Human Rights: A Critique of the Raz/Rawls Approach

Jeremy Waldron
NYU School of Law, jeremy.waldron@nyu.edu

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I
What does the term “human” mean in human rights? The most familiar answer is that human rights are rights all humans have by virtue of their humanity (their being human). They are rights that humans have whatever society they live in, however they are governed, and whatever stage of economic development their society happens to be at. Unlike legal rights and constitutional rights, they are not supposed to differ from country to country, depending contingently on positive laws and constitutions. They are rights that belong to human beings as such.

I say this is the most familiar understanding, but it is certainly not free of difficulty. Indeed, it is often thought that the category of human rights, so defined, may be empty. For consider three points.

(i) Humans evolved as a species hundreds of thousands of years ago. For most of that time, it hardly makes sense to think of human beings as right-holders; certainly they didn’t think of themselves in those terms and they didn’t have governments they could hold rights against. The conditions and circumstances of their lives have varied enormously over that period. Even ten thousand years ago, if humans might be said to have had any rights, they would be quite different in character from the rights humans are now thought to have. Of course rights-claims are normative, not descriptive. We are not talking about how Cro-Magnon man was actually treated by his peers and rulers (if he had any). We are not even talking about Cro-Magnon man’s thoughts about his rights; human rights are rights that humans have, not that humans think they have. Still, many will say that the attribution to Cro-Magnon man of the rights that we take to be human rights today makes no sense. The circumstances of his human being and of his human life are so different from the circumstances of ours, that the very idea of trying to establish a normative list of rights we share with him is misconceived.

(ii) Something similar confronts us even today when we try to concoct such a normative list in the face of the variety of ways there are of being human. Humans live now in so many ways and they are so disparately situated in such different social, cultural, economic, political and legal environments; they lead such different kinds of life; and even the idea of leading a life (in our sense of personal autonomy) has such different patterns of application across the human family—that the task of specifying a common set of rights on the basis that “one size fits all” seems insuperable.

(iii) Even if we confine our attention to one class of modern human societies—say, advanced Western democracies—we still run into difficulties with the idea of a single set of rights that it makes sense to attribute to all the human inhabitants of such societies. For the human inhabitants of these societies include not just able-bodied
adults exercising what we think of as distinctively human powers, but tiny babies, humans who suffer from profound disabilities, the very old and the demented who have lost any capacity for reasoned thought or the ability to understand the living of their lives. It may seem that if we are looking for rights that can be attributed literally to all human beings (in a given class of modern societies), the rights in question won’t be much more expansive than rights that may plausibly be attributed to all animals. Either that, or we have to venture into metaphysical or religious conceptions that relate rights to the momentous importance of human beings as such—their importance to God, for example—irrespective of their particular capacities. But there is something unsatisfactory about hitching the idea of human rights to any particular theology when it is supposed to be a theory for the whole world.

These difficulties have prompted some political philosophers to wonder whether the term “human” in human rights might not be doing some quite different work. One possibility is that “human” refers not to the right-bearers (and their humanity) but to the class of people for whom violations of these rights are properly a matter of concern. Certain rights, it may be thought, are or ought to be matters of general concern among humans: As Kant put it, “a violation of right on one part of the earth is felt in all.”¹ The idea is that there is a class of rights such that no human should be indifferent to the violation of any right in that class. These rights are called “human rights” because humans are called on to support them.

So we have two quite different approaches to the term “human” in “human rights.” On the first type, which I shall call “the human bearer approach,” rights are designated as human rights because they are rights held by all humans in virtue of their humanity. On the second type, which I shall call “the human concern approach,” rights are designated as human rights because they are rights whose violation is the proper concern of all humans. Of course there is no reason why these two approaches cannot be combined. I will indicate something along these lines at the end of the paper. But there are versions of the human concern view that define a starker alternative.

For some adherents of the human concern approach, the relevant human concern about rights is not just a matter of disapproving of their violation. It is practical political concern: these theorists say that human rights are rights whose violations appropriately elicits action on the part of the rest of humanity against the violators. More specifically, views of this kind focus on the response of governments and international agencies. The idea is that we can define a class of rights such that no government, nor any other human agency or organization, is even required or permitted to say that the violation of one of these rights is none of their business, no matter where it occurs. Action by a government or an agency in support of such rights is never precluded by the fact that the government or agency is an outsider to the

relation between the right-bearer whose rights are being violated and the government that is responsible for violating them. So we define a right, R, as a human right when we think that, not only that any human person, but also any outside government or agency has authority to respond to and maybe interfere with another government’s violation of R. If we don’t think of R in this way, then—on the view we are considering—we are saying in effect that R is not a human right.

In this essay, I am going to consider several variants of this approach. Though it offers an interesting basis for defining rights as human rights, I shall show that it too faces certain difficulties. These difficulties may cast doubt on the wisdom of abandoning the human bearer approach. Certainly the difficulties I will identify with the human concern approach are worth examining. If the human concern approach is to be made viable, these difficulties have to be confronted and I think better answers have to be supplied than the proponents of this approach have so far been able to come up with. The best known proponents of the human concern approach are John Rawls, in *The Law of Peoples*, and Joseph Raz in an article entitled “Human Rights without Foundations.” Others have followed their lead to a certain extent: I shall also talk a little about the work of Charles Beitz in his book *The Idea of Human Rights*.

None of them uses the label “human concern.” Rawls, I think, would be happy with the term “political” to describe his approach to human rights, to differentiate it from the more philosophical approaches that focus on the character of humanity as such. Raz labels what I have called the human bearer view “the traditional doctrine” and he follows Rawls in developing what he thinks of as a “political conception” in contrast to that, though he distances himself from John Rawls’s own account in a number of respects. Beitz talks of a “practical,” as opposed to a “naturalistic” (human nature) conception of human rights. The terminology doesn’t matter: my “human concern approach” is no doubt the most abstract label; it is supposed to highlight the fundamental character of the contrast.

