What human rights aren't for: Human rights function as moral, political and legal standards—but not as intervention-conditions

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Abstract

An influential strand of human rights theory explains human rights through appeal to their function. Such 'function' theories highlight the role human rights play in international practice and discourse as standards for appropriate state treatment of individuals. But standards in what sense? Standards to be promoted and encouraged through public critique, bilateral pressure, institutional censure or legal culpability? Or standards to be protected and defended through all necessary means? I argue that function theorists conflate (what states themselves recognize as) the important distinctions between these standards. Worse still, many function theorists argue that a major—even definitive—role of human rights involves demarcating permissibility conditions for humanitarian intervention. I argue that this claim gravely mischaracterizes international practice and discourse—in particular it fails to recognize the independent significance of other functional norms operating within the global context. The theorists correctly perceive that we have powerful reasons for wanting this role (of threshold conditions for military intervention) fulfilled, but by mistaking the norms that in fact fulfil it, they distort the actual function of human rights.

Introduction

What is the best way of understanding human rights? Building on Rawls' (1999) later work, an array of contemporary theorists argue that, rather than presuming that the idea of human rights captures a pre-existing moral reality, we should instead direct our attention to the *function* of human rights in the contemporary international environment. On this view,

¹ This is the postprint version of: Breakey, H. 2015. What human rights aren't for: Human rights function as moral, political and legal standards – but not as intervention-conditions. *Research in Ethical Issues in Organizations* 13: 41-59. The final publication is available at Emerald Insight via <https://www.emeraldinsight.com/doi/abs/10.1108/S1529-209620150000013003?fullSc=1>

once we grasp how they work in actual practice, we can see why many people might endorse human rights—even if those people do not cleave to a deeper moral reality where rights play a fundamental role. Equally, once we understand the function, we can work out exactly what content and substance we should impute to human rights lists and practices.

I will term those who adopt this approach as ‘function’ theorists—including Charles Beitz, Joseph Raz and Joshua Cohen. Function theorists often allege that other human rights theories fail to match up to the actual practice of human rights in international affairs—even to the point of being ‘irrelevant to it’ (Raz, 2010, p. 323). In what follows, however, I argue that despite their persistent appeals to the reality of actual human rights discourse, policy and action, function theorists themselves significantly misrepresent the role of human rights. But in making that argument, I hope to show the wisdom of their overarching theoretical insight: sometimes a community *does* deliberately construct a new norm precisely to fulfil a specific need, and the community goes on to think about, delineate and promote that norm precisely because of its capacity to play that role. While such instrumental construction may not furnish the full story, the appeal to function helps us understand vital parts of human rights’ substance, history and normative allure.

With this in mind, this paper aims to delineate what that function does *and does not* include. One of human rights’ major roles involves setting standards for states’ treatment of individual humans. The preamble of the *Universal Declaration of Human Rights* proclaims exactly this: heralding its contents as ‘a common standard of achievement for all peoples and nations...’ (U. N. General-Assembly, 1948). This paper aims to determine, with some precision, what that standard amounts to. The question holds importance in its own right, as well as being a first step in function theories of human rights.

I begin in the first section by distinguishing eight different moral, political, legal and coercive international standards, and show how the role of human rights over the past six decades has shifted amongst (some of) these standards as new events, practices and instruments materialized. I stress that the function theorist needs to be sensitive—as states themselves are—to exactly what type of standard states invoke at any point. In the second section, I argue that human rights are not ‘intervention-conditions’ determining when coercive action can be taken by the international community against culprit states. Far from this being their primary role, serving as triggers for humanitarian intervention is not even *one* of the several

standards filled by human rights. In fact, quite distinct norms have been deliberately constructed to fulfil this role. In the final substantive section, I explain why this function could not be fulfilled by human rights—the content and nature of a list devised to serve as moral, political and legal standards *cannot possibly* be employed as a threshold for coercive action. Indeed, I argue we cannot even ‘follow the logic’ of rights, on its own, to derive intervention-conditions from contemporary human rights.

