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The Legitimacy of Humanitarian Interventions

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Abstract
According to many international lawyers, humanitarian interventions without authorization by the UN Security Council are unlawful, but are sometimes morally justified. This discrepancy between legality and legitimacy has led to proposals for making international law more congruent with morality. This article examines the legitimacy of humanitarian interventions by discussing the major justifications by Walzer, Rawls, and Tesón. It argues that these justifications are open-ended: they fail to show that intervention should be limited to cases of violation of basic human rights, and do not categorically rule out intervention in the name of liberal and democratic rights. This is one more reason for being cautious with attempts to establish a law of humanitarian intervention.

Key words
cosmopolitanism; legitimacy of humanitarian intervention; liberalism; Rawls; Tesón; turn to ethics; Walzer

1. Introduction

Humanitarian interventions often reveal a gap between what is lawful and what is morally justified, between strict legality and legitimacy.[1] The air strikes by NATO against the Federal Republic of Yugoslavia in spring 1999 are a case in point. According to a 'strict' or 'legal positivist' interpretation of current international law, NATO's intervention was unlawful. Article 2(4) of the UN Charter establishes a general prohibition of the use of force, which is subject to two exceptions: the use of force in self-defence against an armed attack and the use of force with authorization from the UN Security Council. NATO's intervention was not an act of self-defence, nor had it received authorization from the UN Security Council. NATO thus violated Article 2(4). Nevertheless, many states and commentators felt that NATO was morally justified in carrying out a humanitarian intervention, which can be defined as 'coercive action by states involving the use of armed force in another state without the consent of its government for the purpose of preventing or putting to a halt gross and massive violations of human rights'.[2] The Independent Commission on Kosovo even stated that NATO's intervention expressed an 'international moral consensus'.[3]

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1. T. Franck, 'Interpretation and change in the law of humanitarian intervention', in J. L. Holzgrefe and R. O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), 216.
2. Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999), 11.
3. See Franck, *supra* note 1, at 215–16.

This discrepancy between strict legality and legitimacy has prompted some commentators to put forward proposals for reinterpreting international law or for making international law more congruent with morality. Some commentators argue that the strict interpretation of current international law is mistaken and that a legal justification for humanitarian intervention without prior Security Council authorization is available under the UN Charter or customary law.[4] Others accept the strict interpretation of the letter of the UN Charter, but argue that the practice of states and UN organs shows that the unlawfulness of humanitarian intervention without prior authorization may be mitigated, to the point of exoneration, depending on the concrete circumstances in which the intervention has occurred, and that such exoneration is in keeping with the spirit of the UN Charter.[5] There have also been proposals to establish through treaty amendment a subsidiary or even a general right of humanitarian intervention outside the auspices of the Security Council.[6]

This article does not aim to discuss the merits of these and other proposals for reinterpreting or reforming international law. It aims to question the assumption which underlies these proposals: the view that humanitarian interventions are or can be morally legitimate. Not that the content of this position is particularly controversial or unclear. Those who believe that humanitarian interventions are legitimate broadly agree over two principles: armed intervention in the domestic jurisdiction of states is acceptable when a state violates the human rights of its citizens; such interventions should be restricted to cases of gross and massive violations of 'basic' or 'fundamental' human rights. Admittedly, the latter principle is somewhat vague. There may be disagreement over the exact list of human rights that belong to the limited category of basic or most fundamental human rights. But no one claims that large-scale violations of political rights such as the right to vote, let alone violations of welfare rights, are sufficient to justify military interventions, however undesirable such human rights violations may be from a liberal democratic point of view. Even Fernando Tesón, who unashamedly claims that 'liberal assumptions are the better ones, universally' and that liberal states should interfere in non-liberal states to increase the observance of liberal and democratic human rights, believes that forcible interventions are justified only in 'beyond-the-pale situations', such as those created by crimes against humanity, serious war crimes, genocide, or widespread torture.[7]

The question is rather whether this position can be defended. In particular, this article examines whether a plausible defence can be given to limit humanitarian interventions to cases of egregious violations of basic or fundamental human rights. This is an issue in the sphere of moral or political theory, but it is relevant to recent efforts by international lawyers to establish a law of humanitarian intervention. It

4. For discussion of these interpretations, see, among others, J. E. Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond', (2001) *Nordic Journal of International Law* 121; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 EJIL 1; S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001).
5. See Franck, *supra* note 1.
6. Discussed in Danish Institute of International Affairs, *supra* note 2, at 111–20.
7. F. Tesón, 'The Liberal Case for Humanitarian Intervention', in Holzgrefe and Keohane, *supra* note 1, at 93.

is clear that most international lawyers who are trying to establish a law of humanitarian intervention come from Western liberal democratic societies. It is equally clear that Western liberal democratic states have recently played an important role in initiating and carrying out humanitarian interventions and are likely to continue to play that role. It is therefore understandable that one of the major concerns about attempts to establish a law of humanitarian intervention is that such attempts may be the expression of a desire by Western states to impose their own political and legal values on non-liberal and non-democratic states, if necessary by force. A reply to this charge is that the moral position which informs recent attempts to establish a law of humanitarian intervention is more modest. For according to this position, the only rights which are to be protected by means of force are basic or fundamental rights such as the right to life, not typically liberal or democratic rights, such as the right to vote or to free speech. And basic or fundamental rights are compatible with and protected by most political systems which are neither liberal nor democratic. It would thus be mistaken to view recent attempts to establish a law of humanitarian intervention as a renewed attempt by the Western hegemon to organize international society in the image of its own values and principles. The strength of this reply, however, depends, among other things, on whether there are indeed compelling reasons for restricting humanitarian interventions to cases of serious violations of basic or fundamental rights. Should such reasons be absent, the commitment to what many international lawyers and commentators perceive as a matter of international justice is potentially intolerant with respect to non-liberal and non-democratic states and therefore dangerous for international stability.

This paper attempts to test the strength of the position that humanitarian interventions can be morally legitimate in cases of egregious violations of basic or fundamental rights by discussing three moral or political theorists who have given elaborate defences of this position: Michael Walzer, John Rawls, and Fernando Tesón. These authors represent the three major perspectives that can be taken on this issue. Walzer tries to establish a limited right to intervention from a point of view which is neutral with respect to the way in which domestic society is organized. Tesón attempts to establish a similar right from a distinctively liberal cosmopolitan point of view. Rawls occupies the middle ground, in that he argues from the perspective of liberal democratic states, but, unlike liberal cosmopolitans, does not believe that liberal democratic states should impose their own values on non-liberal and non-democratic states. Do any of these authors show convincingly that humanitarian interventions are to be limited to cases of serious violation of basic or fundamental rights?

2. Walzer on self-determination and humanitarian intervention

Walzer is one of the most influential philosophers of the ethics of war and humanitarian intervention. In 1977 he published *Just and Unjust Wars: A Moral Argument*

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with Historical Illustrations.[8] Three years later he wrote an essay, 'The Moral Standing of States',[9] in which he defended his book against its critics and clarified some of his views, particularly those on humanitarian intervention. Since then Walzer has published a number of essays on humanitarian intervention,[10] the most important of which has recently been reprinted in *Arguing about War*.[11] These essays do not mark a fundamental break with his earlier work. *Just and Unjust Wars* and 'The Moral Standing of States' thus remain the starting point for a discussion of Walzer's views.[12] But Walzer has gradually become more willing to support humanitarian interventions and he has become aware that humanitarian interventions are more complicated than he originally suggested. His recent essays thus also merit attention.