Labels aside, I will try not to neglect the differences between these theorists. But I want to begin with a quite crude version of the human concern approach. It is not a version that any scholar will own up to holding. (As we shall see, Rawls’s formulation comes close). But it is a version that is in circulation informally, and it is often used in conversation among theorists to display what is distinctive about the human concern

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5 One reason for the broader “human concern” label is to pick up an aspect of Joseph Raz’s recent writing on the subject where he says—in “Human Rights in the Emerging World Order,” *Transnational Legal Theory*, 1 (2010) 31, at 41—that “[o]ne of the most important transformations brought about by the pursuit of human rights has been the empowerment of ordinary people, and the emergence of a powerful network of nongovernmental as well as treaty-based institutions pressurising states and corporations ... in the name of individual rights.”
approach. For me, the advantage of the view I am about to outline is that it highlights in rough and visible form some of the difficulties that, I think, almost all versions of the human concern approach are likely to face. In section II, I shall sketch out the view I want to consider. In section III, I identify various difficulties that it gives rise to. Then, in section IV, I shall consider a more cautious version of the human concern approach to see if it can avoid the difficulties I have identified.

II

According to the version of the human concern approach that I have in mind, a right is properly described as a human right if the appropriate response to its violation by an otherwise sovereign state is armed interference by an outside state or an international organization aimed at remedying or punishing or preventing the continuance of the sovereign state’s violation. I shall call this “the armed intervention version of the human concern approach” (the Armed Intervention View, for short).

I am not attributing the Armed Intervention View to anyone in particular. John Rawls comes close to it in The Law of Peoples. He says that one role of human rights is to specify limits to state sovereignty and to the principle of non-intervention associated with state sovereignty. “Their fulfilment is a necessary condition of a regime’s legitimacy,” and it is “also sufficient to exclude justified and forceful intervention by other peoples, say by economic sanctions or, in grave cases, by military force.” On Rawls’s account, when certain rights are violated by the government of a state, that government loses any standing to complain about interventions by other governments aiming to vindicate the rights in question against the first government. That’s Rawls’s theory of the “human” in human rights, and (as I say) it is quite close to the Armed Intervention View, distinguished only by his willingness to contemplate measures, like economic sanctions, that fall just short of military intervention.

Notice that the Armed Intervention View (and views like it) understands rights as human rights solely on the basis of the remedy appropriate for their violation. That in itself is not a problem. We do something like this as a matter of course when we distinguish legal rights from rights that are merely moral, and also in some countries when we distinguish constitutional rights from ordinary legal rights. The term “legal rights” directs us to remedies provided by courts; “constitutional rights” directs us to remedies that may include judicial review of legislation; and “human rights,” on the approach we are considering, directs us to remedies provided by members of the

6 It is a bit like the strategy suggested by Socrates in The Republic (368d-e)—looking first at some large letters scrawled out on a rough surface to illuminate the detail of some fine print elsewhere.

international community. The remedy associated with a given right is always an important feature of the right: *ubi ius, ibi remedium.*

Some may see it as a problem that the Armed Intervention View makes into a matter of definition what many think should be an open question. Surely, whether outside intervention is an appropriate response to a given set of violations is something for us to argue about. In some circumstances such a drastic remedy may be appropriate; in other circumstances it may be more sensible to look for remedies internal to the polity in question. Perhaps we should argue this through as a practical matter rather than distracting ourselves with the claim that something conceptual turns on the outcome of our deliberation about remedies. But I am reluctant to press this point, because the contrast here between analytic propositions and propositions that are open to substantive argument is not hard and fast. Joseph Raz has stipulated that it may not be plausible to regard either the human concern view or its traditional rival as an analytic proposition: he says “[t]here is not enough discipline underpinning the use of the term ‘human rights’ to make it a useful analytical tool.” On either side, we are arguing about how to approach the issue of the relation between human rights, distinctively human interests, and the actions of the international community. I don’t think either side should be interested in making this or contesting it as a matter of definition.

One advantage of the Armed Intervention View is that it connects up quite naturally to the idea that human rights are *important* rights. Joseph Raz has remarked that there is no guarantee that human rights are important if they are understood along the lines of the human bearer approach: “Neither being universal, that is rights that everyone has, nor being grounded in our humanity, guarantees that they are important.” He criticizes some recent attempts to define the importance that human rights are supposed to have on the basis of interests held by all humans; he thinks we should give up on that enterprise. The alternative view, it seems, offers a better account of importance, or rather a better way of setting the threshold of importance that a right must have to be a human right. A right has to be important for its violation to be connected to the possible overriding of national sovereignty, since overriding sovereignty is a high-stakes matter (as far as the sovereign state in question is concerned, as far as the intervening state is concerned, and as far as the world community is concerned). Nothing could justify it unless it possessed a degree of importance capable of standing against the importance of sovereignty itself and the considerations that ordinarily inhibit (and ought to inhibit) humanitarian intervention.

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10 Ibid., 323.

11 Ibid., 323-7.
Indeed, as John Rawls emphasizes, this particular criterion of importance—or anything like it—will tend to isolate as “human rights” only a subset of the rights that are traditionally given that designation. (He suggests that, of the Universal Declaration of Human Rights, only the right to life and the right not to be tortured are clear instances of human rights; Articles 4 (anti-slavery), 7 (non-discrimination), 9 (protection from arbitrary arrest) and 10-11 (due process) may or may not be in this category “pending issues of interpretation,” while the remaining provisions, including the socioeconomic provisions count as “liberal aspirations” rather than human rights. A page or so earlier, he offers an even more restricted list: “a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.” James Nickel has called this an ultraminimalist conception of human rights. To those who defend an approach like this, it is supposed to be one of its virtues that it picks and chooses among the traditional menu of human rights with great discrimination.