The many possible functions of human rights

This section explains the different roles that human rights can play as international standards for state’s treatment of citizens and residents. Function theorists tend to provide very broad descriptions of how states employ these standards. For example, Cohen (2004, p. 194) tell us human rights provide ‘standards that political societies, in the first instance, can be held to with respect to the treatment of individuals and groups...’ without specifying what ‘can be held to’ means, and what limits circumscribe it. Beitz holds that ‘international human rights are potential triggers of transnational protective and remedial action...’ (2009, p. 65) and goes on to speak of every action from expressing concern to military invasion. I will argue, however, that the contested nature of ‘action’ and ‘can be held to’ warrant more attention than either theorist provides.

Standards: Moral, political, legal and coercive

In the international context, ‘standards’ can set thresholds for a wide array of actions, include public recognition, critique, perceived legitimacy, shifts in bilateral relations, legal culpability, coercive sanctions, military intervention and more. I here set down, on a rough scale of ascending severity, eight types of standards.

S1. Standards for promotion by cooperating states through international institutions and regional organizations. Within the means at their disposal, one of the goals of an organization that accepts these standards is to promote human rights—including by encouraging their performance, aiding state capacity, awareness-raising, communicating ‘lessons learned’ and so on.

S2. Standards for praise of states. This standard countenances the external evaluation of state conduct—at least if such evaluations remain positive. On this approach, states complying with human rights deserve praise, but their failures cannot trigger criticism.

S3. Standards for critique. This standard licenses states to publicise, informally judge and criticize other states' human rights violations. S3 Standards for Critique imply that human rights violations no longer fall entirely within a state's domestic purview and that external critique does not amount to 'interference' in domestic affairs.

S4. Standards of censure. This standard countenances condemnation in official forums, allowing states to place reports about others' conduct on official record and demand the accused state respond to the accusations.

S5. Standards for pressure through voluntary, bilateral measures. This standard licenses states to make human rights compliance an explicit subject of bilateral state-to-state relations. A state may respond to violations by freezing action on economic, trade, or security agreements—or even withdrawing from such agreements. Alternatively it might impose unilateral sanctions, such as travel, economic and technological sanctions, or withdraw diplomatic contact.

S6. Legal standards: A state can sign up to S1 to S5 without acquiring legally binding duties. In the international context, states typically acquire new legal duties by signing and ratifying legal treaties. Even when states sign on the dotted line, legality in the international context differs from the domestic case: laws can have a murky legal status ('soft' versus 'hard' international law), they may be loosely worded rather than determinate ('grey' rather than 'black letter' law), and even when they are determinate and binding, no court may have jurisdiction to judge upon them (Abbott & Snidal, 2000; Breakey, 2014).

S7. Standards for interference: These standards render a noncomplying state liable to various coercive measures, falling short of military attacks but including measures beyond the peaceful S5 Standards for Pressure. Failure to comply with S7 Standards for Interference allows the international community (under the authorization of appropriate regional bodies or the UN Security Council) to enforce trade or arms

embargoes on the country, and place assets freezes and travel bans ('targeted sanctions') on regime figures.

S8. Standards for intervention: The final standard connotes what political theorists call 'permissibility conditions' for international humanitarian intervention. Breach of these standards renders a state liable for military intervention, including full scale military invasion, or lesser measures such as the enforcement of 'no-fly' zones or military assistance to rebel forces. Of course, breach of S8 standards does not necessarily mean that intervention should take place—this threshold sets down only 'defeasible' or 'pro tanto' conditions (Beitz, 2009, p. 117; Raz, 2010, p. 328). For instance, international law requires Security Council authorization for military interventions, and an array of pragmatic considerations must be factored in before military action occurs. But breach of S8 standards sweeps away the 'in principle' reasons prohibiting intervention—respect for international peace, the sovereignty of the target state and the self-determination of its people.

For ease in what follows, I will term standards S7 and S8 'intervention-conditions' (though the full term spelt out would be: 'defeasible permissibility conditions for coercive interference and military intervention').

Without too much simplification, we can group these different standards as moral (S1-S3), political (S4-S5), legal (S6) and coercive (S7-S8)—thought of course the distinction between the first two types (moral and political standards) is not sharp. We can also observe the different type of action-verbs at the core of each of the standards—human rights should be *promoted* (S1 and S2), *demand* (S3, S4, S5), *protected* (S8) or violations should be *prevented* or *remedied* (S6, S7, S8).

