

# HUMANITARIAN INTERVENTION AND THE DISTRIBUTION OF SOVEREIGNTY IN INTERNATIONAL LAW

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## ABSTRACT

Legal debates about humanitarian intervention – military intervention by one or more states to curb gross human rights violations occurring in another state – tend to assume that its legitimacy is irrelevant to its legality. Debates among philosophers and political theorists often assume the inverse, that the legality of humanitarian intervention is irrelevant to its legitimacy. This paper defends an alternative account, one that sees the legality and legitimacy of humanitarian intervention as intertwined and ultimately tied to the justice of the distribution of sovereign power that lies at the heart of the international legal order. Drawing on a long standing debate among domestic legal theorists about the rule of law, it first identifies formal constraints on the UN Security Council's discretion to authorize the use of force to end human rights violations. Developing a distributional conception of international human rights, it then identifies substantive considerations that shed further light on the legality of intervention. It suggests that a failure by the UN Security Council to authorize humanitarian intervention, in some circumstances, may constitute an international illegality, and that, in such circumstances, intervention might not only be legitimate but assume a measure of international legality.

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### I.

What is the relationship between the legality and legitimacy of humanitarian intervention? By ‘humanitarian intervention,’ I mean a uncontroversial definition of the concept, namely, the ‘the threat or use of force across state borders by a state or group of states aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.’<sup>1</sup> By legality, I mean whether and under what conditions international law authorizes such actions. By legitimacy, I mean the normative status of humanitarian intervention as an instrument of international justice.<sup>2</sup>

Legal debates about humanitarian intervention tend to assume that its legitimacy is irrelevant to its legality. The legality of intervention turns not on whether it makes the world a better place but on whether it has been authorized by the United Nations Security Council. Debates among philosophers and political theorists often assume the inverse, that the legality of humanitarian intervention is irrelevant to its legitimacy. If the law is often an ass, international law is doubly so, and Security Council decisions carry no moral, as opposed to legal, weight when assessing the justice of intervention.

In this paper, I explore and defend an alternative account, one that sees the legality and legitimacy of humanitarian intervention as intertwined. This account emerges out of a long standing debate among domestic legal theorists over the rule of law. It also rests on a conception of international law as an institutional order that actively distributes sovereign power among the multitude of legal actors that it recognizes as states. It first identifies formal constraints on the UN Security Council’s discretion to authorize the use of force to end human rights violations. It then draws a distinction between recognitional and distributional conceptions of international human rights. Critiquing the former and building on the latter, it identifies substantive considerations that shed further light on the legality of humanitarian intervention. These formal and substantive considerations combine to suggest that a failure by the UN Security Council to authorize humanitarian intervention, in some circumstances, may constitute an international illegality, and that, in such circumstances, intervention might not only be legitimate but assume a measure of international legality. International lawyers thus have much to learn from political philosophers who grapple with the legitimacy of the use of force to stop egregious

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<sup>1</sup> JL Holzgrefe, ‘The Humanitarian Intervention Debate’ in LJ Holzgrefe & Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) 15 at 18.

<sup>2</sup> I am indebted to the work of David Dyzenhaus on this distinction and its relationship to the rule of law. See D. Dyzenhaus, ‘The Legality of Legitimacy’ (October 3, 2005 draft).

violations of human rights. But political philosophers remain on the hook: questions of legality are central to determining the legitimacy of humanitarian intervention.

## II.

Contemporary legal debates about humanitarian intervention typically begin and end with the Charter of the United Nations. Six provisions of the UN Charter ground the beginning. First, the Charter provides ‘all Members shall refrain ... 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’ (Article 2.4). Second, it prohibits the United Nations from intervening ‘in matters which are essentially within the domestic jurisdiction of any state’ (Article 2.7). Third, the Charter confers upon the Security Council the ‘primary responsibility for the maintenance of international peace and security’ (Article 24). Fourth, it further specifies that the Security Council ‘shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and ‘shall make recommendations, or decide’ what measures shall be taken ... to maintain or restore international peace and security (Article 39). Measures include embargoes, sanctions and the severance of diplomatic relations (Article 41). Fifth, the Charter stipulates that, should the Security Council consider that such measures are likely to be inadequate, ‘it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security’ (Article 42). And, sixth, decisions of the Security Council on the existence of a threat to international peace and security and on whether force is necessary in the circumstances require an affirmative vote of nine of the fifteen members of the Security Council, including the concurring votes of its permanent members (Article 27(3)).<sup>3</sup>

These six provisions frame the international legality of humanitarian intervention as a binary issue that turns on the nature of the human rights violations in question. On the one hand, if the violations are matters that fall within the domestic jurisdiction of the state in which they are occurring, then the UN Charter does not authorize a state or group of states to threaten or use force against the territorial integrity of the state in which they are occurring. On the other hand, if the violations pose a threat to international peace and security,<sup>4</sup> the UN Security Council may authorize a state or group of states to use military force to prevent their occurrence.

This is not to say that the way that these provisions frame the question eliminates legal complexity. Depending on the nature of the conflict in question, the use of force might not threaten a state’s territorial integrity, and thus the Charter might not prohibit the use of force in such circumstances to prevent human rights abuses which fall within a state’s domestic jurisdiction.<sup>5</sup> Conversely, the Charter might not confer a blank cheque

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<sup>3</sup> The permanent members of the Security Council are China, France, Russia, Great Britain, and the United States.

<sup>4</sup> The precise language in Art 39 on this point is a ‘threat to the peace’ or ‘breach of the peace’.

<sup>5</sup> See Oscar Schachter, ‘The Right of States to Use Force’ (1984) 82 Michigan Law Review 1620, 1625 (the Charter does not prohibit the use of force if it does not threaten the ‘territorial integrity or political

on the Security Council to authorize the use of force in all cases where the abuses in question do threaten international peace and security. At a textual minimum, the Charter requires the Security Council to determine that measures short of military intervention are likely to be inadequate. It also requires that military action be ‘necessary’ to the restoration of international peace and security, which may condition the legality of Security Council authorization on questions of proportionality. But it is to say that the Charter frames the legality of humanitarian intervention as ultimately resting on whether the human rights violations at stake are matters within the domestic jurisdiction of the offending state or amount to threats to international peace and security.