Of course even rights in the subset that Rawls identifies are often not supported by humanitarian intervention. It is notorious that humanitarian intervention does not always take place when it should: the Western powers’ failure to act in Rwanda in 1994 is a good example. Intervention by one sovereign state in response to rights violations is still a relatively rare occurrence. Also, we cannot rule out the possibility that some nation or nations will intervene militarily in the sovereign affairs of another (in part citing human rights justifications) when such interference is inappropriate: the U.S.-led invasion of Iraq in 2003 is an example of this. But the Intervention View defines rights as human rights on the basis of what the international community ought to do about them not on the basis of what the international community does do or is likely to do. It is a normative rather than a predictive approach to an understanding of human rights.

On the other hand, proponents of views of this kind often say they don’t want their understanding of the “human” in human rights to be divorced too much from actual practice in international affairs. Raz says, for example, it is “observation of human rights practice” that shows that human rights are taken to be “rights which ... set limits to the sovereignty of states.” This does not necessarily make the view a predictive one; Raz’s point seems to be that the appropriate normative proposition is one that we should infer from some of the normative talk that takes place in human rights practice. Something similar can be said about Charles Beitz’s assertion that “[w]e inspect the practice of human rights because we are interested in the way participants in this practice understand the practical inferences to be drawn from assertions about human

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13 Ibid., 79.
rights.” Again, this does not mean that we treat present practice as beyond criticism; however, it does seem to require that any criticism be immanent rather than advanced from a normative perspective that is not acknowledged within the practice.

There is the further question of what sort of normativity we are speaking of here. Is R a human right when intervention is morally required in response to a violation of R? Or is R a human right when intervention is permitted in response to a violation of R? I guess I can define the artificial position I’m setting up any way I like. But it is worth considering the sort of normativity that views of this sort have in mind. The normativity of Rawls’s view seems to involve permission rather than obligation: what a violation of a human right does is to disable the principle of non-intervention; it removes a reason which would ordinarily make such intervention impermissible. Raz, however, couches his view more affirmatively. He says he takes “human rights to be rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.” And Beitz talks of “a pro tanto reason” to interfere. This seems to imply that, in the absence of reasons to the contrary, non-intervention in response to a violation of one of these rights would be wrong. And maybe this accords with human rights practice, which talks these days of a “responsibility to protect” not just a right or permission to do so. (I emphasize again that neither Beitz nor Raz nor even Rawls holds the Armed Intervention View in an unqualified form. My questions are partly about the shape of the views (of this kind) that they do hold in order to highlight choices that would have to be made about the formulation of the Armed Intervention View or anything like it.)

III

I turn now to some criticism and difficulties. Though I am going to discuss these as they affect the Armed Intervention View, grasping them is important I think for any variant of the human concern view that anticipates some form of official international action in response to human rights violations. In this section, I will consider both criticisms that relate specifically to the Armed Intervention View and criticisms that, having been evoked by that view, may seem to apply to any sort of interventionist approach. Only in section IV, I will consider whether retreating to a more modest version enables the human concern view to avoid criticism along these lines.

(1) Intervention for reasons other than rights

Humanitarian intervention is a very special kind of remedy and it would not be surprising if it seemed appropriate for some otherwise important rights and not for others. I noted earlier Raz’s observation that a view like his helps explain why being a human right is likely to mean being an important right. But importance is not a one-dimensional idea. I think that Raz had in mind moral importance. But rights (and rights-violations) may be important in other ways too: for instance, they may be important because of their geo-political significance. Some rights-violations such as ethnic cleansing have the potential to destabilize large regions of the world beyond the borders of the state that is guilty of the violations. Others, like the violation of the right not to be tortured are morally awful, but do not necessarily have a regionally disruptive character. I am convinced that, on account of its distinctively disruptive character, ethnic cleansing is more likely to generate humanitarian intervention than torture is, because decisions about humanitarian intervention are seldom motivated just by attention to the moral importance of the rights that are being violated. They are motivated also (and often overwhelmingly) by potential ill-effects of violations on the interests of intervening states. No doubt this is as it should be: humanitarian intervention is rare anyway and it is never going to be motivated just by abstract altruism. I think a case can be made, not only that intervention won’t happen in the absence of destabilizing effects, but that it probably shouldn’t happen except when such effects threaten accrue. But it seems odd to hold the “human” in “human rights” hostage to geopolitical factors in this way.

We should also bear in mind that there may be grounds for the appropriateness of humanitarian or other outside intervention which are hardly rights-based at all. Generalized and potentially contagious instability in a country may be a reason for intervention; so may failures of good governance such as rabid kleptocracy or a collapse of state institutions. We should not be seduced by the popularity of rights-discourse into thinking that the theory of rights exhausts the normative theory of good governance, including those aspects of the good governance in a country that are properly of great interest to its neighbours. Of course, one might undertake to jam any ground for intervention into a rights-formula, and perhaps that can always be done; but it may not be an illuminating characterization.