In *Just and Unjust Wars* Walzer develops a theory of aggression which aims to restate the old doctrine of the just war, particularly, though not exclusively, the doctrine of the *jus ad bellum*. He starts with a number of principles that he thinks international lawyers and moralists can easily accept. He calls these principles the legalist paradigm.[13] The cornerstone of this paradigm is the principle of non-intervention. States have the rights of political sovereignty and territorial integrity, or, to put it differently, other states are under a duty not to intervene in the domestic affairs of states. The legalist paradigm further means that any use of force or imminent threat of force against the political sovereignty or territorial integrity of another state constitutes aggression, and that aggression justifies a war of individual or collective self-defence. It finally means that nothing but aggression can justify war. Walzer claims that the legalist paradigm should remain the baseline of the theory of aggression. He supports a strong principle of non-intervention.

Walzer justifies the legalist paradigm in terms of the principle of self-determination. He believes that each human community has a right to autonomy. The members of a community are bound together by shared aims, values, and traditions, which are the product of a long process of shared experiences and mutual co-operation. And they are morally entitled to preserve and protect this common life and to exercise control over their own destiny. An important aspect of communal autonomy is that the members of a community have the right to choose their own form of government. If a government adequately reflects and expresses the shared

8. M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2000).
9. M. Walzer, 'The Moral Standing of States: A Response to Four Critics', (1980) 9 *Philosophy and Public Affairs* 209.
10. M. Walzer, 'The Politics of Rescue', (1995) 35 *Dissent* 35; M. Walzer, 'The Argument about Humanitarian Intervention', (2002) 49 *Dissent* 29.
11. M. Walzer, *Arguing about War* (2004).
12. Walzer's theory of humanitarian intervention has been discussed in P. Laberge, 'Humanitarian Intervention: Three Ethical Positions', (1995) 9 *Ethics and International Affairs* 17; M. W. Doyle, 'The New Interventionism', (2001) 32 (1/2) *Metaphilosophy* 212; M. Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', (1998) 12 *Ethics and International Affairs* 63; D. Luban, 'Just War and Human Rights', in C. Beitz (ed.), *International Ethics* (1985), 195; J. Slater and T. Nardin, 'Nonintervention and Human Rights', (1986) *The Journal of Politics* 86; C. Beitz, 'Nonintervention and Communal Integrity', (1980) 9 *Philosophy and Public Affairs* 385; J. McMahan, 'The Ethics of International Intervention', in A. Ellis (ed.), (1986) *Ethics and International Relations* 24; S. Caney, 'Humanitarian Intervention and State Sovereignty', in A. Valls (ed.), *Ethics in International Affairs* (2000), 117; V. Zanetti, 'Ethik des Interventionsrechts', in W. Kersting and C. Chwaszcza (eds.), *Politische Philosophie der internationalen Beziehungen* (1998), 297.
13. See Walzer, *supra* note 8, at 58.

traditions, values, and aspirations of a community, the government is legitimate. A certain 'fit' between the government and the people then exists.[14] Walzer believes that it may be presumed that the government of a particular state usually is legitimate, that a certain 'fit' between government and people usually exists. That is why the doctrine of state sovereignty and the non-intervention principle are important. The rights to territorial integrity and political sovereignty serve to protect the members of a community from having its affairs directed from the outside, by people who neither fully understand nor fully share the culture and history of the community. The state has moral standing in international society because it is an instrument of communal self-determination.

It is important to note that the principle of self-determination does not entail a form of democratic government. While the right to participate in political decision-making or to have one's interests taken into account in the conduct of government might be a sufficient condition of self-determination, it is not a necessary one. Individuals of a community might be indifferent or even hostile to the idea of democratic government and may believe that an authoritarian regime is legitimate. 'The history, culture, and religion of the community may be such that authoritarian regimes come, as it were, naturally, reflecting a widely shared world view or way of life.'[15] The non-intervention principle thus protects not only states with democratic regimes, but also states with authoritarian ones, provided there is a 'fit of some sort' between government and community.

Walzer even claims that this last reservation is not necessary. The non-intervention principle should, except in rare cases, also protect states with governments that are actually illegitimate, that is, states where 'fit', even of the undemocratic sort, between government and community is in fact absent. That a state has moral standing in the society of states does not automatically mean that it is in fact a vehicle of communal self-determination; 'states can be presumptively legitimate in international society and actually illegitimate at home'.[16] Walzer gives two arguments in support of this claim. The first is epistemological.[17] Whereas the members of a community know their own history, culture, and values and are therefore competent to make a reliable assessment of the government's legitimacy, foreigners lack the knowledge that would warrant denying or affirming the existence of 'fit' between the community and its government. Foreigners are therefore to act on the presumption that the government is legitimate and are to refrain from intervening. The second argument derives from J. S. Mill's 'A Few Words on Non-intervention', a short essay that was first published in 1859.[18] According to this argument, foreigners are to accord respect to the internal politics of each state: people can only become free by their own efforts; freedom cannot be imposed on a society by outsiders.

Walzer thus supports the legalist paradigm and its principle of non-intervention. But he denies that absolute value is to be placed on the non-intervention principle

14. Ibid., at 53, and Walzer, *supra* note 9, at 224, 233.
15. Walzer, *supra* note 9, at 233.
16. Ibid., at 222.
17. Ibid., at 220.
18. See Walzer, *supra* note 8, at 88.

and thereby qualifies the legalist paradigm. There are, in his view, three 'rules of disregard',[19] that is, situations in which states may justifiably intervene in the domestic affairs of other states. One of these rules is that the principle of non-intervention may justifiably be overridden when a state massacres, enslaves, or expels very large numbers of people. Walzer emphasizes that the constraints on this right of humanitarian intervention are severe. Humanitarian intervention is only justified when cruelty and suffering are extreme. It should not be undertaken 'for the sake of democracy or free enterprise or economic justice or voluntary association or any other of the social practices and arrangements that we might hope for or even call for in other people's countries'.[20]

Walzer gives two different arguments in defence of humanitarian intervention. The first is that it would be 'cynical and irrelevant' to presume that a community is self-determining when its members are massacred or enslaved or expelled on a large scale. The value of communal self-determination requires in such cases that the usual presumption of legitimacy is reversed: states 'ought to assume either that there is no "fit" between the government and the community or that there is no community'.[21] States should intervene to protect and rescue the people in a foreign territory from extreme injustice. The first argument is thus grounded in the principle of self-determination. The second argument is that the acts that call for humanitarian intervention are terrible in themselves, apart from the value of self-determination. They are acts that 'shock the conscience of mankind', that is, 'the moral convictions of ordinary men and women, acquired in the course of their everyday activities'.[22]

This justification of humanitarian intervention raises many questions. One of them concerns the relation between extreme acts of injustice and fit. According to Walzer, states must presume that a fit between the government and the people is absent when the government engages in extreme acts of injustice. Fit and extreme acts of injustice are mutually exclusive. This is plausible when the people of a state form a homogeneous entity. But it need not be true in divided states, that is, in states which consist of two or more groups or communities. In divided states there may very well be a fit between the government and one particular community in the sense that the government adequately reflects the values, history, and culture of that particular community. Yet at the same time the government may engage in extreme acts of injustice against the members of another community, a policy that may reflect an aspect of the values and traditions of the dominant community. The policy of the Serb government of the Federal Republic of Yugoslavia regarding the Kosovar Albanians in the late 1990s is a case in point, as is the current policy of the Sudanese government regarding the people in Darfur. It is unclear if humanitarian interventions are justified in such cases. Should states refrain from intervening because a fit between the government and a community exists? Or should they intervene because the government engages in acts that shock the conscience of mankind?