Why should we trouble ourselves to make these distinctions amongst different standards? One hint that these distinctions matter is that states think they matter. In any short space, it is hard to convey the extent of debate, compromise, filibustering, cajoling and even bullying that can hinge on a single word (or translation of a word) during negotiations on such instruments (Glendon, 2001; Morsink, 1999). If states prove acutely sensitive to knowing and controlling *exactly* what they are signing up to when they approach human rights

documents and practices, theorists trying to account for the practice of human rights need to be sensitive to the same distinctions.

Furthermore, the practice and discourse of human rights (even after the instruments have been successfully negotiated) itself distinguishes amongst these roles. Different instruments, practices and developments have expanded the ambitions of human rights as standards.

Since the UN Charter in 1945, human rights have always played a role as moral standards to be promoted and encouraged (S1-S2). The legally binding UN Charter (UN, 1945) explicitly demands at least S1 Standards for Promotion, requiring member states and the Organization (especially the General Assembly and ECOSOC) 'promote', 'encourage' and 'assist in realizing' human rights. S2 Standards for Praise reflects a concern for human rights balanced with a strong commitment to non-interference with state sovereignty. For instance, *General Assembly Resolution 2625* (UN General-Assembly, 1970) on 'Friendly relations and cooperation among States' requires that states promote human rights, but mentions this requirement only in a larger context stressing non-intervention and self-determination. The Resolution proclaims states' duties 'not to intervene in matters within the domestic jurisdiction of any state' and not to 'foment' or 'incite' subversive activities. Since international condemnation for a state's human rights violations almost inevitably increases the legitimacy of dissident struggles, one could easily conclude that human rights were not a fit subject for international critique—only praise. Standards of promotion (S1) and praise (S2) can also seem implied by the *Universal Declaration's* assertion of a standard *of achievement*: compare, for example, standards 'of acceptability' or 'of minimally decent conduct'. The high bar set by the *Declaration's* generous list of rights supports this interpretation. Any state that managed to fully provide the full suite of stated human rights for all its people would achieve an extraordinary accomplishment.

While a minimal reading of the *Universal Declaration* might demand only the first two standards, S3 Standards for Critique remains a natural reading, and was undoubtedly intended by many of the drafters and some of the state signatories (Glendon, 2001, p. 166). Even so, a stronger political role for human rights as Institutional Standards for Censure (S4) and Bilateral Standards for Pressure (S5) did not appear for some decades. The signing of the Helsinki Declaration in 1975 helped signal the emergence of this political role, at least in

East-West relations. The inclusion of human rights in the Helsinki Final Act prevented the Communist bloc (as signatories) from rejecting human rights as a proper object of international attention and bilateral negotiation (Thomas, 2001).

Human rights became (S6) Legal Standards in 1977 with the ratification of the first major human rights treaties, and several decades on almost every UN member state has signed at least one such treaty. Still, jurisdictional coverage even for civil and political human rights remains fragmentary, and almost non-existent for many other rights. Even within S6, therefore, states exercise substantial control over the precise nature of their international legal obligations, and over their submission to external institutions, courts and tribunals' legal judgments and penalties. As such, S6 legal standards can vary considerably from one to another.

As I will argue in the following section, human rights have never been intervention-conditions, either at their inception or since.

Collapsing these distinct standards together removes our capacity to explain this dynamic history of human rights. The conflation can also lead us into error by making it seem as if human rights were originally and ubiquitously intended to play this wide array of roles. As the history shows, human rights have been put to uses that would amaze their early advocates and shock their initial sceptics.

As well as allowing us to map onto state concerns and the historical development of human rights, clear legal differences exist between moral-political standards (S1-S5), legal standards (S6) and coercive standards (S7-S8). Moral-political standards carry no strict legal weight, as compared with the treaty obligations of S6. Coercive standards of (S7-S8) are also legally significant, as coercion involves directly infracting on a state's sovereignty. The *UN Charter*, as the fundamental document of international law, governs such coercive infractions strictly, but makes few determinations about moral-political standards.

