aim is advanced by a document that prescribes no behavior and establishes no penalty for its violation? How does law understand the long period in which there were no legal obligations concerning human rights, even after the Declaration?⁷ Can the philosophical project treat the question of the grounding of human rights as lightly as Maritain did? The temptation of the human rights project is to always be looking to the future, when the problems with the law and institutions as they exist at any moment will be solved.

⁶ This topic will be discussed at greater length in Chapters 2 and 4.

⁷ Eighteen years lapsed between the Universal Declaration and the next major human rights treaty, the International Covenant on Civil and Political Rights.

Samantha Power's book on U.S. foreign policy concerning genocide raises many of these same questions. She opens the book by telling the story of the Convention on Genocide. Through the work of one enterprising international lawyer, who made his name exposing the abuse of rule of law in Nazi Germany, there arose a wide consensus that genocide represented a new form of crime. Precisely because it was the government-ordered or supported murder of a whole population, it was properly an international concern. Though it took much work, the Convention became law even before the Universal Declaration got off the ground.⁸

Two things are worth noting from her narrative. First, the U.S. took an extraordinary amount of time to ratify the Convention. The U.S. has ratified now, and in any case always claimed to support the values of the Convention, and for this reason, the delay is taken as something lamentable, but not revelatory about the political environment in which laws are made.⁹ Second, the Convention on Genocide has an enforcement provision, which made it markedly different from the Universal Declaration. Enforcement of the convention runs through the Security Council, specifically through the power given to the Council in Chapter VII to undertake the use

⁸ Power relates the story of Samuel Lemkin and his influence on the Convention on Genocide in *Samantha Power, A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 17-61.

⁹ Power, *A Problem From Hell*, 78ff. The passage of the Convention in the United States was the effort of Senators William Proxmire and Claiborne Pell. Proxmire gave a speech in favor of the law every day Congress was in session from 1967 to 1986. The U.S. signed the Convention in 1948, but did not ratify it until 1988.

of military force if it is deemed necessary.¹⁰ In principle, the responsibility to report genocide and the moral obligation triggered once the spectre of genocide is raised should combine to produce a response.

In point of fact, the Convention does not—and cannot—work in the manner intended. Another prominent 20th century international lawyer, J.L. Brierly, ably made the point. In a work surveying the structure of the new United Nations and its likely impact on international law, he identified the veto power given to permanent members of the Security Council as the fatal flaw in producing any international action: “The veto is the price that the United Nations has paid in order to obtain an organ which should have the power to decide and act in a corporate capacity, and it is already clear that the price will be a high one.”¹¹ The very mechanism by which the Convention on Genocide is supposed to be enforced lacks the necessary institutional strength to enforce anything.

2.1.1 The Criteria for a Human Rights Theory

The optimistic approach can sometimes make it seem like the human rights project will make substantial progress with little difficulty. The pessimistic approach can border on a fatalistic acceptance of international politics as it is, unable to change or be changed.

¹⁰ <http://www.hrweb.org/legal/genocide.html>. Article 8 reads: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.” The UN Charter places this under Chapter VII powers.

¹¹ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1949), 104ff. He goes on to note that though there is a provision which requires a state that is party to a conflict to recuse itself from voting, the question of whether the state in question is a party is one that state is allowed to veto. That is, it could be the case that a permanent member should recuse themselves from a vote, but if they do not want to do so, the Security Council is powerless to do anything about it.

Both point to the need to more strictly define what it is reasonable to expect a theory of human rights to do. Human rights theories need to explain and cultivate a collective sense of the most basic facts of what it means to be human; these theories should be able to support a legal order, and embed that legal order in international politics. Though human rights should be aspirational, pointing to the correct moral standards, they should not be so far removed from politics that they cannot be successfully implemented in the world as it is.

Insomuch as the goal of a human rights theory is to accomplish these things, to give a philosophically satisfying account that can be integrated into politics, three features are essential for a theory. First, it has to respect the conditions of pluralism. There is no clear consensus on matters of justice, rights, or the good. This means that if a theory offers a grounding or justification of rights, it must be one that could be accepted by a number of people regardless of their more particular beliefs.¹² In the same vein, pluralism does not imply relativism: in this instance, it explicitly opposes it. Though much can differ across societies and traditions, some basic things must be held in common, or be capable of generating common consent. If that is impossible, then the human rights project faces a more difficult path.

¹² It is not, for this reason, sufficient that a theory be true, or claim to be true. If a true theory of human rights is unable to gain sufficiently widespread support, its political use is thereby limited.

Second, a theory of human rights needs to be minimal. The problem of rights proliferation underlines this point. Any successful theory will need to allow political leaders and citizens to distinguish those claims that are human rights from those that are merely desirable. Merely desirable claims may include issues that are rights, but not human rights, that touch on fundamental matters of the good, or are otherwise deeply important. If human rights are to be a separate subject of inquiry, and not merely one additional place where conceptions of justice can fight against each other, then they must represent something distinct and, therefore, more basic. Human rights may be minimal in number or in the claims they make compared to a full-scale theory of justice, but a human rights theory must provide means by which to tell if a proposed right is a human right or not.

Third, a human rights theory must go at least some way toward explaining why a theory of human rights is required in the first place. A *political* theory of human rights should recognize that whatever the list of rights might be, they are being proposed to a world composed of states that will often ignore or violate those rights. Therefore such a theory will need to explain, in at least general terms, the reasons rights are violated and how those violations can be remedied or lessened. The link may not be obvious, since the Universal Declaration made a general and passing reference to World War II and the Holocaust as the reason it came into existence. Human rights theories need even more than this, because the institutional structure a theory of human rights implies or argues

for will be based on whatever it conceives the standard threats to be. If the principle difficulty of human rights is the acute violation of rights, it implies one institutional mechanism, perhaps based on the need to quickly diagnose and respond to rights violations. If the world is one in which violations are chronic but less severe, it implies a different institutional mechanism. At all events, the decision about which rights are most important to protect will be determined by political factors, so a judgment about political factors must be a part of a successful theory.

2.2 Rights Proliferation and the Theory of Human Rights

A theory of human rights consists, ideally, of three stages: first, a grounding or justification given to the rights structure as a whole. From this emerges the second stage, where one can derive basic principles underlying all rights, with the principles few in number. In the third, one works out discrete, determinate political and institutional frameworks in which to assert and enforce rights-claims. Any theory of human rights faces cross-pressures in the first and third stages. In the first, groundings and justifications are contentious. The explanations that are given must strive to provide one single ground to which, it will be claimed, all reasonable people can assent regardless of their particular convictions. In the third stage, the problem comes from either overspecifying the institutional context in which rights must be discussed and so alienating the supposed universal rights in some cultural contexts, or else mistaking the concept of

human rights for a set of worthwhile political goals, thereby inflating the number of “rights” beyond a credible point.¹³

2.2.1 Rights as Minimums and Progressive Legalization

The solution to this problem, traditionally, has been to introduce the notion of human rights as minimums. That is, human rights are not coterminous with desirable political goals; many things humans may want—that lead to the good life—cannot be on the list. Instead, the list of human rights will be restricted to those necessary for a minimally decent life. One will deliberately avoid saying anything on the first or third stages of human rights theory—because the principles are few, general, and basic, it is assumed that each tradition will be able to produce a reason or reasons to support human rights; because they are left unspecified in their political content, each may be fitted to local circumstances in an appropriate manner. The theory is constructed in such a way as to avoid both cross-pressures precisely by remaining at the second level of a human rights theory. It is the claim of this section that the move to make human rights minimal as a part of a ‘second-level’ theory, in order to reduce the need to clarify

¹³ The three stages are designed as a simplifying conceptual device. Two caveats should be noted: first, a theorist is not necessarily the person best positioned to understand how their theory fits within this typology. For instance, Michael Ignatieff claims that his approach to human rights denies the possibility of finding a single ground for rights, but he also asserts that human dignity is ultimately the grounding for human rights. See Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, N.J.: Princeton University Press, 2001). Other theories do not fit neatly into the typology as I have laid it out. Henry Shue’s theory of standard threats could be understood either as a second-level theory in which the indeterminate nature of the threats is key to its conceptual simplicity, or it could be understood that standard threats matter only inasmuch as they guide institution-building, making it a third-level theory. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1996).

foundations or applications of those rights, in fact recapitulates the problem such minimalism is intended to solve. In this way, we can understand both the inflation of rights over time, and the continual search for philosophical foundations that will be convincing to everyone, regardless of particular beliefs.

The primary driving force behind the continuing legal project is progressive legalization, which sits in tension with minimalism. If human rights are minimums, one would expect any list of them to be short. The Universal Declaration itself dubiously accomplishes this task, as it includes amongst the undisputed rights some like the right to paid holidays. The Universal Declaration itself was not enough in the eyes of international lawyers: the division between the US and USSR led to a differing emphasis on which rights were most important, and the institutional mechanisms to support particular rights needed further specification. This resulted in the two Covenants, one addressing Civil and Political Rights (ICCPR), the other Economic, Cultural and Social (ICECS). The rights themselves were under dispute, since the ICCPR was perceived to have a bias toward western, capitalist interests, while the ICECS leans toward the communists. The problems were not resolved so much as extended, into other covenants that addressed the rights of women, children, minorities, and other groups.

Progressive legalization sits uncomfortably with the idea of human rights as minimums. The human rights project could proceed, on its original conception, because it existed in a gray area that required no particular grounding or institutionalization. As

the number of rights increases, it becomes more difficult to maintain the balance between political goals and justifications for rights that Maritain thought desirable. The human rights project, as the number of rights increases, can no longer make do with a limited ontology as it has to explain and justify the identification of rights in ever more specific spheres of political life. Two developments were made in human rights thinking in order to cope with this larger number of rights: relative normativity and the doctrine of *jus cogens*.¹⁴

Relative normativity is the idea that, even within the community of rights, there are some that are more basic or fundamental. One solves the problem of too many rights by giving to them a weight or scope, so that each has limits of its own and imposes limits on how other rights can be enforced.¹⁵ Everything cannot be counted: the legal project is forced, again, to assert some rights are most important. The conditions that necessitated calling human rights minimums have reappeared. *Jus cogens* is the related idea that a key feature of at least some rights is that they are binding regardless of whether a state or individual recognizes themselves as being bound by those rights. When invoked, *jus cogens* makes it impossible to derogate from the enforcement of a

¹⁴ The two concepts receive a useful exposition in Propser Weil, "Toward Relative Normativity in International Law." *American Journal of International Law*, 77, 1983, pp. 413-442.

¹⁵ The difficulty of making weight and scope judgments is discussed in Basak Cali, "Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions," *Human Rights Quarterly* 29, no. 1 (2007).

right, regardless of the circumstances.¹⁶ The point, again, is not to criticize this legal understanding of the human rights project. Human rights were supposed to be unique in that they were both universal and inalienable: all people had them, and they were bound to be recognized. *Jus cogens* states, again, that some rights must be recognized. Why is there a need to repeat the same theoretical formulation?

Rights are given a unique status within justice, and normative relations more generally. Some are content to say that justice is simply the claiming and enforcement of rights. Further, rights are useful in politics, and especially in law, because they take determinate forms that are useful to legalization: one can identify rights-holders and, to some extent, those who have an obligation to uphold rights. Rights, in short, are a problem law is well suited to solve. Another normative claim, such as a claim to charity or moderation, will be taken to have a “social,” as opposed to “political” cast, desirable perhaps in the realm of ethics but not the business of politics and law.

Human rights are supposed to be something other than a political wish list. But rights are uniquely well suited to be (or most frequently adopted as) law, and integrated into politics; different kinds of normative claims, like the pursuit of some good, already have a secondary status. Relative normativity makes the problem worse: even if one gets one’s political claims recognized as a right, it may still be the case that they are set aside

¹⁶ Derogation is the practice by which a state or individual rejects a custom and claims to be exempt from it. See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006): 392-398.

in favor of others considered to be yet more fundamental. Tremendous political pressure exists, then, for groups and individuals who want to make reasonable political claims to make those claims in terms of rights. A normal request for a change in policy will be less well-received than a claim for a now-violated right, better if the right can be claimed as a human right, and better still if the right can be shown to be fundamental in a way that requires it to supersede other claims. As the number of entrants increases, the number of rights increases, and the pressure to maximize one's claims increases. As a result, it is necessarily the case that philosophers and political theorists must turn again to second-level theories in order to make sense of the maze of rights that are now legally recognized as human rights.

2.2.2 James Nickel and the Second-level Theory

The account of human rights given by James Nickel is an ideal starting place to discuss the implications and problems of contemporary human rights theories. *Making Sense of Human Rights* is a sophisticated attempt to understand and manage the philosophical import of these theories. The book, precisely because it aims to be—and succeeds in being—a faithful defense of the human rights approach as exemplified in the Universal Declaration, provides in one place what, in other accounts, is often scattered or left implicit.

The justification of human rights, for Nickel, relies on what he calls the “Four Secure Claims.” The four claims are “secure, but abstract moral claims in four areas:

- A secure claim to have a life
- A secure claim to lead one's life
- A secure claim against severely cruel or degrading treatment
- A secure claim against severely unfair treatment¹⁷

These claims, taken together, ensure on Nickel's theory a life that is "decent or minimally good."

The Four Secure Claims rest in the second level of human rights theories. No justificatory argument is given, though the Claims all have an intuitive logic behind them. It is possible to imagine the sort of arguments that could be given for each, and indeed the possibility of many potential groundings that could support the Claims. Further, the Claims specify no discrete program of rights, instead giving a set of principles to guide the choosing of particular rights, and suggesting at a very general level the institutional framework needed to secure the Claims. In this sense, Nickel's argument falls within the terms Maritain set out for the Universal Declaration. Looked at from the perspective of the three levels of human rights theories, a second-level theory, such as Nickel's, is based on the premise that a well-articulate set of minimal principles can meet the tasks a human rights theory must accomplish, with the related claim that it can do so because it ignores the questions that would be raised by leaving more room for the first and third levels.

After outlining each of the Four Secure Claims, and giving some idea of their content, Nickel tries to pull them all together:

¹⁷ James Nickel, *Making Sense of Human Rights* (Oxford: Blackwell Publishing, 2007), 62.

The Universal Declaration speaks of the “inherent dignity... of all members of the human family” and declares that: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience.’ The four grounds of human rights that I have proposed provide an interpretation of these ideas.¹⁸

Though he also tries to demonstrate that each of the Four Secure Claims is different and none of them can be derived from the others.¹⁹ It matters less whether Nickel is right about these claims: it may be that human rights are ultimately derived from human dignity and the Four Secure Claims really are basic. But one should remember the warnings given by Richard Rorty and Michael Ignatieff, among others: there is nothing obvious about the claim to human dignity.²⁰ The human rights project ultimately must say something about its grounding or justification; such a question arises naturally.

The larger issue arises when it comes time to derive particular rights from the Four Secure Claims. Nickel is aware of the problem of rights inflation: as rights gain currency in international law, more people will want their own interests protected as rights. The six-stage test he proposes, he argues, can combat the worst excesses latent in the idea of rights expansion.²¹

¹⁸ Ibid. 66.

¹⁹ Ibid. 67.

²⁰ Ignatieff, *Human Rights as Politics and Idolatry*; Richard Rorty, "Human Rights, Rationality and Sentimentality," in *On Human Rights*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1994).

²¹ Nickel, *Making Sense of Human Rights*, 96.

First, each human right must respond to a substantial or recurrent threat: “An early step in justifying a specific human right involves showing that important interests or claims are significantly threatened in the area that the right would protect.”²² Second, one must make certain that the right protects something of great importance: there must be the threat of indignity, not just discomfort.²³ Third, the right must be able to be made universal: it has to apply to all people as such (this raises, of course, the question of whether human rights can belong to, e.g., women, children or minorities). Fourth, the question of whether some weaker norm might be effective.²⁴ Fifth, because rights impose obligations on specific people, it is important to make sure those burdens can be justified. Sixth and finally, the right must be “feasible in a majority of countries”.²⁵

When, later in the book, Nickel discusses the way in which the six-stage test can limit rights inflation, he makes the following telling remark: “It is important to be open-minded to new rights because justifiable lists of specific human rights depend on the problems, institutions, and resources of particular places and times.”²⁶ It is important to read his argument alongside his quasi-acceptance of Henry Shue’s approach to deriving rights.²⁷ Shue’s idea is that under particular circumstances, some rights may imply the

²² Ibid. 71.

²³ Ibid. 74.

²⁴ Ibid. 75.

²⁵ Ibid. 78.

²⁶ Ibid. 97.

²⁷ Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 87-90.

necessity for or existence of other rights. Nickel is prepared to support this, up to a point. Though he doubts that Shue's entire system can be applied, he does admit

It is clear, however, that a variety of supportive relationships are likely to exist within complex systems of rights, and thus many rights may be wholly or partially justified because of the support they provide for other rights that are already accepted as justified.²⁸

On the one hand, there is a six-step test designed to screen out desirable political goals that are not sufficiently basic to qualify as human rights. On the other, there is the possibility that rights may be implied by other rights already agreed upon, and there is the notion that we may not be well-positioned to recognize what rights need to be recognized. Even agreeing that these two positions are desirable, the problem of rights inflation remains.

None of the six steps poses any serious burden to a proposed right, provided that the individuals who want it included in international law are consistent in claiming it as a human right and patient enough to overcome intransigence on the part of states.²⁹ To allow in the rights that, on Nickel's standard, ought to be adopted, one must also allow for the possibility of rights that do not meet the standard as he would desire it. The problem is evident even in the Universal Declaration. The same document that in Article 9 says "No one shall be subjected to arbitrary arrest, detention or exile," says in Article 24 "Everyone has the right to rest and leisure, including reasonable limitation of

²⁸ Nickel, *Making Sense of Human Rights*, 90.

²⁹ This is the way in which the Convention on Genocide comes into being, recounted in the first chapter of *Power, A Problem From Hell*.

working hours and periodic holidays with pay.”³⁰ Even granting that the Universal Declaration covers a wide variety of topics, it is hard to see how these can be speaking of the same kind of thing.

Nickel could remedy the problem of rights inflation by addressing the possibility of removing rights that do not meet the standard he proposes. Holidays with pay are a good, but not basic in his sense. A mechanism which not only screened rights as they are being proposed, but is open to the idea that certain things may be taken as fundamental which, as political, institutional, and social circumstances change, are no longer seen not to be, would be both consistent with his openness to new rights and a means to demonstrating serious resolve to limit rights proliferation. For political reasons, centered primarily on the symbolic force of removing something from a list of human rights, this proposal would have a hard time in any philosophical theory.

Absent a mechanism to revise the list of rights, without the serious possibility that rights could be removed, rights inflation is a necessary consequence of the Universal Declaration model. Nickel’s theory, which has many useful and admirable features, is ultimately unable to place clear, consistent limits on what human rights are. The nature of second-level theories lies behind this problems, which arise in part from the unwillingness to take on the question of foundations. Again, there are understandable political reasons this is not an option—as the controversy over political

³⁰ <http://www.un.org/Overview/rights.html>.

liberalism in a domestic context attests, attributing any foundation at all will result in strong opposition from some quarters. Leaving justification open, while not ideal, may be a politically smart idea. So long as rights are minimums, and given a special protected status in international law, it will be the case that the pressure that leads to relative normativity will increase.

2.2 Rights Indeterminacy and Rights Proliferation: Foundational Theories of Human Rights

Nickel's approach, the second-level, does not work. In following the development of human rights law, he tries to base human rights on four secure claims that, he insists, do not function as a justification or grounding for human rights. In so doing, he hopes to be able to support the current set of human rights and all reasonable extensions of those rights. However, his theory fails both on its own terms, and as a theory of human rights. It fails on its own terms because it cannot resist grounding the Four Secure Claims on a yet more basic account that makes dignity the principal feature of what it means to be human. It fails, as we saw, as a theory of human rights because, in order to leave open the possibility that the current generation may be blind to important moral facts about what it means to be human, it can propose no practical limit to the sorts of things about which people may make human rights claims.

It is this last problem which re-introduces the problem of rights proliferation that the Four Secure Claims was intended to solve. As long as rights function as trumps, or receive heightened priority for political decision-makers, then there will be formal and

informal upward pressures on rights. There will be formal pressures in the sense that, combined with the imperative of the legal project to fill 'holes' in international law via progressive legalization, those who have claims they wish to advance in the political sphere are well advised to describe those claims in terms of rights. The pressures will be informal when, because the status of rights within moral thinking produces an incentive for groups to find current rights that match their desired outcomes and advance their claims in those terms. Moreover, the system as a whole is a kind of Prisoner's Dilemma, in which the very real possibility that someone else will pursue their claim in terms of rights encourages others to do the same, lest they be ignored.³¹

What a theory of human rights should do, then, is give some means by which to sort through these claims. Philosophers make this argument in two primary ways, either, on the first level, by providing a foundation for human rights claims that brings some order to what may or may not be claimed, or else, on the third level, by ignoring the question of foundations and focusing instead on bringing further sharpness to the

³¹ Imagine a state and two citizens, who are in disagreement about whether their state should take a marginal tax dollar and devote it to education or to health care. Both are, on one way of thinking about the matter, routine goods provided by the state, alongside many other goods. If the advocate for one side particularly wants the dollar to go to education, they know that claiming education as a right, not simply a good, would bump education ahead of health care. The health care advocate, knowing this, would have a similar incentive. Each knows that if they press their claim as a right while the other does not, the produces the best outcome for them; therefore both have the incentive to make their claim as a rights-claim, regardless of whether that is the best or most helpful way to think of this issue. The same applies to human rights against other rights or goods.

institutional structures in which human rights claims are adjudicated. This section of the chapter considers first-level foundational claims using the work of James Griffin.³²

Foundational theories share in common the belief that the problem of rights inflation is really a problem of indeterminacy about the term ‘human rights.’ The legal human rights project, as it has developed, studiously avoided asking what human rights are: what it means to be human, in what sense human rights are rights, whether they are minimal or expansive. The inflationary pressure in human rights reflects this inability to sort legitimate claims from illegitimate claims. A proper definition of human rights, grounded in some clear, persuasive account of what it means to be human, can place a limiting condition that allows judgments to be made about how best to proceed.

Griffin offers a foundational account of human rights with three different groundings. All three groundings are non-religious in their nature. In choosing to focus on his account, other accounts that attempt to ground human rights on a particular idea

³² I do not pretend to be able to offer an exhaustive account of human rights, of which there are many theories on offer. The work I am reading and criticizing is, I believe, the best of the work now available. Griffin’s theory, like Nickel’s, cannot succeed in doing what it sets out to do. Along the way, though, it is illuminating, occasionally inspiring, and carries its particular view as far as it can go. Other approaches to human rights that focus on establishing a grounding for those rights include Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996) and Simon Caney, *Justice Beyond Borders: A Global Political Theory* (New York: Oxford University Press, 2005), both of whom focus on well-being and the possibility of human flourishing as the grounding of human rights. Both bear a strong resemblance, in this respect, to the work of John Finnis discussed below. Differing significantly is the work of Nicholas Wolterstorff, who is primarily concerned to establish human rights as a necessary consequence of the relational nature of human beings in Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, N.J.: Princeton University Press, 2008).

of what it means to be a human being, must be put to the side. I will briefly consider two such accounts.

2.3.1 Perry's Religious Grounding

In Michael Perry's work, he argues that all questions of morality are ultimately questions of religion.

Sarah [his fictional character who represents a religious viewpoint]'s religious ground for the morality of human rights reminds us that in the real world, if not in every academic moralist's study, fundamental moral questions are intimately related to religious (or metaphysical) questions; there is no way to address fundamental moral questions without also addressing, if only implicitly, religious questions.³³

A non-religious morality, on his account, must reflect a "cosmology according to which the universe is, finally and radically, meaningless."³⁴ No viewpoint that excludes religion can provide a source for normativity, that is, for preferring one moral view of the world to another.

Perry's critique is, at a minimum, too strong. It aims to prove that there can be no secular ground for normativity at all. However, he overstates his case. In critiquing Ronald Dworkin's idea that human rights should be grounded "in the value we attach to every human being understood as a creative masterpiece."³⁵ Perry argues people do not actually reason in this way: "Did the Nazis value the Jews intrinsically?" His example, however, does not touch Dworkin's point. Recognition of what human beings are

³³ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998), 12.

³⁴ *Ibid.* 16.

³⁵ *Ibid.* 21.

should ground morality, as a normative matter. Whether it does so successfully in all cases is another, different, question.³⁶

2.3.2 Finnis and the New Natural Law

John Finnis' approach, sometimes known as the 'new natural law,' might appear to be a better starting point. Finnis' concept of what it means to be a human being and an agent are clearly based in the tradition of Thomism and Catholic Social Thought. Unlike Perry, Finnis goes to great lengths to show his view does not require a belief in Thomism or Catholicism. In good Rawlsian fashion, he is prepared to assert that the list of 'basic goods' he sees as essential to being human is a list that does not require any particular viewpoint, religious or secular, to ground it. The basic goods, for Finnis, are knowable by reason, and therefore open to people from any background (or none at all) that are prepared to follow his logic.³⁷

The difficulty with Finnis' approach comes in its application. He asserts that "Human or natural rights are the fundamental and general moral rights," which, in form, bears some relation to a typical definition of human rights. Fundamental in his sense corresponds to basic or minimal in the language of human rights; general means the rights of which he speaks apply to all human beings simply in virtue of their being

³⁶ See also the criticism advanced in Michael Freeman, "The Problem of Secularism in Human Rights Theory," *Human Rights Quarterly* 26 (2004).

³⁷ Finnis develops his theory of the basic goods in John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 59-100.

human.³⁸ He also asserts that “the core of the notion of rights is neither individual choice nor individual benefit but basic or fundamental human needs:’ [quoting HLA Hart] in my terminology, basic aspects of human flourishing.”³⁹ The notions of a minimal set of human rights based on needs and human flourishing are opposed. Human rights are not, in the eyes of most philosophers, every good thing that might benefit people; they are the minimal conditions for a decent human life. Finnis’ unwillingness to separate out essential rights from their extensions means his project, at a minimum, will be unable to solve the problem of rights proliferation.⁴⁰ Nor will it do to say that each person has a right to the basic goods because without them there can be no flourishing. The basic goods are not one project onto which human flourishing may be adopted or rejected, depending on one’s individual convictions. It is the basic goods that, on Finnis’ account, warrant actions such as the state regulation of human sexual

³⁸ Finnis, *Natural Law and Natural Rights*, 198.

³⁹ *Ibid.* 205.

⁴⁰ Finnis may think no one is able to get around this problem: “How is this process of specification and demarcation [of rights] to be accomplished? How are conflicts of rights to be resolved? That is to say, how much interference with one person’s enjoyment of his ‘right,’ by other persons, in the exercise of the same right, and of other rights, is to be permitted? There is, I think, no alternative but to hold in one’s mind’s eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specifications of rights as tends to favor that pattern, or range of patterns. In other words, one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing.” See, for example, 219-229. In other words, philosophical theories of human rights may hamstring themselves unless it produces a whole moral vision. One that is essentially negative, focused only on finding a remedy for abuses, must fail. It is unable to produce the end that it wants because it does not know what that end is. For a more sympathetic account about whether such an approach is compatible with a minimal theory of human rights, see Stephen C. Angle, “Human Rights and Harmony,” *Human Rights Quarterly* 30, no. 1 (2008).

conduct. The end result of his theory is more deeply embedded in his assumptions than the formal language of analytic philosophy indicates.

Further, both Finnis' theory and Perry's have a difficulty with the criterion of pluralism, a necessary part of any human rights theory. To be political, a theory of human rights needs to appeal broadly. Perry appears uninterested in offering a persuasive account to non-religious believers: pointing out the logical impossibility of a secular theory of human rights, even if true, sacrifices the political usefulness of a theory for truth. Finnis', though careful to frame his arguments in general and rational terms, has limited appeal outside his own Thomist and Catholic social thought tradition, requiring, as it does, the belief that there are seven, and only seven, basic goods. Griffin, by contrast, will attempt to give a definition of human rights that can respect pluralism without lapsing into relativism, thus meeting the first requirement of a rights theory.

2.3.3 Griffin

On Griffin's account, the biggest problem human rights face is definitional. It is not at all clear what is meant by the term human rights. "The term 'human right' is far less determinate than most common nouns—even than most ethical terms."⁴¹ With some ethical terms, like courage, there is at least consensus as to what the term might look like, even if the specifics differ. Nor can the concern for human rights simply be folded into a larger normative theory, such as a theory of justice. Human rights mean

⁴¹ James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 15.

something much more specific than that. Griffin's theory seeks to define human rights in order to make the term itself more determinate. This process yields two additional benefits. First, a well-defined theory of human rights will suggest connections back to the wider moral world. That a theory of human rights does not exhaust moral considerations is an important feature of any theory of human rights. Second, his use of human rights in this way is made possible because, Griffin argues, a better definition will restrict the possible meanings and content of human rights. By removing options off the table, he is able to offer a potential solution to rights proliferation: only those rights will be recognized which actually respond to the definitional constraints of a 'human right.'

Griffin is ultimately unsuccessful in this attempt. In the first place, it is never quite clear whether Griffin is simply articulating the common idea of human rights with better, clearer language, or whether he believes himself to be giving a novel argument the force of which should be obvious after reading what he has to say. This ambivalence results in the second major problem with his work. After identifying the shortcomings of contemporary human rights documents, he faces the question of whether his theory means he should advocate the disregard of incorrectly-called 'rights.' He fails to bite the bullet and endorse the conclusions of his own theory. In this case, the problem is not simply a failure of nerve, but the limit of philosophical argumentation in this vein. He, like all post-World War II theorists of human rights, takes the human rights project as it

has emerged as a starting point. Griffin is attached to the idea that the current human rights regime, however flawed, is better than none whatsoever. As a result, though his theory generates good means by which to cull the list of human rights, he cannot take any definitive action that would weaken the institutions of rights as they exist.

2.3.3.1 The Grounding of Rights

The manner in which a human right is grounded matters because rights are not the most basic features of the moral universe. On Griffin's account, they are at a 'low-to-middle level' in the structure of morality.⁴² One cannot talk about people 'having' rights in any useful sense unless we can say why they are human rights, that is, the sort of claims available for human beings to make solely because they are human beings. Human rights, if there are any, will be grounded on the more basic facts of what it means to be a human. Griffin rejects the attempt to avoid this level of description, including attempts like Nickel's, by pointing out that all the problems of rights proliferation stem from a failure or unwillingness to define the source and content of rights. "A greater measure of convergence on the justification of human rights might produce more wholehearted promotion of human rights, fewer disagreements over their content, fewer disputes about priorities between them, and more rational and more uniform resolution of their conflicts—all much to be desired."⁴³ Though Griffin imagines

⁴² Ibid. 18.

⁴³ Ibid. 26.

the benefits of further definition come in the form of increased knowledge of respect for and agreement about human rights, it is possible, on his terms, to imagine the opposite effect. Even this would have salutary effects: a more precise definition of rights will require even those who think the right to be incorrectly-defined to be clearer in their objections. If the goals of the theory are all to be found in an improved political discourse, an elegant failure may be nearly as beneficial as a successful argument.

Unlike many theories of human rights, Griffin does not propose to give what he calls a “top-down,” or deductive, account. He intends his account instead to be inductive: “one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them.”⁴⁴ It is important to be clear, though Griffin is obscure about this point early on in his argument, that his “bottom-up” account does not begin with particular rights, what he will later call “applied rights.”⁴⁵ He is concerned instead with basic rights, those that immediately issue from the three groundings he will give.

⁴⁴ Ibid. 29

⁴⁵ Ibid. 50

2.3.3.2 The Three Groundings

The aim of his account is to explicate the human in human rights. He summarizes the tradition of human rights as follows: "Human life is different than the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be... And we try to realize these pictures."⁴⁶ He is prepared to accept this definition as at least provisionally good. Human rights, then, are the things that protect this distinctive form of human standing, which he calls 'personhood.'

Personhood is, for Griffin, the grounding for almost all rights, including all of the most basic rights. One asks the question: what conditions form a prerequisite for being a person? Griffin's answers include life, security of person, voice in political decisions, free expression, freedom of religion, the education which makes informed political and moral life possible—these are the basic rights. Rights cannot be what Finnis wants them to be, the conditions of human flourishing.⁴⁷ In an ideal world, these needs would be met as well, but those are concerns that belong to other areas of moral theory, not to human rights. Only the rights that help individuals attain human status qualify as human rights, and no others.

For Griffin, rights are not, as Dworkin might argue, trumps in an argument, which immediately cancel out other moral claims. Instead, "the best account of rights

⁴⁶ Ibid. 32.

⁴⁷ Ibid. 33-34.

will make them resistant to trade-offs, but not too resistant.”⁴⁸ Here the first note of caution should sound. Griffin’s theory has followed similar accounts to this point. It does better in referencing the moral world outside human rights, though Griffin never develops this portion of his theory to a conclusion. It raises the specter of a compromise in which the unique status of rights is threatened as soon as it is established. Human rights do not function as trumps; if the basic things necessary to assure human personhood do not have this protection, what will?

Griffin’s second grounding is what he calls “practicalities.” For a right to be useful, it must be able to be embedded in an institutional context that will support it. Griffin writes: “to be effective, the line [marking the limit of a right] has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin... We need also to consult human nature, the nature of society, and so on, in drawing the line.” (37) Elsewhere he says that a human right must be “effective and manageable.” (38).

One has to wonder whether this criterion does not fold back on itself. At the beginning of his book, his emphasis is on definitional clarity. A right is a human right if we can give a simple enough account of it. By the end, the emphasis is placed on fit. Troublingly for a normative theory, the fit is with the world as it exists, not as it should be. Within moral theory there is a place, to be sure, to consider the content of human

⁴⁸ Ibid. 37.

rights with respect to the institutions that exist in the contemporary world. But the purpose of a theory of human rights, one might hope, extends beyond this.

The third criterion Griffin offers is minimum provision. Griffin's discussion of this issue is confused, and it is not clear that it adds anything to his account.

Nevertheless, he insists on it as the third grounding for human rights.⁴⁹

2.3.3.3 Conflicts

Rights can come into conflict with other moral considerations. Griffin is aware of this problem and takes steps to address it. He identifies two potential sources of conflict: when a right conflicts with another right, and when a right conflicts with some other moral good. He is careful to argue that a theory of human rights has to address only real conflicts, and not those that appear to be conflicts.⁵⁰ The discontinuity between values within the same system requires what he calls a 'bridging notion,' some concept against

⁴⁹ The best reconstruction of Griffin's argument I can offer is this: He establishes the category by proposing an alternative third grounding, equality. There are many different possible readings of equality, each of which correspond to different theories of justice. Equality, however, does not belong properly to human rights. They do not offer an account of justice or fairness.⁴⁹ The use of equality in a human rights doctrine is meant to be a reflection of the universality of human rights, but this universality is better understood as the guarantee of the rights promised to all people. To use the language of equality is to link human rights up to many different categories in which it does not belong. Griffin, despite numbering 'equality' as third on the list beginning with 'personhood' and 'practicalities,' asserts both that the actual third condition is 'minimum provision' and also that personhood and practicalities are sufficient on their own to generate a list of minimum human rights. This textual problem appears to be a lacuna in Griffin's own understanding of his theory (or possibly a difficulty with copy-editing). In either event, it does not substantially alter the force of his critique.

⁵⁰ On rights-rights conflicts, 58-60; or rights-morals conflicts, 65. For a more skeptical account of this problem, see Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis," *Human Rights Quarterly* 29, no. 3 (2007), who emphasizes the importance of human rights as standards not open to compromise.

which both values may be measured without resorting to anything so simple as a utilitarian calculus.⁵¹

Griffin's explanation of how his account does not resort to utilitarianism is insufficient. He bases his argument in part on the epistemic difficulty of judgment: human beings have no accurate way to calculate the value of one thing relative to another, especially when those things are rights. It may be the case that what Griffin calls 'discontinuity' is more typically referred to as 'incommensurability.' If that is the case, his defense amounts to saying: "I do not know how people make trade-offs between incommensurable goods. I only know that they do." He is clear that neither intuitions nor calculation are sufficient to guide us.⁵² Human rights require more than this. Though Griffin is focusing on the first level of a human rights theory, the other levels still come into play. A human rights theory needs to be able to specify something about how those rights are to fit into legal institutions, and those institutions into the world of politics. If rights are to have no protected status as unique claims, there needs to be some specified mechanism by which those claims can be judged against one another. Griffin might solve the problem of rights proliferation, but it comes at the cost of rendering any judgments about the relative merit of different rights-claims nearly impossible.

⁵¹ Ibid. 68-69.

⁵² On intuition, see 75; on calculation, see 70.

Griffin offers one potential standard that might allow for some judgments to be made about the relative value of rights claims, which he terms “under threatness.” That is, he recognizes that rights are serious moral claims, and should not be put aside even for a great good.⁵³ However, citing the example of Abraham Lincoln’s suspension of *habeas corpus* during the Civil War, he suggests a means to resolve the conflict between two rights: the right that is less “under threat” must give way. Thus *habeas corpus*, though an important right, is less important than the continued existence of the state as a whole, and therefore must be suspended.⁵⁴ The suspension of a right is never good, but it is sometimes necessary.

The last major portion of Griffin’s theory concerns duties. He believes all rights are strictly correlative with duties: every right implies someone has a duty to enforce it, though whose duty can be a difficult matter to discern.⁵⁵ What is possible provides a scope for duties in much the same way practicalities provide a scope for rights; a person ought not be charged with a duty that is impossible to perform. Second, Griffin emphasizes that human rights are not concerned with supererogatory practices: no one

⁵³ Ibid. 76.

⁵⁴ citation

⁵⁵ Ibid. 97. Compare this with the theory of Henry Shue, *Basic Rights*, which gives each person moral responsibility to support the rights of all other people; compare this to the burnout which concerns Norman Geras if the burdens on any one person are too great. For Geras see Norman Geras, *The Contract of Mutual Indifference: Political Philosophy after the Holocaust* (New York: Verso, 1998)). Griffin places two conditions on duties that significantly impact the scope of rights. First, he re-asserts the principle of ‘ought implies can’ at Griffin, *On Human Rights*, 99. Second, at 108-109 he argues that a right must be claimable against someone to issue in a duty.

can have duties to do things that are merely good.⁵⁶ An individual has to do all the duties entailed by the rights other people claim, but cannot be forced to do more. Therefore there will be many important moral principles left to the side. They may be added later, but cannot be a feature of the theory itself.

2.3.3.4 Theory Versus Law

Griffin has come this far with a theory that looks like it is prepared to do serious work in limiting the problem of rights inflation. Rights are only human rights if they protect the essential features of personhood. They are only rights if they come in a practical form given the time and context in which they are being claimed. They only issue in duties if a clear party with responsibility to respect the right can be identified, and only if those duties fall under the scope of minimal necessary conditions. Anything more than this is suspect.