19. Ibid., at 86.
20. See Walzer, *supra* note 11, at 69.
21. Ibid., at 225.
22. Ibid., at 107.

This is an important issue, since humanitarian interventions are typically triggered by serious human rights violations in divided states.

Walzer does not address the issue of humanitarian intervention in a divided state in *Just and Unjust Wars*. But in a more recent essay he indicates that he is aware of the problem. In that essay Walzer admits that his earlier views on humanitarian intervention relied on a simple model of political reality. He conceived of the government as an external and singular source of evil: a tyrant, a usurper, or an alien power that violently oppresses a mass of innocent victims. The aim of humanitarian interventions on this model is to rescue the people from their oppressors and then quickly leave them to (re-)establish a government that they can call their own. Walzer now argues that this 'victim/victimizer, good guys/bad guys model' is almost never an accurate description of reality. He realizes that extreme acts of injustice may be 'locally and widely rooted, a matter of political culture, social structures, historical memories, ethnic fear, resentment and hatred'.[23] This realization has prompted Walzer to raise intriguing questions about the aftermath of humanitarian interventions and to develop the outlines of a theory of *jus post bellum* or post war justice, an extension to the classic 'just war' doctrine. Walzer has not, however, reflected on the bearing that his recent views have on his justification of humanitarian intervention – on the *jus ad bellum* aspect.

It seems that there are two possibilities in dealing with extreme human rights violations in divided states. One is that the principle of non-intervention is upheld as long as there are reasons to believe that fit exists between the government and a particular community. The rights of the members of the violently oppressed community, not only to communal autonomy, but also to life, would thus be sacrificed to the right to self-determination of the dominant community. This would mean that communities that happen to coexist with other communities in a state should not be rescued by foreign states when their rights to self-determination and to life are violated, whereas a community that happens to be the only community in a state should be rescued if its rights to life and self-determination are violated by an evil government. The fact, however, that communities do or do not coexist with other communities in a state is arbitrary from a moral point of view. The other option is that the prohibition against intervention may be overridden when a government commits extreme acts of injustice against members of any of the communities that happen to live in the state, irrespective of whether fit between the government and a particular community exists. On this view, the right to self-determination of any community is restricted by the requirement that it does not engage in acts which 'shock the conscience of mankind'. This requirement would not entail, of course, that the members of repressed communities can actually exercise their right to self-determination. They would only have the right not to be enslaved, massacred, or expelled from the country. Foreigners have a right to put a halt to acts that shock the conscience of mankind.

23. Ibid., at 70.

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Although Walzer does not explicitly discuss these options, it seems clear that he would prefer the latter one. He quite emphatically states that humanitarian interventions are justified in the case of acts that shock the conscience of mankind, that is, in cases of enslavement, massacre, or mass expulsion. This would mean that the justification of humanitarian intervention ultimately lies in the fact that egregious violations of the right to life shock the conscience of mankind, rather than in the fact that these violations indicate that communal self-determination is absent. On Walzer's view, some basic rights are to be protected everywhere and states can only enjoy the protection offered by the non-intervention principle if they respect those rights.

The question, however, is why the application of the shock criterion necessarily results in the view that humanitarian interventions are justified only in cases of serious violations of basic human rights. Surely, serious forms of discrimination or enormous inequalities of wealth or serious violations of rights to association, free speech, and a fair trial are or can be shocking as well. Why would states not be justified in trying to put a halt to these latter type of human rights violations, if necessary by force? Why is humanitarian intervention not justified in a much wider range of cases than the cases of enslavement, expulsion, or murder which Walzer singles out? Walzer fails to give an answer to this question. It is thus unclear why he draws the line as restrictively as he does.

3. Rawls on the limits of decency

In *The Law of Peoples*,[24] his major work on the philosophy of international affairs, Rawls devotes little attention to the issue of humanitarian intervention: a few lines and two footnotes, that is all. But his position is clear and it is the expression of a distinctive theory of international law.[25] In *The Law of Peoples* Rawls aims to develop a body of principles that is to guide the foreign policy of liberal democratic states. Unlike Walzer, whose perspective on international relations is neutral with respect to different conceptions of the way in which domestic society is to be organized,[26] Rawls considers international relations from the perspective of a particular political system. Rawls does not claim, however, that the aim of the foreign policy of liberal democratic states should be to impose its own values on non-liberal and non-democratic states, a position defended by Tesón and other liberal cosmopolitans that will be discussed in the next section. He argues that liberal democratic states should

24. J. Rawls, *The Law of Peoples* (2002).

25. Rawls's views on humanitarian intervention are discussed in F. Tesón, 'The Rawlsian Theory of International Law', (1995) 9 *Ethics and International Affairs* 80; M. Blake, 'Reciprocity, Stability, and Intervention: The Ethics of Disequilibrium', in D. K. Chatterjee and D. E. Scheid (eds.), *Ethics and Foreign Intervention* (2003), 53; C. Beitz, 'Rawls's Law of Peoples', (2000) 110 *Ethics* 669; T. Pogge, 'Rawls on International Justice', (2001) 51 *The Philosophical Quarterly* 246; A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004), 158; K.-C. Tan, 'International Toleration: Rawlsian versus Cosmopolitan', (2005) 18 LJIL 685.

26. The statement that Walzer's theory is neutral needs to be qualified, as the second reviewer has rightly pointed out to me, in that this theory is based on the idea that communities are organized in states and have a political architecture that permits the expression and exercise of self-determination of at least one community and sufficient political and physical integrity to permit the notion of non-intervention to have some purchase.

treat other states as equal participating members in the society of states, provided they meet certain standards of what he terms decency. Rawls thus stands midway between neutralism and liberal cosmopolitanism.

According to Rawls, the fundamental problem of international relations for liberal democratic states stems from the fact that states have different conceptions of the way in which domestic society should be organized. He conceptualizes this cultural pluralism by distinguishing five types of domestic society: liberal peoples, decent peoples, outlaw states, burdened societies, and benevolent absolutisms. The last two types need not concern us here. Nor is it useful to discuss the rich meaning of the word 'peoples' in the *Law of Peoples*.[27] Suffice it to say that Rawls assumes that peoples are politically organized in states, and that it is appropriate, for the purpose of this article, to describe the principles he develops in the *Law of Peoples* as inter-state principles.[28]

Liberal peoples are characterized by three features.[29] There is a constitutional regime that respects certain basic rights and liberties equally for all citizens; priority is given to the protection of these rights over the claims of the general good and of perfectionist values, that is, conceptions of the life that individual citizens should live; and all citizens are given access to the primary goods needed to make effective use of their freedoms.[30] These features are, of course, general; they leave plenty of room for differences of opinion among liberal peoples, for instance with regard to the legitimacy of the death penalty or gay marriage or concerning the extent to which the government should provide its citizens with health care or welfare benefits. But they do serve to distinguish liberal peoples from decent peoples and outlaw states. Decent peoples take the interests of all citizens into account, but not necessarily on an equal basis; discrimination on ethnic, religious, or other grounds is possible. Nor do decent peoples protect the wide range of individual rights that liberal peoples recognize; decent peoples protect only a limited set of basic or 'urgent rights'. This category of urgent rights consists of the rights to life, to hold personal property, and to resources for subsistence; rights against slavery, involuntary servitude, and religious persecution (but not a right to practise one's religion); and a very limited right to political participation: persons might be primarily viewed as members of a group, not as individuals with rights, and it might be the group that is represented in the legal and political system. The list does not include the freedoms of expression and association, the right not to be discriminated against on religious, ethnic, and other grounds, and many other human rights in the UN Declaration of Human Rights and other global and regional human rights treaties. Both decent and liberal peoples do not pursue an aggressive foreign policy; this is the difference in outward behaviour between liberal and decent states on the one hand and outlaw states on the other. There is also a difference in internal characteristics: outlaw states do not respect urgent human rights.