In the last few decades, certain widespread and gross human rights violations, such as genocide, war crimes, crimes against humanity, and, more recently, ethnic cleansing, have come to be understood in international legal circles as falling outside a state’s domestic jurisdiction and amounting to threats to international peace and security.<sup>6</sup> There are numerous, overlapping legal reasons for such an understanding. The violations in question might be contrary to the UN Charter itself, another international treaty, or customary or general principles of international law. For example, the Security Council held that violations of international humanitarian law, in addition to ‘the magnitude of the human tragedy,’ were factors in its determination that the violence and instability in Somalia constituted a threat to international peace and security.<sup>7</sup> Genocide and crimes against humanity, in particular, offend *jus cogens* norms, which bind all states regardless of the offending state’s treaty obligations. Or the violations in question might actually threaten international peace and security because they generate consequences beyond the territory and population of the offending state.<sup>8</sup> The human rights abuses inflicted on the Kurdish population of Iraq in the aftermath of the first Gulf War produced over a million refugees spilling over the borders into Turkey and Iran, causing the Security Council to declare that the abuses amounted to a threat to international peace and security.<sup>9</sup>

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independence of a state’). But see Levitin, ‘The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention’ (1986) 27 Harvard International Law Journal 612 (‘a state’s political independence is compromised whenever another state attempts through armed force to coerce it, to limit its choices on the international plane, or to interfere with its domestic political regime’).

<sup>6</sup> In the 2005 World Summit Outcome, the UN General Assembly stated that ‘we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’ Cite

<sup>7</sup> UN Doc. S/RES/794 (1992).

<sup>8</sup> This formulation leaves open the question of what consequences count as constituting a threat to the peace. Compare Matthias Herdegen, *Die Befugnisse des UN-Sicherheitsrates: Aufgeklärter Absolutismus im Völkerrecht?* (1998), at 15 (the Security Council can recognize a threat to the peace beyond the transborder context if there is a ‘physical threat to internationally protected values and rights of high standing’), at 15, quoted in Bardo Fassbender, ‘Review Essay: *Qui judicabit?* The Security Council, Its Powers and Its Legal Control’ 11 EJIL. cite

<sup>9</sup> UN Doc. S/RES/688 (1991). Resolution 688, however, did not authorize military force under Chapter 7.

These reasons are plausible legal considerations for concluding that certain human rights violations amount to a threat to international peace and security. And if the violations in question do not amount to a threat to international peace and security, then debates over the international legality of humanitarian intervention typically come to an end. Chapter 7 of the UN Charter does not permit the Security Council to authorize military intervention to prevent human rights violations which do not threaten international peace and security. Article 2(7) of the Charter makes this clear by prohibiting the United Nations from intervening ‘in matters which are essentially within the domestic jurisdiction of any state.’ And a state or group of states that acts without Security Council authorization would be in violation of Article 2(4) of the Charter, requires all member states to ‘refrain ... 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.’ Legal scholars,<sup>10</sup> the majority of states that have participated in UN debates on intervention,<sup>11</sup> and a variety of international legal instruments<sup>12</sup> typically treat the UN Charter’s ban on the use of force in absolute terms except where authorized by the Charter itself.

The legal story need not end here, and some scholars have reached beyond the UN Charter to other legal sources to argue that international law, under certain conditions, authorizes humanitarian intervention which does not receive Security Council approval. Some ground such intervention in customary international law, which pins the badge of legality on settled state practice that evinces a belief that such practice is legally obligatory.<sup>13</sup> Others point to the fact that customary international law possesses transformative capacity, and argue that humanitarian intervention without Security Council approval might become legal in the future. Allen Buchanan, for example, argues that states should render legal what is currently illegal by repeatedly intervening for humanitarian purposes without Security Council approval to render such action, over time, permissible under customary international law.<sup>14</sup>

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<sup>10</sup> See Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 265-270; see also Abiew, *ibid*, at 62 n2, for extensive scholarship supporting this conclusion.

<sup>11</sup> See Jean-Pierre Fonteyne, ‘Forcible Self-Help to Protect Human Rights: Recent Views from the UN,’ in Lillich (ed.), *Humanitarian Intervention and the United Nations* (Charlottesville: University of Virginia Press, 1973), at 209-211.

<sup>12</sup> See UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (Xxx) 20 UN GAOR Supp. (No. 14), UN Doc.A/6014 (1965); UN Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, G.A. Res. 2625, 25 UN GAOR, Supp. (No. 28) at 121, UN Doc. A/8028 (1970). Abiew, *supra* at 70, notes that ‘similar proscriptions of intervention’ can be found in the Charter of the Organisation of African Unity, the Charter of the Organisation of American States, and in the Principles of the Final Act of the Helsinki Conference in 1975 (the Helsinki Accord).

<sup>13</sup> See McDougall & Reisman, “Response by Professors McDougall and Reisman,” (1969) 3 *International Lawyer* 438, 444. For a critique of the view that customary international law authorizes humanitarian intervention without Security Council approval, see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (New York: Oxford University Press, 2001).

<sup>14</sup> Buchanan also proposes treaty arrangements authorizing humanitarian intervention, which would, on the one hand, violate the UN Charter by authorizing what the Charter prohibits but, on the other hand, displace the Charter’s current role as the preeminent international legal instrument in international law.

Another tack is to call on states that intervene without Security Council approval to face the music and ‘admit’ that their actions are illegal, and to invoke humanitarian reasons as a way of mitigating the legal wrong they have committed.<sup>15</sup> Thomas Franck offers the Security Council itself as an appropriate institution to ‘pronounce on the validity of claims advanced in mitigation of an unlawful but justifiable recourse to force.’<sup>16</sup> Others, like Robert Keohane, seek accountability from other institutions in the face of Charter illegality.<sup>17</sup> Although they have in mind ‘a coalition of democratic states’ operating independently of the United Nations, another alternative is to seek authorization – albeit in the form of a recommendation – from the UN General Assembly. Article 11(2) of the Charter vests the General Assembly with the authority to make recommendations concerning ‘the maintenance of international peace and security’ in relation to a ‘dispute or situation’ that is not being addressed by the Security Council. Franck points out the effect of such a recommendation ‘would be more than a recommendation to those against whom force was to be deployed.’<sup>18</sup>

These efforts are laudable given the intractable power politics that infuse the Security Council, which far too often stymie multinational efforts to stem human rights abuses for reasons unrelated to their occurrence. But at a certain point, the legal story is typically thought to end, and any remaining questions surrounding humanitarian intervention are not legal questions. On some tough, international issues, the story goes, the law says one thing, and justice (arguably) demands another. Holding to the position that Security Council approval is a prerequisite of legality does not necessarily mean that it is a prerequisite of legitimacy. It is at this point that the political theorist takes over the heavy lifting,<sup>19</sup> and some account of international justice is brought to bear to determine the legitimacy of humanitarian intervention despite the fact that such intervention constitutes an illegal act under international law.