It is not surprising, then, that Griffin is highly critical of human rights law as it now exists. He divides the human rights enshrined in major documents into three categories. The first he terms 'unacceptable cases.' This includes rights that do not have the form of rights, or clearly exceed the warrant of a theory of rights. For example: "The International Covenant on Civil and Political Rights asserts:

'Any propaganda for war shall be prohibited by law' (Article 20.1). It is not clear that this even has the form of a right. It is the denial of a freedom: namely, the freedom to propagandize for war. There seem to be no issues of personhood here

⁵⁶ Not on a theory of human rights, at least. Ibid. 99.

to justify the prohibition. And on any account of human rights, this is an almost incredible claim. Should one be prohibited from advocating even a just war?⁵⁷

The second category consists of ‘debatable cases.’ These are, for Griffin, the sort of rights that may have an entirely plausible standing and moral claims, and even perhaps claims as legal rights, as well, but which do not touch the essential features of human personhood. His clearest example is the rights to a fair legal proceeding: to be informed of the charges against oneself, to have time to prepare a defense, to be free from the obligation to self-incriminate, and others. These are certainly great goods, and certainly a part of any account of justice. On his account, they may even touch on issues of personhood if the person in question has a suspension of their liberty for the duration of a trial. These may be justified as rights because the issues at stake are the very greatest concerns for a theory of justice, so “these guarantees would retain their rationale even if no component of personhood were in the slightest jeopardy.”⁵⁸

One might expect on the basis of this analysis that Griffin’s final verdict would be strongly against contemporary international law, but it is not. Though he notes that most of the rights in question cannot be justified by his account—indeed, his account positively rules them out as human rights—he argues that the difference between his definition of human rights and the standard definition in contemporary human rights law amounts to little. Ultimately: “Most words in a natural language cover some of the

⁵⁷ Ibid. 194.

⁵⁸ Ibid. 199. The third category, which he calls ‘acceptable cases,’ is self-explanatory.

ground they do for reasons of utility and historical accident. Their lack of essential properties does not matter; their having a settled use is enough for there to be criteria for determining whether or not they are used correctly.”⁵⁹ Griffin does not, it is true, therefore accept them without complication as rights. It is important to develop the resources within his theory to define human rights and to assert the value of his definition against other views—after all, human rights need substantive content, and we cannot know what that content should be apart from a theory which supplies it.⁶⁰

Griffin’s theory, taken as a whole, has some persuasive elements. He is right to stress the limitations of a theory of rights in the context of morality as a whole. Rights cannot cover everything, and philosophers should resist the temptation to make them do more work than they can handle. Inasmuch as his work is dedicated to preserving the space for other normative concepts, it is worthwhile. Indeed, he goes beyond this and begins to draw a picture of the interaction of a theory of justice and a theory of human rights. His theory also has the advantage of stressing, from the outset, the importance of determinacy in the concept of human rights as the essential condition for preventing rights inflation.

Nevertheless, his theory fails on two levels. First, on its own terms: he is unwilling, in the final account, to use his theory to do what it was constructed to do. He

⁵⁹ Ibid. 210.

⁶⁰ Ibid. 211.

has a determinate theory of human rights and identifies so-called human rights outside this sphere, but cannot recommend rescinding their status as human rights. In light of this, the reader has two possible responses. Perhaps Griffin's theory is sound up until this last step, at which point he goes in the wrong direction, but one taking up his framework can go in the correct direction. It would be simplest if his last move could just be regarded as a mistake. Alternatively, this last step may be a necessary consequence of earlier stages of his argument. In this case, more will need to be said about the character of this failure.

The ambivalence that hamstring's Griffin's argument is the necessary conclusion of his theory, and not an exception to it. Three portions of his argument, in particular, lead to this conclusion. First, there is his insistence on a "bottom-up" argument. A human rights theory begins, for Griffin, with 'human rights' as the term is understood in the practice of law. This definition carries the very indeterminacy his theory is supposed to resolve. Therefore it is not surprising that he partially endorses this indeterminacy at the end of his argument: the use of human rights in this inaccurate sense is the starting point of his own theory.

This is not an argument against inductive theories as such, but it is a warning about the source material from which a conception of human rights is drawn. Griffin is careful in some parts of his argument to establish a difference between human rights discourse in its contemporary form and the "tradition" of human or natural rights.

Without the commitment to defend all the rights as enshrined in the various human rights document, the argument might have a stronger grounding as a critique.

Second, there is a difficulty with his conception of practicalities. Oddly, this second grounding for human rights recapitulates the same problem as borrowing the meaning of the term 'human rights' from contemporary international law. He is unable to reject contemporary institutions because their own pattern of success and failure marks out the very boundaries of what is practical. As with the first objection, this raises the possibility that no theory that takes the post-Universal Declaration world as a normative starting point can generate enough distance from that world to be properly critical of it.

Finally, though Griffin acknowledges a moral world outside human rights, he is cynical about its prospects to effect change. His insistence that duties not be supererogatory, for example, can be read either as a justifiable pragmatism, or an unwillingness to engage in a more radical form of ethics. Griffin does not believe any theory of ethics can depend on the capacity of people to change:

"The trouble, to my mind, is that the sorts of ethics that can so revolutionize motivation are not plausible, and the sorts that are plausible cannot so revolutionize motivation. But cannot unreachable goals still play an important ethical role? They stretch us, and most of us are undeniably less benevolent than we could and should be. But it is an oxymoron to speak of my adopting what I accept is an 'unreachable goal.'" (73).

Griffin here makes the mistake of assuming that an “inspiring ethics,” in his term, must be of the sort that would convince “a prisoner in a concentration camp to take a stranger’s place in the queue for the gas chamber.” Grotius’ view, by contrast, has space for an inspirational ethics that is less demanding. Griffin thinks only a significant change in motivation can produce a change in politics. But this undercuts the value of the non-human rights moral world at its most critical point. To say more here is to begin the argument for Grotius’ theory.

2.3 Institutional Theories: Donnelly and Nickel

Though second-level theories such as James’ Nickel’s run into conceptual difficulties, any theory of human rights must achieve a balance. Any theory, if it wants to be successful, has to be able to command the respect of people who hold a wide variety of differing beliefs about other, related topics. James Griffin, in this sense, points other philosophers in a useful direction. Human rights do not exhaust the list of rights. Whatever one’s conception of rights, this is but a smaller piece of a conception of justice. That conception is itself a piece of a picture of the good. For a theory of human rights to be useful, it must generate a list of rights; but, as much as possible, that list should be composed without reliance on any particular other conception of rights, justice, or the good. Dispute over these topics is inevitable; it is a feature of politics. Inasmuch as politics is the adjudication of these various claims, nothing is amiss. Human rights, if

they are to rise above the level of mere convenient rhetoric, have to be something different and more basic than the varying claims of different theories of justice.

However, as Griffin also recognized, there is a second meaning of human rights in use. The first takes human rights to be a concept that is a reflection of the reality, truth or nature of what it means to be human. In that case the list of rights should be both fixed and determinable. Perhaps instead human rights are a recognition that to be human, in the sense we find desirable given our time and context, certain things need to be protected. In this different case the list will not be static, changing, usually by adding to, the list of rights, as new threats emerge requiring new responses.⁶¹

The second differs from the first by beginning with a set of facts. In the now 65 years since the formation of the United Nations, a number of different laws, treaties and declarations have come into force. The Convention on Genocide, the Universal Declaration, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and several others have come into force, however tangled the history that led to their adoption, however reluctant particular states were to bring them into force. On this second meaning of human rights, it makes no sense to search for a particular grounding or definition of human rights. Attempting to find some particular wording to which all different conceptions of justice or the good can agree is at best a difficult task. Worse, that attempt is merely replicating the work that was done as a

⁶¹ Nickel, Griffin, Perry, Finnis and others all fit into this first meaning of human rights.

precondition for the human rights law that has come into force: every manufactured definition must do to square itself with the law as it exists. Griffin's definition, to succeed at the task it sets, must tear down some of the work already done in the law. In the name of combating indeterminacy and rights inflation, one has to eviscerate the very documents one is trying to save.

The second approach differs by the intent to begin with the law that exists and then see what work might be necessary for improvement. On this view, the definitions of indeterminacy and rights proliferation can shift. The latter is no longer considered to be a problem. The law governing human rights is incomplete, as much of international law is incomplete. A philosopher who values parsimony will see the addition of more law as a difficulty, but it may well be the necessary step through which the coherence of the whole system can emerge. On the former, determinacy means not just a definition of human rights that can issue in particular rights, properly minimal in character, in a supporting normative system that makes judgments of weight and scope possible, it comes to mean *institutional* determinacy. Every right, no matter how well conceived, no matter how convincing the argument made for its inclusion, will be defended as a part of some institution, legal or political. Human rights must be the sort of things institutions can enforce if they are to mean anything at all. A theory of human rights, then, must anticipate not only what the morally best content of a right would be, but

also the right way to frame it in relation to all the others, knowing that it will be embedded in an institution that has its own characteristic problems and difficulties.⁶²

2.4.1 Donnelly

Jack Donnelly offers a standard account of how human rights fit into politics. Human rights constitute a 'hegemonic political discourse.' On his account, the definition of human rights is rather simple: they are those things which appear and re-appear as concerns in the central human rights documents and treaties.⁶³ One does not need to bother too much with a further definition: rights get their power because they

⁶² Beyond those theories discussed below, other works that focus on the institutional applications of law include John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 2001). Most contemporary international law concerns itself only with the questions of institutional structure and enforcement, and never with the question of groundings. See, for example, Christian Tomuschat, *Human Rights: Between Idealism and Realism* (New York: Oxford University Press, 2008), Ian Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 2003), and Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005). Tomuschat offers an extended history of the development of human rights but devotes no space to the philosophical question of how human rights are to be separated from other rights. In Joshua Cohen and Charles Sabel, "Extra Republicam Nulla Justitia," *Philosophy & Public Affairs* 34, no. 2 (2006), Cohen and Sabel are primarily concerned with the institutional framing of human rights. Against these approaches, see the argument of James Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights," *Human Rights Quarterly* 30, no. 4 (2008). While most institutional theories insist that human rights law must be taken as a whole, Nickel offers powerful reasons to think that human rights may receive a more successful implementation if taken in pieces rather than as a whole.

⁶³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), 38. He has elsewhere referred to this as the 'relative universality' of rights in Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007). His approach to human rights, relying as it does on an analysis of the rhetorical power of language, bears close resemblance to the work of Richard Rorty. See especially Rorty, "Human Rights, Rationality and Sentimentality," For an approach more sympathetic to Donnelly, see Thomas Buergenthal, "The Evolving International Human Rights System," *American Journal of International Law* 100 (2006).

“ultimately rest on a social decision to act as though such ‘things’ existed—and then, through social action directed by those rights to make real the world they envision.”⁶⁴

Contrast this with two paragraphs in which he talks about the Universal

Declaration:

The Universal Declaration, like any list of human rights, specifies minimum conditions for a dignified life, a life worthy of a human being. Even wealthy and powerful countries regularly fall far short of these requirements. As we have seen, however, this is precisely when, and perhaps even why, having human rights is so important: they demand, as rights, the social changes required to realize the underlying moral vision of human nature.

Human rights are at once a utopian ideal and a realistic practice for implementing that ideal. They say, in effect, “Treat a person like a human being and you’ll get a human being.” But they also say “Here’s how you treat someone as a human being,” and proceed to enumerate a list of human rights.⁶⁵

The claim that rights are a hegemonic discourse and the claim that rights serve as aspirational standards cannot be held at the same time. Human rights do serve, as Donnelly says, as a set of minimum conditions. Inasmuch as they do, those rights function as a corrective on politics. The rights point to the important features of humanity to protect; if they are not being protected, they become the standard against which the practice of states can be measured until it improves. Though this reflects the political reality of human rights, it also demonstrates that human rights discourse, powerful and central as it is, cannot be hegemonic in any relevant sense.

⁶⁴ Ibid. 21.

⁶⁵ Ibid. 15.

In claiming that the human rights discourse is hegemonic politically, Donnelly could be arguing two different things. First, he could be claiming that the discourse is hegemonic in the sense that it is a political reality that all states talk in terms of human rights, whether they use that language in a serious or disingenuous manner.

Alternatively, he could be claiming that the passage of so much treaty law governing human rights shows a normative acceptance that these are the correct moral standards to guide decision-making.

In the first case, it is not enough to say that the use of human rights talk is sufficient to show its importance. Political decision-makers have been using normative language as a cover for their decisions for a significant period of time. The fact that states use this language demonstrates very little, if the use of the language does not map onto increased levels of compliance with human rights norms. Often the rhetoric of human rights is only ever rhetoric. In the second case, the failure to fulfill some of the human rights present on the various lists demonstrates that other considerations—from different conceptions of justice and the good, to say nothing of realist calculation or self-interest—play an important role in state decision-making. The Universal Declaration cannot critique practice if there is nothing to critique, and the failure to fulfill human rights does not happen only because we lack knowledge about them. Whatever else a

theory of human rights does, it needs to account for non-compliance.⁶⁶ In this, Donnelly fails to take into account the third criterion for a theory of human rights, the explanation of why human rights are needed in the first place. There is a great deal of state behavior that his theory acknowledges, however tacitly, without integrating.

2.4.2 Beitz and the Defense of Human Rights Law

Charles Beitz offers a stronger version of this argument. He terms his approach a 'practical' one, to distinguish it from theories that rely too much on a naturalistic account of what it means to be human or the belief that a consensus can be found on which to base human rights.⁶⁷ Like other institutional approaches, he is concerned that whatever philosophical theory he generates work with the content of human rights treaties as they are: a theory cannot propose any significant revision of the law. Three arguments are central and distinctive to his approach. The first is his repeated insistence that human rights, as described in the law, are not minimal. The second is his insistence on pluralism as a decisive condition of moral inquiry. There are multiple moral viewpoints, and any doctrine of human rights must recognize and incorporate this fact. Third is his insistence that the proper frame for human rights is as a subset of a theory of justice. Each of these has a decisive moment in his writing; the first in a list of qualities

⁶⁶ Foundational theories do not have this problem because they do not need to assume that the proper content of human rights is obviously available knowledge. Not being linked to the human rights documents as they exist now, they have a freer range to critique international politics.

⁶⁷ The first is an approach like Griffin's; the second bears a resemblance to Finnis' theory.

he attributes to human rights, the second in what he calls 'the model' and the third in what he calls 'the schema.'

Beitz identifies what he considers to be five central features of human rights:

First, broad normative reach: human rights are not minimal. Human rights cover the full range of human activities. This means they do not only cover grave, obvious violations of things like the right to life; they must also extend to guarantee political and cultural participation, as well as economic and social rights.⁶⁸

Second, institutional heterogeneity of requirements: there is no one specific way in which to implement human rights. Many rights have their proper home in the constitutions of the various states. Other rights or parts of rights may require enactment, oversight, or enforcement from non-governmental organizations, trans-state actors, or international institutions like the United Nations.

Third, not all human rights are preemptory: A theory of human rights may not be strongly deontological. Human rights are one kind of political claim among many. In some instances, it may be appropriate to limit the application or enforcement of a rights

⁶⁸ The scope of this claim is open. It may just mean "economic and social rights are human rights, too." Such a position is, of course, compatible with believing that human rights are minimum standards; Henry Shue and James Nickel both offer arguments to this effect (for Shue, see *Basic Rights*, 13-35). On this basis, one may read Beitz to be claiming something yet stronger: whatever the status of those rights might be, it is to something more than a minimally decent life.

claim, for example if the right outstrips the organizational capacity of the government trying to enforce it, or if some other important consideration comes into effect.⁶⁹

Fourth, relativity to human circumstances: human rights are not static and universal, if by that one means that they always have the same content and always need the same institutionalization. As capacities and needs change, the expectations regarding the right change.

Fifth, human rights are not static: the increase in human rights law is not simply working out the implications of the earlier law. New conceptions of human rights touch more and more of average human lives, in a greater number of spheres.⁷⁰

Following this, Beitz turns to the work of John Rawls to construct his practical conception of human rights. The key influence of Rawls is in the language of public reason; for Beitz, human rights work as a freestanding conception and a language in which to talk about that conception.⁷¹ It requires—and allows—no reference back to any particular concept of what human rights are and why they are important. The language

⁶⁹ Here it is appropriate to say something about the ‘utilitarianism of rights’ that is a concern of Loren Lomasky, among others. Most theories of human rights recognize that those rights do not exhaust the moral universe; some combine that with Buchanan’s insight that rights-claims have a deep indeterminacy that requires trade-offs and decisions. Bringing about compliance with a human right is not as easy as saying “do not commit genocide.” At the same time, as Griffin recognized, one needs a stronger barrier than “we should care slightly more about this than our other concerns.” Theories which rely on contemporary international human rights law have to recognize that all the rights contained there cannot have a peremptory character; but this does not settle the question of whether human rights—whatever they are—ought to have a peremptory character. For Lomasky, see Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 18ff. In this he borrows from Nozick in Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974)

⁷⁰ The discussion of human rights is found in Charles R. Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 29-31.

⁷¹ *Ibid.* 99.

of human rights itself provides all the needed content. With this basis, Beitz can take his distinctive turn: human rights discourse proceeds by attending to “the practical inferences that would be drawn by competent participants in the practice from what they regard as valid claims of human rights.”⁷² Human rights treaties provide the starting point; no assumption that there is a collection of ‘real’ rights underlying the treaties is permitted. From here, Beitz can outline exactly how he thinks this discourse would work, in three steps:

1. Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers (“standard threats”) to which they are vulnerable under typical circumstances of life in a modern world order composed of states.

2. Human rights apply in the first instance to the political institutions of states, including their constitutions, laws, and public policies. ... Governments have limited discretion to choose the means by which they carry out these requirements, the scope of discretion varying with the nature of the underlying interest and the range of threats protected against. The government of any state may be said to “violate” human rights when it fails in any of these respects.

3. Human rights are matters of international concern. Governments that violate human rights may place responsibilities on other states to act including 1. Holding states

⁷² Ibid. 102.

accountable through international institutions. 2. States that can act effectively have a *pro tanto* reason to assist another state if it cannot do so itself. 3. States that can act effectively have *pro tanto* reasons to interfere with another state.⁷³

One may well wonder even after this explanation how one knows whether a right has been violated. For this, Beitz proposes a schema:

1. That the interest that would be protected by the right is sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection a political priority.

2. That it would be advantageous to protect the underlying interest by means of legal or policy instruments available to the state.

3. That in the central range of cases in which a state might fail to provide for the protection, the failure would be a suitable object of international concern.⁷⁴

Beitz's theory highlights at least two important features of a successful theory of human rights. First, he reasserts the importance of pluralism. Institutional theories, like second-level theories, recognize that deliberation about moral questions takes place in a world where agreement is limited. As Maritain quipped, everyone can agree to the rights on the condition no one asks why. Political analysis of human rights must begin with the recognition that Maritain's comment does reflect the world in an important

⁷³ Ibid. 109.

⁷⁴ Ibid. 137.

way. Beitz strengthens the usual argument by emphasizing the human rights documents. Whatever else one might know about human rights, one knows that all the signatories were able to agree on this particular formulation of them.⁷⁵ Given knowledge of the history behind the formation of these documents, one knows there is little else about which all the signatories could agree. Pluralism is a reminder that the depth of moral consensus is limited.⁷⁶

In addition to this, Beitz carefully reconstructs an argument for the limited relativity of rights. He is not the first person to make this argument, but the note is an important one to strike in an institutional theory. As capacities grow, and states are able to do more, as technology develops, what it is reasonable to expect a state to do in defense of human rights changes. Further, the content of rights, or their scope, can change as facts about what it means to be human change. The typical forms of coercion and threats to humanity change over time. A theory of human rights that was too static would lack the ability to adapt, and adaptation is the mark of a mature theory of human rights.

⁷⁵ See, for an explanation of this view, Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

⁷⁶ No better example exists than the debate that rages over the right to life, which appears frequently in the literature as a thinly veiled argument over abortion. Does that right imply that states must make abortion illegal? Does it imply that fetuses are not people in a relevant sense? Does it make government intervention even further into the sexual lives of its citizens permissible? Everyone can agree on the right to life, just not on what it means.

2.4.2.1 Difficulties of Beitz's Argument

Despite these reminders, Beitz's argument has two fatal shortfalls. It is unable to stop the proliferation of rights-claims; many features of his theory actually increase pressure to inflate the number of rights. Second, for a theory focused on the way human rights behave within institutional settings, it is vague at key moments about what obligations states and non-state actors have, and what the acceptable bounds of action would be.

On the problem of rights proliferation, the difficulty begins with the first point of his schema: "That the interest that would be protected by the right is sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection a political priority." The judgment about whether a particular wrong constitutes a rights violation is made from the perspective of the person who would be protected by a right. This theory bears a strong similarity to the theory of humanitarian intervention put forward by Fernando Tesón.⁷⁷ That theory comes in for a great deal of criticism because its fundamental assertion requires a hypothetical subjective reconstruction of someone else's thought: we may intervene if we may reasonably assume that the people on whose behalf we are intervening would ask us to do so, were they able.

⁷⁷ Fernando R. Tesón, *Humanitarian Intervention: An Enquiry into Law and Morals* (Ardsley, NY: Transnational Publishers, 2005). The book will be discussed at length in Chapter 3.

As a definition of a human right, Beitz's schema is too vague. Worse, he plays directly into the difficulty of rights proliferation by removing the ability of a rights theory to place outside conditions on the recognition of a right. All that needs to happen, on his theory, is for someone to claim a right and someone else to think it qualifies as a human right. The right, for Beitz, has to be a 'political priority,' because rights on his account are not peremptory, and must only be 'sufficiently important.' Many potential rights can meet such a standard. In Griffin, these might be called important political goals, but would not be rights.

Beitz's own list of characteristically modern rights-violations underlines this point: "unfair pay, lack of educational opportunity and access to medical care, loss of nationality." (30). Unfair pay, though certainly an important economic issue and a central concern for any theory of social justice, does not appear to be a threat qua threat in the same way loss of nationality is a threat. Beitz's desire to defend the list of human rights now included in law sits uncomfortably alongside the need to address inflation and indeterminacy. Otherwise Beitz's theory has no way to prevent human rights from becoming just another locus where theories of justice compete.

In the few moments in his theory where the inflationary pressure might be reduced, some other feature of the theory emerges to reassert the possibility of proliferation. In his explanation of why human rights are not necessarily peremptory, Beitz writes that the resources of any state are limited, so it is unreasonable to expect

that any particular rights-claim will necessarily be able to command all the needed resources from the state. In other words, as Griffin argued, ought implies can: if a state just lacks the ability to enforce a human right, it does not constitute a violation of that right. Politics requires hard decisions and the distribution of scarce resources; so long as the decision is motivated by acceptable political reasons, there is no room for complaint. Beitz undercuts this position in the third part of his model: other states may find the inability of another state to implement a human right to be a violation of that right. Further, this constitutes a *pro tanto* reason to provide aid to the other state. If the aiding state believes the issue is not one of ability, but will, then this confers a *pro tanto* obligation to interfere in the other state. The limiting condition on rights-claims offered at the beginning of the argument is taken away, at least in some circumstances, by the end.

The *pro tanto* language in the third portion of Beitz's model is the second major problem of his theory. An institutional theory, if it will be successful in the sense of the third criterion for a human rights theory, needs to provide some positive guidance about how rights are to be integrated into political practice. The guidance should be of two kinds, indicating both what the responsibilities of certain actors are, and who, precisely, has the obligation to act in the instance of a rights violation. Both factors are relevant: humanitarian intervention, which will be considered later, is a contentious topic in no small part because it is unclear which actors, if any, are able to intervene. Does the UN

have authority to do so? Does NATO or the EU, if the UN is unable or unwilling? Could a collection of states intervene? Just one? Beitz correctly notes that human rights have been institutionalized in many different ways, but a theory of enforcement needs more specificity. Otherwise it amounts to Beitz saying that a theory of human rights should consider the role of politics in the enforcement of human rights without Beitz's theory considering the role of politics.

Further, to write that states have a *pro tanto* obligation to enforce human rights if a violation has been judged to occur is to say too little. It is close to obvious that, as violations become more severe, the ability of other entities to intervene increases. Beitz's approach, insisting that rights cover the whole range of moral considerations relevant to humanity, does not give any criteria by which to judge more and less serious violations, except for the subjective assessment of the actors involved. Simply put, there is no institutional guidance at the moment it is most needed.

2.5 Conclusion: Buchanan and May

2.5.1 Buchanan

At first glance, Allen Buchanan's procedural approach to human rights bears a strong resemblance to Beitz's model. Like Beitz, Buchanan imagines the institutional implications of human rights being worked out among states. Other states in the system, and possibly some international organizations, would be the judges of what constitutes a violation of human rights. He differs from Beitz in adding a standard of legitimacy: for

a state to be able to make judgments about the violation of human rights and what consequences, if any, should follow, the state itself needs to adhere to a minimum set of human rights. In addition to this, the state needs itself to have a measure of legitimacy by satisfying what he calls a “minimum democracy requirement.”⁷⁸

For Beitz, the project of a theory of human rights is just the defense of all the rights treaties that exist, in all their content. For Buchanan, there exist sources outside those treaties to which appeal can be made. This includes moral theory in the form of various conceptions of justice, though as Buchanan notes, these will remain controversial and so be of limited use.⁷⁹ However, Buchanan innovates by noting other, less controversial sources of information. These include using the example of successful or failed past institutions as a guide to decision-making over human rights and their enforcement, and what he calls social epistemology. The latter is new knowledge that must be generated, “for example, about the comparative effectiveness of alternative due process mechanisms or about which social and economic rights must be realized if political participation is to be meaningful.”⁸⁰ This differs significantly from a typical

⁷⁸ Unlike Beitz, Buchanan is also careful to point out that basic human rights are different than the all-things-considered demands of justice. “More important, if no political entities that now exist or are likely to exist in the foreseeable future would meet its conditions for legitimacy, a theory cannot serve any useful function as a guide in the practice of conferring benefits of legitimate statehood. ... By setting its requirements too high it would set a goal that states would not take seriously.” Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), 268. For the general point, see 187ff.

⁷⁹ Allen E. Buchanan, “Human Rights and the Legitimacy of the International Order,” in *Human Rights, Legitimacy, and the Use of Force*, ed. Allen E. Buchanan (New York: Oxford University Press, 2010).

⁸⁰ *Ibid.*

philosophical account precisely because it places a limit on what abstract theorizing can do. One has to have knowledge of how the world works in order to make reasonable, tractable moral claims for human rights.

Buchanan's theory, at least in outline, appears to meet the three conditions of a human rights theory. It addresses the subject of pluralism, by noting that differing conceptions of justice will make the development of human rights norms and institutions more difficult. Rather than lapse into giving one dominant account of human rights or asserting pluralism implies no meaningful agreement can be reached on moral issues, he goes outside moral theory to find potential sources to which states and individuals may appeal on an equal footing. It succeeds in achieving minimalism through its insistence that not all claims to human rights be treated as rights; in restricting the number of states that can judge, he attempts to limit the number of specious claims made on behalf of other interests. Further, the conditions of legitimacy themselves suggest a minimum set of rights that need to be enforced. Finally, it does integrate a specifically political element in his design of institutions that are to defend rights and adjudicate claims of rights violations, given the world as it is.

The difficulties of his approach come in the specific application of this theoretical framework to particular political difficulties. The work of Buchanan and Keohane on the preventive use of force highlights the difficulty in bringing in all relevant considerations. Buchanan and Keohane propose that in certain high-pressure situations in which time is

of the essence, states may be permitted to violate the usual rule prohibiting preventive uses of force. In order to bring this action within the scope of institutional rules and to give it legitimacy in the eyes of the international community, they propose two mechanisms, one before the use of force, the other after. The prior action would require entering into an agreement with a “diverse body of states” which would provide a provisional authorization for their action. After the fighting was over, the state would then submit a record of its decisions and actions to those states with which it entered into an agreement, to determine if those actions were within the correct bounds.⁸¹

The difficulty of this approach is that it significantly raises the costs to a state considering a preventive action. Indeed, this is part of the point: by raising costs and institutionalizing the practice, those states that might want to engage in preventive action under a spurious context will be dissuaded. However, a convincing argument can be made that states already face a significant number of domestic and international costs prior to any use of force.⁸² For states of good will, raising their costs does nothing except provide one more forum in which they might be found incorrectly to have overstepped the reasonable use of their power.⁸³

⁸¹ Buchanan, Allen and Robert O. Keohane. “The Preventive Use of Force: A Cosmopolitan Institutional Proposal.”

⁸² These costs include the difficulty of managing public opinion over any war, much less one not clearly in the national interest, criticism of the use or avoidance of international institutions, and speculation about the ‘real’ motivations for action, among others.

⁸³ The underlying institutional mechanism here, in fact, is also utilized by Simon Chesterman and others who want to stamp out the practice of humanitarian intervention: raise enough institutional hurdles, and the practice will die out. This topic will be discussed further in Chapters 3 and 4.

2.5.2 May

The most successful contemporary approach to human rights is that of Larry May. Human rights, in his view, have a curious feature: though they are generally held to be rights each person has simply because they are a human, and must therefore be peremptory in character, the implementation of rights also has a consensual element. If human beings have a right to life, then they have it, regardless of whether that right is violated; but to institutionalize a right, or to have it play a role in moral theory, individuals and states must recognize and accept that it has this content.⁸⁴ How precisely one builds a theory of human rights out of the conundrum is unclear.

May's solution consists in two parts, an attempt to explain what sort of character a theory of human rights must have, and to simplify the problems of institutionalization by focusing on one narrow portion of the human rights project, international criminal law. May discusses, at length, the historical antipathy between natural law and positivist theories of human rights.⁸⁵ The former emphasize the obligatory nature of human rights but provide no reason to support their theories unless one already accepts the premises behind the theory.⁸⁶ The latter give reasons to follow the law of human rights, but no deep explanation of why.

⁸⁴ Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 18, 27.

⁸⁵ *Ibid.*

⁸⁶ This is, in a similar way, the problem of Michael Perry or John Finnis.

May develops an approach that relies on a naturalistic element to provide a minimal moral theory that generates a small number of human rights, and relies on positivism to give an account of legitimacy which gives those rights legal and political force.⁸⁷ He approvingly quotes the work of H.L.A. Hart, who “provides a good bridge between traditional natural law theory and traditional legal positivism. He talked *explicitly* of a minimum content of the natural law on which legal norms based their efficacy, although not their justification.”⁸⁸ May’s willingness to embrace this position allows him to take a unique approach to the institutionalization of human rights. Positivists, on his account, have a difficult time embracing minimalism, because a minimalist must be able to restrict the range of possible agreements that can be made. Positivism is committed, on at least some level, to embracing whatever comes out of a legitimate process of agreement.⁸⁹ Yet even granted this important role for minimal moral norms, they must be connected back into that system of agreement, or else they will lack legitimacy. Minimal moral norms without this element are the equivalent of Perry’s insistence that only theists can believe in human rights: it may be a correct description of the moral world, but is unable to be action-guiding in the pluralistic political world.

⁸⁷ Ibid. 32-34.

⁸⁸ Ibid. 30.

⁸⁹ Ibid. 32 ff.

The interesting work in his theory comes when he applies the minimal morality to the institutions of international criminal law. What sort of violations might international law, in the form of tribunals or the work of institutions like the ICC, be particularly able to address and remedy? May lists three:

Crimes that will not be prosecuted domestically because of a weak State
Crimes that are committed by the State or with significant State complicity
Crimes that target a whole group, not merely a solitary human person.⁹⁰

Everything else is excluded. In more particular terms, his three categories of violations include peremptory norms against “genocide, apartheid, slavery, and torture,” as well as “the violations of the right to physical security and subsistence”.⁹¹ Institutionally, tribunals are to have very limited scope: indeed, the smallest possible scope that is compatible with meeting these obligations. Further, May is skeptical of a move in international criminal law to give more credence to the claims of victims, not because they are not relevant to a full theory of justice, but because they are beyond the scope of the institution.⁹²

May’s theory combines a number of features of human rights theories that have proven to be desirable. It makes a plausible claim for a minimal number of rights that does not rely on any particular account of moral reality, but rather utilizes the idea of a minimal common morality, tied to consent, to get the institutional project off the

⁹⁰ Ibid. 7.

⁹¹ Ibid. 87, 64.

⁹² Ibid. 84-85.

ground.⁹³ It recognizes a place for justice and a larger theory of the good, without making every claim pressing for every institution. It picks a narrow institutional goal and accepts all the material necessary to aid that institution, while rejecting other considerations that would dampen the effectiveness of international criminal law. Indeed, May's theory has an appealing range of historical reference, to the important features of the history of just war thinking. The central figure that directs his thinking on just war is Hugo Grotius. It is from Grotius that May draws his idea of a minimal natural law, and the manner in which such a minimal morality could be integrated into the world of international law.⁹⁴ May's reading of Grotius contains some flaws, particularly his analysis of the role virtue and honor play in Grotius' moral theory, but to explain the weaknesses of this part of his interpretation, we must turn to Grotius.

⁹³ One might object that this is, ultimately, the same position Maritain and the Universal Declaration thought they were holding. May's position, like Maritain's, is a pluralist one; unlike Maritain's, it is also minimalist, and is concerned with the narrow question of how some particular set of rights fits into a given institutional structure.

⁹⁴ May's most extensive discussion of Grotius is in Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), 48-66.

3. Hugo Grotius and Moving Beyond Rights

Introducing Grotius into the topic of human rights requires two separate, but related, arguments. First, Grotius must be distinguished from the Grotius literature, which often asks questions tangential to Grotius' interests. Second, a case must be made that Grotius' approach to rights can meet the three criteria laid out for a theory of human rights, and this in a way that is significantly different than even relatively successful human rights theories. In this chapter I will attempt both these tasks.

On the first point, the literature on Grotius is often focused on answering questions about his place in the history of ideas. Such an approach can be useful in demonstrating his originality or lack thereof, as well as the implications of his theory for subsequent theorists of international law. However, that approach often leads to an emphasis on the wrong portions of his work: the majority of scholarly work looking at Grotius on the topic of rights focuses on the Prolegomena and first chapter of Book I. The thesis of this chapter, as it relates to Grotius, is that Book III, taken as a whole, constitutes Grotius' most important statement on the relationship between rights, the law, and politics. Many of the themes that emerge in Book III are present in earlier parts of the work, but if one draws only from those parts, the novel character of Grotius' approach is easily missed. Any interpretation that does not grapple with Book III cannot, therefore, outline the whole of Grotius' theory.

On the second point, the content of Grotius theory consists of two interrelated claims about the nature of rights. First, rights are best understood as permissions: one *may* do something or claim something, but it is by not *necessary* to do so. A right remains even if it is unclaimed. Second, rights cannot be interpreted and understood without appealing to other normative concepts. The most important such concepts for Grotius are moderation and faith, though he does mention others. The presence of these other concepts functions as a limit on the rights themselves, pointing to situations where the right can—or should—remain unclaimed. These concepts, in addition to limiting the scope of rights, are containing limits for their own application. Grotius emerges with a theory of rights that is central to his approach to politics and justice, without those rights overwhelming legal or political institutions. It is this framework that can then be usefully applied to the topic of human rights.

The chapter will address these claims in five major stages. First, it will examine Larry May's work on Grotius, both in the way Grotius is used, as well as May's conceptual confusions that limit the usefulness of Grotius to his work. Second, it will take up the central text for Grotius' theory of rights, Chapter 10 of Book III. In an examination of the passage in which Grotius turns rights theory on its head, the present chapter will also look to the three types of law Grotius uses in his arguments. Building on this, third, an examination of the way the second half of Book III rewrites the first half will indicate the nature and importance of moderation and faith as conceptual aids to a

correct theory of rights. With Grotius' theory fully developed, fourth, it is then possible to turn to more standard accounts of Grotius as they appear in the Grotius literature. Taking their key texts, including the Prolegomena and Chapter 1 of Book I, it is possible to show that such theories, however sophisticated they may be, miss the importance of Grotius' contribution. Finally, fifth, Grotius' theory will be tested against the three criteria of a theory of human rights to demonstrate the ways in which it can succeed where other theories have had difficulty.

3.1 Larry May's Use of Grotius

The last chapter gave reason to despair of human rights theory. One can propose a theory that centers around a definition or grounding of what human rights are, but these theories have a difficult time grappling with the problem of pluralism. Alternatively, one can try to take human rights law as it exists, but the rights listed function at so many different normative levels that the project of human rights as minimums must be abandoned. Worse, on these views it appears to be the case that the debate over human rights is yet one more location to have all the arguments of politics or a theory of justice, rather than a distinct realm of moral theory where consensus is easier to achieve. The only theory, amongst those surveyed, which resolved some of these difficulties was that of Larry May. He, unlike many other theorists, was able to prioritize some human rights over others and implement them in a restricted institutional space.

May's approach rested on a theoretical appreciation of Hugo Grotius. His Grotius makes a number of significant and original additions to the just war tradition. The first is a distinction Grotius draws in his earlier *De jure praedae* between what he calls 'primary' and 'secondary' law of nations. Primary law of nations is those principles, shared by all nations, which are fixed points of moral agreement that reflect the shape of the law of nature. Secondary law of nations is those agreements that states come to about what practices they will permit and encourage.¹ This allows Grotius to secularize natural law: the law of nations no longer serves just as a sub-species of God's eternal and immutable law. By creating a space for the consent of nations, Grotius makes possible a modern approach to international law, from formal institutions and treaty law to less formal legal practices, like Customary International Law.² The tension that Grotius builds in between the law of nature and the law of nations--or the law of nations in its primary versus secondary senses--reflects the odd character of many agreements about international law. The agreements themselves are strictly voluntary, but the force of the law is not merely its consensual status: there is some moral claim behind it that demands a particular response.³

¹ May, *War Crimes and Just War*, 50-51,

² *Ibid.* 60-61.

³ *Ibid.* 52: "What Grotius seems to intend by speaking of the laws of nature is to carve out a set of moral norms that apply to all people at all times. Such moral norms could then ground principles of international law. To say that international legal norms can be grounded in natural law principles is not to say that there is a straightforward derivation from morality to legality. Indeed, Grotius does not say there is; nor does he say what else is needed to make this move." May's last claim is wrong: an understanding the three types of law Grotius surveys will explain why there can be no straightforward derivation of legality from morality.

May also appreciates Grotius' contribution to the concept of humanity, which he sees at the basis of humanitarian law and the law of war. It is the ability of people to exceed the pessimistic viewpoint of realist theories of war that opens up space for higher expectations. However, May thinks Grotius oversteps what can reasonably be expected: "For Grotius, acting honorably is going beyond what is required by the law of nations and even beyond what is required by justice... Grotian honor is instilled in soldiers by particular societies, but what is instilled is a higher standard than that which ordinary people hold themselves to."⁴ May is right to point to the law of nations/law of nature distinction as one of crucial importance, and to recognize that in his desire to expand beyond what is merely permissible, Grotius lays the groundwork for a humanitarian vision of international politics. He misses the mark by reading Grotius' demands for honor and virtue as establishing a higher morality than the average citizen is able or willing to hold. Grotius' theory reaches much more broadly, to the beliefs and behaviors of all people.

