AN ALTERNATIVE AUTHORIZATION INSTITUTION FOR LEGITIMATE
HUMANITARIAN INTERVENTION

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<u>Abstract</u>

At present, the United Nations Security Council has exclusive power over the authorization of humanitarian intervention. Any intervention, regardless of intentions or success, which proceeds without explicit authorization from the Security Council is both illegal and of questionable legitimacy. However, there are strong reasons to believe that the Security Council is a sub-optimal decision making body and therefor ill-suited for this task. The purpose of this thesis is to explore these reasons and propose that Standardized Regional Organizations are an ideal alternative to the Security Council.

This thesis proceeds in three chapters. The first chapter discusses the intricacies of humanitarian intervention and the inherent conflict between state sovereignty and international human rights protection. This chapter explores the core issues which an authorizing institution would have to weigh in any humanitarian crisis. The second chapter outlines the exact role which an authorizing institution plays in the norm of humanitarian intervention and the specific qualities which an ideal institution requires. The third and final chapter utilizes conclusions drawn in the first two to critically examine potential alternatives to the Security Council. After demonstrating that all the alternatives available in the literature are problematic, and Standardized Regional Institutions are proposed and defended.

The Standardized Regional Organization proposal calls for Regional Organizations to adopt a new, standardized institutional model which will massively improve their ability to properly deal with humanitarian crises. By building transparency safeguards and accountability mechanisms into Regional Organizations' decision making

procedures they become highly reliable bodies for the authorization of humanitarian

intervention. This approach captures the standing practical benefits inherent to Regional

Organizations and adds philosophical rigour to their decision making procedures.

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Introduction

Imagine a humanitarian crisis occurs in a province of the fictional state of Ithras. Suppose the province's government turns its militia against the populace and begins a large scale campaign of ethnic cleansing. The federal government makes a number of peaceful attempts to bring an end to the slaughter but none are successful. As the days drag on thousands more die and it appears that the federal government's only option is to take military action to stop the slaughter. Even though they will face tough resistance it seems that the federal government is justified in taking military action to halt the ongoing atrocity occurring within its territory. Even though such actions would risk civil war, the state can legitimately use armed force in an effort to protect its citizens. Now suppose the same crisis occurred in the neighbouring state Panarka instead. If the federal government of Ithras were to cross an international border with the same humanitarian goals without proper authorization it would be committing an act of war. [1] Even if the morally relevant features of the crisis and the military response are identical, the introduction of a border protecting a sovereign state changes the terms of the debate. The Ithrassian government would be violating the most fundamental principle of international law; that of a sovereign state's right to self-determination within its own borders. Yet there is a pervasive belief that this right to self-determination should not license the whole-sale slaughter of a state's constituents. It is out of this tension between a sovereign state's

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[1] This is a modified version of the example offered by Fernando Teson in "The Liberal Case for Humanitarian Intervention," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press: 2003), 102

right to non-interference and the international community's perceived obligation to

protect human rights that the norm of humanitarian intervention is crafted.

For the duration of this paper the term humanitarian intervention shall exclusively

refer to:

> the use of force across state borders by a state (or group of states) aimed at
> preventing or ending widespread and grave violations of fundamental human
> rights of individuals other than its own citizens, without the permission of the
> state within whose territory force is applied.[2]

Compared to other definitions used in the literature, the one I am using here is very

narrow. Humanitarian intervention frequently refers to a variety of actions short of the

actual use of force, such as economic or diplomatic sanctions. While these forms of

intervention are certainly fascinating and controversial, they are beyond the scope of my

discussion here. I am focused on one particular aspect of humanitarian intervention,

namely the tension it creates between a sovereign state's right to non-interference, and

the strong moral reasons the international community has to assist foreigners beset by

some grave crisis.[3] While these tensions are certainly at play when sanctions are pressed

against a state, they pose a far more serious issue when military force is used. Since the

purpose of this thesis is determine which authorizing body is best suited to adjudicate the

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[2] The original definition offered by J.L. Holzgrefe includes 'the threat of force.' Since my discussion is focused on actual launched interventions I felt it necessary for simplicity's sake to cut the mere threat of violence from my discussion. The original definition can be found in J.L. Holzgrefe "The Humanitarian Intervention Debate" in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, J.L. Holzgrefe and Robert O. Keohane eds. (Cambridge University Press: 2003), 18

[3] I do not wish to wade into murky moral waters to discuss if states actually have a duty or obligation to save others. I am concerned with the actual workings of the authorizing body which would lend legitimacy to an intervention, whether or not the intervening states feel a strong moral obligation to act is irrelevant. For this reason I will be hedging any moral commentary and simply asserting that states have strong moral reasons to act but will remain agnostic as to whether these reasons create a duty or obligation.

conflict between the duty of non-interference and the desire to save others, focusing on the most serious form of intervention best suits my discussion.

I will not be focusing on the nature of the humanitarian intervention itself, but rather the criteria which govern its legitimate practice. The criteria for a legitimate humanitarian intervention can be split into three distinct questions, each of which will be discussed in the subsequent chapters. The first question is 'What are the reasons which are relevant to a legitimate intervention?' This question deals with the limitations of sovereignty, the importance of human rights and the moral questions surrounding a legitimate humanitarian intervention.

The second question asks 'Is an authority necessary for legitimate humanitarian intervention?' Once we have the reasons which dictate the circumstances for a legitimate intervention, we still need to know when they apply. It is not immediately clear whether this job is best left to states themselves or tasked to some sort of authority. We need to identify the qualities required for accurately weighing the reasons both for and against a humanitarian intervention in any given case and determining the correct course of action.

The third question is 'What is the best authority to weigh and act on these reasons?' At present the United Nations Security Council has exclusive authority over legitimate humanitarian intervention, but it may well be that it is not the best suited institution for the job. To answer this question we will have to compare a number of possible institutions against the list of ideal qualities which are required for a decision maker.

The three chapters in this thesis deal with each of these questions in turn. The first chapter addresses the initial circumstances regarding a legitimate intervention. The second chapter outlines why an authority is required for legitimate intervention and what qualities it would utilize. The third chapter applies that criteria to a number of different alternatives and ultimately suggests a novel institutional body which would be best suited for authorizing humanitarian intervention.

Chapter 1
State Sovereignty and Human Rights

This chapter deals with two conflicting concepts at the core of the humanitarian intervention norm: state sovereignty and human rights. Sovereignty plays a vital role in international relations; it grants certain rights and protections to legitimate states and thereby creates an even playing field where every state is legally equal to every other. Each state has the ability to conduct its affairs in a manner that it sees fit without fear of outside interference. However, while sovereignty provides strong protections for the interests of states, human rights are designed to provide strong protections for the interests of individual persons. Human rights are meant to establish a baseline for minimum respect and treatment for all people as well as to provide a universal language for discussing mistreatment on a massive scale. If states are going to take human rights seriously then there needs to be a willingness to protect individuals from those who threaten their basic rights. Unfortunately, when a humanitarian crisis occurs and the local government finds itself unwilling or unable to halt the crisis, or worse when the government itself is the perpetrator of the atrocity, then the responsibility to protect the affected individuals falls on the international community. Thus the enforcement and protection of human rights will occasionally necessitate the direct violation of a state's sovereign rights.

The purpose of this chapter is to explicate the inherent tension between sovereignty and meaningful protection of human rights. I will begin by discussing the significance of sovereignty and how our understanding of the concept has changed

throughout history. I will then discuss threshold conditions for humanitarian intervention as a demonstration of the justification of the practice. Once we have a strong grasp of the common justifications of sovereignty as well as the justifications for humanitarian intervention, we should be able to more clearly navigate the points where they come in to conflict. Understanding this conflict is the first step in identifying a proper authorizing body for humanitarian intervention. The primary task an authorizing body is faced with is determining when mass violations of human rights are so serious that they trump sovereign concerns. For this reason, the norm of sovereignty is the most reasonable starting place for the search for a proper authorizing body.

1.1 Sovereignty

The western concept of nation state sovereignty rose to prominence with the Peace of Westphalia; a series of peace treaties signed in 1648 to end the thirty years war. Each signing member: the Holy Roman Empire, Spain, France, Sweden and the Dutch Republic agreed to respect each other's territorial integrity and right to non-interference. The concept of Westphalian sovereignty is still at the core of the modern international legal system. Although the basic idea is still the same, the concept has grown and changed over time and has become increasingly complex. Recently Allen Buchanan has argued that sovereignty is best thought of as a bundle of five basic rights:

1. The right to territorial integrity;
2. The right to non-interference in the internal affairs, i.e., internal self-determination (subject to certain restrictions);
3. The power to make treaties, alliances, and trade agreements, thereby altering its juridical relations to other entities;
4. The right to make war;

5. The right to promulgate, adjudicate, and enforce legal rules within its territory (subject to certain restrictions).[4]

Together these sovereign rights offer states a powerful claim to a certain standing in the international community.

Not all states qualify for sovereign status. Generally sovereign status is granted to those states that achieve some degree of legitimacy. So long as a state is legitimate, it will be privileged to the full bundle of sovereign rights. Those states that are deemed illegitimate have no such rights and are, to the extent which international law allows, at the mercy of other states. Since we are concerned with sovereign states, and modern conceptions of sovereignty hinge on legitimacy, we must question how states are determined legitimate. There are innumerable answers to this question, and with each explanation of legitimacy, a unique account of sovereignty follows. I will only outline a few accounts in an attempt to demonstrate the spectrum of the debate and how it has evolved.