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See Allen Buchanan, ‘Reforming the Law of Humanitarian Intervention,’ in Holzgreve & Keohane (eds), *Humanitarian Intervention*, *supra*, 130, at 138-41.

<sup>15</sup> Byers and Chesterman, ‘Changing the Rules About Rules,’ in Holzgreve & Keohane, *supra*, at 177.

<sup>16</sup> Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), at 186. Franck likens the role of the Security Council (and the General Assembly) in this *ex post* context to that of a jury, whose members ‘are not without feelings and biases, but whose first concern is to do the right thing by the norms under which we all live’ (at 187). For critique, see Thomas Pogge, ‘Moralizing Humanitarian Intervention,’ in Terry Nardin & Melissa Williams (eds.), *Humanitarian Intervention* (New York: NYU Press, 2006).

<sup>17</sup> See Allen Buchanan and Robert Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” 18 *Ethics & International Affairs* 1 (2004) (arguing for *ex ante* and *ex post* contractual arrangements requiring an ‘evidence-based case’ for intervention to be put to the Security Council, authorization by a coalition of democratic states if the Security Council does not approve of the intervention, and evaluation by an impartial body after the fact).

<sup>18</sup> Franck, *Recourse to Force*, *supra*, at 35. Franck details the history of Article 11(2) and its use in this respect. The International Court of Justice has interpreted Article 11(2.) in the event of a veto by a Security Council permanent member, as authorizing a ‘secondary’ role for the General Assembly ‘to organize peace-keeping operations ... by means of recommendation’ and only ‘at the request, or with the consent, of the States concerned.’ *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 1962 I.C.J. 163, at 164. It should be noted that Article 11(2) does not stipulate state request or consent as a precondition of the exercise of General Assembly authority.

<sup>19</sup> E.g., Walzer, Beitz.

### III.

That the law runs out and politics and morality step into the breach will come as no surprise to legal scholars of domestic legal orders, who are familiar with a sharp distinction between legality and justice. The stability of this distinction is at the heart of a long-standing debate over what it means for a society to be governed by the rule of law. According to one school of thought, legal positivism, legal rights and obligations exist solely because of positive legislative or judicial action.<sup>20</sup> Positivism distinguishes between description and evaluation, or between what the law is and what the law ought to be. In the words of John Austin, a classical positivist scholar, '[t]he existence of the law is one thing; its merit or demerit is another.'<sup>21</sup> The legal validity of a rule or action, on a positivist account, does not depend on whether it is consistent with what justice or morality might require or prohibit. It depends on whether it was enacted in accordance with, or authorized by, the rules that its host legal system stipulates for the formulation of law and the exercise of power.<sup>22</sup>

Other legal theorists, however, claim that law bears a more intimate relationship to morality. Lon Fuller, for example, famously argued that the legal validity of a rule or action rests not simply on formal compliance with the process that a legal system establishes for the formulation of a legal rule or the exercise of power. It also turns on its content. Despite the fact that they are enacted or engaged in by the appropriate legal authority, there are some rules and actions that cannot be said to be 'legal' because they are inconsistent with the very concept of the rule of law.<sup>23</sup> What the concept of the rule of law requires, of course, is hotly contested, and legal theorists have arrayed themselves on a spectrum ranging from thin, formal conceptions of what is necessary for law to generate obedience, to thicker conceptions of justice that posit substantive normative preconditions of specific laws and, more generally, of legal orders.<sup>24</sup>

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<sup>20</sup> See generally, J. Austin, *The Province of Jurisprudence Determined* (W.E. Rumble ed.) (Cambridge: Cambridge University Press, 1995); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). See also Owen Fiss, *The Varieties of Positivism*, 90 Yale L.J. 1007 (1981).

<sup>21</sup> Austin, *The Province of Jurisprudence Determined*, *supra*, at 157.

<sup>22</sup> See, for example, Austin, *The Province of Jurisprudence Determined*, *supra* (a law is valid because it is the command of a sovereign); Hans Kelsen, *General Theory of Law and State*, *supra* (a legal norm is valid if authorized by another legal norm of a higher rank); H.L.A. Hart, *The Concept of Law*, *supra* (a law is valid if it conforms with 'secondary rules' or laws that authorize the enactment of law). Some have drawn a distinction between political and analytic positivism, with the former as an interpretive strategy and the latter as objective description. See Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), at 26-33. For a defense of political positivism in international law, see Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law* (2002) 13 EJIL 401.

<sup>23</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition).

<sup>24</sup> For conception considerably thicker than Fuller's, see T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at 76 ('the principles of equality and due process, and associated freedoms of expression, association and conscience, must be regarded as integral features of law which limit the kinds of state action that can qualify as legitimate sources of legal obligation). For an especially illuminating account that comprehends formal equality as an

Positivists do not necessarily contest the proposition that the rule of law requires that laws – to be law – possess certain qualities, such as prospectivity, publicity, clarity, stability, and generality. Nor do they necessarily deny that a legal order – to operate as a legal order – requires certain features, such as due process and limits on discretionary authority.<sup>25</sup> But positivism generally takes issue with the proposition that the rule of law requires that laws – to be law and to comprise a legal order – possess certain features that generate obedience or be necessarily consistent with justice or morality. On a positivist account, the rule of law requires law to possess certain characteristics simply because, without them, a legal order would not be able to function as a legal order and, in such circumstances, society would not be governed by the rule of law.<sup>26</sup>

International legal theory is intimately familiar with the claim that the validity of a law rests on its formal compliance with the rules surrounding the formation of law of its host legal system. The history of international legal theory is punctuated by spectacular scholarly efforts to establish a measure of autonomy for the field from raw claims of morality and power.<sup>27</sup> Hans Kelsen's 'pure theory of law' epitomizes a positivist conception of international law and, indeed, its relationship to domestic legal orders.<sup>28</sup> Kelsen distinguished between moral norms, which are typically derived from general moral principles, and legal norms, which are the product of an act of will. According to Kelsen, an act of will creates law only if it is authorized by a 'higher' legal norm. For Kelsen, the legality of domestic law ultimately rests on international legal norms, which validates claims by states of sovereign authority over territory and persons.