3.1.1 Grotius' Theory of Rights

Even given May's use of him, Grotius, at first blush, seems like an odd figure around whom to build a theory of human rights. 'Human rights' is an anachronistic

Regardless of this difficulty, May does correctly note that the law of nature is used to prevent the voluntary agreements of international law from becoming simply whatever principles states want to defend.

⁴ Ibid. 55.

concept to import into Grotius' 17th century world. Yet there are some reasons to think he could be useful even here. Richard Tuck identified Grotius as a supporter of a common morality built around minimums.⁵ Grotius is interested in the interaction between a theory of morality and the political and legal institutions that exist. At a broad level, his work *De jure belli ac pacis* is an attempt to fit moral theory into the existing political and legal institutions of his time.

Though he does not have a theory of human rights as such, Grotius' theory of rights is of considerable interest for contemporary philosophers. It includes the following five elements:

1. Rights are entitlements or claims to particular things or actions. But the term 'rights' itself covers two distinct phenomena: they compose, on one level, those things granted by the consent of a state or a community of states. Rights also reflect those things without which human life is impossible. In this second sense, they compose a set of conditions necessary for a minimally decent human life, not unlike human rights. It is important to separate these two senses, but one must remember that in many practical situations, it may be difficult to tell whether a right is of the consensual kind, or the necessary kind. Nevertheless, there is a sense in which at least some rights are not conditional on consent.

⁵ Richard Tuck, *The Right of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999), 102. Tuck incorrectly identifies the source of this minimalism as a response to early modern skeptical theories. Tierney offers a useful correction to this view, discussed later in this chapter.

2. Though there is a minimal set of rights that could command widespread or total agreement—this is the essence of the law of nature in Grotius—no set of beliefs in the world contains only that minimum content and nothing else. Every person has a set of particular moral beliefs, whether in the form of a religion, philosophy, or something else. Moreover, no one begins in a state of nature: in a human life each person is surrounded by legal and political institutions from the moment of their birth. Almost all of these particular moral viewpoints include additional rights or duties, though the content of these duties will vary. That is, each of these viewpoints will include rights and duties in excess of the minimum established by the law of nature. It is a mistake to assume that these rights or duties carry across different moral theories and institutions; different peoples will have different moral viewpoints. A Christian should do the extra duties he believes himself to have, but should not expect non-Christians to do so, as well.

3. Justice, for Grotius, requires the recognition that sometimes one should do more than one's duty and accept less than that to which one has an entitlement or a right.

4. One cannot understand why to accept this definition of justice apart from also understanding that rights are but one element of normativity. One should always speak of rights being modified by considerations of moderation, faith, interpretive charity, and other related concepts.

5. Finally, there is a problem sorting out true moral principles from those that are widely accepted, but not morally sustainable. There may be practices that have a strong normative claim on their behalf and are widely accepted, and yet cannot fit within rights as minimums or Grotius' concept of justice. The case of slavery in the late medieval to early modern period is the best example of this: many states, even the most morally exemplary, engaged in the practice or permitted it to happen. The logic behind this practice was what appeared to be an overwhelming moral consent to the idea that some people, by nature or by choice, could put themselves into a condition of slavery. When both practice and theory point in favor of a disreputable practice, it will be especially difficult to establish a moral consensus in the other direction. In those instances, the proper action is to recognize the wrongness of the practice, and seek to eliminate it or mitigate its effects.

These five general principles, though they appear throughout Grotius' work, never appear in this specific form, or, indeed, in this order. This makes the task of interpreting his work considerably more difficult than it might otherwise be. Additionally, the decisive moments for Grotius' concept of rights come late in his work. The movement of Book III as a whole, especially the great re-setting that takes place in Chapter X, is the most important evidence of these themes working themselves out in the course of his book.

The implication of this is that most interpretations of Grotius are asking the wrong questions. Most, which want to treat of rights or law, begin with the Prolegomena and work their way forward. Many never make it past the second chapter of the first book. The more adventurous will cull a passage on property and one on punishment from book II; others will look at selected passages from Book III, with little concern whether the citation comes from the first nine chapters, or the new vision of rights Grotius offers in the rest of the book. Many will not mention moderation, the subject of seven chapters in book three, or faith, which takes up the last seven.

As a result, much Grotius scholarship asks questions that, though important, are orthogonal to Grotius' intended purpose. Is he the first person to make the switch from an objective to a subjective notion of rights? Is he the first person to secularize natural law and, thus, rights? Is he endorsing a cynical view of war, or is he rejecting it? Is he endorsing or rejecting a Thomist view of natural law? Is he creating a double standard for morality, with one higher set of expectations for Christian nations, and one lower standard for the treatment of others?⁶ These questions are all important for the study of

⁶ Much of the Grotius literature falls under this category. I do not mean by this treatment, or the forthcoming discussion of Brian Tierney's interpretation to Grotius, to indicate these questions are of no importance in the study of Grotius. He was an enormously influential and popular intellectual figure through the beginning of the 20th century, and he was often given credit for whatever went right (or whatever went wrong) in international legal theory after him. It is important, certainly, to establish the precise manner in which he borrows from past traditions, alters that tradition to suit new purposes, and innovates a truly new response to political conditions or theoretical insights. However, to undertake this process effectively, it is important to have his full theory in view, and the absence of a fully integrated Book III is a significant oversight.

intellectual history, especially for a figure as influential as Grotius. But to be able to judge whether he has been put to good use by subsequent theorists, it is important to understand his theory as a whole.⁷

3.2 The Importance of Book III

Book III appears to be about subject matter unrelated to the concerns of human rights, or even rights as a whole. A simple division of *De jure belli* might say that the first

There is also much literature which points usefully to these features of Grotius' thought, though often without picking up the implications of that thought for contemporary international law.

Richard Tuck's work, especially *Natural Rights Theories* and *The Rights of War and Peace*, uses Grotius as the key figure in the transition from medieval to modern political theory. Richard Tuck, *Natural Rights Theories: Their Origin and Development* (New York: Cambridge University Press, 1979). In *Natural Rights Theories* he is concerned with establishing the manner in which Grotius was read by those who came after him. Grotius is, on this reading, Janus-faced (79) because he was adopted by both absolutist and libertarian strains of political theory in the period after he died. The topic of how Grotius was read is an interesting question, and Cornelis Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (The Hague: M. Nijhoff, 1919) documents some of these readings and misreadings. As Van Vollenhoven is quick to remind his reader, though, there is a world of difference between a 'Grotian' theory and the actual theory espoused by Grotius. Tuck's *The Rights of War and Peace* and Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (New York: Cambridge University Press, 2002) both look at the impact of Grotius' writings on doctrines of colonialism. However, Keene in particular misreads the importance of Christian morality as opposed to the law of nature: for Grotius, both the law of nature and Christian morality demand more of colonial states than they are willing to grant. Christian morality demands even more than the law of nature. In all instances, individuals and states should be comporting themselves with the highest applicable standards of morality. That, and not a preference for European to American peoples, is behind this distinction in Grotius.

⁷ There are a few works of political theory that provide a useful interpretation of Grotius: Yasuaki Onuma, ed., *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (New York: Oxford University Press, 1993) does an excellent job moving through the various sections of *De jure belli* and connecting them back to the whole. It is virtually the only work of Grotius exegesis that gives Book III an emphasis equal to its relative importance in *De jure belli* itself. James Turner Johnson recognizes the historical importance of charity to Grotius' argument (a topic not covered here) in James Turner Johnson, "Grotius' Use of History and Charity in the Modern Transformation of the Just War Idea," *Grotiana*, no. IV (1983). Johnson considers the topic in relation to Michael Walzer's *Just and Unjust Wars* but does not connect it to human rights. Peter Pavel Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague: M. Nijhoff, 1960) is the best book that connects Grotius to international law. Unfortunately the book was written in 1960, before the first of the human rights Covenants was passed, and so has limited relevance to contemporary international law.

book, at the broadest level, is concerned with whether it is ever permissible to fight a war; the second book is concerned to state under which circumstances war may be justified; the third to outline permissible conduct during and after a war. Starting here is even more unusual because the analysis of law and rights is one of the first topics Grotius takes up in Book I. In order to understand this approach, is important to see that Grotius' method differs quite sharply from medieval and contemporary methods. He does not offer a definition at the beginning of a piece of writing and systematically lay out all the implications of that definition, as often happens in scholastic thought. He differs from contemporary theory by often holding his most important or decisive views until very late in his argument. Care must be taken in reading Grotius that one correctly understands what he is doing in a passage. He will frequently offer an example to support a theory and then give an argument showing that both that theory and the example previously given are incorrectly interpreted. Nowhere is the tendency more readily evident than in Book III.

The third book begins by surveying what may be done during and after a war.⁸ Grotius asks what behavior is acceptable in war, on topics as various as the destruction of enemy territory and possessions, the treatment after the conclusion of a war of the aforementioned territory and possessions, as well as prisoners taken for captives or

⁸ The literature on *jus post bellum*, concerned with extending the principles of just war thinking to conduct after a war has begun, is a new topic in international law theory. Grotius, who devotes much time and energy to questions of how to reestablish normalcy and peace after fighting has ceased, would make an excellent resource to critique and extend the contemporary literature on this topic.

ransom, and how to resolve questions of who has political control over territory that has changed hands. Through nine chapters, the discussion proceeds exactly the same as in the rest of Grotius, until the critical opening of the tenth chapter:

I must now reflect, and take away from those that make war almost all the rights, which I may seem to have granted them; which yet in reality I have not. For when I first undertook to explain this part of the law of nations, I then declared, that many things are said to be of right and lawful, because they escape punishment, and partly because courts of justice have given them their authority, though they are contrary to the rules, either of justice properly so called, or of other virtues, or at least those, which abstain from such things, act in a manner and more commendable in the opinion of good men.⁹

The problem discussed here is similar to a problem that recurs in the discussion of human rights: the existence of multiple definitions of a right. The law of nations appears to be giving sanction to many different actions that undershoot a true definition of rights.¹⁰ There are, of course, also particular views of justice that set the bar of rights and duties very high; the developed requirements of Christian morality are one such example that Grotius draws upon at some length. The fundamental question that he needs to answer is: how does one establish a definition of rights in a world where some people demand too little, and others demand too much?

3.2.1 The Three Types of Law

⁹ III.X.I. All English citations are to Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis, Ind.: Liberty Fund, 2005). Grotius' arguments traditionally are cited by book, chapter, and section in Roman numerals. Sub-sections, when applicable, are indicated by Arabic numerals. The Prolegomena, unnumbered in many editions, will be cited as 'Prolegomena' with a Roman numeral indicating its paragraph number.

¹⁰ Ibid. Prolegomena I.

Grotius is working to lay out the requirements of three different systems of law: the law of nature, the law of nations, and particular moral viewpoints, including various religions, philosophies and creeds. He is making the law of nations into something quite other than it was in traditional natural law theory; it is not, quite crucially, an extension of the law of nature.¹¹ Further, the law of nations and the law of nature have important differences as sources of law. The law of nature is the set of rights and duties people have simply in virtue of being human. Grotius is careful to never identify the rights contained in the law of nature with much specificity. At times, it appears he is only interested in using the law of nature as a means of affirming moral realism.¹² That is, the law of nature matters because it exists: it is a set of moral precepts that are true always and everywhere. From it a few basic facts can be deduced about human beings, perhaps

¹¹ Compare to Aquinas, *Summa Theologiae*, I-II, Q. 95, 4: "To the law of nations belongs the things that are derived from the law of nature as conclusions from its principles, for example fairness in buying and selling and the like without which men could not live in society—which is a part of the law of nature because man is by nature a social animal, as is proved in Book I of the *Politics*." The law of nations, in Grotius, will include many consensual agreements that do not follow from the law of nature—indeed, many agreements will end up recommending a standard far below the law of nature.

Joan B. Tooke in *The Just War in Aquinas and Grotius* and Pauline C. Westerman in *The Disintegration of Natural Law Theory* both criticize Grotius for departing from the Thomist tradition. In Westerman's project, this fatally wounds Grotius as a source for natural law theorizing. For Tooke, Grotius' departure from Thomas appears to be more a matter of not being properly clear about the role of law and morality, as well as the shift to a subjective definition of right. Jean B. Tooke, *The Just War in Aquinas and Grotius* (London: SPCK, 1965); Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (New York: Brill, 1998)

¹² This is actually the force of the discussion of the famous *etiamsi daremus*. When Grotius picks up the topic of natural law in I.IX.5, he insists the law of nature "is so unalterable, that God himself cannot change it." The concern is not, as Tuck has it, skepticism, but rather nominalism: the fear that God might change what is right into what is wrong. The law of nature here implies that the rightness or wrongness of the act is a fact of the act itself, and not a subsequent judgment that is rendered on it. This is the same as Grotius' insistence that consent through the law of nations does not make something a good practice.

no more than the importance of self-preservation and the natural sociability of man.¹³

Every other precept it might contain is usually known inductively. Indeed, it is this that will cause a significant problem for interpretations of Grotius that attempt to place him solely in the natural law tradition.

The law of nations, by contrast, is uneven.¹⁴ The natural law is consistent for all people at all times; the law of nations is a collection of agreements of a more limited scope. In part this is because it is solely consensual: it is just whatever states say other states can do or get away with. His discussion in Chapter 10 of Book III identifies two sources of difficulty with the law of nations: the identification of prohibition with punishment, and the sanction of institutions, in this case, courts.

Both these standards are problematic because they are overdetermined. All the failure to punish means is that, for whatever reason, no one punished a state for engaging in its particular action. This failure may not have a moral valance: it could reflect nothing more complicated than the inability to devote state resources to this particular issue; knowledge that it happened may not have been widespread; or states

¹³ Ibid. Prolegomena VI-VIII.

¹⁴ May and Tierney both criticize Grotius for abandoning the distinction he drew in *De jure praedae* between primary and secondary law of nations. For both, the distinction neatly captures the reality that the consensual agreements of political societies may reflect true moral norms to a greater or lesser degree. However, for reasons I will outline, I believe Grotius' decision to conflate the two into one undifferentiated law of nature is a defensible position. What is lost in analytic clarity is gained in fidelity to politics as it actually happens. It is difficult, for reasons underlined in the section of this chapter on the evidentiary problem, to know whether any particular agreement made between men is a reflection of the law of nature or particular social and political circumstances. Therefore differentiating 'primary' and 'secondary' sources of the law of nations is of little use, when all laws of nations appear to states in exactly the same form.

may quietly acquiesce in some otherwise objectionable activity because they hope to benefit by doing the same thing in the future.¹⁵ None of these touches the question of rights, even if a rights-violation is involved.

A court's verdict, depending on its composition and relationship to the parties in conflict, could mean little or nothing except that one set of judges could be convinced that no rights-violation had occurred. If the court in question is a domestic court, judging the case of its state against another, it functions as a very weak signal. If the court has a wider jurisdiction, the meaning of its verdict depends on its ability to enforce its decisions. A court that never rules against the stronger party may avoid making decisions in accordance with rights in order to continue its own existence.¹⁶ Each is a thin reed on which to rest the weight of a normative conception.

The reed is thin, in this case, because both of these approaches rely on consent. In this way the problem May talks about with positivist approaches to law is recapitulated: the positivist grounds the force of law, ultimately, on the fact all parties consent to the law as it is. That gives it internal consistency, but does not answer the question of

¹⁵ It is exactly this problem, I will contend, that haunts the discussion of humanitarian intervention. What we know is that most states, most of the time, do nothing to prevent serious abuses of human rights as they are happening. In the eyes of some international lawyers, this means that there is a custom which favors the right of sovereign states to do as they see fit within their own borders. In those instances where a state, or a group of states, try to challenge that custom by intervening, they are told that the comparative silence of other states means that the opinion of the world is decidedly against the emergence of a new custom. Reading implications into silence is a difficult proposition.

¹⁶ Realists and some institutionalists who study international relations will often make a critique along these lines: states only permit decisions against them when the issue at hand is one of comparatively little importance. See Downs, Rocke and Barsboom 1996; also Downs and Rocke, Fearon, and Mearsheimer 1995.

whether that consistency is grounded on the correct idea of morality expressed in law. This is a variation on the difficulty of Beitz's human rights theory: human rights law is a reflection of those things upon which states could reach consensus. States not only determine what the rights are: those very same states are left in charge of judging whether any rights have been violated. In those instances where states fail to properly enforce a right, in the hope that they themselves might be able to violate it in the future, there is no recourse outside the law.

The consent approach has real advantages, because it does not require an already-established system that specifies how to respond in every circumstance. The expression of law in any area at any point in time can be closer to the-best-we-can-do, rather than all-things-considered best, and this feature of the law is reflected back in the willingness to alter those arrangements to fit new and different circumstances. A consent-based legal system does, however, also carry the notable weakness of being unable to specify which standard is appropriate in which cases. That is, sometimes one should follow domestic law, sometimes the established practices of nations; sometimes one should defer to institutions to direct one to the right, sometimes one needs to break outside the confines of institutions. The law of nations can never direct one to the appropriate answers; only indicate that all of these are options.

In Grotius' system, these problems are altered in a significant way. The business of the law of nations is to approximate the law of nature in as close a way as possible,

with the hope, but nothing as definitive as the promise, that as time passes certain, less desirable, practices will be left aside.¹⁷ Even in Grotius' day there were definite limits on war that had been agreed to by many states. There was nothing essential about those limits as a part of the law of nations, but they did constitute an improvement over a world without those limits. It is also worth noting that human rights theories, though they dedicate much time to assessing lists of human rights, and finding the right theory or guide to identify such a list, do little to address the question of what happens when those rights are violated.

The practice of states, especially those that sign treaties and then ignore them, either through formal means like the placement of reservations or understandings on a treaty, or just by failing to enforce their obligations, is a political phenomenon.¹⁸ A theory of human rights that wants to be political needs an account of this, in the same way that a theory of human rights that want to talk about institutions must consider the ways that the facts about institutions alter and limit what is possible.¹⁹ The problem of self-interest must always be close-to-hand for a theory of international law and politics.

3.2.2 Particular Moral Viewpoints

¹⁷ As Grotius insists, the motivation for his work was his belief that states were deliberately doing less than they had moral obligations to do. Prolegomena I-IV.

¹⁸ Within international law, reservations and understandings make it possible for states to avoid compliance with particular aspects of a treaty they dislike. A reservation will generally exempt a state from a portion of the treaty they do not wish to follow; an understanding will construe a particular passage in a light favorable to the state.

¹⁹ Buchanan's discussion of non-ideal theory is particularly useful. See Buchanan, *Justice, Legitimacy, and Self-Determination*, 14-70.

Grotius' solution is not to propose a 'law of nature' with specified minimal content that directs the individual or the state always and unswervingly to the right action. What he wants, instead, is to preserve the flexibility of the law of nations in the face of different circumstances, but add to it the resources to better specify the circumstances under which those changes ought to happen. In this, he is trying to add in a third layer to the relationship between the fluctuating, inconstant law of nations and the fixed, if low, bar of the law of nature. The third layer is that of particular moral viewpoints and beliefs that require more than a minimum, whether of the law of nations or the law of nature. One good example of this is the practice, accepted amongst Christian nations, that citizens of those states taken prisoner during a war are not to be made into slaves. The law of nature permits it, but Christians have decided on a higher standard.²⁰

The question, in other words, becomes this: if the law of nature is constant, how do we best understand its relation to these two other sources of moral law, the law of nations and particular moralities, which sometimes ask less than the law of nature and sometimes much more? The three categories of law make it possible to begin teasing out the claims made by one sort of law, and the reality of the interactions between them. The difficulty of most human rights theories is that they want to treat the law of nature and

²⁰ Grotius III.VII.IX.

the law of nations of co-terminous categories; Grotius will give reason to think these are incompatible aims.

3.3 The Modification of Rights-Claims

Grotius points in a different direction than contemporary human rights theory. When those theories try to specify the meaning of the term 'rights,' they, like Grotius, attempt to do so against a background of law and institutions, as well as a pluralism of moral beliefs. Indeterminacy is generally addressed by attempting to fix a definition of human rights that will include the desired rights and nothing else. The problem of indeterminacy is solved, in other words, by making the definition narrow, and excluding other senses or uses of the term.

By contrast, Grotius controls the meaning of a right not by defining it more carefully, but by placing it alongside concepts that limit what it can mean. Instead of relying on consent or nature to provide the determinate content of a theory of rights, he looks to justice, virtue, and the opinion of good men. These concepts are useful precisely because they are self-limiting: the concept of moderation, taken at the right point, heightens the effectiveness of a just war by encouraging the state to engage in or refrain from those actions that would damage the chances of peace. If moderation is taken too far, the aim of a just war is compromised: a state will be refusing to punish behavior that should be punished. However, there are also certain rights to which these concepts should not apply: the right to life, for Grotius, is central, and no properly minimal set of

rights can require a person to give up his life. The concepts that surround rights make it possible to differentiate the most important and basic rights-claims from important, but not critical, rights. Those rights that can, without great difficulty, be moderated ought to be moderated, at least some of the time.

3.3.1 The Application of Moderation and Faith

Grotius deploys the concepts of moderation and faith to remedy this situation.

Human rights theory is almost always concerned about rights; other normative considerations might enter in, but the manner in which they do so is usually left unspecified. Up until Chapter 10 of Book III, Grotius is following a similar pattern.

Whatever the topic under consideration, the question is: what are the rights involved?

What are states and individuals permitted to do? Even in these earlier portions of his work there are some indications that rights alone will be insufficient to answer questions about international politics. Grotius will chime in occasionally with a consideration of justice or charity, or what ought to be expected of Christians in a specific case.

Sometimes these considerations are more than passing: when he takes up the question of whether it is ever permissible to fight in a war, he is primarily concerned to show that it is possible for a pious Christian, though he offers reasons for people from other traditions to do so.²¹

²¹ Grotius I.II takes on the question of just war through the lenses of the Old Testament, the New Testament, the practice of the early Christian church, and the opinions of prominent Christian thinkers.

For the most part, rights are permissions granted, and duties discussed are minimal expectations one can reasonably have of other people. Chapter 10 does not remove rights from the center of Grotius' theory of justice. Instead, in the space of the first two sections, he demonstrates the intolerability of a society that is only concerned with making and enforcing rights claims.²² If the point of war, and indeed of rights, is to ensure that people have the minimal conditions needed to enjoy what they have in peace, then one has to be prepared to engage in those actions that best raise the possibilities of peace. This means that sometimes, a right will have to be foregone.²³

Moderation, at the most general level, is the mitigation of a rights-claim. Under the law of nations, a state is permitted to do some action, which is sometimes cast in the form of a right conferred by the law of nations. The chapters on moderation argue for a limited, situation-based rollback of the full area of those rights. Moderation, then, is a concept whose job it is to bridge between various levels of moral permission. If a right, given by the law of nations, is short of the mark that would be established by the law of nature, then moderation is the means by which action is guided from the lower to the higher standard. This is especially important for Grotius because the law of nations is not just those principles to which states are prepared to agree, but also their actual

²² A contemporary application of the same technique can be found in John Tomasi, *Liberalism Beyond Justice: Citizens, Societies, and the Boundaries of Political Theory* (Princeton, N.J.: Princeton University Press, 2001).

²³ This does not mean that all rights have to be foregone. One need not take less than one's due if the alternative is death. It means, rather, the recognition that sometimes it really does make sense to ask for less than one deserves.

behaviors, no matter how radically those differ from their purported beliefs. In war it is frequently the case that the actual behavior of states is less noble than their intentions. It is precisely this problem that moderation seeks to limit.

Faith, by contrast, is intended as an equalizer. The biggest problem with the law of nations is that, unlike the law of nature, it does not hold everyone in equal regard. Some actions are permissible under the law of nations for strangers or enemies but not for those with whom one has more of an acquaintance. Faith is nothing more than the insistence that one's promises, once given, are binding. Crucially, they are binding no matter to whom they are given. The combination of these two concepts will, as Grotius demonstrates in the latter half of Book III, make it possible to do much with rights without needing a precise definition of rights that allows their scope and weight to be determined. In a Grotian system, other concepts do much of the work, and because of that, the pressure placed on rights is reduced.

3.3.2 Moderation

Grotius is careful, in his discussions of moderation, to make the chapters after the key turnabout in Chapter 10 match the problems discussed in the first nine chapters. Every previous statement is consciously revised. Thus the chapters have a certain symmetry, and should be read against one another: on the one hand, what Grotius says is permissible under the law of nations, on the other, what moderation ought to direct states towards. Rather than exhaustively cover all the topics Grotius revises, I will focus

on one to demonstrate the effect of his revisions, and, thereby, the relationship between the actions before and after. The two chapters in question are Chapters 4 and 11: Chapter 4 concerns the right to kill enemies in a war; Chapter 11 moderates those rights.

Even in chapter 4, before he has decisively attacked the problem of multiple sources of law, Grotius is careful to note definitional problems. The term 'lawful' misleads in just this way, especially applied to the topic of killing during war. Lawful, in one sense, means those things that are permitted under the law of nations; on another, it means those things that are morally best to do.²⁴ In order to not foster confusion over what he means, he replaces the term 'lawful' with the granting of an 'impunity,' the right to act without receiving punishment.²⁵

After this discussion, Grotius moves into the general principle governing killing in war. The subjects of a state, with which one is an enemy, can be attacked anywhere: in one's own state, in their state, on the high seas. Indeed, they can be killed everywhere except the territory of a state that is expressly neutral in the conflict.²⁶ Therefore, generally speaking, there are no restrictions placed on where it is permissible to kill an enemy soldier during war.

²⁴ Grotius III.IV.II.

²⁵ Ibid. III.IV.III; see also III.IV.V.2 for a related discussion.

²⁶ Ibid. III.IV.V.8. Later on, Grotius will claim that this is a law of nature as well as a law of nations (III.IV.18.2). This is either a mistake in the text, or on the part of Grotius. In the original discussion of this topic at III.V.VIII, it is crucial for the legitimacy of this rule that the war be solemn, that is, formalized by the announcement of both states that they are at war. But this announcement, which Grotius calls 'denunciation,' is a feature only of the law of nations III.VI.I. Therefore Grotius errs in saying that a war must be denounced for this to take place, or there are instances where the law of nature requires a war to be denounced.

The same logic applies, in the law of nations, to the treatment of women and children. As long as they are members of the state with which one is at war, they are a valid target for attack; or, at the very least, one does no wrong in killing them.²⁷

The third example is the ‘ravishing of women.’ Grotius notes that the law of nations has here, at least in some places, exceeded the requirements of natural law. The practice undertaken, particularly by Christian nations, makes the sexual violation of women during war a crime with an unbounded jurisdiction: any state is allowed to punish someone who has done this.²⁸

In Chapter 11, the general principle is reversed. Rather than taking the impunity to kill any enemy, action should be based on any one of several alternate standards. It could be, as Grotius proposes, that we have duties to those who have wronged us; or a duty to avoid cruelty, even if our cause is just; or perhaps the standard at which we should aim is charity, and not the bare minimum of what rights permit.²⁹

²⁷ Ibid. III.IV.IX. Interestingly, in subsection 2, Grotius touches on one of the great themes of his work, which has received little comment: the place of cruelty:

And the emperor Titus exposed the women and children of the Jews to be devoured by wild beasts in public shows; and yet these two princes were never esteemed to be of a cruel nature: whence it appears how much that inhumanity was turned into custom.

In this one comment, Grotius shows an aversion to cruelty, even that which had become an accepted custom. Given the centrality of cruelty to the human rights project, this commends Grotius for another reason.

²⁸ Ibid. III.IV.XIX.

²⁹ Ibid. III.XI.II-III.

This has its biggest implications in the section where Grotius revisits the question of whether it is acceptable to kill women and children. Rather than permitting the practice, he forbids it. More importantly, he argues against a concept of the law of nations that just collects the practice of states. Against the Biblical and ancient citations he compiled in chapter 4, he argues that the model should be neither state practice, nor what is permitted, but that conduct should be based on what the most just states at the most just times did.³⁰ Though one can produce examples where women and children were killed with impunity, the practice of better states tends toward sparing both.³¹ In fact, the practice of the best states extends this moderation from women and children to priests, scholars, husbandmen, merchants and captives.

There is, as one might expect, no comparable section to the ‘ravishing of women’ section in chapter 4. In instances where the law of nations is already expecting more than even the law of nature might, there is no need for moderation. Moderation does not undo a right. It does not blunt the force of the claim, nor does it overturn the consensus of the law of nations. The acts Grotius describes may be done with impunity. It is not the case that the concept of moderation displaces the right. It does serve as a reminder that the right exists for a reason, in order to do something. The permissions surrounding killing in a just war are designed to facilitate the war-fighting abilities of the just side,

³⁰ Ibid. III.XI.VIII.

³¹ The practice of better states makes for an interesting standard, reflected perhaps in Buchanan’s idea of a minimum set of conditions for state legitimacy.

through giving them wide berth to fight the war as it needs to be fought. The concept of moderation filters the right through the aim it is supposed to achieve. So, if the right to kill is intended to make victory in war easier, then the question becomes what the aim of a just war is—the establishment of peace and justice. Grotius uses moderation to show that a strict use of the rights that one has available may be counterproductive. Onuma et al correctly point out one of Grotius' concerns in Book III is to put an end to perpetual war: each violation of the law of nations could, in theory, give rise to a war to set right the previous injustice.³² Grotius wants to put a stop to that possibility. If the aim of a just war is peace, then sometimes rights cannot be fully claimed: it is possible to kill indiscriminately, but an especially bad policy if one wants to foster the natural inclination to sociability, and not kill it outright. A theory of rights alone cannot do this.

The *jus in bello* principles Grotius is outlining in Book III appear, at first glance, to be an odd place to mount this particular attack on rights. After all, these rights are both dubious in the origin and require no significant moral effort to surpass. The rights are dubious because they are simply impunities, agreements made amongst the states of the world not to raise too much of a fuss when claimed and acted upon. They are rights only in the broadest sense of the word, and certainly do not appear to be connected to any worthwhile normative theory. Additionally, these so-called rights set the bar for action

³² Onuma, ed., *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, 282: "Grotius next gives one reason after another for pardoning even those who purposely do wrong. ... This is why his just-war doctrine is free from the extremes of achieving substantive justice at any cost and of accepting the belligerent may shed the blood of his foe so long as his acts are just."

very low. The difference between the claimed right and Grotius' moderated right involves nothing more than the decision to not kill innocents in the middle of a war. This constitutes no extraordinary moral effort.

However, it is precisely here that one should look to see the importance of bringing other considerations to bear on rights. Grotius' definition of justice is the recognition that sometimes one should claim less than that to which one has a right, and do more than that to which one has a duty. Executing both ends of this definition will be most difficult in a war one's side believes to be just, especially after such a war has been won. It is at this point that it is easiest to needlessly extract more from one's enemies, and at this point that they are least able to oppose such an effort. Even here it is important to hold back—perhaps especially here.

The rights in question are not the fundamental rights that might appear on a list of conditions for a minimally decent life. Moderation is a guide not for those fundamentals, but for all the other rights that, though important, can sometimes be set aside. Human rights theories will occasionally point out that the resources of a state are limited: not all claims can be met.³³ The willingness, on the margins, and in particular cases, to hold back from claiming all of one's due is a critical part of maintaining a system of rights given the limitations of government. Further, the point of moderation is that sometimes rights must be qualified. It does not follow from this that they always

³³ Buchanan and Griffin both made claims to this effect.

must be qualified, only that it is important that political actors be aware of this possibility.

3.3.3 Faith

For Grotius, where he ends is at least as important as where he begins. Book I ends with the insistence that just as we have a right to fight on our own behalf, we have a right to fight on the behalf of others. Book II's penultimate chapter extends this principle. Book III ends with a series of admonitions to the importance of keeping faith in international politics. Faith is not, here, the sharing of any particular set of beliefs, but rather the bond which a people share with each other.³⁴ Faith is an important part of justice, and acting in a good way in the world.

However, faith is importantly different from justice. Whereas, Grotius says, the actions that are just, and the explanations for why those actions are just, can be complicated to discover and explain, the bond of faith is self-evident. One demonstrates faith by making promises and keeping them.³⁵ Thus there is a link between the public friendship of states, and private friendship: the willingness to make and keep promises

³⁴ In this sense, Onuma is correct to point out, Grotius' definition seeks to recapture the ancient sense of the word against the medieval religious connotation. Onuma, *A Normative Approach to War*, 330-331.

³⁵ Unlike Onuma, however, one has to understand this chapter as a series of admonitions, more important for their rhetorical than substantive power. Grotius' willingness to make a utility-based argument is not, per Onuma, evidence that the entire Grotian argument is based on a utilitarian calculus. As a parallel case, he admonishes princes to consider the effect on their reputation if they continually break promises. However, in the reversal of Chapter X, he explicitly identifies reputation as the wrong thing to concern oneself with in if one wants to act well. Ibid. 328-332.

is a sign and token of goodwill, especially when there have been problems in the past. Faith is, in other words, the central element required for peace.³⁶

Again, rather than examining all the different uses Grotius makes of the concept of peace, it is easiest to focus on one. He admits, at the end of the chapter, that the general ideas behind his concept of faith should be evident; the later chapters merely extend the principles to other critical cases. In this case, that will be chapter 19, which focuses on how faith is to be kept between enemies. The general principle is simple: one should keep faith at all times, even to one's enemies.³⁷ There is, of course, no obligation to promise anything; but once one promises, it becomes their obligation to carry it out, even if the promise could be broken at little cost. Faith matters because it is crucial to maintaining the whole system of rights and goods—faith makes it possible to believe that war can be something less than total.³⁸ If one thing is preserved even though it would be easy to toss it aside, then other things might be preserved, as well.

Grotius is prepared to take this general principle very far. He says one must honor promises to tyrants and pirates, since we must always keep the hope that they may change their ways; and indeed there are some historical instances of this. These protections even extend to those who we can otherwise punish for committing a crime: once he is promised something, despite his status as a criminal, it is vital that we keep

³⁶ Grotius III.XXV.I.

³⁷ Ibid. III.XIX.I.

³⁸ Ibid. III.XIX.I.2: "It is the public faith, as it is in Quintilian the Father, that procures a truce between armed enemies, and preserves the rights of yielded cities."

our end of the promise.³⁹ The residual question here is why anyone would consent to a system of binding promises such as this one. Grotius' system goes far beyond what most anyone would counsel. The costs of maintaining promises to unsavory figures like tyrants and pirates are obvious, and it appears to be the case that Grotius trades common sense for the slim possibility that one of these figures might see the error of their ways.

The relationship of faith to rights is more complicated than this; it is the recognition of significant and recurring problems in international politics. Though it is a radical solution to the problem, it provides at least two clear benefits: first, it serves as an equalizer. Onuma points out that, when Grotius has his extended discussion of treaties, that Grotius is alone amongst his contemporaries in believing that Christians could make treaties with non-Christians and, moreover, that these treaties had the same binding force they would have if made with Christians.⁴⁰ That is, one may not selectively break the terms of an arrangement. His discussion of faith is nothing more than an extension of this principle, which at bottom is a principle of equal regard. No one is required to sign a treaty; but if one does, then it does not matter with whom the treaty or contract is signed: they are an equal partner for the duration of the agreement. Similarly, no one has to promise anything. But if one does promise, then the promiser

³⁹ Ibid. III.XIX.III.

⁴⁰ Onuma, *A Normative Approach to War*, 311-312.

and the promised have a relationship for the duration of that agreement. Faith requires seeing the person with whom one is dealing as an equal, regardless of time or circumstance. Each person is on equal footing; each person is worthy of equal regard.

Second, there is a problem of rhetoric in international politics. A state can never quite get beyond the suspicion of others that the state does not quite mean what it says. Nowhere is this more evident than in humanitarian intervention, where a wide differentiation is made between the reasons a state gives for its action, and the 'real' motivations for that action.⁴¹ It is, without a doubt, in the best interests of most states to at least occasionally partially misrepresent their motives. Grotius is pointing us to the only way out of this problem: honesty and transparency. One does not often promise, but when one does, the promise is carried out: it does not remove suspicion, but it mitigates its effects, especially when faith is not the exception but the usual standard of action. This is a significant, if little acknowledged, conclusion: one solves the problem of rhetoric by not extending one's promises beyond those things one intends to carry out.

The potential implications of this for international law are quite extensive: states undercut their own credibility by signing treaties they fail to enforce. Samantha Power's

⁴¹ The differentiation between 'justifying reasons,' as rhetorical explanations of the reasons for a state's action, and 'motivations,' the actual explanation for its actions, is made by Grotius in Book II, as part of his discussion of wars based on punishment. Though a fuller discussion of this passage and its implications for humanitarian intervention will occur in chapter 5, it is important to note two things about Grotius' differentiation of these concepts. First, they are distinct, and thus the problem of rhetoric exists: because states act and do not always make the true reasons for their actions known, the behavior of all states is suspect. Second, Grotius raises the possibility that even in a war of punishment, being fought from a mixture of good and bad motivations, the presence of the good motivations may be enough to outweigh the bad.

example of the Convention on Genocide is a prime case: the reluctance of the United States to call what happened in 1994 in Rwanda a genocide undercut their credibility when they tried to claim potential genocide as a reason to intervene in Kosovo.⁴²

Concern for one's reputation, for Grotius, is not a proper motivation for action, but it is a real part of the political world, and not to be ignored.

3.3.4 Moderation, Faith, and Human Rights

The inclusion of moderation and faith alongside rights has three effects for Grotius' theory, all of which have important implications for a theory of human rights. First, Grotius' theory puts rights in their place. The rights a person has under the law of nations, and, more importantly, the law of nature, are the central concern of his politics. One has to begin by talking about them. He recognizes the variability of rights claims, though, and the wide gap that can exist between what the law of nations expects and the law of nature requires. Rather than declaring one use of rights to be correct and the other wrong, and so recapitulating the debate that occurs between differing definitions of human rights, he applies the concept of moderation. One does not solve the problem of the grounding of rights by creating a better definition of what rights are: one solves the problem by stepping outside the language of rights to other concepts.

The manner this works itself out on the topic of the killing of women and children is exemplary. One has a right—whatever is meant by right—under the law of

⁴² Power, *A Problem From Hell*, 358-364.

nations to kill anyone one wishes, in a properly defined war. One does not attempt to change this by pointing back to the notion of right; all one has in that situation is two opposed rights with people committed to calling each the true right. Instead, one points to other concepts, like moderation, justice, and cruelty. What exactly is accomplished by killing women and children? Could the ends being sought not be better accomplished by other means, and in fact nothing more complicated than not exercising one's right in this instance? If other concepts can be called upon to do work, it reduces the pressure to find one definition of human rights that will overcome all objections: it need only be one mode among many.

Second, moderation and faith are self-limiting concepts. One cannot simply carry over the fight about rights into the territory of these other concepts. Rights proliferate, in part, because they have the ability to cover all normative relations. Moderation does not. In Grotius' argument, this is demonstrable from his treatment of the question of rape during war. It is an unimportant matter whether there is, in the law of nations, a right to rape; what matters is the belief and practice of many states is moving definitively against the practice. It does not appear in the chapter on moderation in killing because moderation is not needed in this case; the problem has already been addressed on a satisfactory level by the law of nations. A similar limitation applies to faith: its rules only extend as far as one's promises. If one never makes any agreements, then one is never

bound to the standard of faith. It is in the nature of both that they will sometimes be unnecessary.