Before we delve into the issues surrounding state legitimacy, we should take a moment to distinguish between a number of different types of legitimacy. The first distinction we should make clear is the difference between state legitimacy with governmental legitimacy. When I refer to a state's legitimacy I am referring to the qualities of the enduring institutional structure which comprises the roles filled by members of the government. The relationship between the legitimacy of a state and its government is extremely complex. The fact that a government is illegitimate does not

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[4] Allen Buchanan Book, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2003), 263

necessarily mean the state loses its sovereign status. For example, suppose it became

apparent that the current French president came to power through extensive election

rigging. It would be clear that the current French government is illegitimate but this does

not mean that the nation of France should lose its sovereign status. The fact that the

president cheated his way in to office certainly invalidates his claim to leadership but it

does not invalidate France's sovereign claim. France could lose its sovereign status if it

were to splinter in to a number of smaller states or through some tremendous calamity

happened to fail as a state. While these cases are fairly clear cut, legitimacy concerns can

be extremely complex. If the French government were to take part in massive human

rights violations within their border, then their actions would likely be sufficient to

impact France's sovereign claim to certain rights of non-interference (as well as the

government's legitimacy). This is not to say that the France would lose its sovereign

status, only that the actions of its government are so horrifying that humanitarian

concerns supersede France's sovereign rights. Since we are primarily concerned with this

type of situation, for the duration of this paper, legitimacy will refer to state legitimacy

rather than governmental.

State legitimacy contains two discrete conceptions of legitimacy; internal and

recognitional. Internal legitimacy primarily deals with whether or not a state is justified in

exercising political power over its constituents.[5] If a state is internally legitimate then it is

justified in creating and enforcing laws within its territory. Recognitional legitimacy on

the other hand concerns whether or not states are viewed as privy to the rights and

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[5] Buchanan, 233

privileges afforded to legitimate states. Just as with governmental and state legitimacy,

the internal legitimacy of a state can have an effect on its recognitional legitimacy. The

fact that a state is internally legitimate will lend support to any argument that it should be

recognized as a legitimate by the international community. However internal legitimacy

is not a necessary condition for recognitional legitimacy; a state could be internally

illegitimate but internationally recognised and vice versa.[6] Part of the reason for this

disconnect is that standards for legitimacy can be broadly lumped in to two categories:

those standards which serve as the philosophical justification of legitimacy and those

standards which international law recognises as binding. The former tend to deal with

more nuanced issues of justice and the role of the state while the latter is primarily

concerned with the letter of international law. While I will touch base briefly on the more

positivist standards of international law, this chapter primarily focuses on the

philosophical justification for a state's recognitional legitimacy which generally hinges

on a state being internally legitimate.

In the following section I will discuss a number of theories which place varying

limitations on sovereignty. These justifications all follow a very clear pattern, as we

move through time to more recent accounts of sovereignty, intervention becomes

increasingly accepted. To track these changes we will first look at J.S. Mill who presents

a strong anti-interventionist account by asserting that peoples deserve the government

they create. Then we will move on to Walzer whose account of sovereignty and

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[6] For example, imagine a case where a province is attempting to succeed from a larger state. Although the province's internal legitimacy would be relevant, its recognition as a legitimate state will likely depend on the reputation and international standing of the state it is attempting to succeed from.

corresponding legalist paradigm sets a state-centric standard for international aggression. Then we shall look at more modern accounts offered by Buchanan and Wellman. These accounts are highly nuanced theories of sovereignty where a state's claim to legitimacy is dependent on its respecting human rights.

<div align="center">**1.2 Justifications of Sovereignty**</div>

In international legal circles the most commonly cited criteria for state legitimacy comes from the Montevideo convention of 1933. Although they were written with only the Americas in mind, these qualifications have become common use in questions of state legitimacy.[7] This more positivist account of sovereignty holds that in order to be recognised as a sovereign state must have a permanent population, a defined territory, a government, and the capacity to enter into relationships with other states.[8] Any territory which achieves these four criteria is to be considered a sovereign state and given equal standing within the international community. Allen Buchanan notes that while these traditional qualifications are still commonly referred to in international law, a fifth qualification is occasionally used which holds that a nation must not have broken a basic rule of international law in the course of its formation.[9] Although this fifth qualification is occasionally referenced it is unclear what, if any, affect it has on the practical determination of legitimate states as modern international legal opinion still tends hold that entities which only satisfy the traditional four criteria qualify. The Montevideo convention does not hold states to any moral standards, nor does it question the

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[7]Buchanan, 264
[8] Convention on the Rights and Duties of States (inter-American); December 26, 1933,Article 1
[9] Buchanan, 264

relationship between a state and its peoples, it simply serves as a tool to determine which states the law identifies as legitimate, and which it does not. While the Montevideo convention is certainly a helpful tool in international legal circles, it is far too superficial for our purposes here. We are more interested in legitimacy as a philosophical concept rather than a legal one.

1.2.1 Non-Interventionism

In his essay *A Few Words on Non-Intervention* John Stuart Mill reasoned that statehood can only be properly achieved by the natives of a given state.[10] Whether it is by waging a war of unification or toppling a despotic leader Mill views a population's battle for sovereignty as 'the only test possessing any real value, of a people's having become fit for popular institutions.'[11] Thus the test of a state's legitimacy rests on its peoples properly constructing institutions which serve to represent their interests on a collective level. Mill argued that since statehood is a direct result of the exertion of self-determination of a nation's people only those people can properly regulate the political institutions of the state. He believed that a foreign state intervening in the domestic affairs of another, no matter how dire the situation will lead to negative consequences for the afflicted state.[12] If those who are being oppressed do not have a 'sufficient love of liberty to be able to wrest it from merely domestic oppressors' then when it is forced on

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[10] John Stuart Mill, *A Few Words on Non-Intervention*, 1859, 9
[11] Mill, 9
[12] Mill did allow for one major exception to this rule and those were cases in which another state has already become involved. He argues that in cases where the native population finds themselves 'struggling against the foreign yoke, or against a native tyranny upheld by foreign arms' then foreign nations may intervene on the native population's behalf. In these cases an intervening state is not disturbing the balance of forces in the area but rather rectifying an imbalance.

them by a foreign intervener, their liberty will be fleeting. [13] Mill argued that the appreciation and operation of sovereignty needs to be learned and internalized and since these sorts of lessons can only be self-taught, no foreigner has the right to interfere.

By deriving the moral norm of non-interference on a state level from the moral norms of non-interference and self-determination on an individual level, Mill crafts a very strong conception of sovereignty where intervention, of almost any sort, is viewed as overt paternalism and unfit for a legitimate state (or a state in the throes of independence). For Mill, the actions of the government of a sovereign state, be they just or unjust, are exclusively the concern of the natives of that state because it is their responsibility to will the government they wish to lead them. A government is a direct representation of what the people put in to it, if their will or desire is lacking the government will suffer correspondingly. While the idea that a people is to some extent deserving of their government has lost traction in recent years, a kernel of this idea lingers in one of the most famous non-interventionist account of sovereignty found in the literature, namely Michael Walzer's account of sovereignty and the legalist paradigm.

1.2.2 The Legalist Paradigm

Walzer, like Mill, views a state's right to sovereignty as an extension of the rights of self-determination which belong to the citizens of a sovereign nation.[14] A state is formed through the experiences and cooperation of the people who share a common life within its borders. The creation of the state is the result of a community of people

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[13] Mill, 9

[14] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4th ed. (New York: Basic Books), 53

exercising their individual rights to live as they see fit. Walzer argues that this creates a

sort of contract between the state and the individuals who created it.[15] Although the

legitimacy of a state ultimately depends on the consent of the people, the relationship is

not as simple as a straight contract between the living members of the state and its

government, but rather refers to the ongoing common life which the state protects. The

moral standing of a state and its claim to sovereign rights depend on its ability and

willingness to defend this common life, as well as the willingness of the people to let it.

The existence of states and their accompanying sovereign rights take on dual importance.

They exist not only to physically protect the common lives which they represent but also

to affirm the dignity and importance for each of those particular common lives.

Sovereignty allows each state equal rights to defence and self-determination. Thus

sovereignty becomes a natural first step in a theory for international relations. However,

the exact nature of international relations will be governed by how states perceive each

other and under what circumstance they treat each other as sovereign.

Walzer asserts that states are obligated to make certain presumptions about the

standing of foreign sovereign states. The first presumption is that there is a certain fit

between a foreign state and its people. Thus a foreign government is not a gang of thugs

acting in its own interest, but rather a legitimate state apparatus formed and acting in

accordance with a long cultural history. [16] States have no way of fully understanding the

history, cultural differences and political landscape which lead to formation of a foreign

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[15] Walzer, *Just and Unjust Wars*, 54
[16] Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs* 9, no3 (Spring 1980), 212

state. As a result they should always rely on the assumption that a government fits its

people unless a lack of fit is radically apparent. This entails a second presumption which

holds that if a state were attacked, its citizens would feel bound to protect it. This is not

to say that they are actually bound, or would actually fight for it but rather that the

majority of citizens would at least feel as though they should. This is meant to provide

further hesitation to any potential intervener who would view themselves as a saviour.