As such, we need to distinguish between S1 to S8 (or at least between moral-political, legal and coercive standards) if we are to respond adequately to human rights as they exist in state concerns, historical development and legal and practical reality.

Human right are not intervention-conditions

Almost all functional theorists think that one of the roles played by human rights encompasses describing the conditions under which international interventions can, in principle, take place—S7 and S8 ‘intervention-conditions’ (Beitz, 2009, pp. 65, 116; Cohen, 2004, pp. 194, 195; Raz, 2010, p. 328). Beitz in particular harnesses an array of evidence suggesting human rights provide *pro tanto* reasons for intervention. He appeals to the *UN Charter*, the *Universal Declaration of Human Rights*’ drafter’s intentions, widely-accepted norms governing humanitarian intervention, and even the proclamations of state sovereignty defenders such as China. Asserting all this evidence is ‘obvious’ and even ‘elementary for those familiar with the subject’ (2009, pp. 13, 65), it seems we must accede to Beitz’s view that the function of human rights includes acting as intervention-conditions.

To the contrary, however, I will argue that the more one is familiar with international relations, law and norms, the more alarming all of this should sound. Let us begin at the beginning—with the *UN Charter* of 1945.

The UN Charter

Beitz’s (2009, p. 13) idea about human rights involves ‘states being responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action’.

Beitz tells us that the *UN Charter* incorporates this idea. I disagree.

To begin, the *Charter* says little about state responsibility or remedial action in general. It does speak of prevention: prevention of acts of aggression, breaches of the peace and threats to the peace. In its core provisions, the *Charter* authorizes the UN Security Council to respond preventively to each of these situations. But the *Charter* does not declare or even suggest that human rights might count as such triggers. Indeed, human rights are not even mentioned in any of the chapters describing the Security Council’s role. Far from licensing international remedies or preventing human rights violations, the *UN Charter* presents the fundamental legal bulwark *against* such adventures. We should not forget that the *UN Charter* restrained NATO forces from intervening in the Balkans conflict, and when NATO

finally acted in Kosovo to prevent ethnic cleansing, it did so *in violation of the Charter*, not on its basis (IICK, 2000).

What then *does* the *Charter* say about human rights? In a handful of articles, the *UN Charter* requires that the member states and the Organization (in particular the General Assembly and ECOSOC) will ‘promote’, ‘encourage’ and ‘assist in realizing’ human rights. Why this wishy-washy language? Why not, with Beitz, ‘protect’ human rights and ‘prevent and remedy’ violations? Given the echoing silence on human rights in the chapters on the Security Council, regional arrangements and the International Court of Justice (ICJ), we already can surmise the answer. The institutions the *Charter* made responsible for human rights were simply not capable of *protecting* human rights, or of *preventing* and *remedying* international violations. Only the Security Council (and perhaps, speculatively, the ICJ) could play that role, and the founding parties possessed no desire to embroil these institutions in any such task. The purpose of the *UN Charter* was to prevent international war, after all, not to foment it.

But the General Assembly and ECOSOC certainly could *promote* rights; they could formalize them, declare them, pen treaties and entreat member states to sign, create commissions to evaluate state implementation, and so on. They did all these things—and did them in accordance with the *UN Charter’s* explicit direction. In short, upholding standards of S1 and S2, these UN organs used the *Charter* machinery to nurture the possibility of S3, S4, S5 and elements of S6. But in over-stating human rights’ significance throughout the *Charter*, and in extending their role to encompass S7 and S8 intervention-conditions, Beitz profoundly mistakes the role of human rights in the *UN Charter*.