There are distinctive features of domestic debates about the rule of law, however, that, when reframed in the context of international law, suggest that there are deeper legal stories to be told about the legality of humanitarian intervention. They indicate that that the international community might be governed not simply by the various treaties, instruments and rules that comprise the formal corpus of positive international law but by the rule of law itself. They also suggest shifting the vantage point from the plain meaning of the UN Charter to the normative ideals that it instantiates, and treating the Charter as neither the beginning nor the end of legal debates but instead as a bridge between the legality and legitimacy of international humanitarian intervention.

Specifically, they hold out two possibilities relevant to the legality of humanitarian intervention. The first is that certain actions, although formally authorized by positive international law, might constitute an illegality due to their inconsistency with the rule of law. The second is the inverse, that certain actions, although formally prohibited by

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essential feature of law, see David Dyzenhaus, 'The Dilemma of Legality and the Moral Limits of Law,' in Austin Sarat (ed.), *The Limits of Law* (Stanford: Stanford University Press, 2005).

<sup>25</sup> On both points, see Joseph Raz, 'The Rule of Law and Its Virtue' in Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

<sup>26</sup> Another way of making the positivist point here is to say that whether society *should* be governed by the rule of law is not something the rule of law answers.

<sup>27</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

<sup>28</sup> Hans Kelsen, *Introduction to Problems of Legal Theory: A translation of the First Edition of the *Reine Rechtslehre* or *Pure Theory of Law** (Oxford: Oxford University Press, 1992).

positive international law, might nonetheless possess legal validity because they are required by the rule of law. The first yields the proposition that international law might require Security Council members, in certain circumstances, to authorize humanitarian intervention. A failure by the Security Council to authorize the use of force or the exercise of a veto on the use of force in the face of certain gross human rights violations thus has the potential to be an international illegality. The second suggests that humanitarian intervention without Security Council approval, in such circumstances, might not be illegal after all.<sup>29</sup>

Recall that the Charter draws a distinction between ‘matters which are essentially within the domestic jurisdiction’ of a state and threats to international peace and security. Positivism would dictate that a matter is within the jurisdiction of a state until the Security Council declares that it constitutes a threat to international peace and security. What morality or justice may have to say about the matter is irrelevant to its legal status. True, the Security Council may – or may not – be influenced by questions of morality or justice when deciding whether the matter is a threat to international peace or security. This is because the Charter is not clear on what matters constitute such threats, and therefore the Security Council must exercise discretion in deciding the question. The Charter vests discretion in the Security Council but does not determine how this discretion is to be exercised. By (positivist) definition, the law does not, and cannot, determine discretion. The Security Council’s decision is law because the Charter confers authority on the Security Council to make this decision, not because of the merits of the decision itself. It may be a just or morally correct – or an unjust or immoral – decision. Its legal validity turns only on the fact that the law authorized the Security Council to determine the matter.

The preceding account is a positivist explanation of why the legitimacy of humanitarian intervention is irrelevant to its legality and, conversely, why its legality is irrelevant to its legitimacy. But note, in this explanation, that the law runs out in two places. The first is in relation to the merits of the decision as opposed to the decision itself. This is the place where, on the dominant account of the justice of humanitarian intervention, the political theorist takes over the normative reins. The second, however, is earlier in the chain, when Security Council members exercise the discretion they possess to determine the legal status of the matter. Positivism treats discretion – whether it vests in a legislature or an executive or judicial body – as beyond the law: it is where politics and morality inevitably influence outcomes. Legislative discretion is politics, pure and simple, occurring, just as it should, in a political institution. Executive discretion presents no challenge to positivism to the extent the executive body is exercising authority in accordance with rules laid down by its host legal system. But judicial discretion poses a challenge to the separation of law and politics. If judicial

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<sup>29</sup> The Charter’s text does not rule out an interpretation that holds that the Security Council is required to authorize the use of force when it is necessary in the circumstances. The Charter stipulates that the Security Council ‘shall determine the existence of any threat,’ and that it ‘shall make recommendations, or decide’ the measures that ‘shall be taken.’ The text of the Charter, in other words, does exclude the possibility that the Security Council can violate its terms by failing to authorize the use of force.

discretion is endemic in a legal system, then the legal system is not really a legal system at all. But if discretion is the exception, and law is the norm, then a modicum of discretion will not threaten the integrity of the positivist rule of law.<sup>30</sup>

It would be a stretch to construe the exercise of a veto as the exercise of judicial authority and, in any event, it is a stretch I don't want to make.<sup>31</sup> Assuming the domestic analogy holds,<sup>32</sup> the Security Council exercises executive authority conferred on it by the UN Charter. To characterize its discretion as not governed by legal considerations, however, is to ignore the possibility for the exercise of a veto to possess legal validity, it must be consistent with at least the minimal requirements of the rule of law. Andreas Stein, for example, argues that the Security Council is governed by 'the rule of law which according to an emerging consensus in legal science as well as in state practice ... is to be the governing principle of international relations.'<sup>33</sup> A failure by the Security Council to operate within the parameters of the rule of law when exercising its discretion would strip its decision of legal validity.

This claim visualizes the Charter as vesting executive authority in the Security Council to interpret, administer and enforce its terms and, further, that the Security Council is prohibited from abusing any discretion it possesses in this respect.<sup>34</sup> But, again, holding to the domestic analogy, it could be said that Chapter 7 vests in the Security Council quasi-legislative authority governing the use of force. Although Security Council decisions over humanitarian intervention typically are conflict-specific and temporary in scope and thus appear more executive than legislative in nature, they do establish ground rules over the use of force in the international arena. In this respect, the Security Council is making international law.<sup>35</sup> On this account, the Security

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<sup>30</sup> Hart.

<sup>31</sup> The closest one can come to treating the Security Council as exercising judicial authority, I think, is Tom Franck's characterization of the Security Council operating like a jury in the context of humanitarian intervention. See Franck, *Recourse to Force*, *supra*.

<sup>32</sup> For discussion of the domestic analogy, see Laurence R. Helfer, 'Constitutional Analogies in the International Legal System,' 37 *Loy. L.A. L. Rev.* 193 (2004). For a skeptical view, see David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001).

<sup>33</sup> Andreas Stein, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 393, quoted in Fassbender, *ibid.* cite.

<sup>34</sup> See Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998). Brownlie outlines several criteria to assess the legality of Security Council decisionmaking, including the exercise of its Chapter 7 powers.