This allows Walzer to offer a unique concept of internal state legitimacy and

recognitional legitimacy. A state is internally legitimate only if the government properly

fits the populace. Without that fit, a population would be justified in rebelling or

otherwise transforming the government. However, the internal legitimacy of a state is

distinct from its recognitional legitimacy. The threshold for recognitional legitimacy is

not the actual fit but the internationally perceived fit, and governments should assume a

strong fit in all but the most extreme cases. States should assume an acceptable fit

between a government and its people regardless of any illiberal practices short of

genocide, deportation or massive human rights violations. Walzer allows that these sorts

of extreme cases are the only time when foreign nations could confidently identify a lack

of fit between a government and its people, any injustice short of these levels should be

viewed as a cultural difference and supported by the populace. Walzer uses these two

presumptions as building blocks for the legalist paradigm, which is the baseline for a

theory of aggression on an international scale.

The legalist paradigm outlines a starting position for peaceful international affairs

and offers guidelines for the kinds of acts of aggression which can be counted as just

deviations from the peaceful norm. It serves as the positivist arm of Walzer's account of sovereignty. His concept of fit explains how a state's claim to sovereignty and then the legalist paradigm dictates how the international legal system should interpret this claim. The paradigm has six primary propositions and four revisions. The first proposition of the legalist paradigm is that there exists an international society of independent states. Sovereign nations function on an international legal level much like individuals do on a domestic legal level. Just as there is a prima facie duty on individuals to refrain from forcibly interfering with other rational agents, there is a prima facie duty among states to avoid interfering with one another's affairs; hence the principle of non-intervention. In this way, the United Nations Declaration of Human Rights should be recognized but cannot be enforced without threatening the very fabric of the society itself, which values the existence of separate political entities.

The second proposition holds that the international society establishes the rights of its members with a particular focus on political sovereignty and its entailed right to territorial integrity.[17] This proposition is grounded on the rights of individual agents to build a common life together and fashion a secure state of their own choosing. The third proposition asserts that the use or threat of imminent force by one state against the sovereignty or territorial integrity of another is a criminal act.[18] The purpose here is to explicitly prohibit military aggression without harming states' right to forcibly defend themselves. The fourth proposition asserts that aggression justifies two types of violent response; war of self-defense by the victim and/or a war of law enforcement by the

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[17] Walzer, *Just and Unjust Wars,* 61
[18] Walzer, *Just and Unjust Wars,* 62

victim or any other international agent. This proposition only refers to state on state violence, and does not allow for another country to force a government to refrain from harming their citizens. The fifth proposition asserts that nothing but aggression can justify war, which prohibits humanitarian intervention outright. The sixth and final proposition is that once a state is repelled, it can be punished. Punishment must be designed to limit a state's ability and willingness to make war in the future.

Walzer's position appears to be considerably non-interventionist, however he proposes four revisions to the legalist paradigm, which have a dramatic effect on his position. I will focus specifically on the fourth revision, which concerns humanitarian intervention.[19] This revision holds that a breach of a state's sovereign border can be justified if it is committed in order to rescue peoples threatened by massacre, slavery or mass expulsion.[20] Walzer views these incidents as cases where a lack of fit is radically apparent and the international community may abandon its first presumption.[21] Unlike Mill, Walzer does not hold that people who are being outright butchered by their oppressors need to pass a test of self-help before they can receive international assistance. Rather, he argues that the '[governments which] initiate massacres lose their normal right to participate in the process of domestic self-determination.'[22] Even though Walzer is hardly a proponent of humanitarian intervention he recognizes that Mill's position is no longer (if it ever was) tenable. He is careful to note that there is no strong duty to

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[19] The other three revisions concern acting on a perceived threat, assisting secessionist movements and balancing prior interventions committed by other powers. Although balancing prior interventions is directly related to the topic of this thesis, it is beyond its scope. My purposes here are to discuss the conditions of a legitimate intervention, which hopefully would eliminate the need for any reparative attempts.

[20] Walzer, *The Moral Standing of States,* 218

[21] Walzer, *The Moral Standing of States,* 214

[22] Walzer, *Just and Unjust Wars,* 106

intervene on the part of other nations, but only that, should a nation choose to intervene they could do so without clearly violating the legalist paradigm. While this system certainly does provide a strong foundation for international peace, it is not without certain drawbacks.

A common thread among non-interventionist accounts of sovereignty is that they attribute certain moral qualities to the state. These accounts tend to imagine states as existing as people in the international arena. They are free, autonomous moral agents and to interfere with them against their will would be patently immoral. Fernando Teson has famously claimed that to personify states by attributing strong moral attributes to them is to perpetuate 'The Hegelian Myth.'[23]

Teson identifies two variants of the Hegelian Myth-- one strong and one weak.[24] The strong variant holds that states are exactly analogous to free persons and no other state has the right to interfere with its affairs, except in cases morally permitted under just war theory.[25] Even in cases where a government is committing genocide against its own people, the state would retain its strong moral character and other states would have no right to interfere. In recent years this strong variant of the Hegelian Myth has all but disappeared from the literature in favour of more human rights focused accounts.[26] However, the weaker version of the Hegelian Myth is still apparent in a number of

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[23] Teson chose to name the strong attribution of moral status to state after Hagel's famous claim that the state should be considered as a rational entity which has a supreme right to freedom. Teson, 59
[24] Teson, 55
[25] Such as defensive wars, Teson, 58
[26] This is one of two reasons why I will not be directly discussing accounts of sovereignty which hold the strong Hegelian position. The second reason is redundancy. Any criticism which is leveled against the weaker account will target the stronger as well, so there is little reason to discuss and critique them both in turn. Thus each account of sovereignty addressed in this chapter will allow for intervention in at least some cases.

famous sovereignty discussions, such as Walzer. The weaker version holds that while states have moral value which affords them rights of autonomy and non-interference, there are still distinct limitations to this autonomy specifically gross human rights violations.[27]

Teson argues that the main problem with viewing states as free and autonomous moral agents is that the analogy between states and individuals immediately breaks down.[28] We can understand what a free and autonomous person is, but it is unclear how these words are being used when they are applied to a state. While we can certainly understand what a 'free person' is, Teson argues that we would have considerably more trouble understanding what constitutes a 'free government.' The use of free leaves us unclear who exactly bears this right; the government or the people of the state. Furthermore, if it is the government who holds this right we are left questioning how governments should claim this right. Teson argues that it cannot be from the individual right to autonomy possessed by each citizen. For such a move, as both Walzer and Mill make, would not lead to a non-interventionist conclusion as a humanitarian intervention would not violate the autonomy of every citizen.[29] If a population is oppressed by its government, claiming that the government holds a right to non-interference because of the autonomy of those they oppress seems absurd.

The basic problem with any account of sovereignty which supports the Hegelian myth is that states are not comparable to persons. Although they are constructed of

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[27] Teson, 56
[28] Teson, 76
[29] Teson, 75

individual people, one cannot use those individual people's human rights to imbue the

state with a certain moral value.[30] When one attempts to apply terms such as 'autonomy'

and 'freedom' to state practices, the terms are being stripped of their meaning, which was

originally intended for human beings and simply carrying on emotional connotations to a

state level. More recent accounts of sovereignty have begun to stray away from the

pitfalls of the Hegelian Myth and as the focus of sovereignty has shifted from the strong

rights of the state, the justification of sovereignty has shifted as well.

Walzer's account of state legitimacy takes the form of a transactional approach to

sovereignty. Transactional accounts hold that states derives their legitimacy and claim to

sovereignty by winning the consent of all (or some meaningful majority) those within

their territorial jurisdiction. However, Walzer's account is a rather sophisticated form of

transactional account. While a state's internal legitimacy rests on the consent of the

population Walzer clearly states that this consent is 'not constituted through a series of

transfers from individual men and women to the sovereign.'[31] Rather the complex

relationship which was described in previous paragraphs constitutes the transaction; the

shared life of the populace constitutes consent towards a state which protects that shared

life. This internal legitimacy directly translates into recognitional legitimacy, as Walzer

insists that foreign states presuppose a certain level of fit (internal legitimacy) and on that

basis grant a state recognitional legitimacy.

While transactional accounts of sovereignty were once the dominant viewpoint,

they have fallen out of vogue. Transactional theories suffer from certain key problems;

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[30] Teson, 76
[31] Walzer, 54

foremost among them is the problem of consent. If the legitimacy of the state depends on the consent of the populace, then it seems that the state's claim to legitimacy would be weakened by every member who fails to consent. The scope of this problem is evidenced by the fact that no state existing in the past or present enjoys the consent of all or even most of its citizens. It is likely the case that few enjoy the consent of even a majority of their citizens. States are structured to reflect this fact; governments and politics in particular are focused on ways of getting along when consent is lacking.[32]

In response to the charge that transactional accounts depend on a utopian level of consent, theorists often fall back on tacit consent. Locke famously argued that by merely continuing to reside within a particular nation state a person consents to that state's government, for if they did not consent they could simply leave. However Hume noted that for many people the cost of exit is so prohibitively high that residency cannot be counted as a vote in favour of the status quo.[33] Walzer's description of the complex relationship between a people and their state represents a more nuanced account of tacit consent in that he believes that the sovereign state is consented to only in so far as it protects the individual and shared lives of the people within its borders. This shared life allows for the formation of government to protect its interests, and this in turn allows Walzer to rest the recognitional legitimacy of a state on its internal legitimacy so far as the structure and functioning of a state is assumed to fit its populace. Although Walzer's tacit consent is far more complex than other accounts, it does not escape Hume's criticism. There is no reason to believe that a person's residence in a state is indicative of

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[32] Buchanan, 244
[33] Buchanan, 244

their consent to that state's current form. Without tacit consent, Walzer cannot rely on the assumption of fit, which is a key for the standards of recognitional legitimacy which he argues for throughout the legalist paradigm.