Defenders of the Armed Intervention View may be unconcerned that there are also non-right-based grounds for humanitarian intervention. But it makes the theory look rather ad hoc, if it turns out not only that many of the rights we thought were human rights are not human rights on this account, but also that right-based grounds for humanitarian intervention are usually entangled with other grounds. If it turns out that—whatever the rhetoric—the most likely predictor of humanitarian intervention is the destabilizing character of conditions in the target country (whether rights violations

21 See above, text accompanying note 10.
are involved or not), then we may seem to be concocting a conception of human rights that really doesn’t map onto significant features of political reality. And that may sacrifice important advantages—such as fidelity to practice—that the human concern approach claims for itself.

One final point in this regard. As I have noted, it is important to some of the defenders of the human concern approach that they maintain a realistic connection to the realities of human rights practice. But it is equally important, given the shape of the view, that they maintain a realistic connection to the realities of humanitarian intervention. And the fact is that the most fervent defenders of the “Responsibility to Protect,” do not envisage human rights violations as such (under any definition of “human”) as the appropriate trigger for intervention. The famous article 139 of the 2005 World Summit Outcome document refers to intervention “to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.” These phenomena certainly comprise human rights violations; but the violations trigger intervention only when they take place en masse, and the reason for deeming intervention appropriate only when they take place en masse seems to have more to do with the destabilizing impact of massive population-wide abuses rather than the fact that rights as such are at stake.

(2) Contingency and circumstances
Even when rights are in play, judgments about the appropriateness of humanitarian intervention will involve an awful lot of other factors as well. We know that such interventions are in fact very rare in spite of the huge number of what most of us regard as human rights violations in the world. They are rare because their costs are very high, they are often politically unpopular, their chances of success are low, they tend to get out of hand and require the intervening power to take much more responsibility for governance in the target country than it may have intended to, and they often do more harm than good—indeed they sometimes end up just empowering another echelon of rights-violators. Any country contemplating humanitarian intervention has to consider all this. It has to make a global calculation ranging over an enormous number of factors. These factors may vary dramatically in their bearing on particular cases. My question is: Are all these factors to be taken into account in using the appropriateness of intervention as the criterion for designating a given right, R, as a human right? If so, should we expect the designation of R as a human right to vary in the same sort of way?

There are two possibilities. (A) Maybe the designation of a right as a human right reflects an all-things-considered judgment about the appropriateness of humanitarian intervention in a particular case. Or (B) maybe it reflects only a pro tanto view about the appropriateness of intervention based on the character of the right itself.

22 See note 20 above.
Now, version (A) of the Armed Intervention View is going to be a little counterintuitive. As things stand, we identify rights as human rights using general descriptions—like the right to free speech or the right not to be tortured. We don’t usually refer to them as the right to free-speech-in-Kosovo or the right not-to-be-tortured-in-Iraq. But if the designation of a right as human depends on the all-things-considered appropriateness of humanitarian intervention to vindicate that right, then a given right will turn out to be a human right in some settings but not in others, depending on how the array of considerations relevant to the justification of humanitarian intervention plays out in each setting. The right not to be tortured might prove to be a human right in Iraq in 2003, but what we usually identify as the same right might prove not to be a human right in Syria in 2013 because (at the date of writing: May 2013) the practicalities argue against humanitarian intervention against the atrocities of the Assad regime.

As I say, it seems counterintuitive to have the predicate “human” apply to rights in this contingent and situational fashion. And this is not just because we are accustomed to thinking of rights as human (or not) on a more settled basis, but because of the kinds of factors that are likely to enter into the relevant judgement. For example, I have heard it said that the technological possibility of drone warfare makes humanitarian intervention easier, which means it may be appropriate, all things considered, for a wider range of cases. Do we really want to draw from this the inference that certain rights become human rights which were not so in the days before drones? Or, I have heard it said that humanitarian intervention is less appropriate when it is likely to encounter substantial and prolonged opposition than when the offending government whose territory is to be invaded is weak. (This is not just a predictive matter; the justification for military intervention always depends in part on the prospects of success and the likelihood of there being a protracted war as a result.) Do we really want to have to infer from this that rights are more likely to count as human rights when they are asserted against a weak government than when they are asserted against a government capable of offering protracted military resistance to humanitarian intervention.\(^{23}\)

Is there a way for proponents of the Armed Intervention View to avoid committing themselves to apply the term “human” to certain rights on the basis of all-things-considered situational judgments about humanitarian intervention?

(B) Well, maybe the Armed Intervention View can be focused on the right itself as one factor among others that enters into the political calculation about the appropriateness of humanitarian intervention. The idea might be that we designate R as a human right by virtue of the fact that it is appropriate for the prevention or

\(^{23}\) Some defenders of the human concern view seem comfortable with results along these lines. Joseph Raz, for example, acknowledges that “one immediate consequence of the [human concern] conception is that human rights need not be universal or foundational,” although I am not sure he envisages their being quite as contingent as this. See Raz, “Human Rights without Foundations,” 332.
punishment of violations of R to enter positively into calculations about humanitarian intervention. Even if other factors such as cost or danger or the potential loss of blood and treasure outweigh the advantages of stopping or punishing violations of R, still it may make sense to say that R (understood now in a general way) is a constant and serious factor in connection with possible humanitarian intervention and that this is why it is put into this special class of rights (viz., human rights). This would mean that rights do not go into and out of the “human rights” classification on the basis of contingent considerations about political cost, available technology, etc. Raz seems to have this in mind when he says we should understand human rights as “rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.”