<sup>35</sup> Security Council Resolution 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 2, U.N. Doc. S/RES/1373 (2001), which requires all states to take certain measures to combat terrorism in the wake of September 11, 2001, veers even closer to international legislation by its general and non-temporary nature. See Paul C. Szasz, 'The Security Council Starts Legislating,' 96 *Am. J. Int'l L.* 901 (2002). Resolution 1373 also delegates the task of monitoring implementation of its terms to a plenary committee of the Security Council. For the view that such delegation lacks legal authority because it offends the rule of law, see David Dyzenhaus, 'The Rule of (Administrative) Law in International Law,' 68 *Law & Cont. Probs.* 127. On delegation and the Security Council more generally, see Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999). On the Security Council as a 'global parliament,' see Tom Farer, in Holzgrefe & Keohane (eds), *Humanitarian Intervention*, *supra*.

Council's discretion is more properly understood as raw political power. The legality of legislative power should not turn on the extent to which legislators rely on certain legal norms as reasons for exercising their power. The fact that the law runs out at this moment is precisely what the law should do.

But this doesn't mean that the law also runs out in the second moment, that is, in relation to the merits of the Security Council's decision itself. Whether this is the case is precisely the issue. The dominant account assumes that the law does run out here, but, as the debates about positivism reveal, there are good reasons to challenge this assumption. Whether it is executive or legislative in nature, some combination thereof, or something altogether different, even positivists would require a Security Council's decision about the use of force, at a minimum, to be prospective, public, clear, stable, and general in nature before characterizing it as possessing legal validity. Moving to thicker conceptions of the rule of law, the decision must possess these features because it must possess the capacity to generate obedience by those it governs. Here is where legitimacy begins to join legality, or where questions of international justice inform the meaning of international law. It is at this point where international law might require Security Council members, in certain circumstances, to authorize humanitarian intervention, and that a failure to do so would not render intervention a violation of the Charter.

Why might this be the case? An extreme example is all that is needed here. Imagine a despotic government engaging in massive genocide on its territory. Imagine that the international community has exhausted all non-military avenues in seeking to stop the genocide. Imagine that a representative group of democratic states is willing to establish a multilateral force to intervene to end the atrocities. Imagine that the likelihood of a successful intervention is overwhelmingly high due to the superior military force of the intervening states and that there exists overwhelming support for intervention by the population of the state in question. Imagine that intervention will immediately and permanently end the genocide and will entail no military or civilian casualties. Imagine away, in other words, all of the factors that typically complicate questions about the legitimacy of humanitarian intervention.

Now imagine that one member of the Security Council vetoes authorization of the use of force and provides no reason for doing so. It simply says nothing. The exercise of veto power in this scenario constitutes an active decision by an international legal actor to permit the offending state to continue to inflict gross human rights abuses on its population. But does such injustice strip the veto of legal validity? Failing to stem human rights violations may be deeply unjust, but the positivists are right to demand something more than injustice to divest a legal act of legal validity. Justice may require authorization, but the law authorizes the veto.

For the veto to possess legal validity, however, it must, first of all, constitute a legal act. The specifically legal intolerability<sup>36</sup> surrounding the veto in this scenario is that it

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<sup>36</sup> In the words of Gustav Radbruch, 'positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a "false 'law'" to justice.' This

perpetuates gross human rights violations *and* fails to provide an intelligible reason to legal actors – namely, those willing to intervene to stop the genocide – why they should obey the law. By intelligibility, I refer to the capacity of a decision to generate obedience from those it governs. Whether successful or not, international law requires obedience from those it addresses.<sup>37</sup> But a precondition of obedience is a reason to obey, even – or especially – if one disagrees with it.<sup>38</sup> Offering no reason for the veto makes its exercise unintelligible to all relevant legal actors, including those willing to intervene as well as, of course, those whose human rights are being abused. The veto in such circumstances thus offends the rule of law at the intersection of its unintelligibility and the consequences it creates for those who are the victims of human rights abuses in the offending state.

The previous hypothetical paints a scenario where one necessary feature of a legal act – intelligibility – is missing from the exercise of discretion by a permanent member of the Security Council. It would not be difficult to imagine other scenarios where other essential elements of law, such as publicity or generality, are absent from a decision by a permanent Security Council member to veto the use of force. The significance of such hypotheticals shouldn't be under-estimated. They demonstrate that values associated with the rule of law infuse the legality of discretionary authority under the UN Charter. But they shouldn't be over-estimated either. We can more easily imagine hypotheticals – ones that more closely mirror history – where the exercise of a veto possesses all the requisite formal criteria of legality but where the ensuing failure of the Security Council to authorize the use of force perpetuates gross human rights abuses by the offending state.

Is it valid for a Security Council member to veto the use of force in these kinds of cases? Making a moral judgment in these circumstances is relatively easy. Turning a blind eye to injustice when you are in a legal position to do something about it is, to say the least, morally problematic. But the legality of turning a blind eye turns on the precise nature of the rights at stake and of the legal authority you possess. That is, the role of human rights in the international legal order and the reasons why the Security Council possesses discretion to authorize the use of force need to figure prominently in any account that seeks to bridge legality and legitimacy in this manner. In the following section of this paper, I offer one such account, one that speaks to the broader functions of the international legal order.

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formulation has become known as the 'Radbruch formula.' Radbruch continues as follows: 'when justice is not even aimed at, where equality – the core of justice – is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status.' For analysis, see Robert Alexy, 'A Defence of Radbruch's Formula,' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart, 1999) 15-39.

<sup>37</sup> See Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, at 918 ('the principle of international legality generally requires that addressees of international law should obey it').

<sup>38</sup> Compare Jeremy Waldron, 'The Concept and the Rule of Law' (14 September 2006 draft), at 25 ('to guide action is to indicate and highlight reasons for action which those being guided are to apply to their own behavior').

#### IV.

Beyond the formal requirements of the rule of law, are there substantive values that must be respected by the Security Council to render its decisions, and the decisions of its members, legally valid? The text of the Charter itself imbues certain substantive moral values and concepts with legal significance.<sup>39</sup> The Charter's reference to 'peace', for example, appeals to certain norms and values that the Security Council must engage when determining whether peace has been threatened. Jochen Herbst, for example, argues that the determination of a threat to peace and security is 'primarily a factual question left to the discretion of the Security Council' but that 'this discretion remains ... contingent on and thus limited by the purposes and principles of the UN Charter.'<sup>40</sup> Presumably, the Security Council's discretionary authority must also be exercised in a manner consistent with the various commitments that comprise international human rights law, including those enshrined in the various human rights treaties that are being violated by the offending state in question. But what consistency means in this context turns out to be a complex legal matter.