1.2.3 Functionalism

In recent scholarship most accounts of sovereignty follow the functionalist model of justification. The functionalist approach holds that instead of the consent of its populace, a state's legitimacy rests on its ability to perform certain functions which are primarily moral in nature.[34] Unlike transactional accounts, which rely on the population consenting to the state, functionalist accounts hold states to a moral standard. If a state falls below that standard then its claim to sovereignty can be weakened regardless of the consent of the population.

Allen Buchanan offers a functionalist account which holds that a state is legitimate if it can meet three requirements. The first is the minimal internal justice requirement, the second is the nonusurpation requirement and the third is the minimal external justice requirement.[35] The first requirement holds that the state must do a credible job of protecting basic human rights within its borders and it must provide this function through processes and policies that themselves respect human rights.[36] The second requirement specifically refers to the formation of the state, it rules out states that come into existence 'through violent or otherwise unlawful overthrow of a

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[34] Wellman, Christopher Heath "Debate: Taking Human Rights Seriously" *The Journal of Philosophy* Vol 30, no 1, pg 210
[35] Buchanan, 266
[36] Buchanan, 247

recognitionally legitimate state.'[37] The third requirement is identical to the first except it applies to the state's actions outside its own borders. If a state achieves these three requirements then it should be considered internally legitimate and as such should be recognised as legitimate and granted sovereign status by the international community.

1.2.4 Bundled Sovereignty

Functionalist accounts come in many forms; recently accounts such as Buchanan's recently came under fire from Christopher Wellman. Wellman's objection relies on the functionalist's claim that by achieving minimal standards of justice a state should be privy to full sovereign rights. If we really take human rights seriously, so seriously that their violation trumps sovereign concerns, then just one serious human rights violation should be sufficient to threaten a legitimate state's claim to sovereignty.[38] Wellman argues functionalism cannot properly handle human rights if we truly take them seriously. To demonstrate this point asks us to imagine a scenario where a single person is being tortured in Norway. This person can only be helped by the Swedish government and the Norwegians refuse Swedish aid. Suppose that the Swedes have a plan to save this person that would lead to no collateral damage, harm or international incident. It seems that the Swedes should be morally praised if they choose to act regardless of Norway's refusal to consent.[39] For if they fail to act then it seems that we are inching back towards the Hegelian myth, that sovereignty has a certain moral weight which is greater than the rights of a single person. However, if we accept Wellman's assertion and hold human

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[37] Buchanan, 275
[38] Wellman, 112
[39] Wellman, 122

rights to be so important that a single violation can threaten a state's legitimacy then a nation's claim to sovereignty is tremendously weakened. States would have no principled objection to neighbouring states intervening to rectify any and all human rights violations so long as those intervening states believed their actions could do more good than harm.[40] It seems functionalism is caught between drifting into the Hegelian Myth and reducing sovereignty down to little more than a title.

Wellman dismisses three potential solutions to this problem. The first is to insist that perfection, not minimal justice is necessary for legitimacy, the second is to deny that legitimacy entitles states to self-determination and territorial integrity and the third is to not take human rights as seriously.[41] The first solution can be dismissed out of hand. While we could imagine a world where only perfectly just states are recognized as legitimate, it is far too lofty a standard for real world politics. Similar to the problem which struck consent theory, there simply has not, is not and will not be a state that functions perfectly.

While Wellman notes that the second solution, denying that legitimacy entails sovereign rights to self-determination and non-interference, would solve the problem in this case, it is also far too problematic to be accepted. The primary issue is that if we de-couple non-interference from sovereignty then Sweden would not need a strong excuse to interfere in Norwegian affairs. It may still want one of course, as interference could lead to severe political ramifications or military resistance, but these facts aside Norway would not have a principled claim against such interference and would have no right to

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[40] The full criteria for intervention will be discuss later in this chapter
[41] Wellman, 123

resist it. Sweden could go so far as to attempt to annex Norway, a result which seems less

in keeping with the major tenets of sovereignty.[42]

Wellman goes on to argue that the third possibility, taking human rights less

seriously, is also an unsatisfactory solution. He demonstrates this position by use of a

thought experiment. Wellman asks us to imagine a man who is a citizen of an ideal

legitimate state. Human rights are protected, due process is respected and the state

performs its every duty to an exemplary degree. However, due to some unforeseeable

error, one man is wrongfully convicted of a heinous crime. Wellman argues that while no

one is at fault for his conviction (the error was both honest and impossible to correct) this

individual has no duty to stay in jail. Thus, he is well within his rights to attempt to

escape prison, so long as his escape does not infringe on any other person's rights.

Furthermore, if he is permitted to attempt escape from prison, then others such as friends

or family members are permitted to help him. The reason is that if a person is permitted

in doing X, then others are permitted in assisting that person do X.[43] Wellman pushes this

point to the eventual conclusion that if he is permitted to escape and others are permitted

to help him, then there is no reason other than supposed sovereign concerns, why those

others could not be members of a foreign government.[44] The only difference between that

person's friends and family assisting him and a foreign government is that Norway has a

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[42] Wellman, 124

[43] Wellman, 125

[44] This is an abridged version of Wellman's thought experiment. In his full paper he moves there are far more steps; could your mother help you escape? What if your mother was a foreign prime minister? And so on. Although I removed these steps the version presented here captures the full force of the thought experiment. If the reader is interested they may find the full thought experiment here: Wellman, Christopher Heath "Debate: Taking Human Rights Seriously" *The Journal of Philosophy* Vol 30, no 1, pg 125

sovereign claim against a foreign government interfering in its affairs. Wellman's point here is that if we believe that a friend could help, but not a foreign government then we must be allocating a certain moral weight to sovereignty such that its preservation is more important than a single human rights violation. In doing so, the value of sovereignty outweighs a particular number of human rights violations. Wellman claims that this is an unacceptable position for the functionalist account, as the functionalist holds that sovereignty has no intrinsic moral value.

Wellman's solution to this problem is a new sort of functionalist account where sovereignty can be unbundled and parceled out piecemeal. This argument rests on the idea that sovereign rights are structured very similarly to personal rights. For example, if a person has a driver's license they have a right to operate a motor vehicle. They will retain their right so long as they maintain certain minimum safety standards. If the same person has children they have the right to raise their children as they see fit, again so long as they maintain minimum standards. The fact that a person possesses one of these rights has no bearing on her possessing the other. It would be absurd to suspend an individual's driver's licence on the grounds that he was a negligent parent.[45] Likewise it would be absurd to allow a negligent parent to keep her children on the grounds that she is an excellent driver. Wellman argues that when it comes to sovereignty, it would be absurd to completely dissolve a state's sovereign rights for a single or otherwise narrow scope of human rights abuses. However it is problematic to hold that sovereignty has a moral

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[45] Wellman, 126

value which exceeds a certain number of violations. Instead he argues that states should lose their sovereign rights in accordance with the injustices they commit.[46]

If we return to the Norwegian torture victim, under the bundled sovereignty account Norway would have no principled objection to Sweden breaching their right to non-interference by launching a focused intervention which is targeted at saving this one person.[47] If the Swedes, after freeing the torture victim attempt to redress Norway's education system then Norway would have strong reason to object because they would still have sovereign control over that aspect of their state. Each intervention then does not necessarily trump the full sovereign rights of a state but rather only those narrowly focused on issues which must be remedied. Wellman argues that this understanding of sovereignty is preferable because it allows for a far more nuanced understanding of sovereignty and human rights. We can take human rights seriously without radically diminishing the value of sovereignty or insisting on unreasonably high standards of legitimacy. Of course Wellman is not suggesting that states should intervene to rectify every human rights violation; often there will be many strong reasons not to interfere, such as political relationships or risk of collateral damage. The point here is far more theoretical; if we think of sovereignty as a bundled entity we can have a robust concept of sovereignty that removes states' ability to principally object to limited interventions which focus on correcting narrow human rights violations.

While Wellman's account represents an interesting take on sovereign rights, there are certain problems with his belief that we can unbundle features of a state. It seems that

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[46] Wellman, 126
[47] Wellman, 126

the institutions and functions of states are far more interwoven than Wellman gives them

credit for. For instance, think of the Norwegian torture victim again. It seems that if states

accept Wellman's call to take human rights seriously and a single serious violation can be

sufficient for action, then states are not only justified in taking steps to halt a

transgression but also to take reasonable steps to prevent future transgressions. If Sweden

were to intervene in Norway to rescue this single torture victim, then they should also

take certain steps to prevent the Norwegians from continuing to torture innocent people

after the Swedes depart. But how far does Sweden's jurisdiction reasonably extend in the

name of preventing future instances of torture. It seems that it should certainly extend to

punishing the torturer for that person is directly responsible for the human rights violation

itself. But what about the torturer's superior(s), the one(s) who ordered the torture be

committed? They are also directly tied to the injustice. We can reasonably extend this

further and ask what is to be done about the branch of government that refused to stop the

torture initially? If Norway refused to take a case of torture within their borders seriously

there seems to be tremendous shortcomings within their governmental apparatus. If the

Swedes could fix these shortcomings by removing certain key people from office, or

instituting further institutional safeguards or checks and balances should the relevant

branches should Norway lose sovereign control over those areas? What if the torture was

racially motivated and the reason that those in power did not intervene was because of

deep seeded racial hatred which is pervasive within the country? Perhaps the Swedes are

in fact justified in re-modeling the educational system, if only to better instil a sense of

tolerance in the next generation of Norwegians. It seems that this line of questioning can

continue indefinitely, and poses a serious problem to Wellman's claim that sovereignty can be neatly dissected.