27. See Rawls, *supra* note 24, at 23–9.
28. For discussion see A. Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', (2000) 110 (4) *Ethics* 697.
29. See Rawls, *supra* note 24, at 14.
30. Ibid., at 14.

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The question for liberal democratic states, or liberal peoples, is how they are to deal with decent peoples and outlaw states. There are two options. One is to assume that liberal democratic values are superior to non-liberal conceptions of domestic life and that non-liberal peoples do not deserve to be tolerated and treated with respect in the society of states. Prudential considerations might of course prevent liberal states from acting on that assumption. But absent such considerations, liberal states should pursue a foreign policy whose aim is 'gradually to shape all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal'.[31] This is the liberal cosmopolitan position, which is defended by authors like Tesón. Another option is to accept non-liberal societies, or at least those that can be considered as decent, as 'equal participating members in good standing of the Society of Peoples'.[32] On this view, liberal states should limit their actions to those which are in accordance with principles that satisfy the criterion of reciprocity, that is, with principles that can be accepted by liberal and decent non-liberal societies alike. Rawls rejects the liberal cosmopolitan view and proposes that decent non-liberal states should be tolerated and respected in the society of states as a matter of liberal principle. This does not mean, however, that Rawls believes that all states should be tolerated. Outlaw states are excluded from the law of peoples. Rawls's law of peoples thus conflicts with one of the pillars of the UN Charter: the principle of the formal equal sovereignty of states, which entails that states are not placed in any kind of hierarchy. In a sense, his law of peoples marks a return to an earlier conception of international law that is based on a hierarchy between an elite group of 'civilized states' and outlaw states.[33]

Rawls's procedure for constructing the content of the law of peoples is the 'original position', his version of the idea of the social contract. The original position is a hypothetical situation in which parties choose principles of justice. Rawls first developed the notion of the original position in *A Theory of Justice* and *Political Liberalism*, which are about principles of justice in the domestic context. There are, however, important differences between the original position in Rawls's earlier books and *The Law of Peoples*, aside from the fact that the latter deals with international affairs. First, the principles of justice in the international original position are chosen by the representatives of peoples, not by individual persons. The interests of individual persons are thus only indirectly represented in the original position. This entails, among other things, that a principle which would allow for humanitarian intervention cannot directly be grounded in the idea that individual persons have rights and that they would never agree to have their rights violated. It can only be grounded in the reciprocal agreement among states that the rights of individuals are to be respected and that violations of these rights are unacceptable. Second, not all of those whose life is affected by the principles of justice that are chosen in the

31. Ibid., at 60.
32. Ibid., at 59.
33. For this conception of international law, see G. Gong, *The Standard of Civilisation in International Society* (1984); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004). Simpson, at 294, points out that Rawls's (and Tesón's) concept of the outlaw state goes back to the nineteenth-century language of anti-pluralism in international law.

international original position are represented in that original position. Only liberal peoples and decent non-liberal peoples are represented; outlaw states are excluded and thus stand outside the society of peoples. The reason for this is that outlaw states are not prepared to act on principles which are acceptable not only to themselves, but also to decent and liberal peoples; they refuse to accept that principles for international conduct must satisfy the criterion of reciprocity. Third, the parties represented in the international original position know more about themselves than do their counterparts in the domestic case. Most importantly, they know whether they represent liberal or decent societies. They do not know, however, the size of the population or the territory of the peoples they represent, or its relative strength, which is to guarantee that the principles are chosen in a fair and relatively impartial way. Finally, the international original position proceeds in two steps. Rawls first considers the principles for international conduct that would be accepted by liberal peoples. He then extends the law of peoples to decent non-liberal peoples.

Rawls argues that both liberal and decent non-liberal peoples accept eight principles of international justice as their basic charter. For the purpose of this paper, four are particularly relevant: (i) peoples are free and independent, and their freedom and independence are to be respected by other peoples; (ii) peoples are to observe a duty of non-intervention; (iii) peoples have a right of self-defence but no right to instigate war for reasons other than self-defence; and (iv) peoples are to honour human rights.[34]

The main difference between the law of peoples that liberal states would agree to and the law of peoples that would be accepted by liberal and decent non-liberal peoples alike, lies in the first principle: respect for human rights. The list of human rights that would be accepted among liberal peoples is much more extensive than the list accepted by both liberal and decent non-liberal peoples; the latter category of 'urgent rights' is a 'proper subset of the rights possessed by citizens in a liberal democratic regime'.[35] But since the violation of urgent rights is equally condemned by liberal and decent non-liberal peoples, these rights cannot be regarded as typically liberal or Western or 'politically parochial'. Indeed, Rawls claims that urgent human rights are universal rights in the sense that they 'have a political (moral) effect whether or not they are supported locally'.[36] That is, urgent human rights are binding, not only on liberal and decent non-liberal states, but also on outlaw states. This is an unconventional understanding of the universality of human rights, because universality is not based on a theological, philosophical, or moral conception of the nature of the human person, but on a reciprocal agreement between liberal and decent non-liberal states that human rights are to be honoured, not only in their own societies, but also in states and societies that are neither liberal nor decent, that is, in outlaw states – though such states are not represented in the international original position where the principle that human rights are to be honoured is chosen. Outlaw states are to honour urgent human rights internally because

34. See Rawls, *supra* note 24, at 37.
35. Ibid., at 81.
36. Ibid., at 80.

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liberal and decent non-liberal states mutually agree that they should.[37] The practical import of this universality is that states that do not fulfil the duty to honour urgent human rights internally become the legitimate target of 'forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force'.[38]

This brings us to the issue of humanitarian intervention. Rawls's law of peoples consists of a duty of non-intervention and a prohibition on the use of force except in the case of self-defence. But Rawls is adamant that these principles will have to be qualified 'in the general case of outlaw states and grave violations of human rights'. The most important qualification is that the use of force against outlaw states is justified in the case of egregious violations of urgent human rights. 'An outlaw state that violates these rights is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention'.[39]

The argument Rawls initially offers in support of humanitarian intervention is remarkable. He does not appeal to the moral status of those whose urgent rights are violated or to the agreement between liberal and decent non-liberal peoples that violations of urgent rights are not to be tolerated in any state, but to considerations of international stability: failure to take action against outlaw states threatens collective security. Outlaw states are 'aggressive and dangerous; all peoples are safer and more secure if such states change, or are forced to change, their ways. Otherwise, they deeply affect the international climate of power and violence.'[40] This empirical claim about the aggressiveness of outlaw states is perhaps largely true.[41] It is at least true for some outlaw states. But domestic oppression does not always go hand in hand with an aggressive and dangerous foreign policy. Rawls realizes this and then poses the question of whether humanitarian intervention can be justified in outlaw states simply because they violate human rights, that is, in outlaw states that lack the power or the will to pursue an aggressive foreign policy.[42] His position is clear: 'If the offenses against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defense of human rights would be acceptable and would be called for.'[43] Rawls does not explicitly justify this position, but in the light of the foregoing it is clear that humanitarian intervention is justified because liberal and decent non-liberal peoples would agree that egregious violations of urgent rights are not to be tolerated and that the use of force is an acceptable means of putting a halt to these human rights violations.