The Universal Declaration of Human Rights

If the *UN Charter* did not include an interventionist reading of human rights, then did the *Universal Declaration* change things in this regard? At least one of the *Declaration’s* drafters hoped for this result. When the Soviet representative complained that the draft declaration went beyond international law and might even lead to ‘intervention in the affairs of individual countries’, Rene Cassin replied forthrightly that the right of interference was indeed here. ‘Why?’ he challenged the Soviet delegate, ‘Because we do not want a repetition of what happened in 1933, where Germany began to massacre its own nationals

and everybody... bowed, saying “Thou art sovereign and master in thine own house”.’
(Glendon, 2001, p. 60)

But consider for a moment: *who really won this debate?* Cassin may have had the last word on the day, but the Soviets knew they would have the last word when the Assembly ultimately voted on the *Declaration*. True, dissenting votes from the Warsaw Pact bloc would have wounded communism’s worldwide legitimacy—but such dissent would have proved doubly fatal to the prospects of the *Declaration* itself. Not only did the Soviets know this—they knew that Cassin and the other drafters knew the Soviet position. The drafters had to fashion the *Declaration* in such a way as to receive assent from a vast majority of member states, and preferably to avoid any dissenting votes. We therefore cannot read the ‘function’ of the *Declaration* off the drafter’s intentions, unless these were subsequently endorsed by the member states. On the question of human-rights-based-intervention, Cassin’s position was explicitly repudiated by the entire Soviet bloc. Indeed, there was little enthusiasm across member states at the time for such interventionism. As well as the already-beginning Communist repressions, the U.S. was still struggling with its race discrimination issues, and the U.K. presided over a vast colonial empire. In the wake of a second devastating world war, there was little appetite for rights-based intervention.

As a result, the drafters’ debate had almost nothing to do with intervention-triggers. Instead, it centered on whether the standards they were imposing should be moral and political (S1-S5) or legal (S6) (Glendon, 2001; Morsink, 1999). In the event, the tool chosen by the General Assembly in 1948 to improve individual human wellbeing comprised a set of moral standards for promotion, encouragement and critique (S1-S5). It was not a set of triggers for international military intervention. *That* development would wait almost half a century before its birth—as the responsibility to protect (R2P).

The Responsibility to Protect

Fast forward to the twenty-first century. In the wake of the catastrophes of Rwanda, Bosnia and Kosovo in the 1990s, the vast majority of nations could see the benefit in having an authoritative standard for triggering interventions, at least to ensure that interventions accorded with international law (as NATO’s Kosovo incursion did not). This issue would hardly have arisen if there was any consensus that human rights *already provided* that

standard. Of course, human rights were not missing from the debate. In his influential *Millennium Report*, UN Secretary-General Kofi Annan (2000, p. 48) grilled the international community: 'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?' But Annan's invocation only proves the fundamental point: human rights themselves could not solve this problem. If San Francisco in 1945, Paris in 1948, Helsinki in 1975 or New York in 1977 had broached and resolved this issue, then Annan would not have had to pose the conundrum at all. What was desperately needed was not the concept of human rights, which was by then well-known. What was needed was a quite different standard—a concept of 'gross-and-systematic-violations-of-human-rights-that-offend-every-precept-of-our-common-humanity' (in Annan's words). Into this international maelstrom, to fashion an answer to *this* question, stepped the *International Commission for Intervention and State Sovereignty* (ICISS).

The norm ICISS created, the 'responsibility to protect' (R2P), presents a perfect example of the functional creation of a norm: a norm created to fill a keenly felt need. Thomas Weiss (2011, p. 288) describes the development of the norm in precisely these terms, underscoring its 'demand-driven character'. Responding to this demand, ICISS seized upon a new way of thinking about the eternally divisive question. Rather than speaking of external state's 'right to intervene', they mooted a different idea: 'the responsibility to protect'. ICISS eschewed the language of human rights to describe its proposed intervention-conditions, positing instead that there must be imminent 'serious and irreparable harm' involving large-scale loss of life or ethnic cleansing (ICISS, 2001, p. xii).

True, ICISS appealed to human rights as a way of *justifying* its prescriptions (ICISS, 2001, p. 14). But using human rights as one ground in engaging in a new debate, considering new factors, and constructing and developing consensus around a new norm is not the same as using the standard of human rights *themselves* as the trigger. Besides, ICISS drew on a myriad of normative foundations, including the Japanese-developed norm of human security, the African-developed norm of 'sovereignty as responsibility', just war theory, international humanitarian law and prior state and United Nations practice. By eschewing

mention any of these other normative tributaries, Beitz overplays the kinship between R2P and human rights.