The problem is that while states are similar to people in many important ways they are dissimilar in just as many. It is rare that a governmental problem, particularly one as severe as a human rights violation is so neatly compartmentalized that it can be surgically resolved in the ways that Wellman assumes. While Wellman is correct that we could principally limit some sovereign rights which Norway surrenders, for example Sweden would certainly be overstepping their authority if they attempted to rewrite Norwegian tax code, he massively underestimates the number and the importance of the rights a state would likely have to surrender. It is likely the case that any successful intervention will have a scope so broad that Wellman's idea of unbundling sovereignty will simply be unhelpful. States are highly complex institutions with thousands of interconnected relationships that cross between all aspects of life. Breaking sovereignty apart renders the concept too far removed from what it is designed to protect, which is a far more tangled and cohesive institution. We would be better served by thinking of sovereignty as ravelled rather than bundled.

While each of the four accounts of state sovereignty discussed above present certain unique advantages, each also has serious disadvantages and the debate is far from settled. However, my purpose here was not to present a convincing argument for one conception of state legitimacy or another. Instead, my intent was to outline the evolution of conceptions of recognitional legitimacy. Obviously an authorizing institution which accepts a more human rights focused account will operate very differently from a more

statist oriented one. The exact nature of an authorizing institution's conception of

sovereignty is extremely important and worthy of debate, however it is beyond the scope

of my discussion here. I am concerned with the legitimacy conditions of the institution

itself, and the criteria which lead us to believe that a specific institution will be a better

decision maker than all other options. Once we have identified the structure conducive to

the best decision-making then the discussion regarding the exact content can begin. For

these reasons, whether one accepts Buchanan's account, Wellman's, Walzer's or some

other functional or transactional account of sovereignty my project will still be of interest.

Just as my discussion does not depend on a particular conception of sovereignty, it is also

independent from the current state of international law. This section was simply meant to

demonstrate the scope of the debate, not settle it.

1.3 Threshold Conditions for Humanitarian Intervention

1.3.1 Moral Considerations

Humanitarian intervention is an extremely complex practice which involves the

interests of multiple states, sovereign values, human rights and moral obligations. Any

argument that attempts to demonstrate a strong moral reason to allow for intervention to

occur must account for the tremendous number of relevant factors and the dozens of ways

to consider them.[48] Holzgrefe divides the moral considerations for humanitarian

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[48] There are of course those that believe humanitarian intervention is not/never justified. For example a pacifist may argue that violence is always wrong, no matter the justification. Or they may take a utilitarian tack and argue that the harm created in the course of an intervention will always outweigh the harm that would have occurred had other options been pursued. My aim here is to argue for an ideal authorizing body for legitimate humanitarian intervention. This hinges on the reader's accepting the premise that at there is at least one instance, either historically or hypothetically, that a legitimate humanitarian intervention can occur. Since the pacifist holds that no such instance can exist, in their eyes my project is a non-starter. Engaging the pacifist position directly is beyond the scope of this project.

intervention into four broad categories; each category is split between two conflicting positions.

The first is the source of the moral concern, what gives an international norm its moral force. Naturalists argue that international norms derive their legitimacy from certain facts about the world which can be discovered through reason or experience. If we reason that a norm is morally binding, it is because there is some intrinsic feature of the world which grants the norm that power. Conversely, consentualists hold that legal norms are only binding so long as they are consented to by the relevant actors and there is no intrinsic force to a given norm.[49]

Holzgrefe's second divide concerns the appropriate objects of moral concern. Here we have individualists who are primarily concerned about the welfare of individual persons and collectivists who think that groups are the proper objects of moral concern. We saw a bit of this tension in the discussion of sovereignty, Mill falls in to the collectivist camp and Buchanan and Wellman the individualist.

The third ethical divide concern the weight of moral concern. Here, egalitarians hold that all objects of moral concern must be treated equally whereas inegalitarians argue that unequal treatment can be acceptable. [50] For example, an inegalitarian might argue that although we have an obligation to prevent human rights violations in all countries, it is the prime responsibility of the state to take care of its own people first and only help those in others states when there is little or no risk to its own constituents.

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[49] Holzgrefe, 19
[50] Holzgrefe, 20

Although the state has an obligation to help everyone, it does nothing wrong by preferentially helping its own citizens.

The fourth ethical divide which Holzgrefe identifies is the appropriate breadth of the moral concern. In this debate we have universalists who hold that all persons deserve equal moral concern against particularists who hold that certain people deserve moral concern and others do not. A universalist would likely argue that we have an obligation to stop human rights abuses no matter where they occur. Conversely a particularist might argue that we have an obligation to stop human rights abuses within our own borders and no obligation to stop them abroad.

These four divides only identify the types of debate that occur both for and against intervention. Within these debates scholars will argue from particular perspectives such as utilitarianism, legal positivism or social contractualism. The scope of the debate is tremendous and no single theory stands out as superior. While each individual account rests its justification, of humanitarian intervention on a unique set of relevant moral features, the important point to note is that each account has a threshold at which point humanitarian intervention is justified. It is the threshold that we are concerned with, as any proper authority will have to judge when a humanitarian crisis passes the relevant threshold. Thus, once an authority is identified theorists are free to debate to determine the exact content of the threshold which the authority should appeal to. However, for now we are simply concerned with enumerating the general criteria which an authorizing institution would be concerned with. Instead of wading in to the debate over specific justification conditions, we will be better served by utilizing a

moderate and widely accepted set of criteria. There is a single document which stands out

in this regard--The Responsibility to Protect.

1.3.2 The Responsibility to Protect

In February 2000 the Canadian government established the International

Commission on Intervention and State Sovereignty (ICIS) with the purpose of answering

the following question: "When, if ever, is it appropriate for states to take coercive – and

in particular military – action, against another state for the purpose of protecting people at

risk in that other state?"[51] Their hope was that in the course of answering this question

they could advance and clarify the norm of humanitarian intervention and bring the

international community to common ground regarding when intervention is an

appropriate action. The document they produced in September 2001 is titled The

Responsibility to Protect (R2P).

R2P does not propose radical solutions or sweeping changes to the current

international system. Its crafters were very careful to work within the confines of existing

international norms and instead of creating new organizations or granting new powers

they simply stress that current institutions should be taking humanitarian crises more

seriously. Perhaps the most significant point made by R2P concerns the redistribution of

responsibility

> The responsibility to protect [is] the idea that sovereign states have a
> responsibility to protect their own citizens from avoidable catastrophe –
> from mass murder and rape, from starvation – but when they are unwilling
> or unable to do so, that responsibility must be borne by the broader
> community of states.[52]

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[51] R2P Forward, pg VII
[52] The Responsibility to Protect, The commission's report, pg VIII

The crafters of this document embrace the position that not only is there stark limitations on sovereignty, but also the international community has certain obligations to those people whose governments fail them.

R2P enjoys considerable acceptance internationally due to its crafters' ability to balance lofty moral ideals with the realities of a pluralistic international world.[53] Although R2P was never formally ratified into international law, the international community still took strides to affirm its acceptance of the document's general tenets. In The Outcome Document of the 2005 World Summit, world leaders affirmed their commitment to R2P in paragraphs 138 and 139 which acknowledge the international community's responsibility to assist in the event of a humanitarian crisis.[54] Although it is not an official legal document, R2P made considerable headway in advancing the norm of humanitarian intervention and is the natural starting place for a discussion concerning triggering conditions for justified humanitarian intervention.

R2P stresses that since humanitarian intervention is an absolute last resort the first major pre-requisite for a legitimate intervention is the proper demonstration that all other avenues have been explored in an attempt to bring an end to the crisis. Since sanctions have grown increasingly more sophisticated and can often target certain aspects of the

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[53] Miles Kahler, "Legitimacy, humanitarian intervention, and international institutions, *"Politics, Philosophy & Economics*, 10 no. 1 (2011), 29
[54] World Summit 2005 Outcome Document, available at http://www.who.int/hiv/universalaccess2010/worldsummit.pdf, Para 138,139 pg. 31

state while leaving others relatively untouched, R2P suggests three types of sanctions which may be effective at bringing a halt to a humanitarian crisis.[55]

The first type targets a state's military area. This includes embargoes on military equipment as well as a halt on all military cooperation with the targeted state. The second type is in the economic area. Most commonly these sanctions target the income generating activities of the state in question. By targeting revenue sources such as oil or diamonds the international community not only stifles a state's ability to conduct military operations, but also often targets the root of the conflict itself. The third type of sanction targets the political and diplomatic area. This could include expulsion from certain international groups, removal of diplomats from foreign states and limiting the movement of certain nationals. These sanctions result in not only the loss of prestige for the government, but also reduce their ability to foster cooperation and communication with sympathizing nations.[56] These sanctions are not laid out in any particular order and the choice of which to apply must be made on a case by case basis, but they serve an important first step in halting a humanitarian crisis. They also provide the initial steps for the justification of a humanitarian crisis, in that the use of sanctions demonstrates the authenticity and severity of the situation. By instituting certain measures of due process, the implementation and eventual failure of sanctions act as a safeguard against exploitation or abuse of the norm of humanitarian intervention.

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[55] Some may hold that sanctions and other forms of coercive actions fall within the realm of humanitarian intervention as they directly influence the internal functions of a sovereign state and in doing so violate its sovereign right to non-interference. However the purpose of this paper is to discuss the breach of sovereignty which necessarily accompanies military intervention. As such, sanctions and other non-violent approaches will not be considered intervention.