37. Ibid., at 65.
38. Ibid., at 80.
39. Ibid., at 81.
40. Ibid.
41. Compare the recent Dutch report on humanitarian intervention by the Advisory Council on International Affairs/Advisory Committee on Issues of Public International Law (2000), at 9: 'international failure to take action against large-scale human rights violations is not only wrongful . . . but also encourages repressive regimes to use, or continue to use, harsh methods in order to maintain their own positions of power. It is precisely these regimes that are most likely to undermine international order as violence within their borders "spills over" to other countries. Passivity on the part of the international community thus not only leads to greater human suffering and injustice, but can also threaten collective security'.
42. See Rawls, *supra* note 24, at 81 (n. 26).
43. Ibid., at 94 (n. 6).

But why should liberal democratic peoples be content with the protection of urgent rights? Why should they not intervene when typically liberal rights, such as the freedom of association or of speech, are violated on a large scale in decent non-liberal states? Why not try to liberalize decent non-liberal peoples by force? In short, why should liberal states seek reciprocal agreement with decent non-liberal peoples rather than impose their own values on non-liberal states?

Rawls seems to give two answers to this question. The first is that the method of seeking reciprocal agreement guarantees or facilitates stability in the society of states. This does not mean, to be sure, that stability would not be possible if liberal states were to pursue a foreign policy whose aim is to impose liberal values on decent non-liberal and other non-liberal societies. In that case, liberal states would still have to show restraint and accept many of Rawls's principles of international justice, particularly the duty of non-intervention, because the political, strategic, and economic costs of pursuing an aggressive liberal foreign policy are usually exceptionally high. But this kind of stability for prudential reasons and calculations would merely be a modus vivendi, a balance of powers for the time being. Neither liberal nor non-liberal states would feel bound to respect the principle of non-intervention and other principles of international justice if they were to acquire an overwhelming surplus of power and resources.

Stability on the basis of reciprocal agreement, by contrast, is enduring, according to Rawls. The criterion of reciprocity requires that the principles of international justice are based on arguments and reasons that are acceptable to both liberal and decent non-liberal peoples. These arguments and reasons do not have the character of prudential calculations of those who know that they are powerful or powerless. They reflect the views of peoples on fair co-operation among equal and free states, irrespective of their own relative strength or weakness. The criterion of reciprocity 'asks of other societies what they can reasonably grant without submitting to a position of inferiority or domination'.[44] One of the reasons that this use of reciprocity provides stability over time is that peoples are genuinely motivated to act on and abide by the principles of international justice. Compliance is not a matter of prudence or coercive threat, it is a matter of principle and of willing acceptance. Furthermore, each people knows that other peoples, or rather other liberal and decent non-liberal peoples, are similarly motivated to abide by the law of peoples. The relations between peoples are thus characterized by mutual trust and confidence, rather than by fear of defection. Finally, seeking reciprocal agreement is a sign of respect for the dignity of other peoples, for it is based on the notion that other peoples have an equal status. The opposite, a foreign policy based on liberal contempt for other societies, will 'wound the self-respect of decent non-liberal peoples as peoples, as well as their individual members, and may lead to great bitterness and resentment'.[45]

It cannot be denied that genuine acceptance provides a stronger and more durable motivation to comply with the principles of international justice than coercive threats. Nor can it be denied that permanent stability is an important value for

44. Ibid., at 121.
45. Ibid., at 61.

liberal – and non-liberal – states. But the idea of stability over time nevertheless raises some problems. First, although stability over time is an important value for liberal peoples, it seems that stability over time comes at a high price, as is evident when one looks at the principle of international justice that human rights are to be respected internally. If liberal peoples seek reciprocal agreement with decent non-liberal peoples, they will have to settle for a relatively austere list of 'urgent' or 'basic' human rights. They will have to content themselves with a 'subset of the rights possessed by citizens in a liberal constitutional democratic regime'.[46] If, on the other hand, liberal peoples seek reciprocal agreement with other liberal peoples only, they will agree, not to this subset, but to the whole set of liberal constitutional rights, which includes more and more robust rights, such as equal and individual rights to free speech, association, non-discrimination, and democratic participation. For these rights are instrumental to the realization of the fundamental value of liberalism, which may, in the words of Ronald Dworkin, be described as the requirement that people are to be treated with equal concern and respect. In short, the principle that urgent human rights are to be respected internally seems to be a second-best option from the perspective of liberal peoples. There are some passages in the *Law of Peoples* where Rawls admits as much: 'I am not saying that a decent hierarchical society is as reasonable and just as a liberal society. For judged by the principles of a liberal democratic society, a decent hierarchical society clearly does not treat its members equally.'[47] Liberal peoples thus seem to be faced with an awkward choice: stability over time and the sacrifice of liberal values, or stability as a balance of powers and a foreign policy based on liberal values.

Or perhaps, and this is the second problem, there is not even a choice. For if the principle that urgent human rights are to be respected is indeed a principle that can only be grudgingly accepted by liberal peoples as a second-best option, then stability over time does not seem feasible. For, according to Rawls, stability over time is generated by principles of international justice which satisfy the criterion of reciprocity. And the criterion of reciprocity 'asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination';[48] it requires that societies are prepared to stand 'in a relation of fair equality with all other societies', that is, in a relation of 'mutual respect'.[49] Now if liberal peoples consider decent non-liberal peoples as inferior and respect for urgent rights as a price that they regrettably have to pay for inter-state peace, then the relation between liberal peoples and decent non-liberal peoples is clearly asymmetrical and characterized by a lack of respect. This attitude is likely to 'wound the self-respect of decent nonliberal peoples as peoples, as well as their individual members, and may lead to great bitterness and resentment'.[50] Besides, decent non-liberal peoples can then hardly assume that liberal peoples are genuinely motivated to abide by the principles of international law. For these reasons, stability over time is illusory and stability as

46. Ibid., at 81.
47. Ibid., at 83.
48. Ibid., at 121.
49. Ibid., at 122.
50. Ibid., at 61.

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a modus vivendi the only option. Liberal peoples thus seem to have one choice only: to impose their own standards on non-liberal peoples, whether decent or not.

The only way to avoid this conclusion is to argue that the principles of international justice that will be chosen by both liberal and decent non-liberal peoples, in particular the principle that urgent rights are to be respected, is not, in fact, a second-best solution at all from the point of view of liberal states, but something they can fully endorse. This, indeed, is Rawls's view and it is his second argument – the first was its ability to generate stability over time – in favour of seeking reciprocal agreement with decent non-liberal peoples, rather than imposing one's own liberal views on non-liberal peoples. Liberal peoples can recognize decent non-liberal peoples 'as equal participating members in good standing of the Society of States' and 'are to cooperate with and assist all peoples in good standing'.[51] Stability over time and liberal values are thus, in Rawls's view, compatible.

The question, of course, is why liberal peoples are to tolerate peoples which are decent but not liberal, that is, peoples who do not have aggressive aims and who honour urgent human rights. The answer can be found in both *The Law of Peoples* and Rawls's earlier book on *Political Liberalism*, and consists of two arguments. The first is the willingness to recognize 'the burden of judgement'. In *Political Liberalism*, Rawls points out that a plurality of incompatible comprehensive doctrines, that is, doctrines which extend beyond principles of public order to include notions of justice and ideals, will inevitably emerge in liberal democracies. This pluralism may, in part, be explained by narrow interests or ignorance, but Rawls believes that such explanations are insufficient to account for the deep and irreconcilable disagreements on issues of justice and ideals of individual flourishing between the various religious, nonreligious, or philosophical doctrines. In his view, a more plausible explanation is that persons who use their powers of judgement and reason are unlikely to arrive at agreement, because many hazards are involved in the correct and conscientious exercise of our powers of reason and judgement.[52] Often, for example, the empirical and scientific evidence bearing on the case is conflicting and complex, and it is hard to make an overall assessment. Or people agree about the various considerations that are relevant in a case, but disagree over their relative weight. Or people differ in their interpretations of moral or political concepts whose meaning is usually open to some extent. Or there are different kinds of normative consideration of different force on both sides of an issue, and it is hard to make an overall assessment. Because of these and other sources of reasonable disagreement, it is inevitable that people who conscientiously use their powers of reason and judgement will nevertheless arrive at different judgements. For this reason, the proper attitude with regard to different conceptions of individual flourishing is a sense of humility. In *The Law of Peoples* Rawls argues that a similar attitude is appropriate with regard to different conceptions of the way in which domestic society is to be organized in the context of international affairs. For in 'the Society of States, the parallel to reasonable pluralism is the diversity among reasonable peoples with