The dominant approach in international human rights law toward the commitments and instruments that comprise the field is to regard them as implicating an overarching mission to protect essential and universal features of what it means to be a human being in the face of sovereign power.<sup>41</sup> What these features are, and whether they can and should be comprehended in the form of rights, are questions that have fueled intense debates about the reach of the field since its very inception. At one level, these questions have little to do with the legality or legitimacy of humanitarian intervention. Whether a state or group of states should intervene militarily to prevent or end widespread human rights violations in another state rarely turns on whether the violations in questions merit universal condemnation – because they typically do merit such condemnation. It turns instead on whether such wrongs of universal proportion yield a right or duty of other states to intervene to stop harms inflicted under the cover of sovereign power. At another level, however, the field's commitment to universalism structures debates about the ethics of humanitarian intervention in ways that miss important normative questions about the relationship between international human rights law and sovereign power.

That this is the case is revealed by a distinction between recognitional and distributional conceptions of human rights. A recognitional conception treats human rights as corresponding to duties that individuals owe directly to others in ethical

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<sup>39</sup> Inclusive legal positivism – a positivist account of law that notes the possibility that positive law can impose moral constraints on the exercise of discretion. See Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001). For critique, see Dworkin, *Justice in Robes*, *supra*, at 187-198.

<sup>40</sup> Jochen Herbst, *Rechtskontrolle des UN-Sicherheitsrates* (Frankfurt am Main: Peter Lang, 1999), at 416 *et seq.*, quoted in Bardo Fassbender, 'Review Essay: *Qui judicabit?* The Security Council, Its Powers and Its Legal Control' 11 EJIL. cite

<sup>41</sup> For a classic articulation of this conception of the field, see Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989).

recognition of universal features of what it means to be a human being. A distributional conception, in contrast, focuses less on ‘perfect’ or abstract duties that we owe others directly and more on what justice requires of the establishment and operation of institutional orders that exercise coercive power. Thomas Pogge draws a similar distinction in the context of an argument that international justice requires extensive global wealth redistribution to alleviate world poverty.<sup>42</sup> A recognitional conception of human rights would define this requirement as a positive duty of individuals to assist others in need. Pogge, however, grounds this requirement in a distributional conception of human rights: it is what justice requires in the establishment and operation of an international legal order. Those responsible for the establishment of international order (for Pogge, this means all of us) confront an array of possible institutional options, and respecting human rights requires certain institutional choices over others when constructing and operating institutions to govern global matters. Pogge argues that justice requires institutional choices that decrease rather than increase world poverty.<sup>43</sup>

How does this distinction operate in the context of debates surrounding humanitarian intervention? A recognitional conception of human rights would focus on the duties that individuals directly owe others in the context of gross human rights obligations. Carla Bagnoli, for example, derives a ‘perfect’ duty to intervene to prevent gross human rights abuses occurring in another state from the fact that we, as individuals, are ‘bound by rationality and morality to regard others with respect.’<sup>44</sup> The legal form this duty should assume, according to Bagnoli, is a second order question of institutional design. If there is no international agency to discharge the duty to intervene, then ‘we ought to design such an institution so that the perfect duty could be appropriately fulfilled.’<sup>45</sup> The substantive relationship between the legality and legitimacy of humanitarian intervention, under a recognitional conception, thus rests on the extent to which international human rights law imposes a legal duty on international legal actors to use force when necessary to prevent or stop gross human rights abuses wherever they occur. If such a duty exists, then the discretion that the Security Council possesses to authorize force must be exercised in recognition of such a duty, and a failure to do so – by, say, the use of veto power – would be an international illegality. If such a duty doesn’t exist, then institutional reform is necessary to close the gap between the legitimacy and legality of humanitarian intervention.

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<sup>42</sup> Pogge refers to these conceptions as ‘interactional’ and ‘institutional.’ Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).

<sup>43</sup> This enables Pogge to claim that the obligation to reduce world poverty constitutes a negative duty to not act in ways that exacerbate economic inequality as opposed to a positive obligation to share one’s wealth or resources with strangers in need. The better view, I believe, is that the distinction between negative and positive obligations possesses little currency in an institutional conception of justice, as the normative question in such a conception is not whether to redistribute or not; instead, it assumes that distribution is inevitable in the establishment and operation of an international order and asks instead which order, and which modes of operation, best meet the demands of distributive justice.

<sup>44</sup> Carla Bagnoli, ‘Humanitarian Intervention as a Perfect Duty’ in Terry Nardin & Melissa S. Williams (eds), *Humanitarian Intervention* (New York: New York University Press, 2006) 117 at 133.

<sup>45</sup> *Ibid* at 134.

Note that the source of this duty has nothing to do with positive law. Positive law may recognize the existence of such a duty, but it exists regardless of what positive law has to say about it. Any relationship between the legality and legitimacy of such a duty is coincidental. This is not to say that positive international human rights law does not recognize the existence of such a duty. The field contains an impressive array of legal obligations that range from negative duties not to interfere with the exercise of human rights to positive duties to take measures to ensure human rights compliance. But, assuming that the field recognizes such a duty, this conception of human rights nonetheless runs into difficulty when confronted with a veto that meets the rule of law's formal requirements. Where Security Council member provides reasons for vetoing the use of force, a recognitional approach provides no guidance on what kinds of reasons might legally validate – and what kinds might legally invalidate – the exercise of its discretion. A recognitional conception is too blunt a conception to police the boundary between *intra vires* and *ultra vires* discretionary action. Its universal aspiration – that international legal actors have an obligation to prevent, by the use of force if necessary, gross human rights abuses wherever and whenever they occur because human rights protect universal features of what it means to be a human being – masks its incapacity to serve as a legal standard to evaluate the validity of reasons for and against the use of force in specific conflicts.