The claim that moderation or faith function as self-limiting concepts may appear absurd. Why would it be impossible for one to moderate an already moderate practice? Why couldn't rights function itself as a self-limiting concept? It is important to remember here that the other concepts are not there to displace rights from a central place in any theory of international politics. They are there to serve as a guide to the interpretation of those rights in light of the goals the rights themselves are trying to achieve. Inasmuch as a particular rights-claim is altered because of a consideration of moderation or faith, it is an attempt to express each without ignoring the other.⁴³ In a just war, it is important to have a good deal of mercy, but not so much that it undermines the purposes of the war in the first place. Too much moderation risks failing to sufficiently punish the crimes that gave rise to war in the first place.

Third, both moderation and faith encourage individuals and states to exceed the minimum expectations that rights place. Certain human rights theories—May and Griffin are prominent here—have at least a concept that one may exceed the minimums, and that somehow this excess needs to be incorporated as a feature of the human rights

⁴³ Grotius made reference to values having this relationship before. In his apologetics handbook *De veritate*, Grotius wrote: "*nam clementia, ut justa sit, suos habet limites; et ubi sclera modum excedunt, poenam justitia ex se quasi necessario producit.*" Hugo Grotius, *De Veritate Religionis Christianae* (Elibron Classics, 2006), Book IV, section III. In other words, mercy is an important value, but God cannot be merciful to everyone: if he were, he could not also be just. Thus mercy will have limits.

theory itself. However, for both, the project runs into difficulties because one cannot mandate self-sacrificing behavior, and the sort of moral behavior needed to complement and extend human rights is unreasonable to expect. It is, in other words, a morality of perfection. In Grotius, by contrast, the gaps between the law of nations, the minimum morality of the law of nature, and the rights and duties of particular traditions are easily transversible. It requires moral effort, to be sure, to consciously do more than one knows one can get away with, but this is in fact a very ordinary kind of morality.

This last point is worth dwelling on. For many theorists and philosophers, it is possible that people will occasionally give up their rights or do more than their duty. These practices cannot, however, be a part of a political theory because to give up one's due can never be compulsory. If these behaviors cannot be enforced, then it is difficult to rely on them as the basis for politics, especially for part of politics as contentious as human rights. Grotius turns this expectation around: even if it requires a special act of will to give up one's due, this is not exceptional. Instead, it is a regular feature of moral and political life, where individuals will often give up something of importance in order to meet some other aim.

3.4 Rights in the Prolegomena and Book I

Brian Tierney's contribution to the intellectual history of Grotius is of considerable importance. Grotius is a figure often claimed as both the last representative of the old medieval view and the first distinctively modern view. In his work Tierney is

attempting to bring some consensus to this dispute, in part by taking on and challenging the work of Richard Tuck. Tierney's Grotius, like Tuck's, borrows extensively from earlier traditions of Christian thought, often without credit. Unlike Tuck's Grotius, Tierney's is responsible for saving the natural law tradition and delivering it into the hands of humanists and Protestants who otherwise would have had little to do with it.⁴⁴

Yet even with this emphasis on discovering what it is Grotius argued, and how it connects back to the sources upon which Grotius drew, his approach is missing a key component of Grotius' argument. The first problem is textual: Tierney never addresses, even in passing, Book III and its substantial revision of the concept and import of rights. As a result, Tierney's argument places undue emphasis on Grotius' arguments to establish rights. The establishment of a right, for Grotius, is the first stage of moral argument, not the final. The confusion over the relationship of rights to the rest of moral theory extends into a confusion over the three sources of law. Thus Grotius emerges from this account as a clear innovator whose importance was historic: he served a role as the primary transmitter of natural law and natural rights into the modern period. What is left unclear at the end of his interpretation is the impact, if any, that Grotius' theory was supposed to have on actual political life. In short, Tierney saves Grotius as a political *theorist* at the expense of Grotius as a *political* theorist.

⁴⁴ Brian Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Atlanta, GA: Scholars Press, 1997), 340-342.

The nature of Tierney's confusions is best explained through the strengths and weaknesses of his disagreement with Tuck. Tierney agrees with Tuck that Grotius' theory is a minimal theory of morality. He disagrees with Tuck's assertion that minimalism was a response to rising epistemological skepticism.⁴⁵ On Tuck's theory, it is important that Grotius begins in the Prolegomena to *De jure belli* by focusing on the case of the skeptic, Carneades. On his view, this early and unconvincing attempt to brush aside moral skepticism shows that this was Grotius' true concern.⁴⁶ Tierney counters by noting that the brush with skepticism was a common *topos* of just war thinking, used by Vitoria, among others, and not reflective of any larger concern.⁴⁷ Grotius' minimalism, for Tuck, is a refutation of the common medieval natural law tendency to see that law providing many rules to guide political life. Tuck asserts that natural law theories tend to run to many very specific recommendations about proper human action; since Grotius' theory does not do this, he is innovating. Again, Tierney replies by noting that this was a standard feature of natural law accounts: though Aquinas drew many particular conclusions from his natural law theory, he had only four basic principles that structured the whole system.⁴⁸ Therefore there is nothing new about Grotius' theory. Indeed, as a theorist of the natural law who wants to expand its impact, Grotius gives

⁴⁵ Ibid. 321ff.

⁴⁶ Tierney draws particularly from Tuck, Richard. "Grotius, Carneades, and Hobbes." *Grotiana*, no. IV (1983).

⁴⁷ Tierney 321: "But, like Vitoria, Grotius brushed aside the skeptical objection in a few paragraphs; then he went on for hundreds of pages of refined argumentation without ever adverting to the topic again."

⁴⁸ Ibid. 323.

himself an entirely unnecessary handicap by not taking advantage of the emerging anthropological literature on other societies. If he had possessed that information, he could have demonstrated, rather than just asserted, the key role played by natural law as the true universal moral minimum. Instead, "It never occurred to the Dutch author that his whole conceptual apparatus of natural law and natural rights would have been unintelligible to a learned Chinese scholar."⁴⁹

It is at this point, however, that Tierney has made an interpretive mistake. Though Grotius' argument depends on the law of nature as a minimum set of expectations and a guarantee of moral realism, he is careful not to rest his arguments only on this basis. It is not the underlying principles of natural law that would appeal, intuitively, to a Chinese scholar: it is the consensual agreements of the law of nations. Accordingly, Grotius does not rest his arguments on an appeal to the law of nature. This distinction is made clear in Grotius' descriptions of how one knows the law of nature and the law of nations. One knows the law of nations in two ways: either through "the necessary fitness or unfitness of any thing, with a reasonable and sociable nature" or

When we cannot with absolute certainty, yet with very great probability, conclude that to be by the law of nature, which is generally believed to be so by all, or at least the most civilized, nations. For, an universal effect requires a universal cause.⁵⁰

⁴⁹ Ibid. 321.

⁵⁰ Grotius I.I.XII.

The law of nations, by contrast

Derives its authority from the will of all, or at least many, nations. I say of many, because there is scarce any right found, except that of nature, which is also called the right of nations, common to all nations. ... Now the proofs on which the law of nations is founded, are the same as those of the unwritten civil law, viz. continual use, and the testimony of men skilled in laws.⁵¹

In other words, the law of nature has an evidentiary problem. Except for those precepts that follow “the necessary fitness or unfitness of anything, with a reasonable and sociable nature,” the requirements of the law of nature can only be established through something like the consent of all nations. Grotius, however, is unprepared to make universal consent a requirement: it is the practice of ‘at least the most civilized’ states. Something may be a part of the law of nature and yet denied by some, perhaps many, states. The law of nations, in the same manner as the law of nature, is recognized through the will of many states. One recognizes the law of nature in the law, practices, and institutions of a state. One recognizes the law of nations through the same sources.

It should be clear at this point that Tierney’s Chinese scholar example does not work within Grotius’ framework. Grotius makes claims about the law of nature, it is true, and these claims will be inscrutable for one not raised within a tradition that privileges this kind of moral theory. However, the sort of claims Grotius makes and the evidence he uses to back them up will both be accessible to any kind of scholar. For a

⁵¹ Ibid. I.I.XIV.

claim such as Grotius' theory of property, of interest to Tierney, the Chinese scholar will be forced to ask a series of questions: do the examples Grotius cites approvingly point to the right conduct? Do the things he says are deserving of punishment deserve punishment? Notwithstanding the use of rights terminology, is he pointing to a useful way to think about these problems? Moral theory plays a role, but so do institutions, laws, and histories. These can always be compared even if precise moral frameworks cannot. To claim otherwise would be to make political societies forever opaque to one another.

A typical, though telling, Grotian insight occurs in his chapters on property from Book II. He is concerned, here as elsewhere, to establish the baseline rights people can have with respect to property: how one knows who owns it, how it may be used, under what conditions ownership of property may be transferred. At one place in this long, sustained argument, he takes up the question of waste land. Grotius writes:

And if there be any waste or barren land within our dominions, that also is to be given to strangers, at their request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a property, only so far as concerns jurisdiction, which always continues the right of the antient people. And Servius remarks, that seven hundred acres of bad, unmanured land were granted to the Trojans, by the original Latins: So we read Dion Prusaensis, that they commit no crime who cultivate and manure the untilled part of a country. Thus the Ansibarians formerly cried, that as the Gods have Heaven, so the earth was given to mankind, and what is possessed by none, belongs to every one. And then looking up to the sun and stars as if present, and within hearing, they asked them, whether they could bear to look on those uninhabited lands, and whether they would not rather pour in the sea upon those who hindered

others to settle on them.⁵² But these general maxims were ill applied by them to the present case; for those lands were not waste and desolate, but were employed in the feeding of their soldiers cattle; which was a just reason that the Romans should refuse them. Neither was it less just what the Romans formerly inquired of the Galli Senones, what right any one had to demand a country from the lawful owners, and, in case of refusal, to threaten them with war?⁵³

The Chinese Scholar, faced with this passage, has only to ask: has Grotius correctly identified the right solution in each of these cases, and drawn the correct principle behind them all? He lays the first stress in the passage on the ability of those who own a piece of property to give it to others, if the land is not being otherwise used. He asserts that what matters is not whether it simply appears that land is unclaimed and unused, but whether it actually is unused: this is why the Ansibarians are wrong to claim the Roman land was wasted. Further, one cannot use a specious claim to someone else's territory as a cause for war. An outsider need not know anything about natural law to render a judgment on Grotius' opinion. Indeed, it is quite crucial for the link between the law of nations and the law of nature that the rights protected by the law of

⁵² Richard Tuck uses this example in *The Rights of War and Peace*, 105. He cuts the citation at this point in the text, using the example as evidence that Grotius had little respect for the claims to property made by native peoples. If the section is read as a whole, it appears to point to the exact opposite conclusion.

⁵³ Grotius II.II.XVII. The discussion of waste land is itself quite interesting. Barbeyrac, who translated Grotius into French, producing the edition most likely read by Rousseau, as well as providing a substantial impact on English editions of *De jure belli*, has a note in his translation at this point. He objects to Grotius' general principle (that unoccupied land might be claimed by any people who will make use of it) by asserting that most land is bounded as the territory of one or another state, and there is no principle that can make the possession of that land by anyone other than its owners legitimate. Grotius, however, covers exactly this argument in section 4, arguing that if land is claimed as a whole, then it is to be considered occupied by others regardless of whether or not it is used. This is why, in section 17, it is so important for Grotius to leave open the possibility that unused land might be given, rather than taken. In the context of the Americas, this position, combined with Grotius' sensitivity to different forms of sovereign power, could easily create an argument that the assumption, having discovered any land that appears to be unoccupied, is that the land is rightfully claimed by someone, and only after it has become sufficiently clear that no one claims the land may it be taken.

nature are the sorts of claims that can be recognized by anyone, regardless of their particular moral viewpoint.

Problems remain for Grotius' account. If, apart from this claim of 'fitness,' the manner for establishing a law of nature and a law of nations are the same, how does this not effectively collapse the two categories into one? One can survey international practice and find some behaviors endorsed by those states purportedly best. One cannot determine on that basis, however, whether what one has found is a fixed point of moral inquiry or a subjective, changing-with-circumstance point of agreement. This concern echoes in the literature of human rights; as seen in Nickel, it is precisely this concern that leads him to keep his theory of human rights open-ended, just in case there is another fundamental basis for human respect that ought to be included under the umbrella of human rights. Grotius himself is vexing on this question. Despite the formal similarity of these two definitions and their proximity in Chapter 1 of Book I, Grotius never resolves this tension.

But perhaps the point is not simplicity but clarity, insofar as that is possible. The evidentiary problem just is a central feature of international politics, and the law that will regulate those practices needs to be informed by this problem. It is, on this level, a plea for epistemological humility. But this humility runs both ways: the law of nations can be confused for the law of nature, and vice versa. We can misjudge what appears to be each. What matters is that the law of nations will always be an approximation of the

law of nature. Sometimes this approximation will be closer, and sometimes farther away, but there does exist a real standard against which we can measure particular views. Tierney gives an uncertain foundation for law, in part by avoiding the evidentiary problem of the rule of law, but also because the content of the law of nature does not cleanly separate from the law of nations.

A similar problem occurs in Tierney's treatment of rights. He notes that one must begin, as Grotius does, with the definition of right.⁵⁴ However, the problem of Book III's absence returns: a reader should begin where Grotius begins, but also end where he ends. This leads Tierney to make arguments that, while technically and historically correct, end up missing a significant portion of the point of a doctrine. In his discussion of the different meanings of the word 'right,' Tierney is correct to note that the distinctions Grotius is drawing come from medieval political thought. Grotius does not innovate in defining right in a subjective as well as objective sense, nor does he innovate by defining right as a faculty rather than an aptitude. One may even grant to Tierney that Grotius chose the definition that he did because his allowed him to make a right a legal claim, whereas other definitions would have prevented this.⁵⁵ But rights are, for

⁵⁴ Tierney, *The Idea of Natural Rights*, 324. This is not, strictly speaking, true, since the Prolegomena begins with other subject matter. The Prolegomena, more to the point I am trying to draw, begins with a recounting of the types and sources of law: "But that law, which is common to many nations or rulers of nations, whether derived from nature, or instituted by divine commands, or introduced by custom and tacit consent, few have touched upon, and none hitherto treated of universally and methodically, tho' it is the interest of mankind that it should be done."

⁵⁵ *Ibid.* 325.

Grotius, the beginning of moral inquiry, rather than the end. Therefore an approach, for example, to property, which is concerned only to establish the rights and duties of property-ownership, will miss at least part of the point of moral theory, as in the example given above.⁵⁶

Grotius, even in the Prolegomena, admits this definition of right to be “the abstaining from that which is another’s, and the restitution of what we have of another’s” and they “consist in leaving others in quiet possession of what is already their own, or in doing for them what in strictness they may demand”.⁵⁷ However, even this early on, Grotius entertains the possibility that “to receive less than one’s due may indeed happen to be a vice, when the circumstances of himself or his family cannot allow of any abatement; but it is certainly not repugnant to justice, since it consists wholly in abstaining from that which is another man’s.”⁵⁸ Already Grotius is opening the possibility that the full claiming of rights may yet fall short of a theory of justice. To the extent that Grotius develops a theory of rights on any topic, it is but an indication of what his final position will be.

3.5 Conclusion

Grotius did not have a theory of human rights: this much is abundantly clear from his work. It is difficult, even, to apply the concept of human rights to him, because

⁵⁶ Or in the case of sovereignty and the right of resistance, which we will take up more fully in Chapter 5.

⁵⁷ Grotius Prolegomena VIII, X.

⁵⁸ Grotius Prolegomena XLV.

it is so closely tied to contemporary tradition. The human rights project was a response to a particular set of wrongs that occurred throughout the 20th century, to the increasing horror of well-meaning states. Grotius cannot provide a definition of human rights that will allow contemporary readers to apply his definition to the documents now in existence in order to make judgments about them, as Griffin's definition allowed him to do.

Instead, Grotius has a theory of rights. His theory contains within it elements to meet the criteria for human rights theories established in Chapter 1. It is from these elements that it becomes possible to understand how Grotius' theory of rights can be transformed into a theory that can critique contemporary understandings of human rights. Three elements stand out: first, Grotius' acceptance of pluralism. Politics is, at its basis, a dispute amongst rival conceptions of the right or the good. In Grotius, this means the recognition of the three sources of law: the law of nature, the law of nations, and the particular moral codes to which individuals and peoples subscribe. All three of these sources prescribe and prohibit different things. In the best of all possible worlds, all three sources coincide. This is the basis of Grotius' assertion that the law of nations, which is the reflection of the moral consensus of all states, should be identical to the law of nature. But the crucial term in Grotius' argument is the 'should': it would be convenient and beneficial if the political world lined up with the moral world in this way, but it does not. As a result, no explanation of rights can hinge on any particular

moral account, or even an account of the right of nations. Peoples differ, and this difference will be the source of much tension in the political world.

In this, Grotius sides with those human rights theorists who emphasize institutions against those who emphasize definitions or groundings. Griffin's task is, in a certain sense, a hopeless one. The more he works to give determinate content to what it means to be human—the more he specifies what constitutes personhood—the further he moves from articulating a viewpoint which could evoke consensus. Again, there is no better example of the manner in which this works than his extended discussion of whether human rights extend to children or fetuses. If he takes the position that human beings come into their rights in stages, as he does, he will lose one portion of his audience. If he takes the opposite position, he will lose another portion of the audience. Even at this point, the debate over human rights is inseparable from the debate over the right and the good more generally. The notion that there is any simple solution is bound to fail.

Second, Grotius addresses the perpetual confusion about the relationship of rights to the rest of morality. The pressure of rights proliferation comes from the place of rights within most legal conceptual schemes. If rights function as trumps, then it is in the interest of all peoples who want to press a political claim to find a right to which that claim can be attached. Even if rights do not function as trumps, the interest is the same. In a world where rights are given a high, but not final, priority, it is still in the interest of

any group who want to make a claim to tie that claim to a right, on the sound game-theoretic logic that, if everyone else will, one ought to, as well. Thus there is pressure to expand the list of rights to include more potential claims. In addition to this, there is also the real and understandable fear that the particular circumstances of a time and place might blind the international community to the recognition of a type of right hitherto unknown. Thus there is not just a pressure to make every claim a rights-claim, but there is a pressure to remain open to rights-claims one initially might want to dismiss.

Against this, Grotius offers a different theory of rights. Though they are certainly an important, indeed central, part of Grotius' theory, rights have limits. These limits are established by other concepts, like moderation, faith, justice, and others; and, as a bonus, these concepts are self-limiting. The result is a world in which rights claims are adjudicated throughout the whole system of morality. Every person has the understanding that the possession of a right is not the most important thing; sometimes one accepts that one will get less than one's due, with the knowledge that at some point, one will have to give less than one owes. Justice is, after all, the recognition that one must sometimes exceed one's duties and claim less than one's rights.

Unlike contemporary theorists who imagine that these sort of demands must be onerous and beyond what can reasonably be asked of citizens, Grotius sees them as a regular feature of moral life. This is just what it means to have a particular moral viewpoint, like a religion, that specifies further duties and rights. The foregoing of rights

can be a mild, typical inconvenience, and not an injustice. In so doing, Grotius leaves room to take the most serious rights-claims seriously while reducing the pressure to treat others as though they were of the same importance.

Third, there is Grotius' integration of politics into law. The distinction drawn between the three types of law is again important. The law of nations contains the whole world of the belief and action of states. It is important to know the beliefs shared by states around the world and the agreements they have come to amongst themselves. It is no less important to know how states actually behave. The motivation behind Grotius' entire project, after all, is the world he sees around him. Christian states, which ought to know better both from the natural law they profess to know and their own religious beliefs, should be models of just war. Instead, they fight against each other on specious pretexts, in unnecessarily violent ways, and in general mock the legal and moral conventions that were supposed to cover war-fighting.⁵⁹ The law of nations has to account for the actual behavior of states rather than just their intended or states principles. That is to say, an understanding of the law of nations requires a *political* theory, not just a *legal* theory.

Bringing the conversation into contemporary terms, Grotius here sides with those who favor a grounding or definition against those who favor an institutional approach beginning with the law as it is. Philosophers like Beitz will often make note of

⁵⁹ Grotius, *The Rights of War and Peace* Prolegomena I-IV.

the fact that a working definition of what human rights are is contained in the law that has been built up on that topic. A theory of human rights must begin at the beginning, and institutions are the place to begin. Those who favor a definition will point out, by contrast, that the lists of human rights proposed in various legal documents do not all function on the same level. This is the essence of Griffin's critique: some things that are called rights could not be rights at all; some are simply very important, but not basic. These cannot belong in any meaningful sense to a list of rights: rights must all exist on the same, hopefully basic, level. Grotius would point to this as a conflation of the role of the law of nations and the law of nature. The law of nations should contain developing standards, at all levels of moral seriousness, which point back to the law of nature. In any world but the best of all possible worlds, however, the law of nations will never be the law of nature. It is the point of these two sources of law that they are in constant tension with each other. The law as it exists is an approximation; it is never the final word.

International law as a discipline provides a further problem (which will be discussed at further length later but needs to be discussed here). Law has a tendency to, in social scientific terms, select on the dependent variable. Law is concerned with the things law recognizes: treaties, custom, decisions of courts. The realm of political action outside of law is less frequently addressed. Neither institutional theories of human rights nor definitional theories do much to address these fundamental questions: where

do the violations come from that necessitate a list of human rights in the first place? Why do states sign rights treaties and still continue to violate those rights? In Grotius' scheme, these political facts need to be incorporated into a theory of politics: the law of nations is just as much what states do as what they say they will do. Philosophical theories of human rights often have less to say about why it is states do not comply with their own stated ideals.

The central difficulty of most theories of human rights is achieving a balance between these three elements. Definitional theories want to limit the potential meanings of human rights, but purchase this additional explanatory ability at the cost of producing a theory that can only ever have limited acceptance. Institutional theories are concerned to protect the legacy of the human rights project against threats from without, but can only do so at the price of conceding any logic that might simplify the various claims of those documents. This is, again, the explanation of why those particular approaches must always fall short.

May's approach is different because it anticipates these three points, and makes them a central feature of his theory. His version of Grotius' law of nature/law of nations divide is reflected in May's differentiation between positivist and naturalist theories of law. Positive law binds, if it does at all, because states (all, or at least most) consent to a particular set of norms. However, some of the norms which states consent to do not appear to derive their authority from that consent: they are (on May's telling) binding

whether we want them to be or not. This occupies the same conceptual space as Grotius' law of nature. May's theory satisfies the second element by identifying a minimal set of rights—and those rights only—all of which function of the same basic level. Only crimes committed by a state apparatus, only crimes that state courts cannot be trusted to adjudicate, only those crimes which touch the most basic facts of being human, those rights surrounding the right to life. His theory satisfies the third element because it recognizes that the choice of some rights need to prejudice all the rest. One may select a certain set of rights without threatening the whole apparatus; one simply shuts out some considerations in favor of others.

Grotius' theory has one additional benefit, not to be underestimated: it is not tied to human rights law as it exists in the post-World War II world. Even otherwise restrictive theories like Griffin's are tied to a conditional endorsement of that order. The logic runs something like the following: though there are rights listed in the various relevant documents that would not meet most tests for what can qualify as a human right, the lists themselves are much more important than any problems they may contain. Paid holidays with leave may not be a human right, but the attempt to remove it from the Universal Declaration or come to any other official consensus that it did not qualify as a right would be dangerous. Once it became possible to remove rights, there is no guarantee that rights would only be removed if they failed to satisfy a rigorous philosophical theory of rights. Regimes that are not interesting in giving certain

protections could lobby to remove those rights, on the specious-but-plausible grounds that whatever right they object to is not basic enough to be a human rights. In a world where the protection of rights is so incomplete and uncertain, it would be a mistake—a *political* mistake—to deny human rights the little power they now have.

The logic Grotius employs points to the opposite conclusion. If human rights law lacks credibility, it is because those documents contain rights no one would be willing to enforce if violated. It is an extension of the principle of faith—one solves the problem of rhetoric in international law by only promising to do those things one will actually do. A promise that a state has no intention of fulfilling is not just a violation of that promise, but spills over into all the other promises that state might make. By including rights that states have no intention of enforcing, the credibility of the human rights project as a whole is undermined.

Even the consideration of the political conditions surrounding human rights violations is ultimately insufficient. The reason for this becomes evident in returning to Larry May's work. His multi-volume project is an attempt to explain and defend the three major divisions of crime under international law. The law of most interest to him is the Rome Treaty, composed over the course of the 1990s and the law at the basis of the International Criminal Court. The idea behind the Court is simple: there have been many cases in which human rights have been violated, and as a part of deferring to international law and institutions, a court with jurisdiction to cover these cases should

be created. Within the terms of human rights theory, both in its contemporary form and in the parts of Grotius' argument highlighted so far, this qualifies as a reasonable and tractable aim.

Difficulties remain in spite of this alliance of theory and practice. The ICC was designed in part to provide a strong institutional background; the background is needed because it became evident throughout the 90s that existing or ad hoc tribunals lacked sufficient power to enforce rights claims. (Cite something here from Gourevitch) Both the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of Yugoslavia (ICTY) have had difficulty bringing individuals to justice, even when their crimes are widely known. Part of the problem is insufficient legal power, which is the sort of problem the Rome Treaty can address. Part of the problem is also the unwillingness of states to surrender the parties responsible. It is not surprising that Serbia might be slow to hand over its governmental officials—even former officials. From the Serb perspective, there was too much interference by European nations and the United States. Even if the officials did wrong, they do not want to countenance a kind of victor's justice.

More significantly, the United States has been unwilling to take part in the Rome Treaty or the ICC. The hesitation has now spanned three presidential administrations—from Clinton to Obama—and so cannot be explained away as the feature of domestic partisan politics. The Clinton administration used their hesitancy over various

provisions requiring those charged with crimes to be given over to the ICC as a means of gaining leverage in the negotiations of the Rome Treaty. Despite the best efforts of negotiators to compromise, the administration still did not sign the treaty until the very end of Clinton's term, and made no effort to introduce it to the Senate.

The motive force behind the U.S.'s reluctance to sign onto the ICC is a concern over sovereignty. In order for the ICC to work, the U.S., and other states, have to be prepared to give up jurisdiction over at least some cases involving their citizens. The open question, from the U.S. perspective, is how far the ICC's power will extend. This sets up a paradoxical relation: the stronger the ICC, the more effective it can be in defending the human rights principles of international law. However, the stronger the ICC, the greater its ability to decide domestic efforts to prosecute, for example, war crimes violators, are insufficient. If a state is convinced that its own internal methods for dealing with criminals are sufficient, what reason does the state have to give someone else the power to contradict that belief?

The problem is complicated because though there is often a self-regarding motive behind these considerations, there is a serious point, as well. The genesis of the human rights project was the worldwide reaction to the Holocaust and the conviction that sort of action should never occur again. But this is not the only, perhaps not even the main, consideration to emerge out of World War II. In the law establishing the International Military Tribunals at Nuremberg, a first draft of the post-1945 international

law, the crimes they identified were concerned primarily with aggressive war. In the structure of the United Nations Charter this concern is repeated and amplified. The idea that one state can meddle in the purely domestic affairs of another state is a serious threat—not just in war, but in the ability to place undue diplomatic pressure on weaker states to conform with the will of stronger states. War and the threat of war are serious problems in the international system. A strong endorsement of sovereignty works to counteract those pressures.

The problem of international law, in brief, is this: the law, after 1945, is concerned to take human rights and sovereignty, and attempts to make both the primary value around which international law and institutions are organized. This tension accounts for the sometimes divergent aims of the UN Charter and the Universal Declaration, and for the censure particular states receive for acting in defense of human rights while human rights law continues to expand. It is important, in this line of thought, to recognize both human rights and sovereignty are values: sovereignty is not just the defense of immoral state behavior, but a positive advancement in its own right. But the tensions between these two values are infrequently recognized by international law, and the conflict between them is taken as a given. Contemporary theorists are encouraged to side with one value over the other, in a particularly unhelpful way: either sovereignty is the most important value in the international system and so any threat to it, such as the threat posed by intervention, must be viewed as an existential threat to international law itself;

or the values defended by human rights are of supreme importance, and appeals to sovereignty should be regarded as disingenuous attempts to avoid the enforcement of international moral standards. The subject of how this division came to be, and how extensive it is in contemporary international law thinking, is the subject of the next chapter.

4. Humanitarian Intervention in International Law

The end of the previous chapter introduced sovereignty as a value in competition with human rights to be the primary value expressed in international law. The result of this competition is what I have called the Dilemma of Humanitarian Intervention: given a human rights crisis, a state may choose to defend human rights, or honor the principle of sovereignty, but not both. This chapter will develop and explicate the intellectual environment of international law, the set of conditions and assumptions that gives the Dilemma the force it has, as well as its apparently irresolvable nature. Contemporary international law deals with humanitarian intervention in a way quite different than Hugo Grotius deals with his comparable concept of intervention. Though some of these contrasts will be made more explicit in the following chapter, a brief overview of Grotius' approach to the question will set the discussion of humanitarian intervention in contemporary international law on the right grounds. In short, Grotius accepts the possibility of one state using military force to intervene in the internal affairs of another state. He puts this under one of his categories of just war, that of punishment. He begins with the idea that punishment is sometimes an acceptable reason for a just war, and ends with the conclusion that there are some behaviors no moral state or individual can countenance which can merit intervention. Along the way he discusses the problem of rhetoric and motivation, what responsibilities one state can have for others, and how

intervention can function as an imperfect duty, that is, one where a state *may* intervene but is not *required* to intervene.

Contemporary international law comes to almost completely opposite conclusions. The majority of international lawyers believe sovereignty to be the key value protected in international law, and that intervention on humanitarian grounds can never be justified apart from a United Nations mandate. However, it is not just those international legal theorists who oppose humanitarian intervention that follow this logic: it is a central contention of this chapter that even those who believe space needs to be created to allow humanitarian intervention accept many of the basic principles of international law theory, including the Dilemma. The chapter will lay out the problems of contemporary international law in three stages. First, the role played by the concept of the rule of law is central to all international law theory for both sides of the Dilemma. Lawyers who oppose intervention point to the clear language of the UN Charter ruling out war for any reasons other than self-defense. Even those lawyers who want a practice of intervention to develop believe that it can only achieve final legitimacy if such a practice can be integrated into law and institutions. In the second stage, we will examine the way in which the camps favoring and opposing a doctrine of humanitarian intervention harden. It is a striking feature of the legal and theoretical work on intervention that almost everyone believes sovereignty and intervention to be mutually exclusive values: if a practice of intervention is admitted, then sovereignty is

compromised. Third, two other pertinent difficulties for a theory of intervention, that of rhetoric and the relationship between human rights and the cosmopolitan/nationalist divide, will be discussed. As clearly as these two issues bear on the discussion of intervention, they rarely receive extended treatment in international law theory. The grand result of these theoretical developments is a world in which advocates of sovereignty and advocates of intervention talk past each other, a world in which interventions continue to happen, but on an ad hoc basis and without the full sanction of international law.

4.1 The Use of Force and the UN Charter

Humanitarian intervention is defined here as the use of military force, by a state or collection of states, against another state, without its consent as a necessary precondition, in order to stop severe violations of human rights. The definition is, of necessity, complex: the intervener could potentially be one state, a collection of states in an international organization such as NATO, or apart from such an organization, or an organized international group led under the auspices of the UN. The human rights violation might be severe and acute, or it could be less severe but chronic. The state which will be intervened might possess a centralized government carrying out the human rights violation, or might be in a condition where no group can exercise effective use of force. The ambivalence in the definition is important: humanitarian intervention theory considers all of these possibilities and attempts to combine them within one

theoretical approach. In the post-1945 era, there have been a number of interventions for which a humanitarian motivation was given, or where one was recognized after the fact. The most frequently cited examples of these include the overthrow of the Khmer Rouge by the Vietnamese and Idi Amin in Uganda, both responses to widespread, state-sanctioned violence. More recent examples include NATO's intervention in Kosovo, and UN action in East Timor.¹

Cases where no intervention occurs also count as instances of the underlying phenomenon. For the contemporary mind, the two most prominent examples are Rwanda and the Darfur region of the Sudan. They are no less important than the successful interventions because they indicate the stresses in contemporary international law. Such an approach offers a secondary benefit, avoiding the tendency of international law to select on the dependent variable. The failure to intervene in certain obvious (in retrospect) cases is one of the features a good theory of humanitarian intervention needs to explain. Additionally, the zeal of humanitarian intervention advocates is often a specifically moral response to the failure to act in the past. It is difficult to read an account of the genocide in Rwanda and not be left with a sense how easily, given a small number of troops and a proper understanding of Hutu-Tutsi dynamics, it could have

¹ It is not my intention to rehash the debates that have already occurred as to whether any of these are 'real' instances of humanitarian intervention. Later I will cover the distance between stated reasons and actual motivations, which will touch on part of that debate. The fact that there are no uncontroversial cases is what drives the underlying problem in international law.

been stopped. The memory of past failures to act keeps the issue in the political and legal forefront.

If the underlying moral intuition is a strong one, and there is at least some history of intervening to stop severe violations of human rights, why is humanitarian intervention a contentious issue? The answer lies in the construction of the UN Charter. On the terms of that document, humanitarian intervention appears clearly illegal.

Three passages are key to understanding the legal claim. The first is from Article 2(4)²:

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

The second, 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.³

The third, Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.⁴

Combine this with the principle expressed in Article 31 of the Vienna Convention on the Law of Treaties:

² A useful one-page edition of the Charter may be found at <http://www.hrweb.org/legal/unchartr.html>.

³ *Idem*.

⁴ *Idem*.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁵

The overwhelmingly popular view amongst international lawyers is that the 'ordinary meaning' of the combined provisions of the UN Charter provides no right to humanitarian intervention under any circumstances. On this view, the Charter makes clear no right could be found or added. Some international legal theorists argue that this is a misinterpretation of the law, while others concede this is, in fact, the law but it may be subject to change over time. Nevertheless, this is the position from which most analyses of humanitarian intervention start. Advocates of intervention believe there is an instinct that a moral and political case can be made for the practice, but international law rules it out. From this clash springs the literature on humanitarian intervention.

4.2 The Rule of Law in International Law

The concept of rule of law serves many purposes in law. In the arena of international law, it includes two related propositions. These are not exhaustive of the meanings of rule of law as a concept, but they are central to it, and allow for a meaningful analysis of the concept. First, rule of law means the belief that every situation in international politics is, or can be, addressed by a law which is constituted from one of the recognized sources of law, such as treaty or custom.⁶ The first

⁵ A one-page version of the Convention may be found at <http://fletcher.tufts.edu/multi/texts/BH538.txt>.

⁶ This is related to the importance of concepts like *jus cogens* and progressive legalization, both of which were touched on in Chapter 2. One might object that, even on a strict view, space always remains for what

proposition entails the second: since a law may exist that will cover any possible scenario of international politics, a practitioner need only make use of duly enacted laws in order to find the proper solution to any political problem. This combination of beliefs will be termed the Rule of Law, and when capitalized will refer to this set of concepts as applied in international law.

The Rule of Law, applied this way, corresponds to the positivist interpretation of international law. This concept has been introduced in the work of Larry May, as well as Beitz's belief that one need only look to human rights law to know what human rights are. In more formal terms, positivism means that only positive sources of law, arrived at in prescribed ways, count as law. The first part of this section will address two reasons this view has the prominence it does in international law: it tells a compelling narrative of progress, and it makes a point of touting its completeness as a theory. The second part will examine alternative interpretations of international law, both the legal realist who argues that the positivist interpretation is mistaken, and the reform theorist who argues that the international legal system is not the closed, complete system it pretends to be. Both share the belief that the positivist interpretation creates a gap between legal doctrine and political reality, and attempt to close that gap. I will also argue that the

Locke referred to as 'prerogative': the ability of one with authority to make exceptions to general rules. In fact, the purpose of the laws of war, especially the restrictions on war of the UN Charter, is to remove the ability to make exceptions. If war is never permissible except in self-defense, some states may still ignore the rule, but far fewer than would ignore a rule that allowed for war in a number of circumstances.

positivist, recognizing the gap between law and politics, employs a number of additional concepts to reconcile discrepancies.

The differences between these views are important, and drive many of the theoretical divides to be discussed later. It will be my contention that, despite the distance between each position, they all share a commitment to the Rule of Law. None is comfortable with the idea that action might be taken in the international realm apart from law or institutions. Even the reform theorist, who will tolerate what he terms 'illegal but justified' behavior, only tolerates it on the condition that such behavior is a necessary but imperfect stage on the way to a change in the underlying law.

4.2.1 Positivism

One of the standard tropes of the international law textbook is to begin with a section that recounts the history of international law up to the point at which the book is written. The account found in Antonio Cassese's *International Law* provides a good example. The historical narrative is first sketched very broadly. Once, Cassese writes, there was not any international law to speak of, now there is. Law or institutions fail, but the failure is not an indication that something is wrong with the underlying principles of international law. Any particular law or institution, especially before 1945, is only an imperfect instantiation of the principle behind it. For example, the Calvo and Drago Doctrine was an informal legal solution to the problem of sovereign default. States would loan money from credit markets in Europe, and then default on their loans. The

banker who controlled the loans would then pressure their governments to send the military to forcibly collect the debt. A practice along these lines was widespread in Central America in the 19th century, and frequently also served as a proxy for colonial power. The Doctrine proposed submitting such disputes to an impartial tribunal, but failed because

No doubt the refusal to apply the clause was legally correct in the light of the international rules applicable at the time. The failure of the Calvo stipulation only proved that it was vain to seek to undermine existing conditions by means which fell short of a radical change in the legal regulation of the treatment of nationals abroad.⁷

Even the League of Nations, the first serious attempt at institutionalizing international law, though it represents a step forward, still has numerous structural failures that prevent it from achieving even its modest goals.

The United Nations changes the status of international law because it finally embodies an institution capable of defending principles in a non-qualified sense.

The new appalling advances in man's ability to wreak havoc made it necessary to regard peace as the fundamental purpose of all states, a purpose to which all others—including respect for international law and promotion of justice—ought to be subordinated... They more realistically set about building up a system designed to make armed clashes exceptional events, to be controlled or terminated by means of international institutionalized co-operation.⁸

The lessons of World War II and the failure of the League of Nations were learned. Unlike previous attempts to institutionalize, this one was successful, because it

⁷ Cassese, *International Law*, 33.