51. Ibid., at 59.
52. J. Rawls, *Political Liberalism* (1993), 55–8.

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their different cultures and traditions of thought, both religious and nonreligious'.[53] Acknowledging the burdens of judgement means that liberal peoples cannot simply impose their own doctrine on decent non-liberal peoples (nor, for that matter, on other liberal peoples with different views on issues such as the death penalty or drug policy or the extent of the welfare state etc.), because they realize that reasonable peoples will inevitably have unresolvable disagreements about issues of justice.

Rawls's second argument for extending toleration to decent non-liberal peoples is that they have a common good conception of justice, which means that the good or fundamental interests of every member are taken into account. This criterion does not require, as is obvious by now, that all citizens are treated with equal concern and respect; it is compatible with strong forms of unequal treatment. It does not require, for instance, that individual citizens all have the right to vote or be elected to public office; citizens may be viewed in public life as members of ethnic, religious, or other groups, and have their interests represented by those who claim to act on behalf of this corporate entity, while some corporate entities or associations, for instance the dominant religious group, may have more rights than others. Nor does it require that all individuals formally have equal access to education, jobs, health care, or housing, and so on. In short, the criterion that the good of everyone counts is compatible with the good of some counting a great deal less than that of others.

Rawls believes that these arguments should be reasons for liberal peoples to tolerate decent non-liberal peoples, but admits that they may not convince everyone:

> The reader has to judge whether a decent people, as given by the two criteria [i.e. non-aggressiveness and respect for urgent rights], is to be tolerated and accepted as a member in good standing of the Society of Peoples. It is my conjecture that most reasonable citizens of a liberal society will find peoples who meet these two criteria acceptable as peoples in good standing. Not all reasonable persons will, certainly, yet most will.[54]

In fact, however, the arguments do not seem to have convinced many liberals.[55] Although it is undeniable that judgement involves many hazards and that even reasonable persons will often be unable to reach agreement over fundamental issues of justice because of these burdens, Rawls's account of properly acknowledging the burdens of judgement seems too formalistic and empty for liberals.[56] The only requirements that Rawls imposes on the reasoning behind the comprehensive doctrines that are to be tolerated is that it be logically consistent, coherent, and conscientiously held, and that the doctrines express a common good conception of justice, that is, take into account everyone's interests. The view that women should not have the right to vote or be elected would thus have to be tolerated, provided that the view is based on a coherent and logically consistent set of arguments, and provided

53. Ibid., at 11.
54. Ibid., at 67.
55. For highly critical reviews, see the books and articles mentioned, *supra* note 25.
56. The best statement of this criticism is in Buchanan, *supra* note 25, at 162–75.

that the interests of women are somehow represented in the political process. This, obviously, falls short of the liberal value that individuals are to be treated with equal concern and respect. It is unclear why liberals should not be more critical with regard to the quality of the reasoning behind comprehensive doctrines.

Rawls's justification of limiting the right of humanitarian intervention to cases of egregious violations of urgent rights thus seems to fail. Liberal peoples have no reason to content themselves with the protection of urgent rights on the ground that reciprocal agreement is to be sought with decent non-liberal peoples and that such agreement only produces the requirement that urgent rights are to be honoured by all states. Does this mean that liberal democratic states have no credible option but to impose their own values on non-liberal and non-democratic states, if necessary by force? Not according to liberal cosmopolitans, who argue that there is a better justification for limiting the right of humanitarian intervention to egregious violations of basic or urgent human rights. It is to this justification that we shall now turn.

4. Tesón and liberal cosmopolitanism

The idea that liberal democratic states should not impose their own values on non-liberal and non-democratic states, whether decent or not, is not shared by liberal cosmopolitans. Liberal cosmopolitans claim that the aim of the foreign policy of liberal democratic states should be to liberalize the world. Fernando Tesón, perhaps the most radical and prolific writer on international law from a liberal cosmopolitan point of view,[57] states that 'liberal assumptions (such as the importance of individual autonomy) are the better ones, universally' and that 'a non-liberal government should *not* be treated as a member of good standing in the international community'.[58]

There are many differences between liberal cosmopolitan authors such as Tesón, Beitz, Pogge, Buchanan, Tan, and Blake,[59] but their position seems to consist of three general assumptions. First, persons have equal rights and freedoms, and the major justification of the political power of states as well as other institutions, whether of a national or an international nature, is to secure and protect these rights and freedoms. Second, all human beings equally possess these rights and freedoms, not merely the members of particular states or of particular ethnic, religious, or other groups. Third, the protection of individual rights and freedoms is a concern for all individuals, states, and national and international organizations alike. 'If human beings are denied basic human rights and are, for that reason, deprived of their capacity to pursue their autonomous projects, then others have a prima facie duty to help them.'[60]

57. F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1997); Tesón, 'Collective Humanitarian Intervention', (1996) *University of Michigan Law School Journal* 232.
58. See Tesón, *supra* note 7, at 98, 101 (the italics are Tesón's).
59. See Beitz et al., *supra* note 25.
60. See Tesón, *supra* note 7, at 97.

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It is not surprising that Tesón and other liberal cosmopolitans justify forcible intervention in another state to put a halt to human rights violations. For the principle of state sovereignty has no intrinsic moral value for liberals:

> a major purpose of states and governments is to protect and secure human rights, that is, rights that all persons have by virtue of personhood alone. Governments and others in power who seriously violate those rights undermine the one reason that justifies their political power, and thus should not be protected by international law.[61]

But which rights are to be protected by military means? In his earlier book, *Humanitarian Intervention: An Inquiry into Law and Morality*, Tesón took the radical view that there were 'decisive reasons for restricting the right of humanitarian intervention to cases of serious violations of civil and political rights', thereby excluding only socioeconomic rights from protection by military means.[62] He thus argued, in effect, that liberal states can justifiably impose their own values on non-liberal and non-democratic states by military means. In a recent essay Tesón has become much more restrictive. He now argues that humanitarian interventions are justified only in beyond-the-pale situations, such as those created by crimes against humanity, serious war crimes, genocide, or widespread torture.[63]

> All regimes that are morally vulnerable to humanitarian intervention are of course illegitimate, but the reverse is not true. For many reasons, it may be wrong to intervene by force in many regimes that are objectionable from a liberal standpoint. Humanitarian intervention is reserved for the more serious cases . . . the illegitimacy of the government is a necessary, not a sufficient, condition for the permissibility of humanitarian intervention.[64]

This view is shared by most liberal cosmopolitans, who thus agree on this issue with authors like Walzer and Rawls.