On this variant, it will be a further question whether a right has to have a certain minimum weight in relation to the other kinds of factors that are relevant to decisions about humanitarian interventions before it can be counted as a human right. If the answer were “no,” then almost every right would be a human right, since there might theoretically be a case for intervention on its behalf whenever the countervailing costs were zero. Perhaps we should set a threshold that reflects at least the nominal significance of infringing another country’s sovereignty, so that R would count as a human right only if its importance were sufficient to override at least the normal considerations that weigh in favor of sovereignty. It would have to have enough importance to outweigh what we might think of as the standard costs of infringing the sovereignty of a violator-state. I worry, however, that if we go down this road, it may be very hard to disentangle these standing costs from the pragmatic considerations that argue against humanitarian intervention in particular cases. The two are not independent; the relation between them would seem to be at least inductive. This is because the importance of sovereignty is not a wholly abstract matter; it is itself partly pragmatic and itself partly responsive to world conditions, the state of the system of states, the likely costs of interventionist warfare in current circumstances, and so on.

(3) Selling short the individualism of rights
One of the most disturbing features of the Armed Intervention View is the way it sells short the individualism of human rights. I don’t mean individualism as opposed to collectivism; I mean the individualism that insists on the trumping importance of each single individual’s right, irrespective of what is happening to other individuals.

Consider a particular right which almost everyone accepts should be regarded as a human right—the right not to be tortured (Rt). Almost all of us accept that when some individual is tortured a human right is violated. But I don’t think anybody believes that when just one person is tortured, humanitarian intervention by outside

24 Ibid., 328 (my emphasis). Again I hasten to add that Raz’s own view is much more subtle than the Armed Intervention View we are considering; nevertheless his view does seem to be (B)-shaped rather than (A)-shaped.
forces is justified to stop that torture or punish it. There is never any question of humanitarian intervention to vindicate just one person’s right. Does this mean that the general impression that Rt is a human right is a mistake, according to the Armed Intervention View?

No doubt if hundreds or thousands of people were being tortured, there might be some prospect of humanitarian intervention. So, a predicate that applies to rights in virtue of the appropriateness of humanitarian intervention makes most sense as applied to large clusters of individual rights: we might say a cluster of rights violations (comprising hundreds or thousands of instances) counts as a cluster of human rights violations if it tends to justify humanitarian intervention. But the logic will be awkward: we will not be able to infer from the fact that R is a member of a cluster of human rights that are being violated that R itself is a human right, considered as something held by just one individual. Or if we do infer that, we will run the risk of implying something quite misleading, namely that the violation of R in and of itself tends to justify humanitarian intervention, which is seldom if ever the case.

I think this is a very serious difficulty. The great advantage of rights-talk has always been the way it forces us to focus on individual wrongs, wrongs done to individual persons, rather than evaluating societies on the basis of the way they treat their members in aggregate terms. True, the Armed Intervention View does not adopt the worst sort of aggregation—trading off the wrongness of rights-violations against the possible advantages that may accrue to a society therefrom. It is aggregative only in the sense that it sums up a large number of rights-violations as a precondition for designating them as violations of human rights. But the “human” now follows the particular remedy, which is a response to the aggregate, rather than the right which was always understood to be individual.

Those who adopt something like the view I am considering show some awareness that there is a problem here. We don’t find Rawls, for example, saying that rights count as human rights when individual violations of them generate a certain level of international concern. Instead he says of human rights that “[a]ny systematic violation of these rights is a serious matter and troubling to the society of peoples as a whole,” and that the normal principle of non-intervention does not apply to states where “serious violations of human rights are endemic.” Similarly Charles Beitz states what he calls his “practical conception” in these terms: “Whatever else is true of human rights, they are supposed to be matters of international concern in the sense that a society’s failure to respect its people’s rights on a sufficiently large scale may provide a reason for outside agents to do something.” And theorists of humanitarian intervention say something similar: J.L. Holzgrefe defines humanitarian intervention as

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“the threat or use of force across borders by a state ... aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals.”27 Individuals are mentioned here, but only widespread violation of their rights triggers the case for intervention.

One can imagine a number of possible responses from proponents of Armed Intervention View.

(i) Verbally, the position can be stated and the problem finessed with a formula that attributes human-ness to individual rights in virtue of something that is true of the violation of many such rights. It is easy enough to say of any individual right that it has the property φ where $\varphi = \{\text{if enough rights of this kind are violated, then outside interference will be justified}\}$. Then one can say one says that R is a human right just in case R has the property φ. Thus one person’s right not to be tortured counts as a human right just because outside interference is justified when many such rights are violated. It works formally, but the manoeuvre feels tricky and it smells disreputable. Property φ is concocted just to make this theory work.

(ii) Alternatively, the Armed Intervention View may embrace the individualism of human rights, and talk about the violation of one individual right tending pro tanto to justify intervention—even though the pro tanto case won’t ever add up to an actual case for intervention until it is accompanied by hundreds or thousands of other instances. At least that restores the normativity of individual rights. But it is a minimal normativity, and we have lost sight of any sense that individual rights as such have momentous trumping importance. We saw earlier that Raz prided himself on offering an account that illuminated the importance of rights.28 But now that seems to be an illusion, at least as far as the Armed Intervention View is concerned: it illuminates only the importance of large clusters of rights-violations.

(iii) A third possible response is to cram all the individualism into the concept of a right as such. Certainly various normative conclusions do follow from the fact that it is a right that is being violated.29 The idea of a right is that someone has a duty just in virtue of some individual’s (the right-bearer’s) individual interest, and the right-bearer should have an (individual) remedy whenever there has been a failure of this duty (as owed to him or her).30 The idea is that all this is securely in place when we start our analysis of the “human” in “human rights.” So, it might be said, whether a right is human or not does not affect the point that each individual right has normative consequences


28 See above, text accompanying note 10.

29 In a recent article—“Human Rights in the Emerging World Order”—Raz makes it quite clear that his account of the “human” in human rights presupposes his more general account of rights as such.

considered in and of itself. All the idea of a human right adds is that there is, in addition, the prospect of an intervention-remedy for large clusters of violations. I think this response is fine as far as it goes. It envisages human rights having individual-level remedies qua rights (qua legal rights, for example, or qua constitutional rights). But it does leave the strange impression of a gap between the way rights work within a state (individual importance, individual remedies) and the way they work from the outside in human rights practice. And that leads to my final criticism.