⁸ *Ibid*, 40.

was complete. Cassese claims a high value for peace enforced through a strong notion of sovereignty, stronger even than justice or the respect for law. He does so in order to pre-empt the standard criticisms that international law has made itself irrelevant to politics or sacrificed its normative aims in order to gain widespread acceptance.⁹

Cassese attempts to pre-empt criticism of international law. The objections he anticipates indicate many of the weak areas of contemporary international law. Central to the positivist project is the need to demonstrate that international law actually can function in the same way as domestic law. Therefore Cassese, as he moves from the history of international law into its current form, emphasizes two important features of the positivist view: codification and the proliferation of law.¹⁰

The first claims that law is moving from 'softer' sources to 'harder' ones. Custom, under a traditional understanding of international law, is considered a 'soft' form of law. For something to be a custom, there needs to be both a widespread practice, and an agreement (*opinio juris*) that the action happens precisely because actors consider themselves legally obligated in some way to do it. States may object to a custom and not be bound by it; states may derogate from a custom to create another. Codification is the

⁹ "They were aware that international friction and inter-State armed conflict would not disappear by legislative fiat. They more realistically set about building up a system designed to make armed clashes exceptional events, to be controlled and terminated by means of international institutionalized co-operation. In short, States aimed at achieving a state of affairs where the absence of war was to be a fairly normal condition." Ibid, 40.

¹⁰ Cassese discusses these features of international law at *ibid*, 44-45. A more skeptical position on codification can be found in Weil, 'Towards Relative Normativity in International Law?', 413 ff.

process by which these customary understandings become written into treaty law, which is binding on all those who sign the treaty, and may not be changed by derogation or the creation of a new custom—the treaty supervenes. Proliferation, by contrast, is the idea that it is a sign of the strength of international law that, via its legislative processes, it creates law that covers an increasing number of issues. In other words, the expectation is that any area of international politics which law may need to cover either already has been addressed, or else there is an expectation that the area in question will be addressed at some point in the future. The combination of these two practices are intended as signs that international law is able to solve problems as they arise, even in areas of law that contain gaps.

The historical account of the rise of positive international law already provides hints—in the transition from soft to hard law, and in the virtue assigned to the increasing number of institutions and laws that govern them—of the status of the theory of international law. Historically, the anxiety surrounding international law has been its failure to embody a full set of primary and secondary rules in the sense employed by HLA Hart. Primary rules are rules or laws in the conventional sense, and the secondary laws are ‘rules of recognition’ that explain when and how primary rules may be regarded as such. Proliferation and codification are designed to address concerns about the lack of primary rules.

Secondary rules are covered by the Doctrine of Sources and General Principles of International Law. The doctrine of sources, simply put, is the idea that a positivist approach to international law recognizes as law only those things that come from a source recognized by the theory.¹¹ Treaty law and customary international law are both examples. Treaties can be known in this way because they are publicly signed by states party to the treaty, registered with the UN, and subject to interpretation under the Vienna Convention on the Law of Treaties if made after the Convention, or the Principle of *pacta sunt servanda* (treaties must be executed) if made before. All components may be known by any interested state or individual. Customary international law poses more of a difficulty: the *usus* of states may be clearly known, but the *opinio juris* is often harder to specify. The uncertainty that surrounds customary international law comes from the means by which it is recognized: how much practice is sufficient to establish a custom? What constitutes persistent objection? How long does it take a norm to solidify? To the extent these questions are answered at all, they are established by the action of courts recognizing that a custom exists. General principles are the set of axioms that make international law function; some of these are codified in the UN Charter.¹²

¹¹ Ian Brownlie makes this the methodological basis of Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (New York: Springer, 1998). The only sources one needs to consider are treaty agreements and decisions handed down by properly constituted judicial bodies, like the ICJ.

¹² Cassese identifies concepts such as sovereignty and equality of states as General Principles; *International Law*, 46-70.

4.2.1.1 Positivist Theory and Politics

The proposition that international law is a fully functional system of rules in Hart's sense is controversial. Some philosophers believe that indeterminacy is the hallmark of any system of rules, and the notion that they can ever be complete is fallacious. This criticism has been leveled at international law at all stages of its history. Whether the criticism is valid is a question that can be set aside for purposes of this study. The belief that international law is a system in Hart's sense is widespread, and an important part of the appeal of positivism. Though the theoretical shortcomings and odd features of positivism are important to identify, it is less the foundational soundness of positivism than the implications that come from holding it as a view which create such difficulty for theories of humanitarian intervention.

Most notable in the standard analysis of international law is the absence of politics. The Rule of Law makes reference back only to valid sources. Thus international lawyers, such as Brownlie, make a point of conspicuously rejecting the idea that politics ever opposes law in a meaningful way.¹³ Lawyers who take this position refer to the

¹³ In social science terms, this is the problem of 'selecting on the dependent variable' that was discussed briefly in Chapter 2. The objection to Brownlie is this: the question he wants to answer is whether international law has a meaningful impact on state behavior (his dependent variable). To answer the question, he looks *only* at cases where international law, whether treaty law, custom, or the decision of courts, made a significant impact in the final behavior of the state in question. Thus he has only selected cases in which the dependent variable (change in state behavior) corresponds with his theory. A political approach to international law might suggest instead that the most important issues for a state are those that they will not allow an outside influence, such as treaty law, etc, to determine. Brownlie's theory is incapable of responding to such an alternative theory.

number or seriousness of international problems that are brought under the scope of law, or else brought to proper institutional channels for adjudication or arbitration.

There is a great deal of truth in the memorably laconic phrase of Theodor Meron: “here, again, practice lags behind legal principle.”¹⁴ Every legal theory must make some adjustment to the reality of the gap between the world envisioned by legal institutions and the political world as it is lived. International lawyers will concede that a gap may exist, under some circumstances. For example, the legal effect of reservations and understandings attached to treaties, discussed earlier, is one area where the gap becomes evident. The treaties themselves make impressive strides in the law while the reservations take back substantial portions of that progress, in the name of sovereignty. The development of a great body of law, through progressive codification, is necessary precisely because states will avoid legal obligations when it is convenient or they perceive it to be necessary, especially when those obligations are implied rather than directly stated. More direct and ‘harder’ forms of law, like treaty law, generate clearer obligations, and thus are preferable from a legal standpoint.

Positivist theory has a number of means by which to close the gap between law and politics. First there is the notion of *jus cogens*, with the attendant idea of relative normativity. The concept comes from the observation that certain attitudes or practices

¹⁴ Meron, *The Humanization of International Law*. Here he speaks specifically of the ability of one state to take other states to international court over the mistreatment of that state’s citizens, and how infrequently this ability has been used.

become norms within the international community, and have a moral force behind them. Given the presence of *jus cogens* norms, there are two possible ways of assimilating them into law. If the norms have *jus cogens* status, a state may not derogate from them for any reason, and will have legal obligations to enforce those norms whether they object to the norm or not. Alternatively, non-*jus cogens* norms can take a place in a subjectively determined but objectively enforceable hierarchy of norms, from which derogation may or may not be possible.¹⁵ In both cases, the obligation to follow the norm can be legally enforced quite apart from whether a state agrees to the norm or considers it to be less important than some other interest.¹⁶

It is a short step from the idea that customs may arise that make derogation impossible to the next theoretical development: the formation of 'instant custom' and the idea that states may be bound to multilateral treaties even if they are not a party to them. Beyond this there are more complicated jurisprudential theories: first, the general

¹⁵ See Weil for a discussion of the creation of a hierarchy of norms. This is, of course, the recreation of the problem of human rights on another, more basic, level of legal theory. The difficulty with rights proliferation was the possibility that, in seeking to cover any possible right that might be violated, one creates so many rights that each loses the force a rights-claim is supposed to possess. *Jus cogens* norms offer the same temptation: since they can 'jump the line' and force compliance, there is a temptation to make as many normative legal claims into *jus cogens*-claims as possible.

¹⁶ The *Barcelona Traction* case is frequently cited in support of this proposition, or the distinction between "the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection" (quoted in Meron, 248, footnote 6). Obligations *erga omnes* do not depend on consent.

principles of international law, but also the idea that the law, in its silences, covers a great deal of other topics, so what appears to be a lacuna is in fact already covered.¹⁷

Two observations are most important to take from this approach to international law. First, though the completeness of international law is an important part of the appeal of positivist theories, they admit that a gap exists between the law as it stands and the practice of states on the world stage. Second, the presence of that gap is a significant problem that threatens the project of international law as a whole. This attitude is not exclusive to the positivist view—even those views that reject it also adopt the attitude—but the problem may be most keenly felt here. The positivist project has a standard that determines its own usefulness as a theory—the presence of a system of rules that function according to the positivist standard. To the extent behaviors remain outside this framework, a positive description will lack completeness.¹⁸

4.2.2 Legal Realism

Legal realism is a partial reinterpretation of the positivist approach. It shares with positivism the belief that international law is, or should aspire to be, a complete

¹⁷ G.G. Fitzmaurice takes this approach in G.G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law, Recueil Des Cours for the Academy of International Law* (Leiden: A.W. Sijthoff, 1958).

¹⁸ Though this attitude is widespread amongst international lawyers, it is not everywhere. The attitude of G.G. Fitzmaurice and Hersch Lauterpacht, amongst others, to the problem of '*non liquet*' that caused so much trouble in the 1940s and 50s (basically the idea that in areas lacking a clearly defined law, an international court could return no verdict at all) was to point out that the same problem afflicted domestic law, and no one there had a problem with assuming the completeness of the law and deriving a result from that assumption. Since there is no *a priori* reason to think of international law as different than domestic law (a contentious but not implausible point), one should assume the same problem merits the same solution.

system capable of responding to international crises as they develop. Where it differs is the interpretation of the parts of the UN Charter that concern, on the positivist model, non-intervention. Positivists read 2(4) as a defense of the concept of sovereignty. Realists place the heavy emphasis on the last clause: “in any other manner inconsistent with the Purposes of the United Nations.” Taking this as a starting point, they look at the development of law after the Charter is adopted—especially the Convention on Genocide—and argue that a reading which over-emphasizes the importance of the Charter in the system of international law is a misreading.¹⁹

The task of the last 60 years, to identify human rights and place them explicitly under protection, indicates that the protection of humanitarian concerns is of at least equal weight under international law. Without addressing the conflict between sovereignty and intervention, the subject of the next section, it is sufficient to note that the realist interpretation simply adds a premise to the positivist interpretation, but considers that decision-making can only happen through the proper legal channels. The legal realist just possesses a more expansive interpretation of what those channels are.

Allied with this is the view of the New Haven School, especially in the work of W. Michael Reisman, who argues that the UN Charter system must be considered a failure. The Charter, read as a whole, is premised on the creation of a system of

¹⁹ Tom J. Farer discusses, though dismisses, this viewpoint in Tom J. Farer, "Humanitarian Intervention before and after 9/11," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 61-68.

collective security, of which the Security Council's Chapter VII powers are its apogee.²⁰ However, since the collective security system never came into existence, the prohibitions on the use of force, which only make sense if they are to clear space for the UN to act, must be taken as void. Though this view appears even more radical, it is still premised on the Rule of Law: all potential sources of law must be explained or explained away before any action can be taken outside the framework of international legal institutions.²¹

4.2.3 International Legal Reform

The last broad approach to consider is the International Legal Reform movement. Those who hold this view argue that the law, as it stands, is valid, and prohibits the use of force for humanitarian purposes. Nevertheless, the introduction of a properly legal or institutionalized right to intervention would be a great good. Therefore effort is placed on finding a means—through the sources of law—to bridge the gap. Theoretical approaches here generally take two forms. First, advocates of this view will argue about secondary rules, especially concerning customary international law. That is, there may be no custom at the present moment recognizing a right to humanitarian intervention, but it might be possible, given a concerted effort over a period of time, to establish a

²⁰ The point is most forcefully argued in W. Michael Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)," *American Journal of International Law* 78, no. 3.

²¹ A different approach, looking to Article 2(7), but with a similar aim, can be found in Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform," *American Journal of International Law* 99 (2006).

custom along those lines.²² The other approach is to argue for institutions which can bridge the gap: sometimes this is a council of democracies that could enforce human rights norms, sometimes it is an institution where states that intervene would have to come to present their case after the intervention.²³ Far more than the positivist or the realist, the international legal reformer is comfortable with the tension between the reality of international politics and the form of international law—it is from here that the ‘illegal but moral’ slogan is most often used.

The tension is accepted only inasmuch as it is a temporary station on the way to full legality or institutionalization. The model for this approach to law is of civil disobedience: one stands outside the law because one finds the law to be morally unacceptable, but the point is to change the law. It is far from clear that those who work in this tradition would be comfortable with a perpetual ‘illegal but moral’ status for intervention. If there is some feature of international law—the popularity of the positivist view, the widespread support for a stringent notion of sovereignty, the unwillingness to support the human rights project with force—which resists even slow alteration, change will never come, and the consequences of making the Rule of Law contingent may prove too undesirable for the reform project to continue.

²² Michael Byers and Simon Chesterman, "Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003).

²³ Allen E. Buchanan, "Reforming the International Law of Humanitarian Intervention," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003).

4.3 Sovereignty and Non-Intervention

The concept of the rule of law is necessary to set the stage for the discussion of intervention, in no small part because it defines both the means by which the argument will be carried out, as well as the parameters that define what constitutes a worthwhile answer to the question of whether intervention is possible. In both contemporary political and legal thought, the concepts of sovereignty and intervention are linked. To affirm one is to negate the other. If one subscribes to a robust theory of sovereignty, which respects sovereignty as the logical consequence of the principle of self-determination, then the only legal and political commitments to which that people may be bound are those that they choose to enter on their own. A people must be given wide latitude to organize the state in such a manner as they see fit. If, by contrast, one adopts a theory of international politics that would leave room for intervention, then one is usually inclined to see sovereignty, whatever useful function it may serve in other situations, as the primary obstacle to the realization of justice in international law. The tendency of those who oppose intervention is to give sovereignty too much respect; the tendency of those who support it is to give sovereignty too little respect. In both cases, there appears to be agreement that one cannot hold both as part of the same theory.

The concept of state sovereignty, in both contemporary international law and a long line of theory stretching back to at least Christian Wolff, has an uneasy relationship with intervention. This perhaps understates how far apart the two concepts are in

contemporary thinking. Advocates of a strong conception of sovereignty, including the Group of 77 nations²⁴ and most international lawyers in government positions, see the principle of non-intervention, as established in the UN Charter, as the signal moral advancement of the 1945-1948 period. The sovereignty of a state, then, is bound to the concept of non-intervention, which in any rigorous form will be hostile to even a moderate theory of intervention. For the strong sovereigntist, the ideal number of interventions, for humanitarian purposes, or any other, is zero.

Those who advocate a doctrine of intervention, for their part, are happy to qualify the extent of sovereignty. Some go very far, arguing that a state's failure to uphold any particular human right constitutes a forfeiture of that state's legitimacy, and thus the state loses whatever presumption of sovereignty it believed itself to have. Others argue that serious violations of basic human rights provide a reason, within the framework of international law, to suspend the presumptions of sovereignty for a short period of time. Whatever view a particular theorist takes, the underlying implication is clear: intervention can only be premised on a negation of sovereignty. What is debated is when and to what extent that negation can be justified.

4.3.1 The Development of Sovereignty

²⁴ See <http://www.g77.org/statement/getstatement.php?id=071005> for one typical G77 statement: "With the adoption of this decision, we wish to stress and expect that the UNDP will fully respect the UN Charter principles of national sovereignty, territorial integrity and national unity of the States. We reiterate that the strength of the United Nations operational system lies in its legitimacy, at the country level, as a neutral, objective and trusted partner for both recipient countries and donor countries."

Sovereignty has a long life in political theory, and most legal accounts of the concept will recount some of that history. The important theorists of sovereignty will often change. For those concerned with the pure political theory of sovereignty, the concept goes back to Bodin and Hobbes. Those interested in the political theory of international politics will begin will take different approaches. For some, sovereignty achieves its place in international law with the systems of Wolff and Vattel. For others, the doctrine of sovereignty begins with Pufendorf, who is concerned to adopt and respond to the theory of Hobbes. Even Rousseau's work on international peace will sometimes be cited as a formative source of the contemporary idea of sovereignty. Regardless of where they fall on this historical account, all agree that the concept of sovereignty gains importance in the 19th century, through the influence of J.S. Mill, and legal positivism of English and German varieties.

As a concept, sovereignty is frequently divided into two parts: internal and external. Following Bleckman, who writes on the concept of sovereignty in the UN Charter, it is easiest to understand external sovereignty and its implications by beginning with internal sovereignty.²⁵ To the extent any state will have longevity, it is by gaining control over most, if not all, members of the state, usually by becoming the sole

²⁵ Albert Bleckman, "Article 2(1)," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma (Oxford: Oxford University Press, 1994). Simma's *Commentary* is considered amongst international lawyers to be one of the best interpretations of the document.

or most powerful wielder of force: this is internal sovereignty.²⁶ Hobbes is frequently associated with this story—internal control by any means necessary, accepting whatever consequences are necessary to have that control, even highly centralized government—though even a political theory as minimal as Nozick’s has this as a feature. The state becomes a unit to the extent it is organized politically.

Next comes self-determination, expressed historically as the idea that a polity can be organized in more than one way.²⁷ Hobbes is open to the possibility that a state might be a monarchy, republic, or take on some other form. Locke expands on this by seeing the form of government as, in some sense, a reflection of the will of the people rather than just a choice imposed by necessity. The thesis that governmental and social organization is a reflection of the will of the people becomes the basis of modern constitutionalism, especially in the American context.²⁸

²⁶ The question of control and the use of force is a difficult one, because two very different models can be adopted to explain what occurs when a state has sovereignty. One focuses on the citizens of a state and their willingness to accept sovereign authority; the other focuses on the ability to control a territorially-delimited piece of land. The difference bears on the question of intervention because the locus of sovereign authority plays into the consideration of what constitutes non-intervention. If sovereignty is about territory, then it is possible to set up bright-line standards that make any use of force across a border impermissible. If sovereignty is about the ability to convince and compel citizens into recognizing the legitimacy of a government, then it is not clear that crossing a border will always fundamentally compromise the doctrine of sovereignty.

²⁷ Self-determination is also an important concept in the development of anti-colonialism. Because sovereignty can do important work to advance some human rights, especially those concerning the ability to establish one’s own political order, it is important to recognize the important role a well-defined theory of sovereignty can play. Self-determination in contemporary international law is not always content to play this limited role.

²⁸ One might complain, fairly, that this narrative is far from complete, and working on a too-general level. The complaint is legitimate, but this is the narrative as it is usually given.

Even figures like Rousseau, for whom the necessary institutional features of government are more determinate, share one feature: a striking disinterest in what happens outside the state. The function of dealing with other states is given to the government, but within the mainstream of political theory, the topic is a secondary one.²⁹ The form of political organization is solely a question for those belonging to the society from which the state will arise; other states and their citizens should have no interest. To the extent other states appear, they appear as threats to the order a polity has established— hence conquest and usurpation are topics frequently addressed. The characteristic interactions of one state with another are in the form of threats—the use of force, the possibility of extinction—and those outside threats need to be managed just as the inside ones do.³⁰ Since power, definitionally, isn't extended beyond the boundaries of the state, the government maintains its power by excluding others.

The analogy between the individual and the state is of some vintage. Certainly it is there in the famous frontispiece of Hobbes' *Leviathan*, the image of the state as one man composed out of many. Some of the characteristics ascribed to the individual have

²⁹ Martii Koskenniemi makes this point in his historical survey of liberal thought, including Hobbes, Locke and Rousseau: "To be sure, none of the classic liberal theorists showed any particular interest toward international relations or international law. On the other hand, most of them felt they had to say something about this matter, too. And they did this by adopting the 'domestic analogy'—assuming that the principles which they regarded as valid in inter-individual relations could, on the whole, be applied in inter-State relations as well." *Martii Koskenniemi, From Apology to Utopia (Cambridge: Cambridge University Press, 2005)*, 89.

³⁰ The analogy of states to firms, complete with the possibility of 'death,' is most famously expressed in Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass: Addison-Wesley Pub. Co., 1979), though other Realists have emphasized the existential threats states face.

always been given to the state, and as the concept of autonomy takes on increasing importance, the link between sovereignty and nonintervention is strengthened.

J.S. Mill's idea of self-determination and non-paternalism, developed in *On Liberty*, provided, within a polity, a space for contestation and deliberation, with two key additional ideas. First, there could be some certainty that a society's deliberation, provided no undue outside influence, would progress from worse to better—the conviction that the truth would win out, given enough time. Second, that changes ought not to be imposed, but rather argued for, and accepted by a people.³¹ The analogy back to the individual is straightforward: if individuals have intellect, and the ability to reason, they will be able to sort good decisions out from the bad, and choose them affirmatively. In this sense, the worst thing one can do is impose from outside, because it would interrupt the natural progression of things. On the international level, this links closely with the view that a people ought to be free to organize itself as it sees fit, with the conviction that, over time, they will move from worse to better.

Thus runs the argument for internal sovereignty, which transitions naturally to arguments for external sovereignty. The freedom to interact with the rest of the world as much or as little as any particular state wishes to. Indeed, the claim, as Bleckmann states,

³¹ "Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted on only a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it." J.S. Mill, *On Liberty* (Indianapolis: Hackett Publishing Co., 1978), 16. In other words, one should respect a man's autonomy, even (perhaps especially) when he is wrong.

is that, though conceptual analysis begins with internal sovereignty, in the present international system, the opposite is true: “The concepts of internal and external sovereignty are also closely related from a political perspective, as there can be no internal sovereignty without external sovereignty.”³²

4.3.2 Sovereignty in Contemporary Legal Theory

For contemporary theorists, sovereignty and nonintervention are thus fused, though the implications drawn from that fact differ in emphasis. Michael Walzer provides a good example of one kind of response that heightens the importance of borders and communal integrity. What goes on in a state is a collective social life in which all individuals play a part. He is ready to give wide deference to the manner in which a people constitute themselves. But since those decisions are formed in a set of conditions to which outside observers can only, inevitably, be outside, Walzer is prepared to strictly curtail the situations in which outsiders can make any claims whatsoever about the life of a community.³³ Every moment in which an outsider wants to exert any influence on the internal workings of a state—even diplomatic pressure of a

³² Bleckman, "Article 2(1)," 80.

³³ I do not believe this is, on balance, Walzer's position, for reasons I will elaborate later. It is, however, one of the very common interpretations of his position, taken by Jeremy Waldron, "When Is It Right to Invade?," *New York Review of Books* 2008), among others. Here self-determination is taken to be a, or perhaps the, fundamental good a people can possess.

routine kind—is taken as a threat.³⁴ The burden is placed on those who would cross the border to explain why their actions would be legitimate and proper.

The legal approach to non-intervention is perhaps best typified by Simon Chesterman. His theoretical approach has two goals. First, to oppose any reading of the UN Charter, especially 2(4), that would create room for a right to humanitarian intervention outside the auspices of the UN. Second, to provide support for the illegality of interventions, on the theory that this is the best way in which to lower the number of interventions undertaken on specious pretexts. To return to the first point, Chesterman goes beyond a typical reading of 2(4) that emphasizes the importance of sovereignty and peace within the UN system. He goes beyond by attacking the attempts of other writers—especially Anthony D’Amato and Fernando Tesón—to provide alternate readings of the Charter.³⁵ To do so, as Chesterman argues, requires D’Amato to make an almost ‘Orwellian’ interpretation of the relevant position, and, Tesón to strain even an Orwellian reading.³⁶ Alternative interpretations of the UN Charter, for Chesterman, are

³⁴ “The Moral Standing of States” in Michael Walzer, *Thinking Politically: Essays in Political Theory* (New Haven: Yale University Press, 2009), 232: “Rights are only enforceable in political communities where they have been collectively recognized, and the process by which they come to be recognized is a political process which requires a political arena. The globe is not, or not yet, such an arena. Or rather, the global community is pluralist in character, a community of nations, not of humanity, and the rights recognized within it have been minimal and largely negative, designed to protect the integrity of nations and to regulate their commercial and military transactions.”

³⁵ Simon Chesterman, *Just War or Just Peace?* (Oxford: Oxford University Press, 2001), 50-53.

³⁶ In fairness to Chesterman, he demonstrates via an examination of the preparatory documents for the Charter that his interpretations were, at the least, prominent in the minds of those who drafted the Charter. Whether legislative history or original intent is a sufficient interpretive principle is not discussed.

not positions to be debated or discussed, as constitutional issues might be on a municipal level, but rather are to be dismissed out of hand as perversions of the law.

Though he is willing to admit that some interventions, such as in the case of Rwanda, could accomplish great goods, Chesterman sees virtue where others see weakness in the international legal regime. Maintaining formal standards against intervention means that the justifications for such action will have dubious legal status, whatever the political or moral merits of the particular case. Overall, this will have the (for Chesterman, desired) effect of limiting the number of interventions, and preventing states from taking the first steps to legitimating humanitarian intervention under customary international law. For Chesterman, the threat of abuse looms quite large: states already undertake actions against their neighbors for a host of reasons, some legitimate, but most not.³⁷ Adding more possible justifications only invites more interventions, a purpose clearly hostile to the intent of the UN Charter.³⁸

4.3.3 The Theory of Intervention

³⁷ Chesterman, *Just War or Just Peace?*, 231: "...it is more dangerous to hand states a 'right'—even of such a limited nature—than to simply assert the cardinal principle of the prohibition of the use of force and let states seek a political justification for a particular action if they find themselves in breach of that norm... On the contrary, the provision of additional justifications for intervention appears likely to increase the number undertaken in bad faith."

³⁸ A note of Rwanda: Chesterman places the blame for inaction in Rwanda in the political realm, naming it particularly as a result of the failure of humanitarian relief efforts in Somalia. That, he argues, is the real reason there was no intervention in Rwanda. To take this position, however, is to deny the effect that a lack of international legal justification had on states' decisions not to intervene—law can and does affect political decisionmaking. (This is to argue that law constrains politics, but is also unable to constrain politics.) It also does not explain the inability of the UN to mobilize its own forces to stop the genocide.

The standard logic of interventionists requires finding the underlying justifications of a strong theory of sovereignty to be misguided. An interventionist, for present purposes, is a person who believes that unilateral intervention, or multilateral intervention not sanctioned (perhaps even explicitly disallowed) by the UN, may be justified in a number of circumstances. Almost all advocates of intervention take the view that it is justified when severe violations of human rights have occurred, such as genocide. The debate amongst this group concerns exactly how far beyond this point interventions may be legitimate. Some, like Altman and Wellman, take the view that intervention can be justified by most failures to protect human rights, so long as the country to be intervened shows a lack of interest or an inability to prosecute criminal violations in its own country.³⁹ The permissible level of intervention is contingent on the severity of the violation; some actions may look more like a state bringing an individual before the ICC than a full humanitarian intervention.⁴⁰ Fernando Tesón adopts the view that intervention is justified in those instances where consent is given by a part of the people to intervention, or (to make things more complicated) where consent would be given if a people were free to express their opinions on the topic. Finally, there are theoretical approaches like that of Michael Walzer, whose thought has become more amenable to intervention over time. His later work on intervention is an extension of an

³⁹ Their theory bears a strong resemblance to the *pro tanto* language of Beitz's theory of human rights.

⁴⁰ Andrew Altman and Christopher Heath Wellman, "A Defense of International Criminal Law," *Ethics* 115, no. October 2004 (2004), 35-67.

observation he makes in *Just and Unjust Wars*, that when serious violations of rights are present, the presumptions of sovereignty reverse themselves.⁴¹

These views, inasmuch as they all would identify different circumstances and solutions to problems of international politics, all reject the basic view of sovereignty discussed above. For international lawyers who want to defend the UN Charter system, sovereignty (as self-determination, territorial integrity, and the rest) is, if not fundamental, then certainly logically prior to other considerations. Even if it is possible to establish sufficient evidence that, on the merits, a violation of a state's sovereignty is warranted, the violation must go through the UN system in order to assure the legitimacy of any intervention. Failure to do so at least raises the question of legitimacy, if it does not automatically answer it in the negative.

By contrast, the interventionist sees legitimacy as the fundamental, or logically prior, condition of a state in international society. If a state is legitimate, then it gains some, perhaps all, of the presumptions of sovereignty; the burden is on the state or its defenders to prove that.⁴² The two positions are incompatible; they are sometimes seen

⁴¹ "The Moral Standing of States," in Walzer, *Thinking Politically: Essays in Political Theory*.

⁴² The issue becomes confused because the states international lawyers and philosophers often have in mind are legitimate states. Altman and Wellman discuss this issue—certain states, especially European social democracies with a strong record of upholding human right, may get the presumptions of sovereignty without having to demonstrate them at every turn. Altman and Wellman helpfully remind the reader that not every state has to fit one model—some states might get a strong presumption of legitimacy, and hence sovereignty, some a weak presumption, some none at all.

as mutually exclusive, because to make one position prior to the other is to favor one of these accounts.

The interventionist rejection of the international lawyer's conception of sovereignty takes several forms, all of which focus on rejecting some combination of the historical narrative, importance of self-determination, and the analogy to personal autonomy. The rejection of the historical narrative of sovereignty takes two primary forms. The question is raised whether Bodin and Hobbes are the proper beginning to sovereignty in international law. Though it is true Hobbes uses an analogy to international politics, it is pointed out that a full concept of sovereignty in anything like its contemporary usage does not exist until Wolff at the earliest. Others place its beginnings even later, as Tesón does by speaking of the 'Hegelian myth' of inviolable sovereignty, or those who identify the strong assimilation of non-intervention to sovereignty as a byproduct of the post-WWI period.⁴³ An interesting addition to this is provided by Stephen Krasner, who argues that sovereignty has never had a fixed meaning, and has ranged across several different dimensions across time, as the circumstances of the moment required.⁴⁴ Thus there is no timeless conception of sovereignty to be discovered. Whatever the contemporary notion of sovereignty may be,

⁴³ Tesón, *Humanitarian Intervention: An Enquiry into Law and Morals*, 57-96.

⁴⁴ E.g. Stephen Krasner, "Compromising Westphalia," *International Security* 20, no. 3

it is not of 500-year-old vintage, and so should not be treated as something given or essential to politics.

Fernando Tesón wants to undermine the story in which sovereignty is necessary for the self-determination of peoples, and does so, in part, by analogy to revolution. Citizens of a state are free, Tesón points out, to reject their government at any point they see fit, as any advocate of sovereignty will agree. What this should indicate to the outside observer, however, is that the interventionist model is correct: government is not co-extensive with an inviolable sovereignty.⁴⁵ On the matter of internal sovereignty, which the regime of international law and the concept of external sovereignty are there to protect, legitimacy is a key condition for an authority that ought to be followed. Since most writers agree that the question of intervention changes if one side explicitly asks for assistance, the appeal of Tesón's view is obvious.

Another strategy, employed by Altman and Wellman, is to replace the metaphor of personal autonomy with that of a parent-child relation.⁴⁶ If the state is taken to be a person, whole and inviolable, then any potential intervention will be paternalistic (in a bad sense), and an imposition which must be justified. Altman and Wellman suggest, instead of seeing a state as unified, one make the distinction between the government of a state and its people. Like a parent, the government has a wide range of action to

⁴⁵ Fernando R. Tesón, *A Philosophy of International Law* (New York: Westview Press, 1998), 57.

⁴⁶ Altman and Wellman, "A Defense of International Criminal Law," 45ff.

organize collective life as it sees fit, but that range has limitations. Just as there are some areas where interference by the state or community can be justified (if there is abuse, for instance), perhaps even presumptively justified, so is intervention when certain obvious abuses occur.

Interventionist theories recognize the importance of the narrative of sovereignty, as it is told in international law. When they critique, it tends to be on the margins, by noting that sovereignty is a relatively new feature of international politics—certainly newer than most non-interventionist advocates claim. Alternatively, they counter the claim for the superiority of sovereignty by placing the criterion of legitimacy before the rest of the argument for sovereignty. Thus it is a feature of interventionist accounts that they begin from the position of defense—they are proposing something outside law as it is understood, rather than, for example, proceeding from a theory of justice and drawing conclusions from it despite the manner in which it would disrupt contemporary understandings.

It is this feature of interventionist theories that best highlights the difficulty of contemporary international legal theory. Interventionists borrow their conceptual structure from sovereigntists, if only to negate the content of that structure. Sovereignty, as it exists in international law, is so tightly bound with the concept of non-intervention that this difficulty is inevitable. A theorist who wishes to affirm the importance of sovereignty and highlight the dangers of intervention will end up affirming those

features of international law that affirm sovereignty. A theorist who wishes to maintain a place for interventions on behalf of human rights will be forced to affirm the problematic nature of the international law regarding sovereignty. Attempts to find a compromise flounder because the lines are so clearly drawn: Chesterman on one side asserting the morally best number of humanitarian interventions is zero, Altman and Wellman on the other insisting sovereignty should always be conditional on legitimacy. Breaking out of this theoretical stalemate will require a more radical conceptual move.

4.4 Nationalism and Cosmopolitanism

The rule of law composes the background conditions that determine whether a theory of humanitarian intervention will be judged successful or a failure. In the last section, we showed that the Dilemma of Humanitarian Intervention is reinforced by those who would favor human rights over sovereignty, as well as those who would favor the reverse. The issue of to whom a state or individual has obligations does not continue on this line of argument. The link between this issue and humanitarian intervention is clear: one of the premises of human rights theories, and the idea of humanitarian intervention, is that it is possible to have duties towards people who do not live within one's own state. The historical conditions that gave rise to the human rights project reflect this: human rights are a guide for the conduct of one's own state but also a standard to which other states may be held. Curiously, though, the question of whether these duties to others exist, and if they do exist, the form and extent of those

duties, is not a central question of international law. It appears in philosophy and political theory under the distinction made between liberal nationalist and cosmopolitan theories of responsibility.

Sovereignty, as a concept, serves a particular function in international law, breaking up the world into autonomous units. The separation of these units fosters indifference between them. Put another way, a strong doctrine of sovereignty gives a good set of political and legal reasons to believe responsibility is, at best, attenuated once one crosses state borders. In the way sovereignty speaks to law and politics, a theory of nationality is designed to speak to ethics. One could see the task of ethics, given any theory of human rights, to be impossible. At any particular moment, many people around the world are having their rights violated. Some of these violations are serious, some less so (the difference, for example, between the right against torture and the right to paid vacation); some are easily known because they happen close to us or receive media coverage, others are less known. Any individual who takes ethical commitment seriously will feel overwhelmed: the violation of rights that forms the background to everyday life places too many demands for any individual to fulfill. Violations—ongoing instances of genocide, or refugee crises—produce very strong reactions, but leave the individual feeling powerless.

Ethics comes in to give some definition to the intuitions of the rights-minded individual. The underlying concept is simple: given that fulfilling every moral demand

that might be placed on us is impossible, how do we choose which demands to meet? The traditional response is to identify two broad classes of responsibilities each individual is to meet: first, those which an individual comes upon in their daily life, and second, those that arise from particular relationships: family, friends, professional associations, ethnic or religious group, and, finally, citizenship. A theory of nationality then becomes a way to establish social justice by managing the relative strength of these commitments. One wants a theory that keeps enough small-scale obligations so that the ethical task of any particular individual is simple to discharge, but adding an element of citizen or national responsibility in order to keep each person's commitments from becoming too parochial.

4.4.1 Nationalism

Nationalism, or liberal nationalism, as it is usually styled (to distinguish it from the unsavory late-19th and early-20th century movements referred to as nationalisms of one or another kind), is generally placed in opposition to cosmopolitanism. This opposition comes in two forms, one milder and one stronger. The strong form takes the view that, once the responsibilities of social justice have been fulfilled—once the life within one nation meets the expectations of justice--then the ethical story is complete, and there is nothing to say about injustices amongst other nations. The milder form says that the obligations of global justice are only to be considered after the circumstances of internal justice have been met, and that local, particular claims should always be met

before more general claims. Two points about the opposition between liberal nationalism and cosmopolitanism are important to make. First, very few authors have argued for the strong version of this opposition: Richard Rorty and John Rawls come close, but come to their respective positions for very different reasons. Second, the mild version of the opposition relies on a notion of what it means to be cosmopolitan that very few advocates of global justice would support.

On the first point, though it is true that in some of his writing Richard Rorty supports the human rights project, and each individual's expansion of the groups of people whom they feel a moral obligation to help, Rorty remains within the nationalist camp.⁴⁷ For him, there is no such thing as 'humanity'; it is rather a meaningless abstract concept that distracts people from the proper objects of moral and sentimental concern.⁴⁸ That is to say, any attempt to reference a concept of the 'human' is an attempt to distract from other, more concrete, realities. At best, 'humanity' is a rhetorical device that can be abused much as any other can—recognition of humanity can mean (and often has meant) a denial of humanity to others. Moreover, the terminology of humankind is not helpful because all obligations are only particular; hence his language concerning the

⁴⁷ "Rorty, "Human Rights, Rationality and Sentimentality," 112ff.

⁴⁸ "Consider, as a final example, the attitude of contemporary American liberals to the unending hopelessness and misery of the lives of young blacks in American cities. Do we say that these people must be helped because they are our fellow human beings? We may, but it is more persuasive, morally as well as politically, to describe them as our fellow *Americans*—to insist that it is outrageous that an *American* should live without hope. The point of these examples is that our sense of solidarity is strongest when those with whom solidarity is expressed are thought of as 'one of us,' where 'us' means something smaller and more local than the human race." *Richard Rorty, Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 191.

rescue of Jews during the Holocaust.⁴⁹ It is impossible that some general moral consideration resulted in their being saved—it can only be because of some more particular relation, however frivolous.⁵⁰

John Rawls takes the same basic idea in another direction, but his motivation is a respect for plurality. The citizens of a state are free, under the conditions of autonomy and our respect for the principle of non-intervention, to order their political and social life in whatever way they see fit. We (where the 'we' is the citizenship of European or American states who have sophisticated and, insofar as they go, correct views on human dignity and rights) ought to respect those decisions, even when they disagree with our particular preferences, so long as they do not cross the line and become serious, fundamental violations of basic rights. Rawls' theory places its biggest emphasis on the idea that the organization of a state and society is a matter internal to those who are members of those groups. One of the consequences of this viewpoint is his belief that other states can have little to say about the internal organization of any other state, provided some general rules are observed. For this reason, his model clearly privileges social justice vis-à-vis global justice, and in fact limits the sphere of global justice to remedial action against serious violations of rights.⁵¹

⁴⁹ Ibid. 189ff.

⁵⁰ Idem. Sharing an identity as bocce ball players is, for Rorty, more meaningful and useful than sharing an identity as human beings.

⁵¹ Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited*. He discusses the limits to intervention at 79-80, though he is open to other, non-military, forms of diplomatic pressure at 93.