A distributional conception fares much better in this respect. Such a conception locates the normative dimensions of intervention less in the abstract, direct duties that we owe others to prevent their suffering and more in the fact that gross human rights abuses occur within the broader institutional framework that constitutes the international legal order. The structure and operation of this institutional framework are not second order questions of institutional design. They are first order questions of distributive justice. These questions arise because the international legal order is responsible for the distribution of sovereign authority among certain collectivities which are geographically concentrated in the various regions of the world. International legal rules determine which collectivities are entitled to exercise sovereign authority and over which territory such authority operates. Although domestic law – at least in liberal democratic states – tends to be premised on the normative supposition that sovereignty ultimately flows from the will of the people, from the bottom up, so to speak, international law comprehends sovereignty in a radically different way. Sovereignty, in the international legal imagination, comes from above, from international law itself.<sup>46</sup>

Specifically, public international law governs relations between and among states. Its primary function is to keep states apart by distributing, defining and protecting state sovereignty. It values sovereignty – what Brierly defines as ‘an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states’<sup>47</sup> – as the formal expression of the principle of self-determination, which stipulates that a political community ought to be free to determine its

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<sup>46</sup> Kelsen. Cf. Nathaniel Berman, Koskenniemi

<sup>47</sup> J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 4<sup>th</sup> ed. (Oxford: Clarendon Press, 1949), at 48-9

constitutional status and pursue its economic, social and cultural development. Sovereignty in international law thus is a bundle of rights that the field vests in a collectivity under certain conditions and in certain circumstances. International law does not validate a claim of sovereign authority of a collectivity unless either (a) the collectivity in question constitutes a 'people' in international law and is entitled to exercise an international right of self-determination in ways that entitle it to sovereign authority; or (b) a sufficient number of states recognize the collectivity in question as a sovereign entity.<sup>48</sup> These two routes of achieving sovereign status are the means by which international law distinguishes between legitimate and illegitimate claims of sovereignty. By validating some claims and refusing to validate others, the field effectively performs an ongoing distribution of sovereignty among certain collectivities in the world. This function of international law constitutes the backdrop for a distributional conception of human rights.

A distributional conception reveals that humanitarian intervention is not really intervention at all. 'Intervention' implies that the international legal order is not intervening before the international legal community or some coalition of states acting under international legal authority exercises military power to prevent human rights abuses. But to the extent that a state possesses the freedom to abuse the rights of its citizens, such freedom is a function of the sovereignty that international law vests in that state. International law is already present, structuring, defining, distributing, and protecting the territorial and jurisdictional dimensions of a legal zone of autonomy that it recognizes as vesting in a sovereign state. Given that this legal zone of autonomy is itself the creation of international intervention, the human rights violations in question are a legal product of the international legal order. By declaring that they fall outside the domestic jurisdiction of the state in which they are occurring, the Security Council is recalibrating the distribution of sovereignty to mitigate an injustice produced by the structure of the international legal order itself.

This distributional conception is not claiming that the international community is responsible for human rights abuses because it fosters the social and economic conditions in which they occur. Anne Orford, for example, argues that the dominant narrative of humanitarian intervention, by ignoring external factors that contribute to human rights abuses, wrongly presents such abuses as spontaneous, endogenous eruptions that demand intervention by the outside international community. In the former Yugoslavia, for example, the aggressive pursuit of neo-liberal structural adjustment policies by the IMF and the World Bank, Orford argues, contributed to the creation of an environment in which genocide became a possibility and, ultimately, a reality.<sup>49</sup>

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<sup>48</sup> Article 1 of the *Montevideo Convention on Rights and Duties of States* (1933), for example, lists the following criteria of statehood: a permanent population, a defined territory, a system of government, and sovereign recognition by other sovereign states. Absent recognition by other sovereign states, a political community with a territorial base – say, Québec – will not possess sovereign statehood under international law unless it can successfully assert a right of external self-determination.

<sup>49</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003).

Orford may or may not be correct on this score. But focusing on prior political and economic policies of outside actors misses the more profound role that the international *legal* order plays in the construction of legal spaces in which human rights abuses occur. Even if the international community does not share culpability for their commission, human rights abuses do not occur beyond the reach of international law. International law comprehends such abuses either as a matter of domestic jurisdiction or as a threat to international peace and security. If they are a matter of ‘domestic jurisdiction,’ it is because the Security Council deems them to be so. If they are a matter of ‘international peace and security,’ it is because the Security Council deems them to be so. What falls within or without the sovereign authority of a state is itself a function of international law. What Paul Kahn wrote about domestic law is equally true of international law: ‘morality may be without borders, but law's rule begins only with the imagination of jurisdiction.’<sup>50</sup> It is in this sense that international law has already intervened. Whether or not a certain state of affairs is ‘essentially within the domestic jurisdiction’ of a state is a question about how to distribute sovereignty. It is a question about the limits of the territorial and jurisdictional spaces that international law itself creates, regardless of what contingent political factors may render external actors more or less ‘responsible’ for particular crises.

The Security Council, when it determines that a matter falls within or beyond the domestic jurisdiction of the state, thus participates in defining the nature and scope of the legal space known to international law as sovereign power. The Security Council has the authority to alter the existing distribution of sovereign power by deeming certain matters to fall outside the sovereign authority of a state and under the jurisdiction of the international community. Members of the Security Council, of course, are sovereign states themselves. But despite their protestations to the contrary, the sovereignty they exercise in international law flows from international law itself – a fact that is revealed by the very role that they play in determining what is a matter within the essential jurisdiction of a state – read, sovereignty – and what is a matter of international peace and security – read, beyond sovereignty. Their power in relation to this binary distinction as well as the distinction itself – flows from the UN Charter, not from any domestic constitutional conception of sovereign authority.<sup>51</sup>

Some argue that the way in which international law conceives of these legal spaces has evolved from an absolute to a conditional conception of sovereignty, and that this evolution is critical to understanding the legality of humanitarian intervention. Drawing on the work of Frances Deng,<sup>52</sup> the Report of the International Commission on

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<sup>50</sup> Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, 1999), 55-56.

<sup>51</sup> Compare Hans Kelsen, *The Law of the United Nations: A Critical Examination of its Fundamental Problems* (1951), at 280 (‘As an organ of the United Nations the Security Council acts on behalf of the United Nations, not on behalf of its Members. ... Acts of the Council ... are ... to be imputed to the Organisation, not to its Members. To disregard this imputation is the tendency of the sovereignty-dogma which is incompatible with the idea of a legal order binding upon the states. ... It is not the Members, it is the Charter which confers responsibilities on the Security Council’).

<sup>52</sup> Francis Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings, 1996).