(4) The implied discontinuity between human rights and constitutional rights
John Rawls observed in *The Law of Peoples* that a view like his distinguishes sharply between human rights, on the one hand, and “constitutional rights or the rights of liberal democratic citizenship, or ... other kinds of rights that belong to certain kinds of political institutions,” on the other.31 Rights in the second category operate within a society to provide assurances for ordinary individuals, by legally constraining the actions of government and by providing a facility for making legal claims in a country’s courts when those rights are infringed. These functions are quite different from those that are indicated by the use of “human” to designate certain rights (on the human concern approach). In the case of the Armed Intervention View, the difference is stark: it is the difference between an ordinary law suit for (say) judicial review of executive action—which many of us regard as business as usual inside a legal system—and the intrusion of military force into a country from the outside, which always has to be regarded as extraordinary.

I said before that Raz regards it as an important feature of views of this kind that they pay attention to the practice of human rights. He says “[t]he task of a theory of human rights is ... to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights.”32 But human rights practice does not acknowledge a gap of this kind between human rights and constitutional rights. Often there is a continuity between the rights designated as human rights and the rights designated as constitutional rights: in the United Kingdom, for example, rights that are used internally as the basis of judicial review of governmental action are set out in something called “the Human Rights Act.”33 And as Gerald Neuman has argued, human rights documents and national rights documents (whether the latter are labelled “human rights” or not) are often seen as complementary positivizations of basically the same idea. Fundamental rights are positivized as constitutional rights so that ordinary individuals are given certain assurances within their society about fundamental aspects of their freedom and well-being, by virtue of

33 See also the argument of James Griffin, “Human Rights and the Autonomy of International Law,” in Besson and Tasioulas (eds.) *The Philosophy of International Law*, 339, at 344.
the fact that governments are legally and internally required to act in a constrained manner; they are positivized to provide a legal basis for individual claims to respond to violations of these assurances.34 And the point of positivizing basically the same rights in international human rights charters, such as the ICCPR, is to guide and direct the provision of these internal assurances and internal remedies in each country’s constitutional law. It is remarkable that, for all his professed interest in human rights practice, Raz fails to acknowledge that the primary instruction contained in the ICCPR so far as sovereign states are concerned is to direct them “to take the necessary steps, in accordance with [their] constitutional processes ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant” and “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”35

On the Armed Intervention View this continuity and this orientation is lost completely. The positivization of fundamental rights in human rights law is supposed to convey quite a different message—that the outside world will respond in various non-legalistic ways to violations of rights. It is supposed to draw attention to the limits of state sovereignty and warn sovereigns of the prospect of outside intervention. Never mind that there is nothing in the great international charters that can remotely be interpreted in that way. The Armed Intervention View insists on this discontinuity despite the fact that nothing like it exists in practice.36

IV

No one, I said, will own to holding the Armed Intervention View. Even Rawls, who came very close to it in The Law of Peoples, pulled back from regarding the appropriateness of armed intervention as the sole criterion for designating a right as a human right. He spoke of military force “in grave cases,” but he also envisaged a continuum of “justified and forceful” pressure including diplomatic activity and economic sanctions.37

Other versions of the human concern view are more moderate. Joseph Raz says that he is following Rawls when he takes “human rights to be rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible)

35 ICCPR, Art. 2.
36 Maybe Rawls’s misconception of the relation between human rights and constitutional rights (in The Law of Peoples, 38) is understandable, given the common (though mistaken) view in the United States that the two are really quite separate enterprises. See also Jeremy Waldron, Partly Laws Common to all Mankind: Foreign Law in American Courts (Yale University Press, 2012), 120-3. There is less excuse for this misconception among British and European scholars.
reason for taking action against the violator in the international arena.” But “taking action” can include many things short of military intervention. He says that “human rights set some limits to sovereignty, but do not necessarily constitute reasons for all measures, however severe, against violators.” For instance, Razian intervention might include forceful criticism or public denunciation of one government by another. However, the logic of the position is the same as the Armed Intervention View. The criticism or denunciation must be such that it would ordinarily be ruled out by respect for the target state’s sovereignty:

[W]hen states act within their sovereignty they can, even when acting wrongly, rebuff interference, invoking their sovereignty. Crudely speaking, they can say to outsiders: whether or not I (the state) am guilty of wrongful action is none of your business. Sovereignty ... protects states from external interference. Violation of human rights disables this response, which is available to states regarding other misdeeds.

How do these more nuanced versions of the human concern approach fare in addressing the various difficulties that we saw afflicting the Armed Intervention View?

(1) Intervention for reasons other than rights
The first difficulty I mentioned—that external military action is often as much a response to regional instability as to the violation of any particular class of rights—really applies only to the Armed Intervention View. But there may be versions of it that attach to any expressions of official action by the international community. If we pull back to a less extreme version of the human concern approach, involving for example just external criticism, we may not find it easy either to associate the human concern approach with any particular delimited class of basic rights or to identify a form of outside response that reacts distinctively to rights-violations as opposed to other kinds of concern.