[56] Responsibility to Protect 4.7-9

The failure of sanctions is a necessary but not a sufficient condition for

intervention. It is entirely possible that a crisis be serious enough to require sanctions and,

should they fail, still remain well below the threshold for intervention. Two examples

could be the widespread imprisonment of political dissidents or systemic racial

discrimination.[57] While these situations certainly merit public condemnation and punitive

sanction they may not merit full intervention. Unfortunately there are no clear guidelines

to when a crisis is sufficiently severe to require intervention; there is no casualty

threshold or violence metric that can be applied to an atrocity. The most common

criterion for intervention is that it should be reserved for a crisis which is so severe that it

'shocks the conscious of mankind.'[58] While this statement may not point to any specific

criteria it certainly highlights the severity required to merit intervention. In an attempt to

contextualize the types of situations which 'shock the conscious of mankind' the ICIS

commission offers six threshold conditions which must be in place in order to trigger a

legitimate humanitarian intervention.

The first condition is drawn directly from just war theory. It holds that there must

be just cause for intervention. The commission lists two broad sets of circumstances

which constitute just cause:

(1) Large scale loss of life, actual or apprehended, with genocidal intent or
not, which is the product either of deliberate state action, or state neglect
or inability to act, or a failed state situation; (2) or large scale "ethnic
cleansing," actual or apprehended, whether carried out by killing, forced
expulsion, acts of terror or rape.[59]

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[57] Responsibility to Protect 4.30
[58] Walzer, *Just and Unjust Wars*, 107
[59] Responsibility to Protect 4.19

If either or both of these conditions are satisfied it is taken as just cause for humanitarian intervention. These conditions would typically include the following types of situations: actions defined by the 1948 genocide convention which involves large scale loss of life, violations of the laws of war, overwhelming natural disasters, civil war and or large scale starvation which are the result of total state collaspe.[60] This is by no means an exhaustive list of the types of situations which qualify for humanitarian intervention, but they serve to paint a picture of the typical situations which would.

The second condition is that the right authority must sanction the intervention. The ICIS commission insists that the Security Council or possibly the General Assembly can authorize a legitimate intervention.[61] If one assumes that the Security Council is a properly functioning institution, then it is the ideal choice as an authorizing agent. The Security Council was designed to determine threats to international peace and make recommendations as to how best restore or maintain international peace and security.[62] Furthermore, it is legally empowered to take action to resolve a particular crisis. The Security Council may call upon other UN members to peacefully aid in the resolution of international conflicts, such as enforcing sanctions, embargos or cutting off diplomatic relations with a specific state or states.[63] However, should these measures fail, the Security Council has, under chapter VII article 42 of the UN charter, the unique ability to authorize the use of force in the name of maintaining international peace:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such

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[60] Responsibility to Protect 4.20
[61] Responsibility to Protect Synopsis 3(E.1)
[62] UN Charter, Chapter VII, Article 39
[63] UN Charter, Chapter VII, Article 41

> action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[64]

The UN Security Council is, at present, the primary authorizing agent for humanitarian intervention and has the exclusive authority to legalize humanitarian interventions. If it is the case that a legitimate intervention must be a legal one, it has exclusive authority over legitimate interventions. However since the pros and cons of the Security Council's role in legitimate humanitarian intervention will be discussed at length in later chapters, I will move on to other conditions outlined by R2P.

The third condition is that intervention must be a last resort. There are two possible ways for this option to be satisfied. The first is the actual attempt and failure of all other peaceful means to halt or prevent an atrocity, namely sanctions and diplomatic measures. However it will often be the case that the international community does not have sufficient time to properly pursue peaceful measures. When this is the case, this condition can be satisfied by the proper demonstration that there is in fact a dire urgency and that if peaceful alternatives were attempted; there is a low expectation of success. [65]

The fourth condition is that the right intention must be present. The primary intention of the intervening state or states must be to save the lives of the affected civilians.[66] However, it need not be the case that every one of the intervening state's intentions is purely altruistic. For instance a state may have to propose a very self-serving

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[64] UN Charter, Chapter VII, Article 42
[65] Responsibility to Protect 4.21
[66] Responsibility to Protect 4.33

rationale to their population in order to win support for the intervention.[67] Even without

the need to bolster support at home it is rather naïve to suppose that a state would embark

on a costly and dangerous intervention for purely altruistic reasons. Thus, so long as the

intervening state's primary reason is morally laudable, they can be said to satisfy this

condition.

The last two conditions are those of proportional means and reasonable prospects.

Proportional means holds that the scale, duration and intensity of any military action must

be the absolute minimum required to halt or prevent a humanitarian crisis. The reasonable

prospects condition asserts that military action can only be justified if the intervention

stands a reasonable chance of success. These two conditions are very closely related in

that the size, strength and duration of an intervention are directly related to its prospective

success. While states must be careful not to under commit their forces they must also

refrain from treating an intervention as a war which must be won at all costs. While it is

certainly a difficult task, the intervening state(s) must endeavour to only apply enough

force to sufficiently bring a halt to or avert human suffering. In this way the failure of this

fifth condition will almost certainly result in the failure of the sixth condition, for the

likelihood that a lengthy sustained military conflict would result in a net drop in human

suffering is extremely low.[68]

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[67] Responsibility to Protect 4.35

[68] From the rule of proportionality to the question of intent just war theory has heavily influenced humanitarian intervention practices. This influence is, in the end a positive quality. Humanitarian intervention is, at heart, military engagement for a strong cause. It seems extremely important that such a military engagement be strongly tempered by the moral restrictions which just war theory places on conflict.

It is not my aim to convince the reader that a specific account of sovereignty or certain threshold conditions should be adhered to over any other set. The positions which have been presented were simply meant to provide a baseline. Ultimately the reader can use a stronger or more flexible account of sovereignty or a lower or higher threshold for intervention. Since the purpose of this thesis is to identify what sort of authority is best suited for determining when a crisis merits intervention, we do not need to settle the debate on what the specific criteria for intervention should be. The proper authority will be able to competently apply any criteria and for this reason the specific reasons for or against intervention as a practise do not directly pertain to my argument.

Chapter 2
Authority's Role in Humanitarian Intervention

In the previous chapter I outlined the nature of sovereignty, its entailed right to territorial integrity and the moral criteria which justifies the breach of that right as defined by the Responsibility to Protect. I will now turn to the second condition for humanitarian intervention laid out in R2P. This condition holds that the use of force must be authorized by the appropriate body, namely the United Nations Security Council.[69]

At first blush it is not immediately clear why a formal authorization would be a necessary condition for a legitimate humanitarian intervention; it seems that the brute moral justification could be sufficient. One could argue that if a situation satisfies the necessary moral conditions then any intervention should be considered legitimate by virtue of those reasons alone. This would render any formal authorization superfluous.

A common argument against this line of reasoning is that un-authorized humanitarian intervention violates international law. International law prohibits interstate aggression unless that aggression is sanctioned by the Security Council under chapter VII of the UN Charter. Legal arguments like the one listed above tend to hold that any violation of international law should be avoided and so states have strong moral reasons to obey international law even when doing so results in undesirable outcomes.[70] Thus states must not break international law, even if they believe they are strongly morally justified in doing so.

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[69] Responsibility to Protect Synopsis 3(E.1)
[70] Teson, *The Liberal* case, 24

Fernando Teson offers a response to this line of reasoning. He argues that the defender of international law is forgetting a key issue pertaining to cases which require humanitarian intervention; such situations already admit of a host of international law violations: genocide, crimes against humanity etc. Whether an intervention occurs or not it seems the international community must shoulder the burden of some violation of international law. The relevant question is not how to avoid all violations, but what sort of violation is preferable. It seems that the defender of international law must either accept the position that interstate war is in all cases worse than genocide, tyranny, anarchy etc. or they must tread a thin line carving out a strong moral difference between acts and omissions.[71]

Teson's solution is to abandon the belief that sovereignty has any intrinsic value. He argues that a state's value is strictly derivative, judged by how well it provides for and protects its people. If a state begins butchering its population, it cannot call upon any intrinsic right to respect, rather its derivative value has been drained and other states should feel free to act entirely on moral reasons alone without the consent of an authority.

2.1 The Importance of Authority

Teson makes a persuasive point. But he seems to overlook the distinction between the relevant considerations concerning an intervention and the importance of exactly who weighs those considerations. Even if we were to assume that sovereignty's value is entirely derivative as Teson insists, there still may be strong reasons to prefer a norm of

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[71] Teson, 27

humanitarian intervention which is anchored in an authorizing body, over a more nebulous one where states regulate their own interventions.

The best way to determine if an authority plays an essential role in legitimizing humanitarian intervention is by outlining how the norm would function without an authority. To this end, we can look to a more basic justification of authority in general and then test if such a justification applies to the case of humanitarian intervention. An excellent example of one such argument comes from Locke and the state of nature. Locke argues as

> To understand political power right, and derive it from its original, we must consider, what state men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man.[72]

In the state of nature each person is free and equal to do is they please without any sort of governing authority. However, Locke is clear to point out that there are natural limits to this freedom; the state of nature is a state of liberty, not licence.[73] Since each person has the right to do what they wish with their own body and possessions, they may claim a right to non-interference from any other person. Thus every person is allowed to do as they wish so long as their actions do not infringe on any other person's right to do as they wish. The only exception to this law of non-interference is in cases of prevention or punishment of a transgression. For example it would be acceptable to forcibly confine a convicted thief because the thief was responsible for the initial transgression against the right of non-interference by stealing another agent's property. However, since all people

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[72] John Locke, *Second Treatise of Government,* Section 4
[73] Locke, Section 5

are free and equal, power and jurisdiction must be reciprocal; no one person has the right to enforce the law above any other person. Thus, in the state of nature the authority to properly enforce the law of non-interference falls equally on all persons.