But how can the restrictiveness of liberal cosmopolitans be justified? It is clearly not possible for Tesón and other liberal cosmopolitans to single out a particular category of urgent or basic or fundamental human rights as worthy of protection by military means on the ground that only these rights are a matter of concern for outsiders. For liberal cosmopolitans hold that liberal rights should be honoured everywhere and that states should not be free to withhold the protection of liberal rights from their citizens. Tesón writes,

> If human beings are denied basic rights and are, for that reason, deprived of their capacity to pursue their autonomous projects, then others have a prima facie duty to help them. The serious violation of fundamental civil and political rights generates obligations on others. Outsiders . . . have a duty not only to respect those rights themselves but also to help ensure that governments respect them.[65]

Nor is it useful to point out that violations of urgent or basic rights are condemned, not only by liberalism, but also by most, if not all, non-liberal and non-democratic

61. Ibid., at 93.
62. See Tesón, *Humanitarian Intervention* (1997), at 125.
63. See Tesón, *supra* note 7, at 95, 98.
64. Ibid., at 98–9.
65. Ibid., at 97.

political or ethical doctrines.[66] For the question is not whether non-liberal and non-democratic states should be able to support humanitarian interventions in cases of serious violations of basic rights, just as liberal and democratic states would. The question is why liberal and democratic states should content themselves with the protection of these rights by violent means. The only argument available which liberal cosmopolitans have, it seems, for restricting the right of humanitarian intervention to egregious violations of urgent or basic or fundamental rights, consists of a combination of various moral and prudential considerations, many of which are familiar from the legal literature on humanitarian intervention. Not all of these arguments, however, are convincing.

The first consideration which is often mentioned is the principle of subsidiarity: the use of force is justified only after other, non-violent means of action against the state that is violating human rights have been exhausted.[67] It is not clear, however, how this argument is relevant to the question at hand. No one doubts that it is morally impermissible to use violent means when non-violent means could accomplish the same end – indeed, the principle underlies Articles 39–42 of the UN Charter. So if non-military means are available to put a halt to human rights violations, these means should be tried before military action can become a serious option. But the question is not whether military force should be used when non-violent means to accomplish the same end are available. The question is why the use of military force is a justifiable means to put a halt to egregious violations of urgent or basic or fundamental rights, but not of civil and political rights. Surely no one would argue that serious violations of civil and political rights can always be successfully countered by using non-military means, and that the application of the principle of subsidiarity thus entails that military intervention can never become a serious option. Clearly, there are many cases where the use of all sorts of non-military means to end violations of civil and political rights fail. The principle of subsidiarity does not explain why the use of military force in such cases is unacceptable as a last resort.

The second consideration which is often mentioned is the principle of proportionality: the use of military force leads to the loss of (many) lives and these moral costs of intervention are justified only if they are proportionate to the good that is to be accomplished.[68] Liberal cosmopolitans suggest that this requirement of proportionality entails that humanitarian interventions are justified only in the case of egregious violations of urgent or basic human rights. Blake, for example, states that 'the pain and horror of warfare is sufficient to make military intervention illegitimate in all but the most egregious of cases'.[69] It is not entirely clear, however, what the underlying argument is. One could argue that the protection of the right to life and other basic and fundamental rights have moral priority over the protection of

66. Tesón, ibid., at 100–3, makes this point, but it is not clear whether that argument is intended to show that most non-liberal and non-democratic states should support humanitarian interventions in cases of serious violations of basic rights, or that humanitarian interventions are justified only in such cases for non-liberal and liberal peoples alike.
67. See Blake, *supra* note 25, at 66.
68. See Tesón, *supra* note 7, at 99, 115–16.
69. See Blake, *supra* note 25, at 66. See also Tesón, *supra* note 7, at 116–18.

civil and political rights, that serious violations of basic rights are thus far worse than serious violations of civil and political rights, and that the moral costs of intervention are of such magnitude that they can be outweighed by the good of securing basic rights but not by the good of securing civil and political rights. It would be odd for liberal cosmopolitans to endorse this line of reasoning, however, since they do not accept such a distinction between urgent or basic and civil and political rights.[70] Alternatively, it could be argued that humanitarian intervention can, under circumstances, be successful in securing and protecting basic or fundamental human rights, but that it is unlikely to contribute to the protection of civil and political rights. Thus the application of the principle that the costs of intervention are justified only if they are outweighed by the good that is to be accomplished leads to the conclusion that humanitarian interventions are justified only in beyond-the-pale situations.

The latter argument is based on empirical analysis or speculation about the effectiveness of humanitarian intervention, the strength of which cannot be discussed in this paper. But it is useful to mention a few factors which, according to liberal cosmopolitans, make it unlikely that the use of force is effective in protecting civil and political human rights, while it can be effective in securing fundamental rights. One of these factors concerns the situation after a humanitarian intervention.[71] Although the use of military force may be able to put a halt to serious violations of civil and political rights, it is unlikely that an intervention is sufficient to secure these rights. For interventions to end violations of civil and political rights will typically be targeted at states which did not have liberal and democratic institutions before. Intervention to end violations of civil and political rights will thus require long-term and extensive state-building efforts. It is exceedingly difficult, however, to build a state, let alone a state with liberal and democratic institutions. For the functioning of a liberal democracy requires that liberal and democratic values are shared, not only by the citizens but also by officials. And this political culture is almost impossible to impose on citizens and officials from outside. Besides, it would require enormous resources from the intervening or other parties that are to create liberal and democratic political institutions. Humanitarian interventions to end egregious violations of basic or fundamental rights, on the other hand, are more likely to be effective. Not that this type of intervention does not require reconstruction or state-building efforts after warfare has ended. The permanent protection of basic or fundamental rights usually requires reconstruction and state-building efforts. But the reconstruction or creation of institutions which guarantee urgent or fundamental rights is more likely to be successful than the creation of liberal and democratic institutions. For

70. This line of reasoning can be found in an essay by Wolfgang Kersting, who makes a distinction between transcendental or existential human rights and programmatic human rights, the former being rights which enable people to live, the second being rights which are instrumental to the realization of a conception of the good life. According to Kersting, the former category of rights is to be protected if necessary by military means by outsiders, while the latter is not an object of international concern, but of domestic politics. This comes close to the ideas of Rawls and Walzer, but one of the main differences is that Kersting's theory is based on the idea that humans as humans have existential rights. Kersting is thus a non-liberal cosmopolitan. See W. Kersting, 'Bewaffnete Intervention als Menschenrechtsschutz', in R. Merkel (ed.), *Der Kosovo-Krieg und das Völkerrecht* (2000), 187, at 218–23.

71. See Blake, *supra* note 25, at 66–7.

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this reason, humanitarian interventions should be restricted to protecting urgent or basic rights.

A second consideration which is mentioned concerns international stability. The use of force against other states may disrupt international stability and lead to tensions or worse. The risk that powerful non-liberal and non-democratic states take offence when liberal states intervene in other states, however, may be less if the aim is to protect urgent rights than if the aim is to protect liberal and democratic rights, because the former aim is more likely to be endorsed by non-liberal and non-democratic states. Indeed, Tesón points out that humanitarian interventions during and after the Cold War have not destabilized international order.[72] For this reason, too, liberal states should limit themselves to intervening in cases of egregious violations of urgent or basic rights.[73]

Liberal cosmopolitans tend to assure their readers that these moral and prudential considerations are constraining in themselves and very constraining indeed if taken together.[74] It is obvious, however, that the constraints mentioned strongly depend on sweeping and debatable empirical generalizations and historical contingencies. If a powerful liberal democratic state has exhausted non-military means to end serious violations of civil and political rights, and if historical analysis were to show that the creation of liberal and democratic institutions is possible under specific circumstances (the examples of post-war Germany, Italy, and Japan are often mentioned in this context),[75] and if the target state is of little strategic importance to other powerful states, then an intervention to protect civil and political rights can be justified by liberal cosmopolitans. While liberal cosmopolitans succeed in demonstrating that humanitarian interventions to protect civil and political rights are unlikely to be justifiable in most cases, they do not present an argument which categorically rules out such interventions.