The problem with the milder version of the opposition arises because it raises questions about who or what a theory of nationalism is opposing. How many theorists believe in total impartiality, so that one saves a stranger before a family member? The position is barely conceivable within a utilitarian framework, and hard to conceive outside of one. Even a self-styled cosmopolitan like Kwame Anthony Appiah argues that one fulfills particular obligations first, taking instead the position that one can meet these responsibilities and consider those of a broader, more global nature; Thomas Nagel and Martha Nussbaum, however active their support for global justice, both take similar positions.⁵²

4.4.2 Liberal Nationalism and Cosmopolitanism

In this section, I will argue that the most interesting feature of the debate between liberal nationalists and cosmopolitans is not the divide between the two, which is in many ways illusory, but rather the way in which the state, and particularly the state border, becomes a crucially important feature of theories concerning the uses and limitations of thinking about nationality. The two terms are often used indiscriminately, though 'nation' is almost always used to identify social fellow-feeling while 'state' is a term for political organization. In most of the paradigmatic cases, nations correspond closely with states, especially after the powerful influence of nationalist movements in

⁵² Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1995); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership (the Tanner Lectures on Human Values)* (Cambridge: Belknap Press of Harvard University Press, 2007). Both prioritize social justice over global justice (though both favor some global justice scheme).

the 19th century. A French citizen may as easily feel France to be an ideal, a way of life, and a community of the like-minded as to think of it as a collection of laws and institutions. In some ways, it is easier to ask loyalty to a nation than to a state: states are abstract entities, but nations share common social characteristics. However, as a result of this, theories that justify loyalty or commitment to nation are often then used to justify loyalty or commitment to the state (or, worse, 'nation-state' a term that assumes consonance between two often very different things), oftentimes overlooking the places where this transitivity is problematic.

4.4.3 David Miller's Nationalism

David Miller gives one useful concept of nationality, which on his theory has five important components.⁵³ First is that a nation is a shared perception of belonging amongst the people in the nation. Second, that an argument is made for some historical continuity in that identity—that is, members of the nation will look to certain historical events as formative of who they are at the present moment. Third, he distinguishes it from a passive identity, such as a religion or ethnicity, where membership in the group is a response to something outside. There is no nation, then, which makes decisions—there is only 'us.' Fourth, Miller insists upon a link between nation and a particular geographical place. It is from this point, and the problematic relationship between

⁵³ David Miller, *On Nationality* (Oxford: Oxford University Press, 1997), 22-26. He discusses the problem myth poses at 40-41.

nation and state, that the difficulties in his theory will arise. Fifth, the members of a nation need to have a common, public life—a culture, in some sense, that though not shared by everyone in its entirety, is nonetheless recognizable to members of the group as belonging to them. Of course, history and political relations are complicated, especially over long periods of time. The history may be partially fabricated or re-told, the culture or social organization may change significantly over time. These do not, on Miller's view, change the usefulness or meaning of nation as a concept. What matters, and will be crucial in assessing interpretations of Grotius, is the ability to distinguish between myths that allow for an openness to change over time, and those that do not.

In *National Justice and Global Responsibility*, Miller tries to efface the distinction between nation and state in three stages. First, he demonstrates that a nation is a real group to which one can have particular, and not just general, responsibilities or duties. Taking this, and the idea of supporting basic rights, he creates a schema divided into four parts: a negative duty to refrain from harming others; a positive duty to secure the basic rights of the people we are responsible for protecting; a positive duty to prevent violations by other parties; and finally the positive duty to secure the basic rights of others when they will not otherwise be met, e.g. by their own countries.⁵⁴ Though the language of nation or state is avoided in this formulation, it is not difficult to see that the first two concern 'our' duties, and the second two consist in the duties owed to 'others.'

⁵⁴ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2008), 47.

Either nation or state fit into the schema he outlines, but the only 'we' he has discussed is that of the nation. Miller then moves into a discussion of the nation-state and its duties toward other nation-states unproblematically.⁵⁵

Nation is not coextensive with state; the argument that one has particular duties owed to those in the same nation does not extend to fellow citizens. His argument confuses the fact that there are, as a positive legal and political matter, obligations and responsibilities to fellow citizens, with the normative argument that these obligations ought to have the same force and character as those to fellow-nationals. One may think of four cases where the obligations to nation and the obligations to state do not overlap:

1. Nations that are wholly within a state, but do not share in many aspects of the national culture, and are content to merely be separate, such as the Amish
2. Nations within a state that harbor aspirations of forming their own separate political community, such as the Quebecois.
3. Nations that lie across the borders between two or more states, such as the Kurds.
4. Nations that share a state with other nations, each maintaining their separate identity, but where the political union between the two is brought into question, such as the Flemish and Walloon in Belgium.

Miller's use of the term nation-state, and the logic employed for it, will sit uncomfortably in cases such as these. No doubt it is a good explanation of states where the national group is largely coextensive with the political community—America and many of the western European nations. The theory of the state needs to be kept separate from the theory of the nation. Even if it only matters at the margins, the margins are

⁵⁵ The term 'nation-state' first appears at Ibid. 54: "The most familiar example of this phenomenon in the contemporary world is the form of membership provided by citizenship in nation-states."

where the conflicts are located. It is precisely for these cases that a theory is needed of how to negotiate these claims.

4.4.4 Michael Walzer's Nationalism

Michael Walzer's work sits at the point of tension between the particular and the universal, and his work on international politics, especially humanitarian intervention, heightens this tension. One may think of this tension as the difference between *Interpretation and Social Criticism* and *Just and Unjust Wars*. The first offers a vision of politics that is essentially particular: a social critic speaks only to the experience of the people of which he is a part. Criticism cannot come from outside, and it would be meaningless if it did. Against this, the clear implication of *Just and Unjust Wars* is that the ethical standards of war are knowable, and instances of their violation may be punished. Mao may complain about the 'asinine ethics' of just war, but regardless of his particular milieu, if he fails to respect those ethics, he may be held responsible. Even if the morality of war is only conventional, and not reflective of any deep truth about the humanity, that convention applies to everyone. Ignorance, or a culture's different values, provide no excuse.⁵⁶

The question Walzer raises is whether the concept of nation poses an insuperable obstacle to pointed moral criticism across societies, such as the human rights project. His

⁵⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1979), 225ff. One might be tempted to add "at least when borders are transgressed." However, it is not clear this is a feature of his theory. Mao, after all, is not conducting a war primarily against other peoples, but his own.

answer is that it does not: a true understanding of the relationship between nations will not give a thick morality, such as that presupposed by the human rights project, with clear standards that apply to all societies and generated simply in virtue of what it means to be human. For Walzer there is no thick concept of justice, only those agreements hammered out by the consent of people at particular places and times. Though this has the look of an institutional theory of human rights, it is in fact considerably weaker: there is only consent, and nothing deeper. His position is, in fact, untenable: if one wants a universal culture of human rights, institutions able to enforce those rights, and the rest, then nation is and must be a circumscribed concept.

The core of the case against his position emerges from his discussion of how other nations impose limits. In *Thick and Thin*, he gives two instructive examples. The first is of Solidarity's protestors in Poland, many of whom held up signs with one-word slogans like 'liberty.' Surely the abstract concept, Walzer writes, is something 'we' can all get behind—who doesn't like liberty?—but the agreement over a thin point masks the more substantive disagreement. The protestors, embedded as they are in a culture, a nation, a particular historical and political experience, would doubtless spin off consequences of 'liberty' that would be not merely foreign to Walzer, but seem to contradict the emphasis on liberty itself.⁵⁷ Note, first, that the divergence in their views

⁵⁷ This is Walzer's claim; whether those students would actually give definitions of liberty he would not recognize or approve of is a separate question. *Michael Walzer, Thick and Thin (South Bend, IN: University of Notre Dame Press, 1994), 1-4.*

is an *a priori* assumption of the theory, rather than a fact established after dialogue or more substantive interaction. Moreover, Walzer seems to be confusing a normal fact of politics—dissent over what basic terms mean and their implications with an insuperable obstacle to understanding.⁵⁸

Walzer's discussion of the Tiananmen Square protesters emphasizes the same point. Though he supports the protests on principle, as a good social democrat, he recognizes that he does not share all, or even many, of their political aims.⁵⁹ The point is meant to highlight that it is hard to translate the local and the particular to those who are not also embedded. Instead, it points to something fundamental about the nature of this interaction. Walzer can see where he agrees and where the point of agreement stops, and this is already to be doing politics. This is not to say there are no limits that attend the discussion of moral issues across cultures, but the nature and character of nation, following on Miller's concept, is not of something fundamentally closed.

Arguments about nationality end up recapitulating the debate over sovereignty in a different context. Sometimes, the concept of nation merges with the concept of a state, so that the two are treated as interchangeable. A nation-state, then, has all the political and legal support international law gives, along with an assumption that the state (always singular) represents the people (also singular). To impose on either is to

⁵⁸ The libertarian and the social democrat, even if both are American, will hardly think they are speaking the same language; one need only read *Spheres of Justice* and *Anarchy, State and Utopia* to realize how sharply views can diverge. Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1977).

⁵⁹ Walzer, *Thick and Thin*, 59-61.

disrupt a functioning, organic unit, to violate its autonomy and to impose from a place of ignorance.

The alternative position, no better, does not assume congruence between the nation and the state, but gives to the nation quasi-state characteristics. It is difficult to proceed in argument against one who believes you neither know nor could know what was the case in a particular social situation.⁶⁰

Various more palatable cosmopolitanisms exist; Kwame Anthony Appiah's is especially so.⁶¹ His stories of his youth in Ghana, and the way in which he moved quite easily between different religious and ethnic groups, should serve as a reminder: for every place where some difference, be it religious, social, ethnic, or any other of those features sometimes given to nations, constitutes a problem or a point of tension, diving a state or spilling across states, there is a place where those tensions have been downplayed, and a communal life that recognizes this difference without ignoring it or elevating it beyond its place can exist. Appiah's model may be too enthusiastic: at best, it points out that all differentiations *may be* transcended, if the context is right, but it should also point out how frequently those differentiations carry high political stakes. The tensions are real, and must be addressed.

⁶⁰ The *Philosophy and Public Affairs* essays responding to *Just and Unjust Wars* and "The Moral Standing of States" exhibit varying levels of perplexity at Walzer's unwillingness to admit that outsiders could have any useful knowledge of internal practices.

⁶¹ See especially Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W. W. Norton & Co., 2006), 155-174.

4.5 Moral Rhetoric and Humanitarian Intervention

Humanitarian intervention is a difficult topic to broach in international politics. The belief is widespread that there can be no such thing as a humanitarian intervention, either because any humanitarian action would be irreducibly political, or because it would violate international law. Both of these objections point to a difficulty in the rhetoric of humanitarian intervention, specifically, trying to interject moral claims into the political world.

The push for multilateral or institutional solutions to the problem of humanitarian crises reflects a distrust of politics in the international realm. A state seldom, if ever, has one overarching reason for its action; any operation has to be a coordination of many different people with different motives, especially when countries have many domestic or bureaucratic constituencies to appease. Multilateral action solves this problem (or mitigates it) because, ostensibly, the parochial reasons that might encourage one state to intervene, whether it is really warranted by the political situation or not, will be counteracted by the parochial interests of another. To the extent that a large number of states sign on, the interests have transcended the particular and may be said to more closely approximate the universal.

However, to take this position is to make an assumption about the motivation of actors. Any action, as has been said, will have a number of reasons offered in support of it, the number depending on who needs to be convinced. One may crudely schematize

these reasons into 'political' and 'moral:' political reasons would include national interest, broadly defined, the achievement of strategic military goals, and control over nearby territory; moral reasons would include the defense of human rights, solidaristic defense of fellow human beings (or co-religionists, or those who share an ethnicity or nationality), and a desire to prevent unjust regimes from maintaining power.

The interventionist who attempts to use moral language will find himself assaulted by two different groups, both of which will devalue the rhetoric he attempts to use. The first group are Realists, who emphasize the struggle for power in international politics and the primacy of material factors. On this view, moral language is a second-best, and a second-best of a problematic kind, since it refers to nothing in particular. Territory, position in the world, military strength and victory: these are all, to some extent, 'real,'⁶² tangible things that can be measured and identified. Moral language points to nothing, and cannot force its reality to be accepted in the same way. One recognizes a tank in a way very different from recognizing a human right. The use of morality in international politics is thus, at the most basic level 'unreal.' All it can do is point individuals and states toward a utopia whose most important feature is that it can never come into being.

⁶² Though the promiscuous use of scare-quotes should be avoided, one needs to differentiate between the things Realists would claim to be 'real' from what is real taken in a less restrictive sense.

Indeed, moral language is more threatening than this: it would have state leaders chase impossible dreams and forget the one moral obligation they do have: ensuring the perpetuation of their own state.⁶³ And where moral language is not dangerously misleading, it functions simply as rhetoric of the emptiest kind. Anyone can make an appeal in moral terms. Leaders of states that frequently engage in unjust actions use moral language to justify their most serious transgressions. Thus any realistic analysis of international politics must also grapple with the reality that moral language is especially prone to abuse, hypocrisy, and frequently masks a power motive.⁶⁴ Whichever way one approaches it, moral appeals are not 'real,' and therefore must be met with skepticism, until the 'real' motivations are found.

Similarly, the rhetoric of international law, especially of the positivist variety, places a great emphasis on its own objectivity. International law is about rules, processes, and institutions: all of which are designed to produce acceptable outcomes in

⁶³ E.H. Carr adopts a position like this in *E.H. Carr, The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (New York: Palgrave Macmillan, 2001). "There are, however, other respects in which we do not ordinarily demand from the state even the same standard of moral behaviour which we demand from other group persons. The state makes altogether a different kind of emotional appeal to its members from that of any other group person. It covers a far larger field of human activities, and demands from the individual a far more intensive loyalty and far graver sacrifices. The good of the state comes more easily to be regarded as an end in itself." N.B. the manner in which the logic of national identity provides the ground for the dismissal of other potential moral claims. See also, more infamously, the introduction to Hans Morgenthau, *Politics among Nations* (New York: McGraw-Hill, 2005).

⁶⁴ Chesterman, though not a realist in the International Relations sense, takes this logic as the basis for his opposition to humanitarian intervention.

a world in which moral agreement is difficult, if not impossible.⁶⁵ The language of international law emphasizes neutrality and consensus: it speaks out of no particular view, and so cannot be thought to take sides in any particular political debate. The only places normativity enters at all as a matter of content rather than form is where there is widespread agreement.

Moral language, except where it has found its way into international law, is subjective. That is to say, it is a matter of personal conviction that may be sufficient to guide action in particular cases, but has to give way to international law wherever there is a conflict: what else could it possibly mean to term one 'objective' and the other 'subjective'? Consequently, any moral view not already in international law will have a difficult time gaining acceptance: it is sufficient in most cases to say "well, that may be your opinion, but it is not law." And a moral appeal for an action already dubiously within international law will look like a weak defense indeed. Most frequently this is discussed in the case of India's intervention in East Pakistan (now Bangladesh) in 1971. India had a number of motivations to fight over East Pakistan, including an interest in weakening Pakistan as a whole; but India made a point of arguing the humanitarian reasons for its action, in addition to others. The voluminous debate over which motives

⁶⁵ Koskenniemi emphasizes neutrality as the central feature of the Rule of Law, and considers it indispensable to liberal political theory. *Koskenniemi, From Apology to Utopia*, 74-94.

are the 'real' ones — rarely are they the humanitarian motivations — indicates how widespread disagreement is on this point.⁶⁶

Moral appeals, when they are made, will have a difficult relationship with the rest of international legal argument. Some, like Philip Gourevitch, will focus on getting the level of moral indignation just right, and do so quite convincingly:

“I hear you’re interested in genocide,” the American said. “Do you know what genocide is?”

I asked him to tell me.

“A cheese sandwich,” he said. “Write it down. Genocide is a cheese sandwich.”

I asked him how he figured that.

“What does anyone care about a cheese sandwich?” he said. “Genocide, genocide, genocide. Cheese sandwich, cheese sandwich, cheese sandwich. Who gives a shit? Crimes against humanity Where’s humanity? Who’s humanity? You? Me? Did you see a crime committed against you? Hey, just a million Rwandans. Did you ever hear about the Genocide Convention?”

I said I had.

“That convention,” the American at the bar said, “makes a nice wrapping for a cheese sandwich.”⁶⁷

Appealing to values all the people involved purport to hold, he shows that they knew perfectly well what was happening in Rwanda, did not need to do very much at all to stop the genocide from happening, to halt it while it was going on, or to find the parties responsible afterward, and deliberately chose not to take those actions. His claim points in the right direction, but it falters at the level of law and institutions. The system failed here, as it had before and would again: how does one solve this problem? These

⁶⁶ Tesón has an excellent summary of the various positions taken, *Tesón, Humanitarian Intervention: An Enquiry into Law and Morals*, 242-253. His own interpretive technique will be discussed below.

⁶⁷ Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Picador, 1998), 170-171.

are perhaps outside the scope of his work, but are legitimate questions to ask: if what is given is the Rortyan option of coming in after the violence and feeling terrible for the people who died, what moral good does this do, especially if it does not result in different behavior the next time? Does it then become just a sick enjoyment of the spectacle involved, a chance to browbeat oneself for moral failure without actually doing anything to change? The language of morality is powerful, but not used powerfully here.

Samantha Power takes another step forward by pointing to the ICC and pointing out the value of shame as a means of forcing change to happen:

Senator Jesse Helms (R.-N.C.), the chairman of the Senate Foreign Relations Committee, compounded the embarrassment by sending a mocking letter to Secretary Albright after the State Department issued a \$5 million reward for information leading to the arrest of certain Serb culprits. 'I have the information that you are looking for,' Helms wrote...⁶⁸

Power goes on to quote the letter in full, in which Helms points out that it was public knowledge where the architects of the ethnic cleansing in Bosnia lived, and it was a failure of nerve alone that prevented anyone from taking the proper legal steps. She identifies this moment of public shaming, along with the election of Tony Blair, as key moments in changing the behavior of the NATO allies in the Balkans.

But these are post-hoc steps: a criminal court, however powerful, is at a certain level remedial—that is, only capable of responding once there is something broken and

⁶⁸ Power, *A Problem from Hell: America and the Age of Genocide*, 493.

someone needs to be held responsible. Shame has its value, but there is a whole culture devoted to avoiding shame, or funneling it into an accepted but ultimately meaningless form of confession and repentance, resulting in no actual change.

Both, in their moments of despair, assume the logic of the realist or the international lawyer. Political motives are the real ones, or the ones to which politicians have their true commitments, and moral reasons must, by shame, or persuasion, or some other means, find a way to be included in the picture. The only notable exception to this rule is Fernando Tesón, who adopts the principle in *Humanitarian Intervention* that, given the moral interests of the world community, the best possible interpretation should be given to the actions states undertake. In this, he follows on the interpretive technique developed by Ronald Dworkin in *Law's Empire*. Despite this pedigree, it is one of the most criticized features of his approach.

4.6 Conclusion

The most important conclusion to draw from the state of contemporary international law is how hostile it remains to a concept of humanitarian intervention. Emphasis on the rule of law makes a fundamental change to the laws of war difficult to imagine; theorists who oppose the positivist approach to international law have a difficult time gaining a hearing. When intervention is admitted as a topic of discussion, it is placed against a concept of sovereignty that is presumed to include non-intervention as one of its central components. Further, the nature of the obligations states have to

other states within the system, and the problem of rhetoric, are removed from the mainstream of international law. The resources to develop a theory of humanitarian intervention that could unite these disparate elements are few.

The categories above are taken as given, and exhaustive. Any theorist, to the extent they want their work to be successful, has to assume either an interventionist or a sovereigntist position: the attempt to split the difference will tend to collapse into one or the other camp. Michael Walzer's work is a good example of this: though he has moments in which he is a strong proponent of intervention, those who interpret him place him in either the camp of interventionists (in which case his moderate, pragmatic approach is praised) or else in the camp of the sovereigntists (in which case the centrality he gives to self-determination is praised), and the same is true when discussing nationalism as opposed to universalism. But the issue here is not simply one of commentary: Walzer himself appears to think his beliefs fall in one or the other camp (though which camp depends on the particular moment). Any position that tacks toward the center is under enormous pressure to pick a side.

The other important feature of contemporary discourse is the way in which these categories are all sometimes called upon to reinforce each other: skepticism about motivations is used as an argument for a neutral rule of law which emphasizes non-intervention. Sovereignty must be respected both because it is a rule of international law—indeed, may well be a General Principle—but also because it recognizes the

inviolability of a nation. These are only the most obvious features, but the logic of each builds off each other. The interventionist navigates these waters only with difficulty. For an interventionist, nationality is sometimes a principle to be defended, when one group is being oppressed by another because of some aspect of their identity; but it is also sometimes a principle to be discarded, when a state tries to claim that a given dispute is purely internal. Interventionist theories that try to take a position cutting between the oppositions of contemporary theory end up facing the same pressure to take one side or the other discussed above.

4.6.1 Koskenniemi and the Deep Problems of Legal Theory

Martti Koskenniemi, in *From Apology to Utopia*, recognizes the intractable character of many disputes in international law. Deep in the structure of liberal international legal theory are two competing, sometimes incompatible, claims about what political ends are and how they are justified. One is termed 'ascending:' beginning with a principle of autonomy, it builds international law by looking at, and providing justifications for, state practice. The other, 'descending,' begins from a premise, or several, about the nature of justice, and sets about determining how best to realize it. Each claim is, at best, incomplete: the ascending justification is aware of the absence of justice in its theory and tries to compensate or find other ways to bring it in; the descending is aware that the principles of justice are often honored in the breach.

Having made his criticism, Koskenniemi attempts to rebuild. First, he dismisses the possibility of a return to any theory of justice in particular:

But it seems hardly plausible to assume that politics (justice and equity), when properly conceived, would ultimately be capable of discussion in such a way as to relieve us from uncertainty. Though it seems clear that dispute-resolution cannot avoid going into what is just or equitable to do, the discussion has in no way shown that the way back to Vitoria's unquestioned faith would be open for the modern lawyer. The Enlightenment project is still with us.⁶⁹

Instead, he proposes a system of deconstruction and conversation. The deconstruction recognizes that concepts like the Rule of Law propose conditions for themselves that they are unable to meet.⁷⁰ On conversation:

Once the lawyer understands that the conflictual character of legal concepts and categories is merely a visible side of the conflictual character of social life he can construct a realistic program of transformation without engaging in totalitarian utopias. Only then he can appreciate the character of normative problem-solution for what it is; a practice of attempting to reach the most acceptable solution in the particular circumstances of the case. It is not the application of ready-made, general rules or principles but a conversation about what to do, here and now.⁷¹

However, it is unclear exactly how conversation can remedy the problem of international law. If it really is a conflict between two approaches to law—one that approaches justice first, the other state practice first—which employ different methodologies and recognize different things as facts, all the conversation will reveal is the depth and character of their disagreement. The acceptable solution will be acceptable to no one. It is precisely the conversation about 'what to do, here and now' on which no

⁶⁹ Koskenniemi, *From Apology to Utopia*, 533.

⁷⁰ *Ibid.* 541.

⁷¹ *Ibid.* 544.

one can agree, and creates a world of interventions that are illegal, not sanctioned, but still tolerated.

It is worth putting in another word for justice, as well. The conversation about Rwanda led to the conclusion, acceptable to all parties involved (though an acceptance of a negative kind), of the failure to act at the proper moment, and compensate for that failure by expressing moral regret afterward. From the perspective of the 'descending' position, this is close to the worst of all outcomes, a world of principles no one wants to uphold.

Koskeniemi's model assumes a level of friction with respect to justice, and this is, as he notes, a feature of liberal theory: the rule of law functions as a neutral arbiter so that people need not re-hash debates over justice before every action they undertake. This is the force of his observation that "The Enlightenment project is still with us." However, as he also notes, every dispute inevitably makes its way back to questions of what is just. He points back, then, to the importance of normativity as a guide to behavior. But the opposition he poses is a false one: the 'unquestioning faith' of Vitoria, or the recognition of the plurality of notions of justice after the liberal manner. The universe of theoretical options is not reduced to only these two: blind faith, or plurality without some component of justice outside the conversation that can function as a critique on that conversation.

4.6.2 The Turn to Grotius

Koskenniemi can usefully point out to contemporary theory its own shortcomings. There is no magic theory of intervention, or opposing intervention, that will instantly convince all theorists on the other side that their convictions have been wrong. So long as theorists share the same basic assumptions about the nature of law, sovereignty, and rights, little headway is possible. It is for this reason Grotius makes a valuable interlocutor. His work on intervention demonstrates the possibility of theory outside the accepted standards of the post-World War II period. Grotius offers a strong theory of intervention alongside a strong theory of sovereignty; he integrates the discussion of rhetoric and cosmopolitanism; he demonstrates the way in which interventions can be compatible with the rule of law even if they are not bound by particular laws or institutions. It is, in fact, more important for his contribution to contemporary discourse that he opens up the possibility of producing a theory of humanitarian intervention than that his theory ultimately succeeds. If it is possible to produce a theory of intervention that does not rely on the institutional assumptions of the contemporary world, but can speak to the law as it is, then it constitutes a potential way out of the thicket of international law.

5. Intervention in Hugo Grotius

The project of contemporary international law is unable to solve the problems that have existed since its formation. The Dilemma of Humanitarian Intervention hinges on those problems remaining: in any situation, one may defend the portion of international law that places the defense of human rights at the center or the portion that places sovereignty there. One cannot do both. One is forced to take sides: human rights must be supreme and so sovereignty must be conditional, or else sovereignty is supreme, and though we can cajole other states into protecting human rights, if the state violates those rights, it is a sovereign choice and not open to question—or response.

5.1 *Chesterman on Intervention*

Simon Chesterman offers an argument that provides greater clarity about the implications of the anti-intervention argument in world politics. Chesterman cites two rationales that give reason to oppose any doctrine of humanitarian intervention. The first is that if there is such a doctrine, more humanitarian interventions will occur—he believes them to be inconsistent affairs worth avoiding—they are taken up halfheartedly by states juggling multiple interests, which are almost never resolved in a satisfactory manner. The second is that a doctrine of humanitarian intervention raises the odds that states will make a specious claim of humanitarian intent to allow the use of force for a less noble goal, such as weakening a neighboring state or producing a better

agreement on some other issue. Chesterman's goal is to introduce as many institutional and legal barriers as possible in order to prevent these two things from occurring.¹

Chesterman's complaints are both appropriate. Humanitarian intervention *is* an inconsistent thing, taken up halfheartedly by states juggling multiple interests, and almost never ending well—or at all. Vietnam's intervention in Cambodia was marred by Vietnam's interest in having a puppet government installed in a neighboring country. Their intervention produced a significant, long-standing refugee crisis, but one that was ignored. Once the intervention was over, Cambodia slid out of international consciousness. Contemporary interventions fare no better: no one acted in Rwanda, which is a case requiring intervention if there is any. The multiple interests juggled by states worked against the Tutsis. Also, the intervention in Kosovo only happened because international law was ignored. Kosovo itself was and is ignored, with the exception of Kosovo's declaration of independence in 2007, which served only to exacerbate regional tensions once again.

The other part of Chesterman's prediction is true, as well. States feel it necessary to cloak their behavior in the language of rights, even when those actions undermine the rights claimed. This fact is often cited by proponents of human rights as a sign of their success: hypocrisy is the tribute vice pays to virtue—and everyone recognizes that using

¹ Chesterman, *Just War or Just Peace?* 219-234.

the language of human rights is a virtue. Language is abused and put to bad ends.² Both the hypocrisy and the acceptance of that hypocrisy make longstanding violations of rights common—such as those that regularly happen in autocratic regimes around the world. The abuses and the counter-rhetoric are so familiar that the response is often nothing; a fuss will be made about the violations, but the issue is ultimately ignored.³ Nor is the situation better with short-term violations. When Russia invaded two provinces of Georgia, the situation was baffling even to those with knowledge of the area. Was Russia merely gesturing to human rights considerations by mentioning the right to self-determination of the people whose lands they occupied? Was claiming the right a means of advancing Russian interests and crippling an ally? Could one maintain the importance of self-determination in this case while still recognizing Russia's claim to be disingenuous?

Chesterman's concern was that absent the most restrictive regime of laws possible, the interventions that happened would be inconsistent, and often used as a pretext for other state interests. The overwhelming consensus of international lawyers is that no space exists for intervention in international law. They cite the UN Charter and ICJ case law. They argue, quite forcefully, that all rhetoric about human rights must be

² George Orwell's "Politics and the English Language" offers examples.

³ The unwillingness of the U.S. government to let the humanitarian violations of Tiananmen Square affect Most-Favored Nation trade status is a prominent example. See David Skidmore and William Gates, "After Tiananmen: The Struggle over Us Policy toward China in the Bush Administration," *Presidential Studies Quarterly* 27, no. 3 (1997).

held suspect (and receive support from other academic communities, including the research done on colonialism, which supports the idea that even well-intentioned people may be unaware of their own motivations). Any state that does act in spite of the legal regime undergoes significant criticism, and pays a price on the international stage.

5.1.1 Political Ethics and Humanitarian Intervention

International law—practiced by lawyers, philosophers, political theorists, and others—launches a comprehensive critique of the practice of humanitarian intervention.⁴ The critique has two elements: first, a doctrine of humanitarian intervention requires sacrificing the value of sovereignty. No one disputes the value of sovereignty in many, perhaps most, situations in international politics. Humanitarian intervention, on this view, requires sacrificing that value. Second, a defense of humanitarian intervention requires a naive view of the world. International politics is an arena where self-interest is ruthlessly pursued. The notion that a state would place its military strength at risk in order to confer a dubious benefit on someone else is ridiculous, especially if there is no reward for the intervening state.

Political ethics offers some insight here. One has some convictions about the moral order of the world, which are expressed as commitments to certain forms of action, and fostering that action in others. Once those ethical commitments get expressed

⁴ I am here omitting those writers who defend the practice. The bulk of opinion is that humanitarian intervention is impermissible under international law regardless of the rationale offered. In a previous chapter I have discussed some reasons to believe most arguments in favor of humanitarian intervention are not helpful to creating a practice of humanitarian intervention; I will return to the topic.

as desirable ends in politics, one has political ethics. How does one critique a particular ethical stance? In two ways: either from a moralist or a moderate perspective.⁵ A moralist perspective will insist on certain values that must be expressed all the time in politics. A moderate will recognize that political ideals are always shattered by reality, and what is needed is compromise between what ought to be and what is. Without compromise, on a moderate view, there can be no politics.

The international law critique of humanitarian intervention requires holding both of these views at the same time. The moderate and the moralist both play a role: the moralist insists on the unimpeachable position of sovereignty; every other value must be subject to it. Consider the way in which sovereignty just *is* the “fundamental principle of international law” for Cassese.⁶ If one literally cannot conceive of international law without that value in one specific doctrinal form, then it is given an absolute priority within any normative scheme of international politics. Intervention is unthinkable.

The interventionist could rejoin that the rights defended by humanitarian intervention also qualify as values. What is needed is not an insistence on the absolute superiority of one or the other, but a means of balancing between them. At this point the moralist becomes the moderate. The problem with intervention is not that it is a value like sovereignty that might be weighed or valued; no, the crucial fact is that it cannot be

⁵ The typology here is adapted from Ruth W. Grant, *Hypocrisy and Integrity : Machiavelli, Rousseau, and the Ethics of Politics* (Chicago: University of Chicago Press, 1999).

⁶ Cassese, *International Law*, 46-71.

integrated into a system of politics. It requires something of men that they cannot give, or will not. The humanitarian principle, expressed as a value, does not admit of qualification, and so cannot be the subject of compromise.

Two observations flow from this insight. First, the inconsistent nature of the argument: the interventionist applies the critique just provided by the sovereigntist back on sovereignty, and is told the critique does not apply for some particular reason. It hardly matters what the objections and the reasons are. The point is that holding both a moralist and a moderate stance at the same time is incoherent. One can critique from one perspective or the other, but not from both. Second, it is the nature of this argument that it will play out in this manner—neither the sovereigntist nor the interventionist can ever score a decisive blow.

If this description of political ethics on the international level is accurate, what theory does it produce? Exactly the theory that we see: alternatively a strong defense of one value or another, constantly slipping between principled defenses of one's own position and political arguments about the tenability or untenability of someone else's position. The entire world of law and politics would be reduced, then, to arguments about one value: sovereignty is the measure of all things. The absolute best a critique of sovereignty will be able to do is suggest another value—human rights—to replace it: otherwise the structure is the same. Both of these positions receive their tension, and their power, from creating two positions that are mutually inconsistent. So long as the

values conflict, the problems of the current dialogue and positions like Chesterman's will continue.

5.2 The Two Stages of Grotius' Theory

In recommending Grotius as an alternative to the contemporary international law story, I want to make two related, but separable, claims:

First: Grotius' theory allows us to expose the Dilemma of Humanitarian Intervention as presenting us with a false choice. The Dilemma poses a problem because it takes two values, declares them to be mutually exclusive, and then encourages theorists to line up on one side or the other. Defenders of sovereignty are quick to say that any qualification of their doctrine surrenders the whole. On a close view of Grotius' theory, however, the two sit side-by-side: a strong doctrine of sovereignty and a strong doctrine of the right of intervention. Grotius demonstrates the possibility of a reconciliation of the two that requires neither side to give up much. If his theory is correct, it knocks out one of the primary arguments supporting the Dilemma.

The Dilemma is the primary, often unspoken, means within international law of preventing a discussion of intervention. If, as Cassese and others argue, sovereignty is the value at the center of the United Nations project, the fundamental value that makes all the others function as they should, then no value, no matter how morally important, which requires sacrificing sovereignty even in the slightest can be justified. But if the defense of human rights is, in some instances, compatible with sovereignty, then there is

no *a priori* reason to rule out a theory of intervention. The argument then must be over which theory is best.

Here Grotius' theory of rights plays into the discussion. If a right to intervention does not *require* intervention on the part of any one state or group of states all the time in order that the right exist, then there are possibilities for a theory that would not require a substantial revision of international law as it now stands.⁷

This leads into the second point: Grotius' theory allows us to link together many areas that are otherwise disparate. The topics discussed in the last chapter all bear on the question of intervention. The rule of law raises the question of how to understand the task and power of the law itself. Sovereignty and non-intervention bring questions of politics to the law. The nationalist/cosmopolitan divide brings the concerns of social theory—it matters which people one has responsibility over. Questions of rhetoric and motivation are near to any political action, especially one as complicated as intervention. Yet it is the case that these theories are most often considered in abstraction from each other—cosmopolitanism bears some on questions of law, but the law literature and the philosophy literature rarely meet each other. Questions of rhetoric and motivation receive different methodological and substantive treatment depending on whether a lawyer, political scientist, or philosopher deals with them. We can articulate some

⁷ This conversation is bracketed in order to not get ahead of the argument—I will be proposing a theory of intervention which has, as a notable feature, no requirement that current international law be changed.

connections between each, but despite the conviction they all bear on each other, they are infrequently discussed together. Grotius' theory, on the other hand, integrates all of these.

The key discussion of intervention in Book II in *De jure belli* is prefaced by discussions of rhetoric, motivation, the extent of moral obligation to friends and strangers, the role of various forms of law in setting our expectations. It is, then, one theory which does the work of several. One needn't accept all the conclusions of his theory to see the value of his project in its attempt to bring everything relevant together.

5.2.1 The Frame for Grotius' Theory

It is important to reiterate that the two points discussed above are separable: one may believe Grotius shows that sovereignty and intervention are not mutually exclusive without believing his theory is the best, or even adequate, to justify a contemporary practice of humanitarian intervention. One may believe that his theory's push to integrate what is now disparate points in the right direction, without arriving completely at its destination. One may think his theory is a good explanation, minus some points (such as the difficult question of *jus post bellum*) that no theory has articulated well. All of these are possible; but to believe any of them is to have moved some distance from contemporary international law.

The turn to Grotius is complicated by the Grotius literature. One of the very odd features of that literature is its inability to come to conclusions about what, exactly, it is

that Grotius argues. Intervention is no exception. Most agree on the texts that matter: the discussion of sovereignty in Book I, Chapter 3, that becomes a discussion of resistance in Chapter 4; the move to expand responsibility beyond state borders in Chapter 5, and the extended discussion of when war is just as a form of punishment from Chapter 20 of Book II to the end, especially Chapter 25. From these texts, a bewildering array of interpretations follow: Grotius is a strong sovereigntist who has no room for resistance theory or intervention; Grotius has a weak theory of sovereignty and permits intervention in most circumstances; Grotius is contradictory and does not say anything clear one way or the other.

Two factors drive this interpretive confusion. First, any difficulty in Grotius' text tends to be treated as an aside, a non-sequitur, or a topic unimportant for our concerns. This issue goes right to the heart of interpretive method: the general belief is that Grotius is writing in a (humanist, scholastic, 17th century) method far removed from our own, and thus has long, tedious discussions with too many citations, where he often says contradictory things.⁸ Whenever a difficulty is encountered, the interpreter, rather than presuming that they are missing a key part of the argument, has a ready-made reason to think that portion of the argument does not exist.

⁸ Hersch Lauterpacht makes this point in Lauterpacht, "The Grotian Tradition in International Law," Many others agree with Lauterpacht's analysis.

Richard Tuck, who declares Grotius to be “Janus-faced,” at one moment strongly advocating for sovereignty, at the next pushing quite far in defense of resistance and the possibility of intervention, can only understand this position as an inconsistency.⁹ R.J. Vincent, who sees Grotius offering a strong, almost overwhelming theory of sovereignty, sees little room for any theory of intervention, though he admits Grotius includes one.¹⁰ Hersch Lauterpacht sees a weak theory of sovereignty that allows for many possible interventions and resistances.¹¹

Each of these viewpoints, because of the methodological approach to Grotius each supports, ends up projecting contemporary, post-World War II categories of international law back onto the work itself. Because it is impossible to hold a theory of sovereignty and a theory of intervention simultaneously, Grotius must fall into one of the contemporary categories.

The second factor that drives interpretive confusion comes because Grotius is often set back into a wider context, which sometimes illuminates his work. Grotius is read back against, for example, his earlier work: *De jure praedae* and his writings on church-state problems in the Netherlands, where he takes a very strong position in defense of sovereignty and against resistance. Such views often end up assuming too much continuity between the younger and the older Grotius: the experience of the

⁹ Tuck, *Natural Rights Theories: Their Origin and Development*, 8-81.

¹⁰ R.J. Vincent, "Grotius, Human Rights and Intervention," in *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury, and Adam Roberts (New York: Oxford University Press, 1992) 241-257.

¹¹ Lauterpacht, "The Grotian Tradition in International Law,"

Arminians at the hands of the Calvinists after Dordt is treated as an interesting, but ultimately irrelevant, factor.

Tuck's Grotius, once escaped from prison, devotes his work to re-entering the good graces of the Netherlands; *De jure belli* is one defense of Dutch colonial practice after another. This sits uncomfortably with the very real bitterness Grotius felt towards the Netherlands after his exile.¹² Sometimes Grotius will be placed back into the context of the Dutch revolt, the neo-stoicism he encountered as a student, or the scholastic and humanist traditions he is said to have fused.