In its authoritative formulation of R2P in the 2005 *World Summit Outcome Document*, the General Assembly tightened the conditions for intervention even further than ICISS, limiting international action to respond to genocide, war crimes, ethnic cleansing and crimes against humanity. These four ‘atrocities crimes’ go far beyond the standard of human rights, most crucially by including a ‘substantiality test’ that ensures the actions constitute mega-crimes against populations, rather than individual violations of rights (Scheffer, 2009, pp. 82-88). Indeed, not only do atrocities crimes constitute a vastly different standard to human rights, human rights are not needed to describe these crimes. Both the *Outcome Document* (UN General-Assembly, 2005, pp. paras. 139-140) and the legal definitions of these crimes in the *Rome Statute* of the International Criminal Court proceed with no mention of human rights.

In sum: eschewing the possibility that human rights *already* could provide intervention-conditions, the international community realised it needed to build consensus around another norm purpose-built for this task. It did this through the construction and institutionalization of R2P. While human rights remain one of the several moral grounds for R2P, the norm itself does not—and does not need to—refer to human rights.

The Chinese position

In his final offering, Beitz argues that even traditional defenders of sovereignty acknowledge his conception of human rights:

Even the government of China, while holding as a general principle that ‘human rights are essentially matters within the domestic jurisdiction of a country,’ also holds that ‘to effect international protection of human rights, the international community should interfere with and stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation, as well as apartheid, racial discrimination, genocide, slave trade and serious violation of human rights by terrorist organizations.’

At first blush, an innocent reader might think that in invoking human rights as grounds for interference, this quote accords with Beitz’s interventionism. But look again. Here, as often on such sensitive topics as international sovereignty, nations select their terms with almost

surgical precision. China's statement does not countenance interference against general state violation of human rights. The statement applies only to acts that 'endanger world peace and security'. The overwhelming majority of rights violations fall far short of this threshold. Furthermore, China allowed interference only in 'gross' human rights violations—another threshold for dispute. Further again, the Chinese doctrine only allows action when these acts have very specific causes—notably when the transgressing state is an aggressor or occupier. The statement only licenses action against an indigenous state when its motives are racist or to enslave. The result? Even if a state *grossly violates* its citizen's human rights to an extent that *endangers world peace and security*, its actions *will still fail to trigger* international action except in the rare cases where the state's actions are demonstrably racist or enslaving. Far from allowing that human rights provide intervention-conditions, the Chinese position asserts the exact opposite.

The United Nations Security Council and Resolution 1973

Naturally, I can hardly deny that the international community will never invade another country for humanitarian reasons without the target country having violated human rights. But rehearsing this truism resembles saying that police should never shoot to kill a person unless that person is breaking or has broken the law. The claim is true—but trivially so. The conditions for when a police officer can unleash lethal force are so much more demanding that it distracts more than it informs to propose mere criminality as a 'defeasible permissibility condition' for lethal force. So too for human rights and military intervention. Humanitarian intervention will never transpire unless the target state has violated human rights, and any serious discussion of intervention would need to tick this box to begin the dialogue. But the standard is so low that it utterly fails to inform us about which situations will be subject to intervention and which will not. In the contemporary international context, the atrocity crimes of R2P play this role.

We see this in Security Council Resolution 1973 authorizing NATO intervention into Libya in 2011. While stressing the 'gross and systematic' violation of human rights, the criteria of R2P set the higher bar. The Council invoked R2P in 'reiterating the responsibility of the Libyan authorities to protect the Libyan population', and then went on to consider 'that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.' Furthermore, legal-

moral terms that play no role in human rights riddle the Resolution. Terms such as *civilians* and *civilian populations* come from the Protection of Civilians (POC) and International Humanitarian Law (IHL)—distinct normative and legal regimes, and ones that (like R2P) set down a higher threshold for action than human rights. Tellingly, the Resolution only briefly mentions ‘human rights’. Yet it invokes POC fourteen times in all, and places the authorization for NATO activity under its banner. In short, the Security Council did not authorize intervention to protect human rights—they did it to protect civilian populations.