Obviously the weaker the form of reaction we are considering, the larger the range of rights that may be the basis of the reactive concern. One can imagine a scrupulous outsider responding critically to everything it hears about the violation of rights—any rights—in a given country. The position we are considering assumes that the sovereignty of the target country insulates it from some such criticisms and entitles it to say to the outside world, “Even if this is a rights-violation, it is none of your business.” But though this may once have been a credible thing for a rights-violator to say—and although some countries, notably China, act as though it is still a credible thing for them to say when rights-violations in that country come to outside attention (I am going to call this the Chinese position)—many people no longer accept this, even in

principle, as an incident of sovereignty. This is certainly true of many people in the human rights community, some of whom are prepared to throw overboard the whole idea of sovereignty and not just this particular aspect of it. Raz, Rawls and others may criticize them for doing this; but the more they do that, the less benefit they can claim from their respect for the actual practice of the human rights community. The trouble is that the versions of the human concern view that we are now exploring seem to need the Chinese position to be available, otherwise they will not be able to associate the criterion of legitimate outside criticism with the specification of a proper subset of rights. But that need arises only out of the exigencies of the theoretical position they have adopted, not out of any sensitive attention to how sovereignty-claims are actually treated in practice.

On the other hand, even if we accept something like the Chinese position about sovereignty and criticism, it may legitimately be displaced by considerations other than the violation of rights. States may regard it as permissible to officially criticize other states for egregious failures of good government or to draw attention to institutional collapse in the target state, even when rights are not at stake or even when the primary basis of such criticism has nothing to do with individual rights. The human concern view is always in danger of conceiving international reaction or expressions of international concern with its own preoccupation with the subject of human rights. But if it is going to live up to its claim of a realistic engagement with practice, it is going to have to come to terms with the fact that rights are not always (and should not always be) uppermost in the mind of governments when they respond to the failings of other governments.

(2) Contingency and circumstances
The second difficulty was about the situational contingency of judgments about humanitarian intervention, and the relationship between rights-violations, as one factor in the judgement about whether to intervene, and all the other factors that go into that judgment. On the more moderate view we are considering, judging the appropriateness of outside criticism may not involve as many other factors or other factors as serious as those involved in judgments about military action. But there will still be other factors involved besides rights, and they will vary from situation to situation. Two countries, X and Y, violate right R and a third country has to consider whether to express official concern. If the third country is a trading partner of country X (but not of country Y) or if it is engaged in delicate negotiations on some other issue with country X, it may be both unlikely (and inappropriate, when the economic or diplomatic stakes are high enough) for it to express the same level of public concern about the same violation in X and Y. Are we to infer that the violated right is a human right in country Y but not in country X? Few will be willing to embrace this conclusion, given the delicacy and contingency of the judgments that are likely to be involved.

So presumably defenders of the human concern will want to adopt (B), the second of the options I set out when I considered this as an objection to the Armed Intervention View: we say that a right is a human right if its being violated is a reason for an outside government or agency to publicly criticize the government that violates it, even though the appropriateness of such criticism may appropriately be off-set by factors other than the sovereignty of the target government. Once again, though, it will be very difficult to specify the threshold that puts a right into this class and very difficult to distinguish the factors that inform the setting of this threshold from other pragmatic, political, economic, and diplomatic considerations that enter into the particular calculation. I said earlier that doctrines of sovereignty are partly based on pragmatic considerations. That may be especially true when we are talking about sovereignty as a barrier to public criticism, as opposed to sovereignty as a barrier to military intervention: to the extent that it is acknowledged at all, sovereignty as a barrier to public criticism is partly a matter of inter-state civility and politesse and that will be difficult to separate from judgments about the particular state of relations between the two countries in question. The problem is exacerbated too by the fact that official criticism of one state by another can cover a range of actions from the withdrawal of ambassadors through various kinds of official demarche all the way down to the raising of some issue in private consultations between the ministers of the respective countries.

(3) Selling short the individualism of rights
The third objection I set out—the objection that humanitarian intervention is usually a response to a large aggregate of rights-violations not to rights-violations one-by-one—may seem to pose slightly less of a difficulty for the more moderate view. Although governments mostly criticize other governments for clusters of rights violations, sometimes the criticism focusses on some individual violation considered on its own. True, these are usually celebrity cases involving people like Aung San Suu Kyi, where the predicament of one well-known figure, often a dissident leader, has caught the attention of the world. The importance of such cases should not be denied. Equally, however, we should not lose sight of the ordinary egalitarianism of rights. Rights are supposed to be attributed to individual men, women, and children, even when they are among the lowest ranks of their society, the humblest, the most ordinary, the least glamorous and well known of their countrymen. Of course outside governments can only respond with official criticism to cases that they know about, and the cases they respond to will always be a skewed sample of the violations that actually take place. The worry is that this seems central to and characteristic of the approach we are considering, whereas a good theory of human rights should surely make it seem marginal and problematic.

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41 See text accompanying note 24 above.
(4) The implied discontinuity between human rights and constitutional rights

We saw that, on the Armed Intervention View, there was a considerable gap between the idea of human rights and the idea of constitutional rights. The account we are now considering offers the prospect of closing that gap. It is easier to envisage a dovetailing of external and internal remedies when the external remedy is official criticism than when it is military intervention. Formal denunciation from the outside often seems appropriate when internal remedies are exhausted. It works in something approaching an appellate mode. This is true of regional decision-making such as decisions of the European Court of Human Rights and global determinations by, for example, the UN Human Rights Committee. And it may even be true, in some fashion, of diplomatic démarches and denunciations. There are formal mechanisms in the ICCPR which enable state parties to complain of each other’s rights violations; and with regard to some regional instruments, like the ECHR, states have competence to commence law-suits in respect of another state’s violations of human rights. Also, it is not just criticism and denunciation. As Beitz has emphasized, outside states and international institutions also offer affirmative assistance to countries that are finding it difficult to satisfy human rights standards or that lack the capacity to satisfy them, as things stand. Outside assistance can be oriented both to the internal establishment of the appropriate standards and to the mechanisms that will enable them to be more effectively upheld.