The context almost always missing is that of his religion: Grotius, as an Arminian, was within the Reformed tradition, a point he emphasized even in his earlier church-state writings; in looking to Grotius as an exponent of this tradition, some of the interpretive questions surrounding his work can be resolved. The discussion of sovereignty in I.IV includes sections that deal with the question of resistance by magistrates, that is, by lesser authorities than the supreme sovereign. The question of whether magistrates were able to resist was a critically important question in Reformed resistance theories, but received little consideration elsewhere in 16th and 17th century

¹² Tuck, *The Right of War and Peace: Political Thought and the International Order from Grotius to Kant* 94-108. Grotius' self-composed epitaph hints at a rather different attitude to his native land:

*Grotius hic Hugo est, Batavum captivus et exsul
Legatus regni, Suecia magna, tui.*
(Here is Hugo Grotius, Dutch captive and exile
Ambassador of your great realm, Sweden)

political writing. This passage, usually ignored or treated indifferently alongside other topics, points to the intellectual tradition to which Grotius was responding.¹³

5.3 Grotius on the Limits of Sovereignty

The best way to come to understand Grotius' view on the topic of sovereignty is to examine what he wrote. Sovereignty and its forms, the right of resistance, and the first mention of a right to intervene, compose the second half of Book I of *De jure belli*; each takes its own chapter—Chapter 3 is concerned primarily with defining a notion of sovereignty, Chapter 4 with the right of resistance, and Chapter 5 with opening the question of intervention. The placement of this discussion, especially Chapter 5, functions as a bridge between Book I and Book II. The first few chapters of Book I are concerned with demonstrating that just war is not an empty category, but rather that some wars are morally permissible to fight. Chapters 3 and 4 are, in this sense, unusual, because they focus on the internal politics of a state; Chapter 5 is the first look at what happens with other states, taken up again in Book II, first in a discussion of property—especially what happens when property claims conflict—and then in a discussion of the role punishment plays in just war.

Even though the bulk of the concept of sovereignty is discussed in Chapter 3 of Book I, the real disagreements in interpretation come from Chapter 4, on resistance. The

¹³ The connection can only be gestured at here. The link is suggested by John Witte, *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (New York: Cambridge University Press, 2008). He writes on the role Reformed resistance theory played in the development of human rights.

two are related: a strong monarchist and sovereignty-loving Grotius would restrict the right of resistance, perhaps remove it altogether. A Grotius with a more flexible conception of sovereignty might leave a good deal of room for citizens to resist. It is, of course, at this point that the two competing camps of interpreters emerge.

Interpretive confusion is understandable. Within the text of Chapter 4, there are moments where it appears to be the case that Grotius absolutely prioritizes the rights of sovereigns over those of subjects and rules out any right of resistance. But there are also other moments in the text, such as the last 12 sections of the chapter, which discuss “exceptional cases” where resistance is legitimate, which seem to support an opposite reading. It is best to see Grotius as arguing for a flexible conception of sovereignty and a limited right of resistance. But it is easiest to explain why by explaining the strengths and limitations of the counterargument.

5.3.1 No Right of Resistance?

The bulk of the argument for a strong conception of sovereignty in Grotius comes from sections 2-6 of Chapter 4. The purpose of government, as Grotius writes, is to preserve peace; it does so (as Locke will later argue) by taking from each person the right they had to defend themselves in nature. The state, being charged to protect peace, is thereby given a right that exceeds the right of any individual. When Grotius speaks of a restriction of the “promiscuous” right of resistance, he means that whatever wrongs a sovereign might do, they cannot be judged by individuals. If that were the case, then

every man would (anticipating Locke again) be partial in his own case, and view any restriction of his behavior as an unjust usurpation.

He then builds this argument in his usual fashion. First he looks to the Hebrew Bible, and the famous warning in I Samuel 8 about the powers that would belong to a king over Israel. God, Grotius writes, implies that, to have a king means to have an obligation to non-resistance. They have chosen him and must continue choosing him even if he does things they do not like. The obligation implies a right on the part of the king to obedience. If they did not want a king in the first place, they need not have one, but having one, they are bound to keep him.

The argument is extended under Christianity, where Grotius begins to argue that even unjust kings cannot unsettle the general laws that are set. If public order really is the supreme concern of public matters, then it is clearly incompatible with a right of resistance (*privata resistendi licenta*).¹⁴ Indeed, Grotius goes one step further than this and rejects the then-prevalent theory that resistance might be licit if performed by magistrates of a lower governmental level than the supreme powers; he rejects this theory on the belief that lower magistrates can only get any authority at all from the supreme power, who still maintains it over them.

¹⁴ Latin citations are from Hugo Grotius, *Hugonis Grotii De Jure Belli Ac Pacis*, ed. William Whewell (London: J. W. Parker, 1853).

Finally, Grotius ends section 7, one of the key sections for the sovereigntist view, by declaring that “having proved, that those who are invested with the sovereign power, cannot lawfully be resisted (*resisti jure non posse*)...” Quite apart from any reconstruction of the text that might be offered by another view, Grotius believes that he has demonstrated the impossibility of a theory of resistance.

What follows from this? If there is no room for resistance, than the supreme power is intended to really be supreme, the final say in what happens in the territory over which it has control. This is sovereignty on Hobbes’ model, or even Locke’s, and for both of them one of the salient features—perhaps so obvious as to not need extended mention—is that sovereignty over one’s subjects implies the right to exclude others who are not one’s subjects. Internal sovereignty, as we saw in the international law account, necessarily implies external sovereignty.

5.3.2 Problems With a Strong Sovereigntist Reading

One might find three reasons to dispute this account of Grotius. First, and most importantly, the reading is incomplete. There are 20 sections in Chapter 4, and the sovereigntist position draws only from sections 2-6 (it does pull in selected passages from Chapter 3, as well, but those will be discussed below). The omissions from the sovereigntist reading are important. Section 1 begins with a seeming piece of boilerplate: that one must show loyalty first to God, not to the state.

It is important to remember, though, that this proposition itself was controversial even at this time. Christendom had been united politically for much of its history, and though the Reformation changed the underlying political fact, it did not change the attitudes involved. Prominent Catholic thinkers like Suarez and Vitoria were more concerned to establish the right of the Papacy to compel sovereigns than in establishing any theory of resistance at all; Lutheran theologians had long ago made peace with the state.¹⁵ The move is important because it de-centers the state in a scheme of politics; the state may only exact any loyalty at all after it has allowed each individual the right to worship God. One needs to stay on this point because the story of Christian unwillingness to submit to the orders of the emperor arises as a significant part of Grotius' theory in section 7.

Following on this, the chapter ends with twelve "exceptional cases" where resistance can, in fact, be justified. The sovereigntist reading will dismiss these as merely hypothetical possibilities. At this time, as the argument goes, a reader would know there are no states that (to use a Grotian example) have divided up the sovereign power in such a way that the king is deprived of a portion of it. Since there are no such cases, it could never (or perhaps only very rarely) be the case that a king would try to take over a portion of the sovereignty not given to him, and so resistance could never (or only very

¹⁵ e.g. Francisco Suarez, "A Defense of the Catholic and Apostolic Faith," in *Selections from Three Works*, ed. J.B. Scott (Oxford: Clarendon Press, 1944). See especially Book III. Vitoria's *Relectiones*, which include his work on just war and the new world but are primarily concerned with establishing Papal authority. For the status of Lutheran political theory, see Witte, op cit.

rarely) be justified.¹⁶ The difficulty in sustaining this reading is that it makes it difficult to say why, exactly, the exceptional cases are there in the first place. One may blunt their force but one may not explain them away.

Secondly, the reading rests on several mistakes in interpreting the text. It is correct to say that in section 2, Grotius argues that the formation of a state necessarily prohibits the “promiscuous” use of the right of resistance. The underlying Latin word, “promiscuum,” is actually used twice in the beginning of section 2:

Therefore the state has a power to prohibit the unlimited use (promiscuum) of that right towards every other person, for maintaining publick peace and good order, which doubtless it does, since otherwise it cannot obtain the end proposed; for if that promiscuous (promiscuum) right of resistance should be allowed, there would no longer be a state, but a multitude without union...¹⁷

The usage in the first instance gives a sense of its meaning in the second. Contra the sovereigntist reading, the problem with a right of resistance is not that it is subjective, leading to the risk that everyone will always judge for themselves. Instead, the problem is one of having a right that can never, under any circumstances, be limited. If it were the case that a right of resistance could not be restricted—it could be used in an unlimited manner—then it implies the possibility of promiscuous resistance, which is to say, resistance that can never be anticipated, and has the negative consequences the sovereigntist fears.

¹⁶ The example is from section 13.

¹⁷ Grotius, *The Rights of War and Peace* I.IV.II.

The mistake of the sovereigntist is to think that the only way to address the worry of promiscuous resistance is to rule resistance out entirely. But if the problem is not the right, but a promiscuous—that is to say, arbitrary—application of the right, the solution may just as easily be finding an ethical and political system that limits the right without abolishing it.

The point is worth dwelling on. Grotius' conception of state function bears some resemblance to a minimalist-libertarian account of the state, such as Nozick's, at this point. The primary functions of a state are not to encourage moral order or the right functioning of the community. The state exists to provide a tolerable minimum of peace from the arbitrary enforcement of rights both within a society—hence the “superior right” of the state—and outside it, hence the long discussion of whether war can be just, which arrives at the conclusion that it can.

The purpose of the state, then, is to take over some portion of the rights of individuals in order to ensure an even broader enjoyment of those rights. The state begins as a means of responding to certain threats to liberty—those that arise in the absence of centralized justice. It may yet be the case that the state itself becomes a threat to liberty. One would then want to circumscribe the right of resistance enough so that it allows the state its proper function, but not so much as to allow the state to exceed it. This is precisely what Grotius does.

5.3.3 Rule of Law in Grotius' Account of Sovereignty

The most common methodological principle in Grotius is the consideration-then-retraction. A famous example comes in Chapter 11 of Book III, where Grotius says that the work he has done in the first ten chapters of that book, which appears to give certain rights to belligerents in war, has in fact done no such thing. He considered a set of arguments that are offered in favor of that position, but has found them wanting: he then proceeds to give his account.

The same thing happens in section 7 of chapter 3. Where it appears Grotius has given no room for the right of resistance, as he shows with a philosophical argument, and supporting examples from the Hebrew Bible, the New Testament, early Christian and other sources. Section 7, by far the longest in the chapter, finds Grotius appealing to each of these sources once again, but he is not simply repeating himself: he is displacing the account he appeared to give.

Having laid the foundation, Grotius digs it back up, and lays another. In section 4, while discussing how to understand the occasional injustices of a sovereign, Grotius establishes the following rule: laws are meant to be general. Given the choice between following a general law to a bad result, and making an exception to the law for a good result, one ought to choose the law in its generality "because that is much better, than to live without law; or to allow every man to be a law to himself."¹⁸

¹⁸ Ibid. I.IV.IV.

In section 7, this sentiment becomes: “some of his [God’s] laws are of such a nature as cannot be easily believed to have been given in so rigid a manner [as to not admit tacit exceptions], which ought still more be presumed as to human laws.”¹⁹ Even if the law is not one of men, but from God, as Grotius argues, it still must make allowance for frailty—that is, all law, however general, must admit of exceptions.

The difference comes from “extreme or inevitable danger.”²⁰ The law of non-resistance of which Grotius has been speaking arises from a consideration of government in its most general modes. For the sake of police power and to ensure justice, men must be willing to set aside their own more particular claims to justice, even when the system occasionally—or even frequently—decides against them. Unhappiness is no cause for revolt. Necessity and danger are other questions entirely.

Contemporary international law has a goal of a system of rules that is seamless and capable of dealing with every potential case, as has been discussed in a previous chapter. The system needs general, neutral rules, which lead to as few conflicts as possible. That conflicts exist is a source for embarrassment in the system, and the motivation for various theoretical and practical attempts to close the gap. A reading of the UN Charter might imply that space exists for a practice of humanitarian

¹⁹ Ibid. I.IV.VII.

²⁰ Idem.

intervention. Inasmuch as this contradicts how other parts of the charter are understood, it threatens the purported status of international law.

Rule of law means something else for Grotius—it is the recognition that the law-making enterprise is always only partly complete. Even when it happens that we land on a rule that appears to generate good results, like a *prima facie* obligation to non-resistance, one needs to understand that the seamlessness of any rule will be shattered by practice. A number, perhaps most, of the cases can be covered by the rule; some cannot. Therefore it is critically necessary that space remain in any law to recognize exceptional circumstances, on the presumption that something will happen which it is impossible to anticipate beforehand.

Government is, and needs to be, a primary place in which these exceptions can be recognized. It is true, Grotius writes, that “some acts of virtue may by a human law be commanded... as for a soldier not to quit his post.”²¹ Indeed, the state has a right to make the exercise of that virtue mandatory under the pain of death. However, one ought not to reason from these cases, which are notable precisely because they are unusual. The subjects of a government are not analogous to soldiers; one should not expect the same things from them.

Instead, one should note that governments are all human creations. Man is a social animal, but institutions are all created by particular men at particular times to do

²¹ Ibid. I.IV.II.

particular things. Grotius asks his reader to imagine the situation in which a government would be formed: could those who founded the government have decided to create a strict rule against resistance? “It may be presumed, on the contrary, that they would have declared that one ought not to bear with every thing, unless the resistance would infallibly occasion great disturbance in the state, or prove the destruction of many innocents.”²²

Indeed, though Grotius ends section 7 by saying he has proven there is no right of resistance, his examples all point in the opposite direction. David, it is true, does not actively take up arms against Saul after the former has been anointed king of Israel, but it is also true that David protects himself with 400 armed men—not exactly non-resistance. In fact, Grotius ends the section by telling the story of a group of Roman soldiers who were also Christians. Told to bow down to Caesar and worship him, they refuse. The soldiers are decimated, then again given the option to worship; they again refuse. All are killed. Though on one level one can say this is non-resistance—the soldiers could presumably have fought their way out of the situation—on another, it is very clearly an act of resistance for soldiers to refuse to follow orders.

The point to understand here is not that Grotius has entirely reversed his opinion, now saying that one can resist in all but the most hopeless of circumstances. To touch on a theme to which this section will return, Grotius is instead trying to rule out

²² Ibid. I.IV.VII.

two possibilities. First, he works to demonstrate that an unlimited right of resistance is incompatible with having a government—if everyone can be judge in his own case, every injustice—or perceived injustice—becomes a pretext under which to fight against the powers to which one has already, in theory, submitted oneself.

Second, the law of non-resistance is not so extensive as to rule out all resistance under any circumstance. If there is a correct theory of resistance, it is somewhere in the middle, a response to particular injustices and always understood within both the framework of particular governmental institutions and the principles of justice that transcend and uphold all institutional structures. Grotius is concerned, in short, not with giving a complete theory, but with ruling out options that are unhelpful. The central concern of Book I is to put the reader in the right frame of mind.

5.3.4 The Relevance of Different Forms of Government to Sovereignty

The ‘exceptional cases’ contained in sections 8-20 are their own special example of the limitations of general rule. They are, as Grotius asserts at the end of section 7, instances not covered under any law of non-resistance, even if they appear to be. A general rule is restricted in terms of its content: it is general only over the thing it purports to regulate. In addition to the idea that even a general rule which does not admit of exceptions contains tacit exceptions all the same, there are cases, Grotius says, which appear to fall under the rule of law, but in fact do not. This is another problem contemporary international law runs into—attempting to extend laws to cover areas

where there are no laws. The difficulty in dealing with some of the cases that have actually occurred, such as the Tanzania-Uganda intervention, are best explained here.

Humanitarian intervention, it is usually thought, is a use of military force without permission across the borders of another sovereign state. But if the use of force is as a response to an illegal use of force, the issue becomes blurry. Uganda militarily occupied a disputed region belonging to Tanzania. The Tanzanian government responded, as might be expected, by forcing Ugandan soldiers out of their territory. Tanzania followed this by marching to the Ugandan capital and overthrowing the government, led by the infamous Idi Amin. At what point, if any, does the Tanzanian action cross the line between legitimate defense and illegitimate intervention in order to stop a humanitarian crisis? Or does this case fit none of those categories at all?

Grotius' exceptional cases include: states where sovereignty ultimately rests with the people and not their prince may make war (section 8); that a king who abdicates may be resisted (9); or a king who tries to alienate his kingdom (10); or one who is an enemy of the whole people (11); or in instances of divided sovereignty (13); or if an agreement between subjects and sovereign leaves some liberty to the subjects, in various forms (12 and 14); or if control is taken by a usurper, under a variety of circumstances (15-20).

One may be inclined, looking at the state of European politics in 1625, to doubt whether most of these conditions would apply to any state in existence, the Netherlands excepted. The exceptional cases all have echoes in the work of Chapter 3, which

considers the various forms sovereignty can take. Chapter 4's admission of a right to resist in cases of divided sovereignty maps onto Chapter 3's discussion (in section 17) of the fact that sovereignty, contra Bodin and divine right thinkers, can in fact be divided, and a king or prince entitled only to a portion of that power. Similarly, though it is in principle possible for a whole people to alienate their sovereignty so as to retain no liberty (section 12), it is also possible for them to retain some, or even much, liberty (section 13).²³

What sovereignty is, for Grotius, is a question that can only receive an answer by looking at the particular history of who agreed to do what, and why. One cannot formulate a general theory of sovereignty that looks to either the powers vested in the governmental apparatus or the powers residing in subjects because the form that institutions and practices take is always idiosyncratic. This argument is crucial for Grotius. In the chapters dealing with the acquisition of land in Book II, Grotius will argue, against the position Locke will later take, that "waste" is no excuse to presume a land unclaimed. Just because a sovereign arrangement (e.g., the government and property rights of a Native American tribe) takes a form with which one is unfamiliar,

²³ Rousseau's complaint, that Grotius builds the conception of sovereignty on the analogy that men may sell themselves into slavery, thus misses the point of his argument. Grotius is not concerned to show that all forms of sovereignty are absolute. Rather, he is concerned to show (when he argues this point in section 8) that a theory of sovereignty which says that power *always* and *without exception* rests only in the people must be wrong. If individuals can alienate themselves, societies can, as well.

does not permit one to conclude it is not a form of sovereignty.²⁴ There are few general principles: there is much variation.

5.3.5 The Place of Intervention in the Account of Sovereignty

We are now positioned to see something decisive about the argument Grotius is making throughout Book I. Chapter 1 makes the argument that there is a coherent sense that can be given both to war and to right, as concepts. Chapter 2 argues that fighting a war may be a just act. Chapter 3 argues that sovereignty may adhere to the people, or to the king, or some combination of them. Chapter 4 argues that resistance may be acceptable in some circumstances. The crucial word in each of these arguments is 'may.' Each is combating a skeptical thesis: that there is no coherent sense to a concept of right; that all wars are unjust; that sovereignty only comes in one form; that resistance is always (or never) right. So each, by ruling out extreme options, opens the way for moral inquiry. If right is not just a cover for interest, what does a theory of rights look like? If some wars are just, how can we identify them? And so on.

The fifth chapter follows on the themes developed earlier. It is not intended to be the argument in its full and complete form. Rather, it is intended to be an indication that there exists, as a result of the argument carried up to this point, room for a non-vacuous concept of intervention. A theory of rights may be able to represent something other than interest narrowly covered over. It may represent a right of resistance that belongs

²⁴ Ibid. II.II.XVII.

to man. Once that right is combined with the notion of sociability as an essential feature of humanity, one gets a partial duty of assistance: amongst friends and fellow-citizens, in particular.

No reason exists, however, to assume that this logic stops at the border, and Grotius in Chapter 5 produces a number of sources that argue that it does not. If the legitimate use of force arises from some combination of right and a relationship that allows enforcement of the right to be legitimate, and there is no reason to regard a border as something that prevents the creation of relationships, then rights and obligations may follow. Convention may change the scope of these relationships, but only as a contingent matter. The convention could always be otherwise. The point, again, is not to establish beyond a shadow of a doubt that intervention is always legitimate: the point is only to establish the possibility, if only theoretical, that it might be. Grotius' argument here pairs almost exactly against Chesterman's. One still must consider other factors, but in the real world, the number of interventions is greater than zero.

Intervention stands off from more conventional war in another way: in any classic just war (that is, a war in which there are two belligerents, where one is responding to an aggressive act by the other), the self-interest of the state and the justice-claim can easily conflict. The claim of self-interest is actionable precisely because it is just, but in the actual circumstances under which war is fought, the relationship tends to

reverse: the claims of self-interest *become* the claims of justice. It is this mentality, in a contemporary context, which lies behind various irredentist claims during the 19th and 20th centuries.

After World War I, France had a justice-claim against Germany because their territory was attacked and occupied by German forces. The claim changed over the course of the war from simply regaining all the invaded territory and perhaps some side-payment to cover the costs of the war, to become a means to assert old claims (such as the possession of Alsace-Lorraine) and new 'just' claims (the de-militarization of the Rhineland). Self-interest and justice appear to have a fundamental link, and France is the last actor capable of making an impartial judgment about the case. It is for this reason, in Grotius' discussion, that the question of whether any war can be just—whether war can be anything other than self-interest—is so tremendously difficult.

Intervention recognizes that self-interest and the claims of justice might not be aligned. Indeed, this is one of the criticisms that is often made of humanitarian intervention as a doctrine: there is insufficient reason for a state to get involved. It is only if motives, good and ill, may be mingled that there is any reason to intervene. For Grotius, the separation of self-interest and justice-claims becomes one of the really striking features about intervention: it is not morally suspect in the way any other war would be. Where contemporary international law says the only justified use of force is in

self-defense, Grotius points us to the idea that the only non-self-interested use of force is intervention.

Contemporary international law is built on the belief that sovereignty and intervention are mutually exclusive. Grotius invites us to ask what, if anything, is lost in sovereignty when intervention is added. Is it the ability to do whatever the sovereign wills within a particular territory? Grotius notes that sovereignty is and can be limited or divided in many ways, depending on the political institutions set up by the people involved, and, in particular, that there are some forms of sovereignty to which we should not assume people could have assented.

5.4 Grotius' Theory of Intervention

The purpose of Book I is to demonstrate the formal, logical possibility of intervention. Sovereignty does and can come in a number of forms, most of which place some limits on the exercise of power. In addition, there are certain behaviors that void whatever agreement a sovereign and his subjects may have made. Locke will make this same point later, quoting the monarchist Barclay admitting the possibility of legitimate resistance. Not even the strongest defenders of sovereignty will argue that there is no point at which resistance can be legitimate. But, as Grotius notes (and Locke later emphasizes), it is the problem of self-interested enforcement of one's own rights that leads to government in the first place.

When one argues one's own case, all the moral judgments that are made are suspect—this is different than their being illegitimate, though they do not get a presumption of legitimacy in all instances. Self-defense and aggressive war have in common the necessity of viewing the case from the perspective of one's own interests, thus re-capitulating the problem on a higher level. Intervention re-opens the possibility of more-impartial judging which mimics the reasoning for government at the international level: if the job of government is to adjudicate disputes and keep all parties honest and in order, then outside parties to the government may be able to adjudicate disputes and keep all parties honest.

The key word, again, is 'may:' Grotius only wants to establish the possibility of a theory of intervention. The substantive work on the theory is left for Book II. Punishment, as a basis for just war, is considered in chapters 20-25. They are stages of an argument, which have to be read and understood in order. The chapters will discuss the moral basis for punishment—that is, the source to which one goes to make the proper moral judgments—as well as the various means of settling a controversy short of war, the role of rhetoric, and relations that extend beyond the borders of the state, before coming to Grotius' final statements on the intervention. Combined with the concern given to the rule of law and the division between sovereignty and intervention, Grotius picks up on every major theme in contemporary international law thinking, but places them all within the scope of one theory.

5.4.1 The Grounds for Judgment and the Law of Nature

In Chapter 20, on most interpretations, Grotius asserts with some of the Spanish neo-Thomists that natural law provides a source against which to judge actions to be punished. Cannibalism, for example, is a violation of the natural law, so one may war against a people who practice it in order to force them to stop. Second, Grotius asserts (possibly against Spanish practice in the New World) that one may not make war against a people on the basis of religion, especially if they refuse to accept Christianity.

The usual interpretation misses an important key linking the discussion of natural law and the discussion of religion: Grotius' rejection of jurisdiction as a legitimate reason to punish in section 40 of Chapter 20. Within the School of Salamanca, which wrote extensively against Spanish colonial practices, it was a common to say that Spain lacked the ability to punish violations of the natural law because no one had the right to punish violations of the natural law. Punishment can only be given out as a response to a wrong done to the one who has the authority to punish. Since punishment can only be done by those who have the proper authority, it meant that only if a wrong was done to a state could that state respond. The natives of the New World, however backward and barbaric they might seem, did no particular wrong to the Spanish, therefore they could not be punished.

Grotius rejects this account for one reason that is found directly in the text, and for one reason that becomes evident from the structure of the remainder of the chapter.

The direct reason is that an account of just war that relies on jurisdiction voids the concept of just war. International society is such that there are no rules by which everyone agrees to be bound. No one can be said to have jurisdiction over the citizens or leaders of another state who violate someone else's rights or otherwise do them wrong. Lacking jurisdiction, there can be no legitimate war to punish: therefore there can never be a just war, even when a violation of a right has occurred. But the Spanish authors in question admit that there are just wars. The logical contradiction in their account means it must be rejected.

The second reason Grotius rejects this account is evident from the structure of Chapter 20. The chapter moves on to discuss whether one may punish on account of religion. However, the final section in the chapter—always a key source when trying to discern Grotius' intentions—does not concern the attempt to convert non-Christians. He has dealt with that topic earlier. Instead, it focuses on the category of sincerely mistaken Christian believers. Using an example of proto-Catholics arguing against the Arians—a significant religious controversy right at the period when Christianity first has the ability to wield political power—he quotes a Catholic who argues that religious disputes are not to be settled with political force. The person who is wrong is allowed to continue to be wrong, on the condition that no force is exchanged in either direction to compel a change of belief.

The typical reading of this chapter focuses on the New World—but Grotius' closing concern has nothing to do with this. He is instead concerned with Europe—the problem underlying both the Calvinist treatment of the Arminians in the Netherlands and the 30 Years' War was an attempt to forcibly convert people from one type of Christianity to another. Grotius rejects the neo-Thomist account because it solves the problem of the New World (if it does so) by creating further problems in Europe. Grotius wants a theory that can solve both.

5.4.2 Jurisdiction

There are reasons to think that even on its own merits a theory relying on jurisdiction must fail. First, there is the problem Grotius explores in his chapters on property. One of the issues that came up repeatedly in the New World was the issue of 'waste land.' Against theories of property—Locke would offer one later in the century—which said land not used for agricultural cultivation, cities, or other identifiable uses must not be already claimed as property in any relevant sense—Grotius argues that people ought to determine conclusively that a property is not claimed before claiming it for oneself. If one is predisposed to ignore the claims made by native peoples and assert property rights for oneself, then the problem of jurisdiction disappears.

Second, there is the problem of universal monarchy, the doctrine that God had intended it that, just as there was but one head for Christians in the world, but one person would have all political power in the world. Though the argument is best

associated with Dante in the 13th century, there was a resurgence under Charles V of Spain which lasted well into Grotius' time; he was claiming jurisdiction over, at the very least, the whole Christian world. Whether he could carry through on his threats was immaterial. Grotius felt it necessary to include a denunciation of the doctrine of universal monarchy. Indeed, the problem was not simply academic, for it was claims of this kind that left the Netherlands under persistent threat from Spain.²⁵ The universal monarchy argument, just as much as it makes licit bad behavior in the New World, allows the overturning of political systems in Europe, as well. An account of punishment that relies on jurisdiction to make its claim work has the bad effect of implying an impunity where one does have jurisdiction.

5.4.3 Limitations on the Law of Nature

A theory of punishment that relies on the law of nature, as Grotius' does, may well arouse suspicion. Appeals to natural law are often self-serving, masking one's ideological preferences as givens of nature. Natural law claims often also punish on the basis of esoteric 'givens' of natural law of which the people being punished were unaware. Grotius has three primary means by which he wants to limit what qualifies as a law of nature that can legitimate punishment.

²⁵ Martine van Ittersum collects evidence of the threat, though in an attempt to prove the opposite point, in *Martine Julia Van Ittersum, Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (New York: Brill, 2006).

The first is the need to distinguish custom from nature. The two can often be conflated because customs, especially in the sense they would be taken in English common law, are practices which have lasted for such a long period that no one can remember the point at which they began. They also typically have the force of some moral sanction behind them—the action is given a moral justification or is considered legally binding (as in the case of Customary International Law) just because it is considered to have a morally obligatory character. This problem of knowledge notwithstanding, only things actually belonging to the law of nature can form the basis of a legitimate punishment. That something has been a custom “time out of mind” does not legitimate it, nor does the fact that some moral reasoning has been offered in defense of the practice. If one thinks a custom is legitimate, there are other means to enforce it, short of war.

Just as one ought not confuse custom with the law of nature, neither should one confuse very specific applications of the law of nature for its basic principles. Grotius is prepared to allow the very most general principles of the law of nature, and those that follow as a logical necessity from those principles, but only at a general level. One may not fault a people for being unable to carry out high-level, precise moral inquiry.

Though he does not gesture at this, Grotius’ attitude makes a Thomist theory of natural law untenable for international politics. The principle use of Thomas, especially in neo-Thomism, is to say that the first principles of natural law may be combined with

practical reason to identify further, less abstract principles. The process can be done over a number of iterations to result in “determinations,” which are practical, actionable principles that might form the basis of a human legal code.²⁶ Grotius rules this possibility out. Two consequences follow: first, the method employed by those Grotius is said to follow upon provides no sufficient basis for international law. Second, Grotius is careful to assert that the law of nature will not coincide with any set of human laws—nor could it. One should not expect in any code of laws moral perfection; if one state violates the laws of another state, this does not make war against the transgressor licit.

The discussion of religion follows on this. One cannot fault a people for not knowing the legal code of another. One also cannot fault a people for not knowing the religion of another, especially a revealed religion, as does Christianity. Though there may be congruence between, for example, the Ten Commandments and some of the principles of the law of nature (imperfect though that correspondence may be), this does not imply that a failure to know the Ten Commandments constitutes a failure to know the law of nature. Grotius’ writing on Christianity often differentiates it as a set of ‘counsels of perfection.’ The point of the Christian ethic for him is how difficult it is to follow: one cannot reasonably expect all men to do so, much less base a political system, with its right to coerce in some, perhaps many, circumstances, on that set of beliefs.

²⁶ This approach rules out contemporary natural law theorists, such as John Finnis’ *Natural Law and Natural Rights*. Suarez draws a theory of natural law along these lines in *De legibus*.

Therefore no political or legal consequence should fall on the person who does not keep those beliefs: they should be permitted to go their own way.

In this way, Grotius' theory is a notable advance over his immediate predecessors. Unlike the Spanish neo-Thomists, he can produce a result that protects against violations of rights in Europe as well as in the New World. More significantly, he structures his theory in such a way that the moral grounds for war are constrained. One should always bring a level of skepticism to the evaluation of any such claim. Has it confused its own legal order for a transcendent system of morality? Has it confused its religious principles with general principles unobjectionable to all? Building off his work on property and sovereignty, is the state wanting to punish able to recognize that political and social organization may not always take a previously known form?

Unlike a purely skeptical theory, Grotius does not rest content with skepticism alone: he is convinced that some moral principles are held in common amongst all people, or can be recognized by all people. He is skeptical that the list of such principles is extensive, or co-extensive with any proposed list. No one gets a presumption, everyone must prove their case—but some cases can be proven. The paradigmatic example is the threat to existence: much can be flexible across societies, but the preference to live over dying or being killed is constant. It follows, then, on Grotius' approach that he devotes the next chapter of Book II to different strategies that can resolve a potential conflict short of war, the means by which those responsible for crimes

can be given over to the offended state, and questions about the extent to which a people are responsible for wrongs done by their sovereign.

5.4.4 Rhetoric and Motivation

Grotius opens Chapter 22 by pointing out the distinction between ‘justifying reasons’ and ‘motives,’ that is, between the reasons a state or prince might give for their decision to fight a war, and the actual reasons motivating their behavior. The distinction is important because the link between reasons and motivations is one of the primary arguments made against a practice of humanitarian intervention. For Chesterman, as for others, moral language often acts as a mask for self-interest. By legitimating more reasons for action, one raises the possibility of their misuse. After all, if defending human rights is a central project of international law, and a claim to be defending human rights gets deference—who doesn’t want to protect human rights?—then it opens up another realm for cynical manipulation of the law. The unfortunate tendency of this view, however, is to go to the other extreme. One ought not be too credulous about the claims other states are making; the easiest way to avoid this problem is to be skeptical about the claims other states are making.

As Grotius reminds us, however, it need not be the case that all reasons are given in bad faith. First, as in all moral reasoning, it is possible to be mistaken: “There are those who alledge some sort of justifying reasons, but such as, being weighed in the

balance of right reason, are found to be unjust.”²⁷ However, if just war is not simply a fiction but an actual possibility, we can use knowledge of just actions in the past as a means of aiding the judgment of a moral cause now.²⁸ We can recognize unjust cases before us precisely because they deviate: it is possible to recognize the unjust cases because we can imagine the just ones. As politics involves deliberation, in learning to do that deliberation well, we can make critical judgments when they are needed.

The problem of rhetoric assumes that reasons given and underlying motivations always differ sharply. Grotius offers in the last section of Chapter 22 the possibility that our reasons for action are not entirely clear to us, and thus that any attempt to give reasons will be incomplete. Human motivation is complex—even moral action does not simply emerge from a selfless, altruistic impulse. But this does not cripple moral action. Critically, as Grotius argues, the presence of bad motives does not outweigh the justifying reasons; even when “something else, not of itself unlawful, does more powerfully incite us.” His examples of that ‘something else’ include the desire for glory, “advantage either private or publick,” or even “taking a satisfaction in another’s suffering, without regard to any good.”²⁹

²⁷ Grotius, *The Rights of War and Peace*, II.XXII.IV.

²⁸ “The knowledge of what causes are unjust, may be pretty well collected from the just causes already mentioned. For the windings of a crooked line presently appear upon its application to a strait one.” Ibid. II.XXII.IV.

²⁹ Ibid. II.XXII.XVII.

In the modern discourse of international law, the presence of bad motives is often thought to be disqualifying; in any instance where national interest and humanitarian motives co-exist, there is a reflexive tendency to treat national interest justifications as the real, and humanitarian considerations as a pretext. The consequence is to lump a number of actions with multiple sources of motivation into a 'prohibited' category, making the identification of acceptable humanitarian justifications more difficult. In contrast to this tendency, Grotius offers first a clear theoretical means by which we can judge actions by comparing them to past just and unjust actions. He then addresses the claim at the heart of contemporary international law's rejections of humanitarian intervention by reminding his reader that the presence of bad motivations does not always overrule the good ones that may also be present.

5.4.5 The Relationship With Those Outside the State

What becomes the divide over nationalist and cosmopolitan theories is treated by Grotius at the beginning of Chapter 25. The first three sections concern citizens and those who, though not formally citizens, are nonetheless under the explicit political protection of a state. Grotius grants wide ability to defend these interests, though he notes a rule of prudence: while people's claims in the main are to be defended, the ruler is allowed to make prudential judgments. "For it is a sovereign's business to have greater regard for the whole than the part; and the larger the part is, so much the more

does it approach the nature of the whole.”³⁰ A complaint by a few, or which, if acted upon, would threaten the whole, requires no response, though the ruler may choose to give one.

Allies are the subject of the next two sections. In any circumstance where an alliance calls for military support, a state is bound to provide it; this is “next to our own subjects, or indeed equally with them,”³¹ giving an idea of how seriously Grotius takes these commitments. As ever, though, the rule comes with an exception: “But such articles do not reach so far (as it was before observed) as to involve us in an unjust war.”³² Nor is it the case that a state must help its ally in a cause judged to be hopeless. States which have formal treaties with states compose one category; Grotius then considers “a third reason for war is the protection of our friends, whom tho’ not under any formal promise, yet upon the score of friendship we are under an obligation of assisting, provided we bring not ourselves into any great trouble, and inconveniences by it.”³³

Section 6 expands the scope of the discussion even further, to include the claim that shared humanity alone can justify intervention. Rather than building on this positive claim, however, Grotius dwells on two exceptions: first, the duty in question can only be imperfect, for the same reasons as those discussed in Chapter 24, concerning

³⁰ Ibid. II.XXV.II.

³¹ Ibid. II.XXV.IV.

³² Idem.

³³ Ibid. II.XXV.V.

the relative merit of peace and liberty: “but yet it is plain, that in case there appears any manifest danger we are not bound to do it; for a man may prefer the preservation of his own life and goods before the life and goods of another.”³⁴ One may value the people involved, and feel that participating in their cause would be just, and still choose not to do so.

In Grotius’ conception, the premise behind a pure nationalist impulse is untenable. States must deal with their neighbors as well as with their own citizens. To think that one can separate out social justice from global justice is to treat foreign policy as a later add-on that the state may indulge in if it so chooses.³⁵ In the reality of global politics, others must always be included in policy decisions. That there is interaction does not determine the character of that interaction: it may be infrequent, or formal, or largely informal. All of those forms of interaction, however, generate expectations of behavior and sometimes legal and political obligations.

5.4.6 Grotius’ Theory of Intervention

The key text in Chapter 25 concerning intervention says

But if the injustice be visible (*manifesta*), as if a Busiris, a Phalaris, or a Thracian Diomedes exercise tyrannies over subjects, as no good man living can approve of, the right (*jus*) of human society [to intervene] shall not be therefore excluded.³⁶

³⁴ Ibid. II.XXV.VII.

³⁵ It is not difficult to see in nationalist or isolationist theories a vision of the state where, as Rawls once put it, people enter only by birth and leave only by death. Though Rawls does not himself endorse this argument except as a method of simplification, it does receive more emphatic support among some of his followers. I am indebted to James Bourke for emphasizing this point.

³⁶ Ibid. II.XXV.VIII.2.

The right of which Grotius speaks can be understood in a narrow or wide sense. On a narrow reading, the three cases mentioned all have the common factor of a threat to human life: Busiris and Diomedes are both mentioned by Apollodorus. Busiris owned horses which he fed with human meat; Diomedes sacrificed foreigners on the altar of Zeus in accordance with a prophecy. The right of human society, then, applies (in keeping with Grotius' position on basic laws of nature) only in cases where human life is threatened. In the same way that a citizen is not required to show allegiance to a government that would kill its people, international society is not required to abstain from action. The wider reading would note that the threshold for intervention is set low: Busiris' sacrifice of one foreigner a year qualifies. Therefore it is not only threats to the right to life that apply; other human rights could be involved as well.

Grotius calls the ability to intervene a right. In accordance with his theory of rights, this means the right functions as a permission, not a mandate. A state, or states, *may* choose to intervene; one cannot say they *must*. The citizens whose lives or well-being are threatened also have a right-claim to decent treatment. The right-claim is in part a claim against their government, which is failing to fulfill its purposes; it is also partly a claim against other states with the capacity to intervene. The duty that comes from this right, however, is an imperfect duty: *someone* ought to act to defend this right, but the defense is the obligation of no one state.