This appeal to POC rather than human rights might surprise us. Reading Beitz, one might expect to learn that the Security Council holds regular thematic debates on human rights, issues two-yearly dedicated resolutions on human rights, explicitly acknowledges human rights as a priority driving Security Council decision-making; and places its statements on R2P under the human rights banner. *Except the Council does none of these things.* To understand the real engagement of the Council with state mistreatment of people, we need to replace ‘human rights’ with ‘protection of civilians’ in each of those statements. POC’s more minimal list of conditions, drawn from International Humanitarian Law (but extended to situations beyond armed conflicts in the strict sense), draws a sensible line around large-scale crimes against populations and so proves a distinct and helpful functional norm in opening discussion of potential coercive measures (Breakey, 2013; Breakey et al., 2012).

In sum, POC and R2P do what human rights cannot: they supply intervention-conditions.

Why is this so? Following the ‘logic of rights’

I have argued that human rights do not fulfil the role of establishing S7 and S8 threshold permissibility conditions for interference and intervention. Could it be argued that even if human rights do not on their own determine intervention-conditions, that if one follows the logic of rights (so to speak), one can nevertheless fashion such conditions? If so, then even if *strictly speaking* human rights do not perform this role, they still ultimately determine these conditions. On this footing, intervention-conditions are not human rights—but they are a function of human rights.

Now this thought deserves investigation—but even if it turns that just by exploring the logic of human rights we can formulate intervention-conditions, this is still not the same thing as

identifying human rights with those conditions. To do so would commit the straightforward logical error of confusing an object that is a function of 'x' with 'x' itself—confusing $f(x)$ with 'x'.

That basic logical point set down, in order to assess this line of thought, we need to consider *what must be added* to human rights to attain intervention-conditions. What did the international community in the 1990s need that human rights failed to provide? Consider again Annan's influential challenge regarding, 'gross and systematic violations of human rights that offend every precept of our common humanity'. Annan's words draw our attention to four distinct types of concepts that need to be added to human rights in order to yield a workable threshold for intervention-conditions.

1. 'Gross': The list of entitlements governing intervention-conditions must prove narrower than the generous list of human rights entitlements. After all, intervention constitutes a massive enterprise, with profound monetary, political, diplomatic and human costs, and lasting ramifications. No state will want to be on the receiving end—or even duty-bound to shoulder the 'giving' end—for anything less than the gravest of humanitarian reasons. As well, intervention-conditions need to overwhelm the moral and legal force of state sovereignty and supersede peoples' rights to self-determination. If we want human rights to provide intervention-conditions, then we must cull the current list of human rights, and include only the most urgent.

2. 'Systematic': Violating even the most urgent human rights of one single human being, on its own, cannot legitimately trigger international war, for the same reasons. Intervention-conditions must speak not of wrongs to individual humans, but of 'mega-crimes that assault civilian populations wholesale' (Scheffer, 2009, p. 83). ICISS duly crafted a substantiality condition far higher than discrete harms against individuals, and the General Assembly further elevated the threshold to 'atrocities crimes'.

3. 'Violation': States can fail human rights in many ways. Even egregious failures occasioned through incompetence and negligence will probably not justify intervention. To trigger intervention, *mens rea* matters: the state needs to be deliberately unleashing the violence, if not performing the atrocities itself.

4. 'Offend every precept of our common humanity': This condition hints at crimes for which there can be no conceivable countervailing factors. Crimes like Rwanda and Srebrenica cannot be imagined as 'necessary evils'—as brutal but arguably proportional pursuits of legitimate security goals. To the contrary, such shocking crimes were pursued for goals that were themselves horrifying.

There are thus four sorts of factors we must add to human rights lists in order to arrive at plausible intervention-conditions. Of course, we probably just need common-sense to work out which rights are most urgent and which violations most heinous. But the problem remains that we do not know *how* urgent the rights have to be, nor *how* egregious their violation must be, nor *how* widespread their failure, nor *how* unpardonable the underlying intentions, until we have assessed the strength of the *countervailing norms* pressing against international intervention. And human rights discourse and practice itself, found in the international instruments and the standards S1-S6, does not inform us about the strength of these countervailing norms.