Intervention and State Sovereignty (ICISS), for example, notes that the reality of global interdependence has steadily eroded international law's traditional understanding of state sovereignty as an absolute sphere of power limited only by the sovereignty of other states.<sup>53</sup> Its authors argue that absolute sovereignty yielded a principle of non-intervention that underpins international law's traditional reluctance to countenance humanitarian intervention. Gradually replacing this absolute conception is a more conditional understanding of sovereignty that yields a principle of responsibility. Under this conditional conception, international law vests sovereignty in a state to enable it to protect its people. If a state fails to meet this responsibility, according to the ICISS, and its population is suffering serious harm in the form of gross human rights abuses,<sup>54</sup> the principle of non-intervention yields to an international responsibility to protect that population from harm by, if necessary, military intervention.<sup>55</sup>

How international law conceives of sovereignty – as absolute or conditional – is not as relevant to either the legality or the legitimacy of humanitarian intervention as the fact that sovereignty itself is an international legal entitlement. If sovereignty was absolute before, it was because of international law, and if sovereignty is conditional now, it too is because of international law. The absolute nature of sovereignty in international law, if it ever existed, never lay beyond international law; it was an international legal product. If the scope of the legal space that international law treats as sovereignty was wider than it is now, the distribution that produced it arguably was more unjust than the distribution that international law performs today. Note that it is the distribution that the field performs, not variations in definitions of the good that it distributes, that engages questions of distributive justice. Note also that these questions of distributive justice are internal to the field and, to this extent, they possess legal significance. They speak to injustices produced by the field itself, not to abstract wrongs such as those contemplated by recognitional conceptions of human rights.

The distributive dimensions of international law reveal that international human rights are instruments that operate to contain or mitigate the injustices of the international legal order itself. John Rawls captures this point with characteristic insight when he offers a remarkably sparse list of human rights that possess international significance. For Rawls, the reason a human right should receive international as opposed to domestic protection is because it is 'intrinsic to the law of peoples.'<sup>56</sup> A right may well protect interests associated with what it means to be human but universalism is not the reason it is on the international register. It possesses international legal significance because it stands as a

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<sup>53</sup> *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre for ICISS, 2001). The report is also available at <http://www.iciss.gc.ca>

<sup>54</sup> According to the ICISS, military intervention is justified to halt or avert: (a) 'large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation;' or (b) 'large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.' *Ibid*, at 32.

<sup>55</sup> The ICCISC states that the relevant principles to assess the necessity of force are: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. *Ibid*, at 32.

<sup>56</sup> John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), at 80.

justification for recalibrating the distribution of sovereignty to address harms that are the product of the international legal order itself. Although Rawls might not have put it this way,<sup>57</sup> international human rights mitigate injustices that occur because of the very design of the international legal order. On a distributional account, universalism takes a back seat to the need to mitigate the harms that flow from an international legal order that has assumed the task of distributing sovereign power.

## V.

Where does humanitarian intervention fit in all of this? Humanitarian intervention involves the threat or use of force by a state or group of states to end or prevent injustices that the international legal order, through its ongoing distribution of sovereign power, otherwise enables. Humanitarian intervention coercively redistributes sovereign power in order to mitigate certain adverse distributional consequences of the international legal order itself. Such coercion obtains legal validity by way of Security Council resolution authorizing the use of force. The Security Council thus possesses the legal power to authorize the coercive redistribution of sovereign authority. When a permanent member vetoes Security Council authorization of the use of force, the rule of law requires it to provide an intelligible reason for its action.

Beyond the formal requirements of the rule of law, substantive commitments in international human rights law possess the potential to further constrain the exercise of Security Council discretion. A recognitional conception requires the Security Council to respect a universal duty to intervene directly in the event of gross abuse of sovereign authority by the offending state. Reasons for vetoing the use of force that are inconsistent with this duty may well cast the legality of the veto into question. But a recognitional conception, on its own, fails to provide guidance on what such reasons might look like or, in other words, on when intervention might be legally valid or invalid.

In contrast, a distributional conception of human rights renders certain reasons for a veto unintelligible, in the following way. Security Council decisions about the use of force are predicated on a finding that the human rights violations are outside a state's domestic jurisdiction and constitute a matter of international peace and security – outside, in other words, the sovereign authority of the offending state. Such a finding takes the matter out of the zone of autonomy that the international legal order vests in the offending state. Reasons for then vetoing the use of force that rest on respecting the sovereign authority of the offending state contradict the recalibration of sovereignty produced by the prior determination of the Security Council that the violations relate to international peace and security.

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<sup>57</sup> Rawls sees the role of international human rights as restricting ‘the justifying reasons for war and its conduct’ and specifying ‘limits of a regime’s internal autonomy.’ *The Law of Peoples*, *supra*, at 79. For an illuminating analysis of his account, see, Charles R. Beitz, ‘Human Rights and the Law of Peoples,’ in D.K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004) 193-214.

A distributional conception thus separates questions relating to the nature and scope of sovereignty from questions relating to the use of force. In relation to sovereignty's nature and scope, gross violations of human rights trigger a redistribution of sovereign authority that removes them from the sovereign authority of the offending state and relocates them in the international realm, reconstituting them as matters that fall under international, as opposed to, domestic, legal authority. What amounts to an unjust distributional consequence, of course, is deeply contestable. Interests protected by the legal entitlement of sovereignty will clash with interests associated with international human rights. When and why one set might trump the other are questions that are shot through with politics and determining if and where the law might 'run out' on this question is the very stuff of international legal and political theory.

In the context of humanitarian intervention, however, there appears to be at least a consensus that genocide, crimes against humanity, and other widespread and gross human rights abuses constitute such an injustice. Once the Security Council has ruled that such abuses fall outside of domestic jurisdiction, interests associated with sovereignty fade from the equation. Here, a distributional conception works negatively, or in an exclusionary fashion, by invalidating certain substantive reasons for exercising a veto in relation to the use of force. It precludes a permanent Security Council member vetoing the use of force on the basis of reasons that relate to interests and values associated with the sovereign authority of the offending state. Beyond this exclusionary function, a distributional conception doesn't stipulate what reasons might justify the exercise of a veto. Pragmatic questions, such as proportionality, timing, likelihood of success, the merits of multilateral versus unilateral action, and the availability of less drastic, alternative strategies, will inevitably rise to the forefront of criteria for determining the legality and legitimacy of intervention. They will entwine themselves in complex power politics relating to strategic interests of the permanent members of the Security Council in ways that likely will not completely fuse legitimacy with legality. But from the welter of justifications for the exercise of Security Council discretion on the use of force, a distributional conception takes certain illegitimate reasons off legality's table, and thereby narrows the gap between the legality and legitimacy of humanitarian intervention.