It is at this point that any theory of intervention has difficulties: how does one apply an imperfect duty across a system of actors who may have little or no interest in acting? Two of the obvious possibilities run into problems. If the responsibility belongs to everyone equally, then one has a coordination problem like the Tragedy of the Commons: all might prefer a world in which human rights are respected, but would prefer someone else do the difficult work. The other alternative is to place all the obligation on one body—such as the UN or the United States—to intervene every time a human rights crisis flairs up. Grotius' theory reaches its limit here. It is enough, he thinks, to note both the imperfect duty to help and the right to intervene. The manner in which the two work themselves out is a question of politics that cannot be answered ahead of time. If it were possible to shift the pattern of responsibility, so that it need not fall indifferently on all possible actors, and not fall too overwhelmingly on one or two, it would be a step forward.³⁷

5.5 Conclusion

We live in a difficult age. The cynic and the hypocrite have free reign. The system of international law that is supposed to uphold both the principle of sovereignty, as well as the advancement of human rights, sides almost always with the former against the latter. On the usual account, sovereignty is opposed to intervention, even for

³⁷ In the conclusion, I will suggest a modification to the concept of Customary International Law that will allow individual states and institutions to respond to crises that are within their abilities without placing them on the hook to solve every problem that arises.

humanitarian purposes. One may have one, or the other, but not both. The consequence is a system that, in the hands of most commentators, upholds the claims of sovereignty as the central pillar of international law—for Cassese, again, sovereignty is just what people mean when they speak of “general principles of international law.” Theories that would make room for intervention—and politicians who think human rights are worth defending by military force—constitute a dangerous threat to peace.

The story plays itself out in different ways. Sometimes, the rhetoric behind human rights is used in a way that is generally considered to be self-serving. Georgia’s breakaway provinces may indeed have wanted to exercise self-determination, and preferred diplomatic relations with Russia instead of with Georgia and the West. Few, however, would be prepared to argue Russia’s intervention did not also, conveniently, serve the purposes of weakening Georgia and damaging long-term plans for NATO expansion. The event gets spun in one of two ways: either it was a sincere explanation on the part of Russia, in which case we again affirm the importance of self-determination and sovereignty, or else it was cynical, which goes to show that all uses of moral categories in international politics are self-serving.

Or else the situation is like that of China after Tiananmen Square. The United States, facing a call to apply human rights standards against a significant trading partner as a stipulation in continuing to give them Most Favored Nation status, eventually defeats the faction calling for the Chinese to be punished for their human rights

violations. This is not even a call to militarily deal with China, nor even a call to suspend trade altogether—the request is for human rights standards to be a condition of further free trade. The defeat is so total that the attempt to place human rights conditions on permanent Most Favored Nation status a few years later fails to even get off the ground. The human rights project looks dead if it is unable to alter even the slightest behavior of states that putatively support those human rights.

Or else the situation is like that of Darfur in the Sudan. The genocide is known and reported from its beginning. No shortage of people are outraged and call for action. In this case, even the institutional enforcers of human rights within international law, like the ICC, take action, indicting the head of the Sudanese government who is responsible for most of the genocide. But no consequences come out of any of this: people are concerned, but no one acts. The Sudanese president announces that he will not accept the indictment, and travels to other countries which also declare they will not act on the indictment. Even the institutions, when they work as they should, fail to achieve their aims.

The current system of laws and institutions does not work—and it fails to work at all levels. It is not only the case that the moral principles underlying international law are co-opted as cover for the real motivations of states. The institutions themselves encourage this behavior, by rendering legitimate any use of force couched in the language of self-interest and viewing with suspicion any higher-minded reasoning

offered, with the result that the state honestly trying to defend a point of principle and the state trying to settle scores look identical to an outsider. Human rights themselves are an add-on, a bonus if they can be included in a deal without too much additional effort. And the mechanism which is supposed to respond to crises fails to act when it is needed.

Into this breach step theories of intervention which propose temporary (or more long-standing) ways to defend human rights across the globe until such a time as international institutions are more effective. They meet a counter-blast from sovereigntists who insist opening the door for intervention means opening the door for all kinds of aggressive war.

Grotius' theory, as we have seen, breaks this stalemate. If it is the case that sovereignty does not necessarily imply non-intervention, then we have reason to think that we can have a theory of intervention that still holds up all the essential elements of sovereignty, that is, one which is not dependent on qualifying sovereignty in terms of 'legitimacy.' (Defining sovereignty in terms of legitimacy, as we have seen, at best pushes the problem back a step). Instead, Grotius insists that the usual picture of sovereignty offered—the right to do whatever one wills within one's own territory—applies to no vision of sovereignty on offer. Locke later will point out that there is no monarchist who believes so strongly in that doctrine that they will not permit resistance in some circumstances.

Half of Grotius' insight is the same as that one—there are some things a government cannot possibly have the right to do, most particularly, to try to destroy its own people. To do so is to violate in the most basic way the reasons for having government at all. But he does not rely solely on this philosophic analysis in order to make his point. History, and the history of law in particular, offer reasons to think sovereignty is even more circumscribed than we usually think. Almost no form of government consciously begun (as opposed to, say, forced on a populace) gives unlimited power to the sovereign: there are always limits. If the objection to intervention is that outside interference prevents a sovereign from doing as he will—there is virtually no state in which the sovereign could do as he wills anyway.

Breaking the stalemate matters. It might be maddening that Grotius offers no final principles for judging the rightness of an intervention. If the question the reader wants an answer to is “should we intervene in such-and-such an instance?” the answer cannot be definitively given. But this misunderstands the nature of his contribution. The most popular stream in international law is to argue that interventions—any intervention, under any circumstances—contravenes political sense, law and morality. The ideal number of interventions is zero. For Grotius, the ideal number of interventions is greater than zero. Whether one or five or every case of a rights-violation does not matter: what matters first is that the category exists. If one thinks there can be just wars, if one thinks human rights exist and, in at least some instances, are worth defending,

then one must assert that the traditional international law story is wrong. The question of whether to intervene in a particular case is an important one, but it is moot unless the question itself is worth asking. This must be established first.

Once we have some reason to believe a theory of intervention will not compromise other interests the international system may have, the question then becomes whether the specifics of the theory can meet the needs of political decision-makers. Grotius' theory deals with all the concerns expressed across contemporary international law. Against a vision of the rule of law in which every potential outcome is covered by some rule, Grotius stresses the need to understand the role exceptions play. Just as even a rule of non-resistance phrased in the strongest possible manner contains some exceptions owing to human frailty or other interests, so even the strongest theory of non-intervention has some exceptions. Further, one has to recognize that there are some cases which are truly exceptional, and will not be able to be covered by any rule. For these, Grotius stresses the importance of a practical political understanding that can distinguish the exceptional cases and act on them.

He provides a moral source for intervention—the most basic principles of the law of nature. But rather than seeing nature as the source of an extensive and well-articulated set of rights, he sees those rights as minimal, perhaps extending no further than the protection of life. As a consequence, he applies several tests which will restrict the number of claimed laws of nature upon which it is acceptable to act. Against the

concerns that rhetoric misleads, Grotius reminds us that even the presence of a bad motivation may not cancel out the moral worth of the act. Against an approach to the state that views it as a carrier for the nation, the sort of body of which Rawls spoke of as containing members who “enter only by birth, and exit only by death,” Grotius reminds us that we are already in a world in which we interact with other states. The question is then not whether to care about others, but when and in what circumstances.

Grotius’ theory also has advantages over contemporary theories. Fernando Teson’s theory requires either the explicit permission or the implied permission of a people to justify an intervention. Grotius’ theory is capable of recommending action even when a people do not ask for it without resorting to considering whether they would ask for help if they were able to. It takes a minimal assumption about the things to which no human society could assent. It does not violate Rawls’ concern about the non-liberal but just society whose institutional forms and laws are different from that of a modern, liberal, western state—Grotius is at the forefront of those who are concerned about recognizing alternative forms of sovereignty, institutions that do not look the way we expect them to. Altman and Wellman’s theory requires a willingness to police potentially every violation of a human right. Grotius, by contrast, again seeks to limit the reasons that would justify an intervention.

The theory to which it may bear closest resemblance is that of Michael Walzer. On his approach, any act that “shocks the conscience of mankind,” may be an

appropriate candidate for an intervention. Much like Grotius' theory, it seeks to limit interventions to the very most chronic or acute crises, sufficiently widespread. Unlike Walzer's theory, however, it requires no mythos of the nation, no idea that the experience within a society is unable to be translated outside of it.³⁸ Walzer wants to make the nation a unit whose experience cannot be understood by those outside of it. The most prominent consequence of this is his approval of those interventions whose motivation is most conflicted by self-interest. The cases he discusses in *Just and Unjust Wars*—India-Pakistan, Vietnam-Cambodia, Tanzania-Uganda—all require intervention by neighboring states, precisely the sort of states which also stand to benefit from weakening the strength of their neighbors. By moving to more objective criteria, Grotius makes it possible for observers, both states and institutions, otherwise far removed from a humanitarian crisis to engage in the process of reasoning about whether intervention is an appropriate

³⁸ Walzer, "The Moral Standing of States" in *Thinking Politically*, David Miller ed.

6. Conclusion

6.1 The Normative Thesis Revisited

The normative thesis of this dissertation is composed of two related claims. The first is that there need to be more humanitarian interventions, which means that the law and institutions governing international politics must be re-imagined in order to facilitate this end. The second claim is that international law is structured to resist the increase in humanitarian interventions. These structural factors are not merely accidental features of international law, but are a part of the intentional design of that law, and so widely accepted that even those who argue for a greater number of interventions accept premises that make their efforts futile.

Contemporary international law cannot solve the problem to which humanitarian intervention is a response: the systematic or widespread violation of human rights. For this reason, humanitarian intervention is an ever-present feature of international politics. In some instances it will issue in interventions of varying levels of perceived legitimacy. In others, it will manifest itself as regret over what could have been easily prevented. The pull of humanitarian intervention will remain so long as there are crises left unanswered; no institutional arrangement can stamp intervention out entirely. The only thing left to be determined is what kind of practice humanitarian intervention will be. Without some substantial effort to reform and re-direct the theory and practice of intervention, international law will continue to struggle with this issue,

trying at turns to exile intervention from legitimate legal practice and trying to integrate it, however fitfully. The effort to re-think international law requires a willingness to set aside both the common understanding of the role human rights has played and many of the technical understandings of international law.

On a normative level, this re-thinking requires three elements, each extensions of the normative thesis. First, the practice of humanitarian intervention should be expanded. At the moment, policymakers are forced to choose between a respect for international law and a respect for their consciences and the dictates of morality. If policymakers decide to follow the letter of international law and ignore a humanitarian crisis, this creates a problem for international law that claims to protect human rights. A Convention on Genocide that does not come into effect during genocides as they are being perpetrated not only makes that law appear ineffectual, it makes the legal and institutional system of which it is a part look useless. If the policymaker decides to follow what appears to them to be a moral imperative and intervene, they will be declaring the international law that condemns their action ineffective and useless. However, a world with the problems generated by illegal humanitarian interventions is still normatively preferable to a world with an intact system of law that cannot respond when most needed. If contemporary international law cannot respect the importance of human rights and enforce them, then the portion of that law which prevents those aims from being achieved must be changed.

Second, humanitarian intervention must balance the claims of human rights against the claims of sovereignty. Advocates of a stronger theory of intervention often see sovereignty as the enemy, only claimed by a state to mask self-interest or indifference to human rights. However, sovereignty is itself a value of international law, and signals the basic commitment of that law to treat every state as an equal unit, with the ability to decide matters internal to that state on its own, regardless of its power or lack thereof. Sovereignty makes it possible for small, weak states to resist much of the pressure exerted by more powerful states. A good theory of humanitarian intervention has to resist the structures of international law that attempt to oppose sovereignty and intervention with the claim that the two are mutually exclusive. Grotius' theory makes room for *both* a strong theory of sovereignty and a strong theory of intervention, leaving a sphere for each that is appropriate to its aims. That is, a successful theory of humanitarian intervention has to find a place for intervention without disturbing the good uses of sovereignty.

Third, though human rights and sovereignty are often treated as equals, human rights are the weaker component on a conceptual level. The theory of sovereignty, whatever its historical origins, conceptual confusions, or dubious metaphors, is capable of a simple and powerful defense within a system of law and institutions. Its basic insight is intuitive; the theoretical elaboration of that insight maintains the same basic structure, though with detail and technical sophistication. By contrast, the human rights

project is unable to articulate its own aims with the same clarity and precision. The gap between the insight of human rights—the basic rights all people have in virtue of being human—and the reality of human rights law is quite wide. Moreover, unlike sovereignty, the technical and detailed explanation of human rights often looks very different than the basic insight might imply, as the analysis of Chapter 2 demonstrated. Human rights, and the use of military intervention to defend human rights, should be a value no less important than sovereignty within international law. For that to happen, the concept of human rights requires more clarity than is on offer in much of the best contemporary theorizing.

6.1.1 Human Rights

In the argument of Chapter 2, the human rights project is not, as it is often pictured, dedicated only to a defense of the most basic rights. It is a collection of documents aimed at different audiences at different times and without thoroughgoing aims or purposes. Indeed, the lack of thoroughgoing aims is part of the point of human rights law. Maritain commented that the Universal Declaration was only possible on the condition no one asked why the rights were judged to be human rights; the conscious decision not to ask is at the root of many problems in contemporary theorizing. We can speak of a human rights project, but to use that term implies more consistency and coherence than the project often exhibits.

Philosophers who recognize this problem have proposed a number of different solutions, but even the best of these theories stumbles over some important criterion of a human rights theory. Griffin's theory is emblematic of almost all contemporary attempts to derive a clear and consistent theory of human rights. It generates simple principles that could do good work in hewing out a reasonable, limited list of human rights, but he fails to recommend the cuts dictated by his theory. This move is not a failure of nerve, but rather borne out of the conviction, widely shared if little expressed, that an imperfect set of human rights institutions is better than none at all.

6.1.2 Humanitarian Intervention

Even granting that some solution could be found to give the human rights project a clear institutional and philosophical footing, another problem arises when the value of human rights is placed against the value of sovereignty. As we saw in Chapter 4, contemporary international law makes sovereignty a central value, possibly *the* central value, in international law. This concept of sovereignty is considered to be identical to, or tightly bundled with, related concepts like self-determination and non-intervention. The insistence on the incompatibility of sovereignty and intervention drives much of the theoretical argumentation on this topic. As I have demonstrated, however, even those most strongly opposed to the contemporary legal consensus on intervention accept the general premises under which the argument over intervention must take place: the need for international politics to be placed under a general set of laws and institutions, and

the impossibility of affirming sovereignty and intervention at the same time. In contemporary legal theory, the only way to admit a theory of intervention is by weakening the claim of sovereignty. That is, to realize one value, another must be sacrificed.

More problematically, the conceptual resources that would be of use in discussing the shortcomings of contemporary international law on intervention are often left out of theories of intervention altogether. Issues of national and cosmopolitan responsibility or the role of rhetoric in international politics, though relevant to the skepticism over intervention and the possibility of its use, are left to theorists working on other political problems. In short, contemporary international law provides little theoretical support for those looking to reform the practice of humanitarian intervention.

6.2 The Interpretive Thesis Revisited

The assertion of Grotius' importance has necessitated a reading of his work outside much of the current scholarly consensus. The most typical reading of Grotius points to the great length of his work and its idiosyncratic style as a tremendous obstacle. On this view, Grotius may be of use, but only if the interpreter separates the essential material in his work from his endless citations and digressions. This dissertation takes the opposite view: that Grotius announces his intentions at the beginning of *De jure belli ac pacis* and, for the most part, writes exactly the book he set out

to write. To see this requires understanding how the overall aims of the book are served by the internal structure of the work.

De jure belli contains very few digressions. What appear to be digressions are often arguments whose importance for the topic at hand will be revealed in time. Though Chapters XX-XXV of Book II appear to concern different topics: punishment, friendship, the rhetoric of politics, and intervention, taken together they compose one extended argument about the conditions under which intervention is possible. Further, Grotius writes a book that has a highly comparative structure, and is best read in that light. The collection of topics in the early chapters of Book III might appear random, but have been chosen to demonstrate the difference between what is permitted under the law of nations and what is required under the law of nature. Once one has read III.XI and understands that the first ten chapters specify only what is permissible, it becomes possible to see how the chapters after it intentionally rewrite the earlier parts of that book. It is this comparative structure that often gives trouble to Grotius interpreters, who will draw from various parts of his work without reference to whether his position on the topic he discusses is altered or changed in a later part of the work.

Grotius' practice of citation and tendency to give many examples is one of the most continual sources of frustration to his readers. Chapter IV of Book I, on resistance, is an excellent example: Grotius walks through the Old Testament, the New Testament, early Christian practice, and ancient history, only to walk through all these topics again

later in the same chapter. The early citations are intended to build the case against his position in the fairest possible manner. The argument has an added pluralistic feature: whether or not any particular reader will read every case, or focus only on those of most interest, they will get a sense of how Grotius uses examples to identify the main principles of law and morality. The later citations are intended to demonstrate both a better moral principle and the superiority of those examples to the first set. The pluralistic element of the examples is key: Grotius is writing in a world where there is little consensus on moral, political, or religious questions. His ability to exhaustively give examples is his best attempt to demonstrate the possibility of agreement on morality where otherwise it would prove a difficult case. He makes a compelling figure for contemporary international law because he does not assume consensus on moral issues, but tries to demonstrate it using a wide variety of sources.

6.2.1 Rights

This dissertation has advanced the argument, unusual in the Grotius literature, that Book III is the single most important guide for Grotius' thinking on the question of rights. Though Grotius does introduce the concepts of right and law very early on in *De jure belli*, it is not until he places the concept of rights under the strain of actual political circumstances that it is possible to determine what he means by rights and how they are intended to function. In Grotius scholarship, the importance is often placed on the Prolegomena and first chapter of Book I, which leads, as discussed earlier, to arguments

over Grotius' place in the history of ideas that, while often illuminating, place a focus on the early part of *De jure belli* out of proportion to its importance in the work.

Two different interpretive consequences fall out of this reading. First, much of the Grotius literature is concerned to establish him as a transitional or revolutionary figure in the history of natural law theory. This school of thought is mistaken. It is true, as Tierney establishes, that Grotius' conception of the law of nature is different than a high medieval conception of the same. It is also true to say that he is one significant figure among many in the gradual transformation of natural law thinking.

However, Grotius' really significant contribution is in his theory of the law of nations. Grotius is among the very first to see the law of nations as something essentially different from the law of nature. The law of nations is, for Grotius, just those things states agree on: this agreement can have a moral valance, but it will not necessarily have one. On some occasions, the law of nations will match the requirements of the law of nature, but there is no reason to suppose this will be the case. Sometimes, quite crucially, the law of nations will demand much less than the law of nature does. Agreement can serve as an indication that the law of nature may be a feature of state practice, but the two must stand independent of each other. Grotius links together a definite positivist view of law alongside a naturalist insistence that moral standards do, nevertheless, exist. He is, in this sense, a modern thinker who can speak directly to the state of

contemporary international law thinking, which also attempts to balance these two modes.

The second consequence of reading Grotius in this manner is his ability to address the three conditions of a successful human rights theory: the need to respect plurality, the need to address the political circumstances that require human rights in the first place, and the need to provide a means to separate human rights from other important claims. Grotius' use of examples, and his separation of both the law of nations and particular moral viewpoints from the law of nature make his theory pluralistic in its approach. In his recognition that the law of nations often permits behaviors far below the standards of the law of nature, he can offer an explanation for the existence and persistence of the behaviors that make a theory of human rights necessary. Most importantly, Grotius develops a theory of rights that makes them central to his theory of justice without reducing justice to the claiming and enforcement of rights, with all the difficulties of rights proliferation that follow. He does this neither by proposing a definition or grounding of human rights nor by specifying a set of institutions, but by surrounding the concept of rights with other normative concepts. These concepts limit the theoretical ground that a concept of human rights would need to cover, and thereby give a means by which to separate basic rights from other rights.

6.2.2 Intervention

Contemporary international law makes intervention and sovereignty into opposites. Grotius, by contrast, demonstrates that it is possible to hold a strong theory of sovereignty and a strong theory of intervention at the same time. There are two different ways to read the claim he makes. The first comes from chapters XX-XXV of Book II. Objections to humanitarian intervention are often built around the idea that states are self-contained entities, and any non-consensual interaction between states can be an unwarranted level of interference. Given the legacy of colonialism, and the tendency of great powers to influence the decision-making of weaker states, these concerns are important. On Grotius' theory, this concern misunderstands the nature of international society. States engage in formal and informal relationships with other states all the time, and these relationships entail responsibilities that, once entered into, must be carried out. A consensual arrangement can result in compulsory duties. But the relationship between two states often exceeds the boundaries of just honoring the terms of the agreements they have made. One agreement makes it easier to have another, increases the level of interaction between the states, and gives each a further interest in the other. These links can develop a social and moral character: for example, the interaction between the United States and Canada, or the United Kingdom, is not reducible to the legal agreements between the two states. It is in this additional social and moral interaction that the duty of intervention can emerge. In Grotius' schema, a state can

never be obligated to intervene on behalf of another, but these ties can give to another state the right to intervene.

The second possibility trades on the distinction between internal and external sovereignty. Internal sovereignty is the ability of a people to manage their own affairs in the way they see fit; external sovereignty is the ability of a people to prevent influence on their decisions from outside that group. In the discussion of resistance, Grotius shows that the belief that resistance might be justified in some circumstances is not incompatible with a strong theory of internal sovereignty; by extension, intervention in some circumstances is not incompatible with a strong theory of external sovereignty.

The circumstances in which resistance will be justified, Grotius argues, differ according to the arrangements by which a political regime has been instituted. Any state must have the space to enact laws and exert basic police power. Depending on the arrangements made between citizens and sovereign, the organization and institutionalization of a state can become much more complex. At all events, however, a right of resistance is retained. It is a relatively uncontroversial feature of political thought that resistance is sometimes justifiable, and this belief is compatible with a wide range of views about the conditions under which a state is legitimate. The presence of a doctrine of resistance poses no insuperable difficulty to a theory of sovereignty. In the same way, there is no particular reason why a theory of intervention, perhaps restricted only to extreme cases, should be incompatible with a strong doctrine of sovereignty. For

Grotius, one can accept the right of a state to order its own affairs and still insist that some decisions are so far beyond what is acceptable that intervention can be justified.

There is much to recommend both of these approaches. However, Grotius makes a contribution to the rethinking of international law even if his particular approach is deemed to be unsuccessful. Grotius demonstrates, through his theoretical constructions, that the opposition of sovereignty and intervention need not be taken as the fundamental starting point for contemporary international law. Just because sovereignty and intervention are taken to be mutually exclusive does not mean they must always be seen in this way. In his ability to open up the theoretical space of contemporary international law, Grotius' theory makes a significant contribution to the dialogue on these topics.

6.3 Implications of the Argument for Contemporary International Law

Grotius' theory provides fertile ground for new work in international law. His approach offers an alternative conceptual framework in which to imagine human rights and humanitarian intervention. Using Grotius as a guide, it becomes possible to re-imagine the way the practice of international politics might be supported by theoretical developments. Beyond the general theoretical contribution, Grotius' approach turns attention to the importance of re-thinking international law as a series of smaller problems. In other words, it will not do to simply replace the framework of contemporary international law with that of Grotius, were that even possible. Change in

the practice of states will come through narrow contributions that utilize Grotius as a guide to resolve the tensions throughout international legal theory. Larry May's work is a first example of how this theoretical approach can maximize its practical impact. May chooses an area of international law, that of international criminal law, which is subject to some confusion. Using Grotius' theoretical insights, he works through the particular tensions and confusions of that area in order to produce a theory that identifies and protects the most important parts of international criminal law, while lessening the importance of the others.

The question often arises in discussions of international law whether it is possible that a custom of humanitarian intervention might emerge. Those who argue from a positivist perspective are adamant that such a custom could never emerge, that the hard law of treaties and the UN Charter rules out the possibility of it occurring. The strangeness of contemporary international law's concept of custom makes it an excellent candidate for a Grotian approach, following the example of May's work on international criminal law.

For this reason, Customary International Law (CIL) is a ripe topic for further exploration.¹ CIL has two components: *usus*, the practice of states, and *opinio juris*, the

¹ The best recent work on CIL is that of Michael Byers. See especially Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), though dated in some respects, remains one of the best works linking human rights to CIL.

idea that a practice is undertaken because a state believes it has a legal or moral obligation to do so. In the wake of the Kosovo intervention, some theorists argued that a new custom was forming, which would permit humanitarian intervention in some circumstances. Most legal scholars and practitioners denied that such a custom could come into existence. Their reasoning relied on several features of contemporary CIL thinking: first, a custom only qualifies if it is the accepted practice of many states, which humanitarian intervention is not. Second, the presence of treaty law reflecting the importance of sovereignty is an indication of the state of *opinio juris* on this subject. Since there is no consistent *usus* or *opinio juris* in favor of intervention, then the conditions for a new custom to emerge do not exist. To establish a new custom in favor of humanitarian intervention, a state must intervene in all possible instances of an intervention. Thus, if the United States fails to intervene every time an intervention might occur, by its own practice it indicates unwillingness to establish a new custom.

CIL, in short, is a very odd form of custom. Within international law as a discipline, it has been treated as a weaker form of treaty law, rather than as its own unique source of law. The development of CIL puts it at odds with a traditional use of custom, which is open to change over time. Custom should emphasize the decision-

Meron's *The Humanization of International Law* and Brownlie, *Principles of Public International Law* both contain excellent discussions of CIL in contemporary politics.

making and consent of decentralized agents, rather than order instilled from outside. In CIL, the emphasis is often placed on *usus*, with the *opinio juris* an afterthought. Indeed, the literature on CIL is frequently unclear on what qualifies as *opinio juris*, and how one can judge whether a claim to *opinio juris* applies. The conceptual confusion indicates substantial work is still needed to clarify the relationship between *opinio juris* and practice.

Here Grotius' conceptual scheme is useful. The same general approach that allows Grotius to have greater flexibility in recognizing and managing rights claims could be applied to the strictures of CIL to produce a more useful idea of custom. Unclaimed rights are a threat to justice in contemporary international law, but Grotius demonstrates that some rights may be modified by other normative concepts without damaging the status of the right itself. One may claim a right or decline to claim it, but one retains the right either way.

The same outline can be applied to CIL: in that approach, the emergence or persistence of a custom depends on continual action by a state, supporting a custom or derogating from it. The result is a theory of custom that looks much more like treaty law: it gains the ability to be easily recognized and enforced at the cost of remaining open to the changing practice of states. If, instead of allowing CIL to become a less flexible form of law, we think of extensions to CIL, a more palatable norm of humanitarian intervention will result. The custom, for example, could be established

that if there were a severe humanitarian crisis that required intervention, it would trigger the ability of a state, institution, or other organization to respond without triggering an obligation to respond every time. In this way the burden of enforcement could be spread. If the *opinio juris* of humanitarian intervention can remain even while the *usus* fluctuates, this would represent an important step forward in thinking about both human rights and humanitarian intervention.

The tragedy of humanitarian intervention is its perpetual relevance. The names and places change over time, but the basic story does not. Ten years ago, few people paid attention to the human rights situation in the Sudan. As the rights violations increased in frequency and intensity over the course of the decade, more people paid attention. For several years, it served as a lightning rod of opinion on international politics, exactly the sort of situation that someone should be doing something to resolve. By the end of the decade, the issue fell out of the public eye, replaced by other problems. All the expressions of concern and alarm resulted in not much more than the ICC's attempt to indict the leader responsible for the systematized killings. But the ICC was unable to secure an agreement from other states to apprehend the Sudanese president; he has ignored the indictment to no consequence. For the ICC, the failure to bring him to trial is a blow to the credibility of that institution at a very early stage in its development.

The features of this story are a failure of state practice: ineffective institutional responses, public indifference, and the haphazard practice of states that sometimes intervene and sometimes attempt to avoid intervening. The state practice is mirrored and intensified by the failure of international legal theory to provide any clear and consistent message about the purposes of international law. There is no agreement about whether human rights are minimal or expansive, meant as corrective standards or aspirations for political societies, or how they are to be institutionalized. There is no agreement about whether sovereignty or human rights is the organizing principle of international law, whether states have moral obligations to aid other states, or whether humanitarian interventions should be permitted. Worse, this inability to reach consensus is a central feature of many of the concepts animating contemporary international law. In the absence of consensus, deriving any practice—for or against intervention—will be a difficult task.

The hope of international theory lies in projects that take some small significant piece of international law, identify the flaws or limitations of that approach, and propose a specific, implementable answer. These projects will vary based on the specific features of contemporary international law, but they require a solid theoretical basis. In the work of Hugo Grotius, we have seen how it is that all the important goals of contemporary international law might be endorsed without many of the conceptual difficulties they now carry. A theoretical approach based on Grotius is one that can assert the value of

human rights without only thinking in terms of rights and one that can recognize the importance of sovereignty while still asserting the right to intervene. On this basis, theory and practice can align in defense of human rights.

References

- Altman, Andrew, and Christopher Heath Wellman. "A Defense of International Criminal Law." *Ethics* 115, no. October 2004 (2004).
- Angle, Stephen C. "Human Rights and Harmony." *Human Rights Quarterly* 30, no. 1 (2008).
- Appiah, Kwame Anthony. *Cosmopolitanism: Ethics in a World of Strangers*. New York: W. W. Norton & Co., 2006.
- Bass, Gary J. *Freedom's Battle: The Origins of Humanitarian Intervention*. New York: Alfred A. Knopf, 2008.
- Beitz, Charles R. *The Idea of Human Rights*. New York: Oxford University Press, 2009.
- Bleckman, Albert. "Article 2(1)." In *The Charter of the United Nations: A Commentary*, edited by Bruno Simma. Oxford: Oxford University Press, 1994.
- Brierly, J.L. *The Law of Nations: An Introduction to the International Law of Peace*. Oxford: Clarendon Press, 1949.
- Brownlie, Ian. *Principles of Public International Law*. New York: Oxford University Press, 2003.
- — —. *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*. New York: Springer, 1998.
- Buchanan, Allen E. "Human Rights and the Legitimacy of the International Order." In *Human Rights, Legitimacy, and the Use of Force*, edited by Allen E. Buchanan. New York: Oxford University Press, 2010.
- — —. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. New York: Oxford University Press, 2004.
- — —. "Reforming the International Law of Humanitarian Intervention." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, edited by J.L. Holzgrefe and Robert O. Keohane. Cambridge: Cambridge University Press, 2003.
- Buergenthal, Thomas. "The Evolving International Human Rights System." *American Journal of International Law* 100 (2006): 783.

- Byers, Michael. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, 1999.
- Byers, Michael, and Simon Chesterman. "Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, edited by J.L. Holzgrefe and Robert O. Keohane. Cambridge: Cambridge University Press, 2003.
- Cali, Basak. "Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions." *Human Rights Quarterly* 29, no. 1 (2007).
- Caney, Simon. *Justice Beyond Borders: A Global Political Theory*. New York: Oxford University Press, 2005.
- Carr, E.H. *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations*. New York: Palgrave Macmillan, 2001.
- Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005.
- Chesterman, Simon. *Just War or Just Peace?* Oxford: Oxford University Press, 2001.
- Cohen, Joshua, and Charles Sabel. "Extra Republicam Nulla Justitia." *Philosophy & Public Affairs* 34, no. 2 (2006).
- Donnelly, Jack. "The Relative Universality of Human Rights." *Human Rights Quarterly* 29, no. 2 (2007).
- — —. *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 2003.
- Dumbault, Edward. *The Life and Legal Writings of Hugo Grotius*. Norman: University of Oklahoma Press, 1969.
- Edwards, Charles S. *Hugo Grotius: The Miracle of Holland*. Chicago: Nelson-Hall, 1981.
- Farer, Tom J. "Humanitarian Intervention before and after 9/11." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, edited by J.L. Holzgrefe and Robert O. Keohane. Cambridge: Cambridge University Press, 2003.
- Finnis, John. *Natural Law and Natural Rights*. New York: Oxford University Press, 1980.

- Fitzmaurice, G.G. *The General Principles of International Law Considered from the Standpoint of the Rule of Law, Recueil Des Cours for the Academy of International Law*. Leiden: A.W. Sijthoff, 1958.
- Freeman, Michael. "The Problem of Secularism in Human Rights Theory." *Human Rights Quarterly* 26 (2004): 375-400.
- Geras, Norman. *The Contract of Mutual Indifference: Political Philosophy after the Holocaust*. New York: Verso, 1998.
- Gewirth, Alan. *The Community of Rights*. Chicago: University of Chicago Press, 1996.
- Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2001.
- Gourevitch, Philip. *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families*. New York: Picador, 1998.
- Grant, Ruth W. *Hypocrisy and Integrity : Machiavelli, Rousseau, and the Ethics of Politics*. Chicago: University of Chicago Press, 1999.
- Griffin, James. *On Human Rights*. New York: Oxford University Press, 2008.
- Grotius, Hugo. *De Veritate Religionis Christianae*: Elibrion Classics, 2006.
- — —. *Hugonis Grotii De Jure Belli Ac Pacis*. Edited by William Whewell. London: J. W. Parker, 1853.
- — —. *The Rights of War and Peace*. Edited by Richard Tuck. Indianapolis, Ind.: Liberty Fund, 2005.
- Ignatieff, Michael. *Human Rights as Politics and Idolatry*. Princeton, N.J.: Princeton University Press, 2001.
- Ittersum, Martine Julia Van. *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615*. New York: Brill, 2006.
- Jeffery, Renée. *Hugo Grotius in International Thought*. New York: Palgrave Macmillan, 2006.
- Johnson, James Turner. "Grotius' Use of History and Charity in the Modern Transformation of the Just War Idea." *Grotiana*, no. IV (1983).

- Keene, Edward. *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*. New York: Cambridge University Press, 2002.
- Koskenniemi, Martii. *From Apology to Utopia*. Cambridge: Cambridge University Press, 2005.
- Krasner, Stephen. "Compromising Westphalia." *International Security* 20, no. 3.
- Lauterpacht, Hersch. *International Law and Human Rights*. New York: F.A. Praeger, 1950.
- — —. "The Grotian Tradition in International Law." *British Yearbook of International Law* 23 (1946): 1-53.
- Lomasky, Loren E. *Persons, Rights, and the Moral Community*. New York: Oxford University Press, 1987.
- May, Larry. *Crimes against Humanity: A Normative Account*. Cambridge: Cambridge University Press, 2005.
- — —. *War Crimes and Just War*. Cambridge: Cambridge University Press, 2007.
- Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 1989.
- — —. *The Humanization of International Law*. Leiden: Martinus Nijhoff Publishers, 2006.
- Mill, J.S. *On Liberty*. Indianapolis: Hackett Publishing Co., 1978.
- Miller, David. *National Responsibility and Global Justice*. Oxford: Oxford University Press, 2008.
- — —. *On Nationality*. Oxford: Oxford University Press, 1997.
- Morgenthau, Hans. *Politics among Nations*. New York: McGraw-Hill, 2005.
- Mutua, Makau. "Standard Setting in Human Rights: Critique and Prognosis." *Human Rights Quarterly* 29, no. 3 (2007).
- Nagel, Thomas. *Equality and Partiality*. New York: Oxford University Press, 1995.
- Nickel, James. *Making Sense of Human Rights*. Oxford: Blackwell Publishing, 2007.

- — —. "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights." *Human Rights Quarterly* 30, no. 4 (2008).
- Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.
- Nussbaum, Martha. *Frontiers of Justice: Disability, Nationality, Species Membership (the Tanner Lectures on Human Values)*. Cambridge: Belknap Press of Harvard University Press, 2007.
- Onuma, Yasuaki, ed. *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*. New York: Oxford University Press, 1993.
- Perry, Michael J. *The Idea of Human Rights: Four Inquires*. New York: Oxford University Press, 1998.
- Power, Samantha. *A Problem from Hell: America and the Age of Genocide*. New York: Basic Books, 2002.
- Rawls, John. *The Law of Peoples: With the Idea of Public Reason Revisited*. Cambridge: Harvard University Press, 2001.
- Reisman, W. Michael. "Coercion and Self-Determination: Construing Charter Article 2(4)." *American Journal of International Law* 78, no. 3.
- Remec, Peter Pavel. *The Position of the Individual in International Law According to Grotius and Vattel*. The Hague: M. Nijhoff, 1960.
- Rorty, Richard. *Contingency, Irony, and Solidarity*. Cambridge: Cambridge University Press, 1989.
- — —. "Human Rights, Rationality and Sentimentality." In *On Human Rights*, edited by Stephen Shute and Susan Hurley. New York: Basic Books, 1994.
- Shue, Henry. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton, N.J.: Princeton University Press, 1996.
- Skidmore, David, and William Gates. "After Tiananmen: The Struggle over Us Policy toward China in the Bush Administration." *Presidential Studies Quarterly* 27, no. 3 (1997).
- Slaughter, Anne-Marie. "Security, Solidarity, and Sovereignty: The Grand Themes of Un Reform." *American Journal of International Law* 99 (2006): 619.

- Suarez, Francisco. "A Defense of the Catholic and Apostolic Faith." In *Selections from Three Works*, edited by J.B. Scott. Oxford: Clarendon Press, 1944.
- Tesón, Fernando R. *A Philosophy of International Law*. New York: Westview Press, 1998.
- — —. *Humanitarian Intervention: An Enquiry into Law and Morals*. Ardsley, NY: Transnational Publishers, 2005.
- Tierney, Brian. *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. Atlanta, GA: Scholars Press, 1997.
- Tomasi, John. *Liberalism Beyond Justice: Citizens, Societies, and the Boundaries of Political Theory*. Princeton, N.J.: Princeton University Press, 2001.
- Tomuschat, Christian. *Human Rights: Between Idealism and Realism*. New York: Oxford University Press, 2008.
- Tooke, Jean B. *The Just War in Aquinas and Grotius*. London: SPCK, 1965.
- Tuck, Richard. *Natural Rights Theories: Their Origin and Development*. New York: Cambridge University Press, 1979.
- — —. *The Right of War and Peace: Political Thought and the International Order from Grotius to Kant*. New York: Oxford University Press, 1999.
- Vincent, R.J. "Grotius, Human Rights and Intervention." In *Hugo Grotius and International Relations*, edited by Hedley Bull, Benedict Kingsbury and Adam Roberts. New York: Oxford University Press, 1992.
- Vollenhoven, Cornelis Van. *The Three Stages in the Evolution of the Law of Nations*. The Hague: M. Nijhoff, 1919.
- Vreeland, Hamilton. *Hugo Grotius: The Father of the Modern Science of International Law*. New York: Oxford University Press, 1917.
- Waldron, Jeremy. *Law and Disagreement*. New York: Oxford University Press, 1999.
- — —. "When Is It Right to Invade?" *New York Review of Books* 2008.
- Waltz, Kenneth N. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co., 1979.

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1979.

— — —. *Spheres of Justice*. New York: Basic Books, 1977.

— — —. *Thick and Thin*. South Bend, IN: University of Notre Dame Press, 1994.

— — —. *Thinking Politically: Essays in Political Theory*. New Haven: Yale University Press, 2009.

Westerman, Pauline C. *The Disintegration of Natural Law Theory: Aquinas to Finnis*. New York: Brill, 1998.

Witte, John. *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism*. New York: Cambridge University Press, 2008.

Wolterstorff, Nicholas. *Justice: Rights and Wrongs*. Princeton, N.J.: Princeton University Press, 2008.

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