5. Conclusion: a liberal hegemonic project?

Humanitarian interventions without authorization from the UN Security Council are unlawful according to a strict interpretation of current international law. Yet many international lawyers believe that such interventions are or can be morally

72. See Tesón, *supra* note 7, at 113–14.

73. Blake, *supra* note 25, at 67, mentions two other considerations. First, since it is difficult to offer any single interpretation of the abstract idea of liberalism of equal concern and respect, and since liberals disagree widely about the implications such ideas have, it is wise for a state to be modest and restrictive as to which injustices it regards as sufficient to license intervention: 'To put things bluntly: if we cannot agree about what liberal justice demands, it makes sense to avoid intervention in all but the most obvious and clear cases of injustice.' Second, foreign political practices are difficult to understand and one may very well err in condemning as illiberal those practices which one does not fully understand. But these considerations, wise though they may be, backfire immediately on the liberal cosmopolitan view of international relations. For if the requirements of liberalism are uncertain and if foreign cultures are difficult to understand, how can liberal cosmopolitans justify even the mildest form of non-military pressure to impose their own values on other states?

74. See Tesón, *supra* note 7, at 98–9; Blake, *supra* note 25, at 65–9.

75. See, for example, the rather optimistic book by J. Dobbins, J. G. McGinn, and K. Crane, *America's Role in Nation-Building: From Germany to Iraq* (2003), and the much more sceptical analysis in F. Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (2004).

acceptable in cases of egregious violations of basic or fundamental human rights. This perceived discrepancy between strict legality and legitimacy has led to various proposals by international lawyers to make international law more congruent with morality. The merits of these proposals are the subject of an ongoing debate, but the effort to establish a law of humanitarian intervention without prior Security Council authorization can count on the sympathy of many international lawyers and commentators.

There are also, however, commentators who agree that humanitarian interventions without prior UN Security Council authorization are formally illegal but can be morally necessary, but strongly doubt the wisdom of efforts to bridge the gap between legality and legitimacy by reinterpreting or reforming international law. Martti Koskenniemi, for example, has been highly critical of what he calls the turn to ethics among international legal scholars: the urge to leave a formalistic approach to international law behind and reinterpret international law in terms of a theory of the good life.[76] For the turn to ethics seems to be part of a renewed effort by the liberal Western hegemon to organize international society in the image of its own values and principles. Not only is this effort conservative in nature, since the West is highly sensitive to egregious violations of human rights in cases like Kosovo, but it is unresponsive to other forms of injustice, such as those created and sustained by the system of the global distribution of wealth. It also seems to reflect a *mission civilisatrice*, a 'crusading spirit' which seeks to impose liberal and democratic values on non-democratic and non-liberal societies.[77]

It is hard to dispute the fact that the issue of humanitarian intervention is incomparably higher on the agenda of international legal scholars than the injustice of the system of the global distribution of wealth. But the criticism that the effort to create a law of humanitarian intervention expresses a renewed liberal Western crusade seems, at first sight, too strong. For the moral position which underlies the various proposals to reinterpret international law consists of two principles. The first is that armed intervention in the domestic jurisdiction of states is acceptable when a state violates the human rights of its citizens. Second, such interventions should be restricted to cases of egregious violations of 'basic' or 'fundamental' human rights, such as the right to life and against torture. Now these basic or fundamental rights do not seem to be typically liberal or typically democratic, but are compatible with and largely respected by most non-liberal and non-democratic political systems. No one advocates humanitarian interventions on behalf of the right to vote or to free speech. It thus seems exaggerated to view efforts to create a law of humanitarian intervention as part of 'the project of organising the administration of the international society by the Rule of Law in the image of the liberal West'.[78]

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76. M. Koskenniemi, 'The Lady Doth Protest Too Much. Kosovo, and the Turn to Ethics in International Law', (2002) *The Modern Law Review* 159.
77. For humanitarian interventions as Western crusades, see also F. Schirrmacher (ed.), *Die Westliche Kreuzzug. 41 Positionen zum Kosovo-Krieg* (1999); G. Beestermöller, 'Die humanitäre Intervention – Kreuzzug im neuen Gewand', in G. Beestermöller (ed.), *Die Humanitäre Intervention – Imperativ der Menschenrechtsidee?* (2003), 141; W. Kersting, *supra* note 70, at 209; A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003), at 18–34.
78. Koskenniemi, *supra* note 76, at 160.

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This reply will not convince everyone, for it is a fact that the whole notion of individual human rights is rooted in Western history and the history of liberalism, and it can be argued that humanitarian warfare in the name of human rights exhibits a Western liberal imperialistic impulse, whether or not such warfare is meant to protect basic or fundamental human rights rather than, say, the rights to vote or to free speech.[79] But leaving this matter aside, the question is whether the position that humanitarian interventions are justified to end serious violations of basic or fundamental human rights rests on solid ground. Why should liberal democratic states not be more ambitious and intervene militarily in cases of gross violations of liberal or democratic rights, like equal rights to free speech or association or political participation? Why should they restrict themselves to intervention on behalf of rights that are arguably compatible with non-liberal and non-democratic political systems?

In this paper, the answers to this question by three moral or political theorists – Walzer, Rawls, and Tesón – have been discussed. These authors all agree that humanitarian interventions to protect basic or fundamental rights can be justified, but the arguments they give in support of this view are different. Walzer tries to establish a right to humanitarian intervention from a perspective that is neutral with respect to the way in which domestic society is organized politically, Tesón tries to base this right on the assumption that the liberal political system is superior to other systems and that liberal states should impose their values on non-liberal and non-democratic states, and Rawls occupies the middle ground. None of the arguments of these theorists, however, is particularly convincing. Walzer, in the final analysis, argues that humanitarian interventions should be restricted to instances of serious violations of basic rights, because such violations shock the conscience of mankind, but on the basis of this criterion it is not clear why violations of other human rights would have to be ruled out. Rawls argues that liberal and democratic states should only use force (and non-violent means of exercising pressure) to protect urgent rights, because they are to seek reciprocal agreement with 'decent' peoples and because such agreement can only result in the demand that urgent rights are to be respected, but he does not show why liberal and democratic peoples should seek reciprocal agreement with decent states. Tesón and other liberal cosmopolitans, finally, argue that humanitarian interventions should be limited to serious violations of basic or urgent rights, because of prudential considerations. The most important of these considerations are the claim that forcible intervention to protect liberal and democratic rights is likely to destabilize international order and the claim that it is almost impossible to impose respect for liberal and democratic rights from outside. These arguments at most, however, show that humanitarian interventions to protect liberal and democratic rights are unjustifiable given current power relations in most cases, but do not categorically rule out such interventions.

Although international lawyers and moral philosophers agree that humanitarian interventions are justified in cases of serious violations of basic or urgent or

79. A reviewer has rightly pointed this out. For the imperialistic aspect of the language of human rights, see, among others, Orford, *supra* note 77.

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fundamental human rights, the argument for being so restrictive from the point of view of liberal democratic states is thus less compelling than one would expect. Of course, this is not to say that recent attempts to reinterpret or reform international law with respect to humanitarian intervention is deliberately based on a desire to liberalize the world, if necessary by force. Rather, the conclusion is that the moral view which informs these attempts is much more open-ended than is usually acknowledged and that it is far from self-evident that the use of force to end violations of liberal and democratic rights can be ruled out categorically. The turn to ethics among international lawyers may thus be described as the urge to leave a formalistic approach to international law behind with the aim of making international law congruent with a moral position the scope of which is as yet unclear. This should be one more reason for being very cautious in attempting to establish a law of humanitarian intervention.