But then there is a question about whether the closing of the gap between internal and external responses puts paid to the idea that external responsiveness defines human rights in a distinctive way. For it is not at all clear that this version of the human concern approach will enable us to pare down the traditional list of human rights to anything like a Rawlsian minimum. Particularly when we emphasize Beitz’s point about outside concern taking the form of affirmative assistance as well as criticism or denunciation, we find that virtually all the rights on the traditional list of human rights satisfy this criterion, including the socioeconomic rights that the Rawlsian version disdained. Indeed, the process may be too accommodating. On some accounts, outside criticism of the informal sort may be an appropriate response to the violation of any right within a community, even ordinary legal rights like rights of property. Outside criticism of countries for failing to adhere to the Rule of Law is commonplace. We may criticize a government for failing to observe the rule of law which may include failures to uphold the rights defined by its own constitution or statutes. Does this make those rights human rights? Surely not.

42 ICCPR Articles 41-4; but not widely used. See also Jeremy Waldron, Partly Laws Common to All Mankind: Foreign Law in American Courts (Yale University Press, 2012), 129-30.
43 E.g., Republic of Ireland v. United Kingdom, ECtHR, Series A, No. 25, 18 January 1978.
45 Rawls, The Law of Peoples, 80n. See text accompanying notes 13 and 14 above.
That point aside, a more general problem with the present approach is that it may not after all offer a genuine alternative to the traditional way of defining human rights. Often when governments are criticized for violating rights, the criticisms come because the rights in question are understood to be human rights; they are not human rights because the criticism is thought appropriate. Agencies like the UN Human Rights Committee bring to their consideration of the behavior of sovereign states a list of rights already regarded as human, with which they then examine the record of each government. And the same seems to be true of individual countries’ criticisms of one another. On the web-site of the U.S. Department of State, for example, we are told that annual Country Reports on Human Rights Practices—the Human Rights Reports—cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights and other international agreements. The U.S. Department of State submits reports on all countries receiving assistance and all United Nations member states to the U.S. Congress in accordance with the Foreign Assistance Act of 1961 and the Trade Act of 1974.46

So an account of the sort we are considering is in some difficulty, at least if it is supposed to be a reflection of practice. It does not follow that the traditional human bearer account is correct (as an account of the way “human” is used in human rights practice). But it would not be surprising if it were. For the international agencies, and the State Department and its equivalents in other countries, do use a common set of criteria to judge and comment from the outside on individual governments’ records with regard to individual rights. They talk and act as if one size fits all—as if the rights-based evaluation of human arrangements, anywhere and in any contemporary circumstances, were a matter of applying a list of rights that any human is understood to have.

V

I believe that the points developed in sections III and IV should lead us to reject the proposal to define a right as a human right simply in virtue of the type of external response that is appropriate when it is violated. Proposals of this kind face too many difficulties: they associate the “human” in human rights with conditions—like local destabilization and diplomatic and military effectiveness—that don’t really relate to the delineation of an important subset of rights; and they unhelpfully sideline a number of conditions that are quite properly thought crucial to the modern human rights idea—such as the individualism of rights and the continuity between human rights and the rights recognized and remedies provided under the auspices of national law.

The criticisms I have made are not knock-down refutations of the position I have been considering. As already noted, there is no question of one side being right and the other wrong in virtue of the logic of the phrase “human rights.” Joseph Raz is right: analytically, the whole field is a bit of a mess. The question is not: What does the “human” in “human rights” really mean? The question is: what is the more convenient and illuminating use to make of the term in this context? Some of the ideas picked out by the human concern view are surely important, and it may well be that we should seek eclectically some sort of combination of approaches, with a set of rights being identified as human rights both (a) in terms of their being rooted in distinctively human interests, on the one hand, and (b) in terms of their violation being an appropriate subject of global human concern. The best features of the human concern view can be incorporated helpfully into such an eclectic account, without the distraction, the omissions, or the selling short of various accepted features of human rights discourse that a criterion based exclusively on the appropriateness of intervention would seem to involve.

Finally, none of these arguments I have put forward against interventionist versions of the human concern view make the difficulties with the human bearer view that we began with go away. (i) We still have to grapple with the problematic universality of a human bearer view (even if it is used, as I have just suggested, in an eclectic position). We still have to address the issue about attributing rights to Cro-Magnon man. (ii) We still have to consider the problem of universality in relation to different ways of being human and of leading a human life even in the modern world. (iii) And we still have to figure what to say about the issues of profound disability that seem to make some members of the human family unlikely bearers of the rights we usually regard as human rights. These problems continue to affect the human bearer approach, whatever we say about intervention and human concern.

My view is that these three issues just need to be grappled with. There is not going to be any easy disposal of them; but it is incumbent on those of us who remain committed to the human bearer approach to do the hard work that grappling with them will involve and to dispel the impression that is sometimes conveyed by our opponents that it is well known upfront that all such work is hopeless. Some progress is being made already; much remains to be done. What I don’t find helpful, however, is the implicit suggestion in the versions of the human bearer approach that I have been considering, that grappling with these problems is neither necessary nor worthwhile in thinking about why we call certain rights human rights.

47 Raz, “Human Rights without Foundations,” 336-7: “There is not enough discipline underpinning the use of the term ‘human rights’ to make it a useful analytical tool.”

48 As far as I can tell, Raz’s essay “Human Rights in the Emerging World Order” offers an account of this type; I think it represents a sort of retreat from his position in “Human Rights without Foundations.”