Locke holds the state of nature will suffer from three inconveniences. The first inconvenience is that the law will lack consistency. Without a common measure against which controversies can be decided each party will apply their own interpretation of the law. If every agent in the state of nature is following and acting on a slightly different variation of the basic rules, then each party is likely to hold a unique interpretation of the law, which can lead to mass confusion and disorder when each party tries to assert their reading simultaneously.[74]

The second inconvenience is the lack of impartial judgement. In most cases the roles of judge, jury and executioner will all be played by the injured party, as they would have the strongest motivation to penalize a transgressor. Although Locke allows for a third party to punish those who break the law there is no reason to believe a third party would act as an unbiased arbiter whose only goal is to see justice served. It is far more likely that an agent who involves himself in another's dispute has some vested interest in a particular outcome. The result is that agents are likely to not only favour themselves or an ally when casting judgement but also get carried away and blur punishment with revenge.[75]

The final inconvenience is that the state of nature unjustly favours the powerful. If an individual is deemed guilty of some infraction she is unlikely to impose a punishment

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[74] Locke, Section 124
[75] Locke, Section 125

on herself, rather that judgement must be forced upon her, either by the offended agent or a third party. To force a punishment on another agent requires a considerable amount of power and so it seems that weaker individuals will be far less able to seek justice than stronger ones. Furthermore the strong agents would be able to define and act on the law with impunity.[76] The result is a far cry from the equal liberty which the state of nature espouses.

We can easily imagine the international community as existing in a Lockean state of nature. It is currently composed of a multitude of states interacting with no real overarching authority. However to make it a true state of nature we will need to imagine slight changes to the existing system. For example, all international laws must be stripped down to the single entrenched right to non-interference. As long as states do not infringe upon one another's affairs they are at total liberty to act how they see fit. Just as in Locke's original analogy, since no state has any claim to rule over any other, the responsibility to uphold each sovereign state's right to non-interference falls on each state equally. Thus every state has the right to restrain and punish those who violate the law. This right is often exercised in the form of defensive wars but there is no reason why a state could not engage in a war to defend another state which has been attacked.[77]

The law of non-interference extends beyond inter-state relations; it actually creates duties between governments and peoples. Since many of the rights and obligations that states enjoy are analogous to the rights and obligations enjoyed by individuals, and states act on behalf of their populations, we can draw a strong connection

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[76] Locke, Section 126
[77] Locke, Section 7

between the obligations which Locke argues that a person owes herself, and the obligations which a state owes its citizens. Just as persons are bound to preserve life, both their own and others', states are likewise bound to preserve the lives of their citizens and the citizens of other states.[78] This adds a further restriction to the liberty which states enjoy. States are free to act as they see fit so long as they do not infringe upon another state's right to non-interference nor the basic rights of human beings. Every state is equally justified in restraining and punishing those other states who fail to uphold these simple duties.[79] Thus each state is equally justified in taking action against governments which are either actively or passively causing significant harm to their populace or another group. In the case of humanitarian intervention the harm present would have to classify as a humanitarian crisis such as genocide or mass expulsion.

When we try to imagine a coherent norm of humanitarian intervention in a state of nature Locke's three inconveniences present serious stumbling blocks. Suppose a humanitarian crisis was to occur in Sierra Leone. A civil war breaks out and government forces outgun, overwhelm and begin to slaughter a large portion of the civilian population. With no end in sight the international community begins to discuss the possibility of an intervention. How would states handle this situation without the guidance of an agreed upon authority? It seems that any hope of a collective decision to intervene would be immediately hamstrung by the first inconvenience; inconsistent application of the law. Every state would have their own set of triggering conditions for a

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[78] Locke, Section 6
[79] Locke, Section 8

legitimate intervention and so any given intervention is likely to be viewed as legitimate by some and an act of war by others.

Even if we charitably assume that every state has agreed to the same basic justifying criteria for humanitarian intervention there is no guarantee that each state will reach the same conclusions in every case. Humanitarian crises are far too complex to yield simple and consistent answers as to whether or not to intervene; two well-meaning states who attempt to impartially apply the same criteria could come to very different conclusions as to whether the Sierra Leone crisis requires intervention.

A split decision would have dire consequences for an intervention. Suppose that group of European states all decide that the crisis in Sierra Leone merits intervention. As a result Sierra Leone can no longer claim a robust right to territorial integrity and foreign powers are free to use force to halt the bloodshed. Conversely group of Asian states decide that the crisis is not sufficient for humanitarian intervention and Sierra Leone should retain its sovereign rights. We can assume that this disagreement was reached honestly and is simply a result of the subjective application of the same criteria to an extremely complex situation. However, regardless of the nature of the disagreement it highlights the problems posed by the third inconvenience, namely that of power relations. If any European state attempts to act on the crisis, any Asian state can, for them legitimately, punish that state for violating Sierra Leone's sovereign right to non-interference. Thus, the only states that can act on an intervention are those who are powerful enough to repel any attempt at punishment from dissenting states. The result is that the actual moral merits of the crisis cease to matter and the only relevant factor is

whether or not the strongest state or states determine the crisis is worthy of intervention. Their choice, regardless of moral reasoning will dictate the legitimacy of the intervention.

Under these circumstances the only states that would ever take part in an intervention are those who are powerful enough to be certain they will not be punished by those states that view the intervention as illegitimate. This leads to the second inconvenience, the problem of bias and over-zealous punishment. As noted in the previous chapter, a major element of a legitimate humanitarian intervention is that the intervening party display considerable restraint in their actions. It is a war to save lives and cannot be fought to win at all costs. Since only the most powerful states will ever intervene, they must also be trusted with the responsibility to exercise restraint, for no other state could reasonably force them to do so. While it is not impossible that states could properly police themselves, it seems highly unlikely. It is far more likely that powerful states will act in such a way that accomplishes its goals to its satisfaction since it is its only oversight body. This means the odds that a state will over step the bounds of what can be done to properly prevent or stop a humanitarian crisis are fairly high.

Considering the significant problems these issues pose; abuse, inconsistent treatment, and rule of the strong and so on, it is unlikely that a coherent norm of humanitarian intervention can occur without a proper legitimizing authority. It seems that if we follow Teson and issue a blanket right to intervene when the moral reasons apply then we are at risk of allowing powerful states to run amok and leave the moral value of humanitarian intervention by the wayside. It seems that an official authorizing body is an integral part of a functional humanitarian intervention norm. That said, we still have no

inkling as to what form this authority should or how it should specifically function. To address these questions we will need to first turn to Raz to understand the exact function of a given authority and then investigate how this function applies to the norm of humanitarian intervention.

2.2 The Nature of Authority

If states agree that there are occasions when humanitarian intervention is necessary then they should accept whatever state of affairs best promotes successful interventions. The Lockean picture provides strong evidence that unrestricted, unilateral intervention would be extremely problematic. It seems that the norm of humanitarian intervention would be greatly improved by some sort of authorizing body which would determine what cases properly meet the threshold conditions for intervention. In the following pages I will demonstrate that states should prefer a centralized authorizing body because they will do better in accordance to their respective reasons if they allow a third party to determine which cases they may legitimately intervene. For this, I will turn to Raz's account of legitimate authority.

Raz's argument is based on three interconnected theses concerning the nature of authoritative directives. First is the dependence thesis, which holds that all authoritative directives should be based on reasons which already apply to the subject.[80] The reasons which apply to the subject are called dependant reasons and because directives issued by an authority are based on them Raz asserts that authoritative directives replace, rather than add to a subject's dependant reasons for acting. This replacement action is called the

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[80] Joseph Raz, Authority and Justification, *Philosophy & Public Affairs,* vol 14, no 1 (Winter, 1985), 14

preemptive thesis.[81] Simply adhering to the dependence and preemptive theses together is

insufficient to be deemed a legitimate authority; the authority needs to also provide an

advantage to the subject. Finally, this leads to the normal justification thesis:

> The normal and primary way that a person should be acknowledged to
> have authority over another person involves showing that the alleged
> subject is likely better to comply with reasons which apply to him (other
> than the alleged authoritative directives) if he accepts the directives of the
> alleged authority as authoritatively binding and tries to follow them, rather
> than by trying to follow the reasons which apply to him directly.[82]

When the three theses are combined we see that a legitimate authority is one which takes

the reasons which apply to a subject, considers them properly and then issues a directive

for the subject to follow based on those reasons.[83] The directive replaces the subject's

dependant reasons and the subject will be better served by following the directive, instead

of considering the dependant reasons themselves. It is the preemptive nature of

authoritative directives which distinguish them from normal advice or suggestions, which

simply add to the relevant reasons instead of replacing them. In this way a subject ought

to follow an authority, simply because the authority makes the directive.[84]

The classic example of an authoritative relationship is the captain of a ship

commanding a sailor to swab the deck. The sailor has a number of dependant reasons

both for and against swabbing the deck. His reasons in favour could include a desire to do

his job well, a desire to have the ship stay in good working order, a desire to maintain a

safe work environment and so on. His reasons against could be equally varied, perhaps he

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[81] Raz, 24

[82] Raz, 19

[83] Although Raz phrases the normal justification thesis with regard to persons it applies equally to any authoritative relationship, in our case the relationship between the humanitarian intervention authorizing institution and states.