Consider norms such as the self-determination of peoples, and also communitarian, nationalist, egalitarian and religious political norms that different people, communities and states might legitimately cherish. For ease, let us call these 'collectivist norms'. Inasmuch as human rights constitute standards for proper government treatment of individuals (S1-S6), we can agree that a state's pursuit of these collectivist norms cannot trump human rights. But beyond that constraint, human rights instruments do not need to commit either way on the importance or existence of collectivist norms.

Collectivist norms, however, could constitute reasons for resisting humanitarian intervention. For example, coercing a state might sunder that political community's self-determination. For this reason, we need to gauge the potential nature and significance of these collectivist norms to derive intervention-conditions. But we have just seen that human rights instruments are themselves agnostic about such collectivist norms; they do not rule them in or out. As a result, the standards that we require for S1 to S6 *are not informationally rich enough* to allow us to derive intervention-conditions. As a philosophic matter, we require further principles setting down the moral significance of state sovereignty and self-determination. And as a practical matter, we require further debate

and consensus-building to forge a functional agreement on this new standard of intervention-conditions—just as actually happened with the birth of R2P.

So much is to argue that we cannot salvage human rights as intervention-conditions by claiming we can derive the latter from the commitments implicit in the former. We need to add further considerations (regarding regime involvement, *mens rea*, and substantiality factors) and narrow the list to urgent human rights.

In some respects, this last factor—narrowing the list from generous entitlements that states can be sanctioned for failing to provide, to narrow entitlements states can be overthrown for violating—constitutes the most serious impediment to conflating the different types of standards, because the need to narrow the list underscores that the content appropriate for one standard will *oppose* the content demanded by the other.

Beitz acknowledges this concern when he speaks of one practice fulfilling multiple ‘values’—fulfilling different standards, in the context of this argument. Beitz envisages no problem with one practice fulfilling different values ‘unless the conflict between the underlying values is systematic and pervasive’ (Beitz, 2009, p. 132). Arguably, the tension between the moral-political standards of S1 to S5, and the legal standards of S6, is of this non-pervasive type (a ‘downstream’ tension, in Beitz’s words). That is, even if we all agree with the appropriate standards to employ in judging states for the purposes of critique and sanction (S1-S5), we may resist thinking that exactly these standards should be carved into multilateral legal instruments for juridical adjudication by international courts (S6). For courts might prove clumsy and ineffective protectors of certain entitlements. But considering this clumsiness need not force us to revise our list itself—just to consider how best to realize the protection of all the rights on it. This political-moral versus legal distinction therefore presents a good example of Beitz’s ‘downstream’ tension.

But it is quite otherwise with the difference between S1 to S6 and the intervention-conditions of S7 and S8. Even from the outset, these are such different purposes that the list created for one cannot help but frustrate the purposes of the other. Intervention-conditions demand an entirely new working list of basic entitlements. We can certainly use our existing lists of human rights to help us think about intervention-conditions—so long as we acknowledge that this thinking will require including and clarifying issues that we did not

have to determine to achieve standards from S1 to S6, and that the result will not itself be declaration of human rights, but a declaration of inhuman crimes—just as we found in R2P.

Conclusion

This article has highlighted substantial flaws in the ways philosophers currently understand the role of human rights. A persistent theme has been philosophers' lack of serious attention to other norms, such as POC and R2P. The problem was not so much that theorists had insufficiently surveyed contemporary human rights practice, but that they failed to attend to other, parallel normative practices and the independent significance of these in international affairs.

To conclude, I have argued: that human rights are not helpfully defined by overly broad characterizations of their role, especially characterizations that stress 'protecting' and 'remedying', as distinct from encouraging, promoting and critiquing; that delineating the conditions for military intervention is not even one of the several functions performed by human rights, and; that to derive intervention-conditions from human rights we must appeal to factors external to human rights *per se*. Certainly, a moral commitment to human rights can ignite the need to do something in the face of atrocity, but human rights discourse at such junctures hands over such determinations to purpose-built functional norms such as POC and R2P.

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