[84] Raz, 9

would rather be playing cards or he feels that swabbing the deck is some other sailor's duty. If the captain is a legitimate authority, we can assume that when he orders the sailor to swab the deck, his directive is based on the reasons which already apply to the sailor. The captain has, ideally, considered the balance of reasons which apply to the sailor and determined that since the desire for a well maintained ship is more important than the desire to play cards the sailor is better off swabbing the deck. When the captain makes this directive, it is not just one more reason to be considered among many, it preempts the sailor's existing reasons and becomes his primary reason for action. The sailor's long list of reasons for and against a given action are summed and replaced by the directive of the authority. It is important to note here that authorities are not expected to always act on dependant reasons, but rather that they should.[85] So long as an authority is at least striving at this ideal it can be considered legitimate, even if it falls well short of it.

2.3 Razian Authority and Humanitarian Intervention

The nature of the directives given by the institution charged with authorizing humanitarian intervention would be significantly different than those issued by the captain, or other traditional authorities. When the captain issues a directive to the sailor he creates a duty which the sailor is obliged to complete. The captain has a claim against the sailor and can coerce him to complete his task. However, as was demonstrated in the previous chapter, every sovereign state has a standing claim of non-interference against all other sovereign states. This claim of course extends to international institutions which

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[85] Raz, 15

lack the ability to create a binding obligation for a state to exercise its military power.[86]

The institution which we require does not need to have this form of authority. The

institution only needs the power to remove or otherwise adjust a given state's preemptive

reason to refrain from interfering with another state. By removing this reason, the

institution allows states to reflect upon their dependant reasons for and against respecting

a given state's sovereign status. Ultimately the decision to intervene will be in the hands

of each individual state. However, should a state choose to intervene, the authority's

directive means that the state can do so without fear of punishment or retribution. Even if

other states, after consulting their dependant reasons find that the state in question's

sovereignty should still be respected they cannot punish those who choose not to respect

it. The directive issued by the authorizing institution changes interstate relations to make

the respect of a particular state's sovereignty optional. In this way, the institution creates

permissions instead of obligations, the actual decision to act still remains in the hands of

the state. The directives this institution would issue would be authoritative in so far as

they would waive the preemptive reasons states possess for respecting a given state's

sovereign right to non-interference.

   To see how this would affect the norm of humanitarian intervention we will return

to our hypothetical humanitarian crisis in Sierra Leone. While this crisis is unfolding

states such as the United States would have a variety of reasons both for and against

respecting Sierra Leone's sovereign claim to territorial integrity. I will forgo listing

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[86] Peter Carey with Pat Walsh, "The Security Council and East Timor" in *The United Nations Security Council and War: The Evolution of Thought and Practice since* 1945, eds. Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum, (Oxford University Press: Oxford, 2008), 350

reasons here but many of them would roughly track the conditions for sovereignty and legitimate intervention discussed in the last the chapter. However, the United States will better act in accordance with its reasons if instead of considering all of its dependant reasons for and against respecting Sierra Leone's sovereignty it simply preempts them with a strong commitment to non-intervention. This commitment preempts any and all reasons the United States would have with regard to the situation in Sierra Leone and makes it extremely difficult for it to legitimately act in the case of a crisis.

In the event of a crisis, the authorizing institution takes action. The institution would consider many of the dependant reasons for and against respecting Sierra Leone's right to non-interference. It would consider the value of sovereignty, the horrifying nature of the crimes being committed, the cost of intervening, the likelihood of success as well as other reasons and weigh them appropriately. If, after careful consideration it finds that the situation in Sierra Leone merits intervention it will issue a directive calling for a humanitarian intervention to halt the crisis. This directing will effectively remove the preemptive reason to refrain from interfering. This will allow states such as the United States to now consider the dependant reasons which it has for and against using military force against Sierra Leone.

It is important to note that many, but not all of the dependant reasons which are now available to the United States would have been the same as those considered by the authorizing institution when it is debating declaring that an intervention is required in Sierra Leone. Every state will have a wide variety of dependant reasons for why it should respect or ignore Sierra Leone's sovereign claims. Some of these reasons, such as a

respect for international law, will be clearly and publically stated. Others, such as national security concerns, will be kept secret. It would be impossible for the authorizing institution to take every single reason in to account. However, it does not have to as legitimate authorities are not required to include every dependant reason which a subject has in their directive. So long as they are at least acting in a way which broadly reflects those reasons they can be considered legitimate. So long as the authority is acting on consistent, and purely relevant dependant reasons such as those listed in the responsibility to protect, its directives can achieve the criteria described in the dependence thesis.

Since the institution would be tasked with reviewing all of the relevant information for and against intervention, states should consider its directive to intervene a strong dependant reason for acting. In this way the institution is an authority with regard to sovereign status, but more like an advisor with regard to the actual decision to intervene.

By allowing a state to consider its dependant reasons for and against respecting a nation's right to territorial integrity, a properly authoritative institution would solve the chaotic deadlock which occurs in the state of nature. The centralization of the moral standards avoids conflicting judgements regarding the severity of a humanitarian crisis and limits state decision making to either acting or refraining to act on the permission to intervene granted by the authority. For these reasons we can clearly see that an authorizing institution is a clear benefit to the norm of humanitarian intervention.

2.4 Authority Selection

Raz points out that the normal justification thesis has a defeater condition built in: if when comparing institutions it can be shown that one institution is able to do a better job with respect to the subject's dependant reasons then it will have a stronger claim to legitimacy.[87] However, the only guidance he offers as to how to judge which of two institutions actually does better with regard to the dependant reasons is that the subjects will be better off according to its directives than following their dependant reasons directly. We not only need an authority which will issue directives based on its subjects' dependant reasons, but will achieve the best results for those subjects as well. In our case this entails the ability to properly identify the relevant features of a humanitarian crisis and balance them against the standing reasons which uphold the norm of sovereignty. The best way to determine what sort of institution is best suited for this purpose is to propose a set of ideal procedural guidelines and then select an institution around them. If we can determine *how* an authority is acting on those reasons we can better predict which authority will more consistently issues directives which allow for subjects to better conform to their dependant reasons. For example, suppose two institutions issue conflicting directives regarding an intervention's necessity. We can look to the decision making procedures of each institution to settle the deadlock. If we find that the first institution was more impartial, transparent, unbiased and pluralistic in their approach than the second, then it is reasonable to assume that it is the better decision maker. This sort of

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[87] Raz, 22

test can allow us to check the merit of the directives without questioning their content, for it could easily be the case that the preferable institution issues less popular directives.

To assist in this process, I will look to Buchanan and Keohane's Complex Standard for testing the legitimacy of an international institution. The Complex Standard is a six part test which allows us to directly compare multiple institutions' claims to legitimacy in both a normative and sociological sense. Buchanan and Keohane argue that institutional legitimacy must be divided in to two senses: normative and sociological. An institution is legitimate in the normative sense if and only if it has the right to rule. This sense tracks closely on to the Razian interpretation we have been dealing with thus far, namely that the fact that the authority issues a directive provides a content independent reason for compliance. However, Buchanan and Keohane press their normative view of legitimacy further by arguing that certain moral criteria are necessary for an international institution to be properly legitimate.

The sociological sense of legitimacy refers to whether or not there is widespread belief that a given institution is legitimate. Because normative legitimacy is a moral judgment about the characteristics of an institution and sociological legitimacy is an empirical claim about common opinion, it is possible for an institution to achieve both, either or neither sense of legitimacy.[88] For instance, an institution could achieve normative legitimacy by conducting itself in a fair, just and transparent manner, but still fail to achieve sociological legitimacy due to widespread and false rumours about its procedures. Since international institutions rely so heavily on voluntary acquiescence, it

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[88] Allen Buchanan and Robert O. Keohane, "Precommitment Regimes for Intervention: Supplementing the Security Council", Ethics & International Affairs 25, no 1 (2011), 43

is extremely important that they achieve a high level of sociological legitimacy. This

practical constraint means that an institution's designer may have to make certain trade-

offs between moral desiderata and sociological expectations.[89]

The Complex Standard involves six criteria, three epistemic and three substantive.

The first epistemic criterion is transparency, the mechanisms and procedures of the

institution must be open to scrutiny or else the institution cannot be considered properly

accountable for its actions. The second criterion is accountability; an institution must

have some mechanism in place whereby it can be made to answer for its decisions. The

accountability criterion forces the institution to govern its actions and avoid abusing its

power. The third criterion is flexibility; the political landscape of the international arena

is constantly changing and evolving, an institution that cannot change and evolve at an

equal pace will quickly find itself no longer applicable to modern crises. Each of these

epistemic criteria is essential to an institution's claim to legitimacy.[90] Conversely the

three substantive criteria are more like counting principles; the more an institution

possesses the stronger its claim, but they are non-essential.

The first substantive criterion is minimum moral acceptability. In order to pass

this criterion the institution 'must not persist in perpetuating serious injustices that

involve violations of basic human rights.'[91] This is not a tremendously high bar, and it is

not meant to be. We cannot demand perfection from our global institutions; if we did we

would be caught in a constant state of dismantling and replacing current institutions.

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[89] As this is first and foremost a philosophical project I will be primarily concerned with the normative sense of legitimacy. With that in mind please note that for the remainder of this thesis 'legitimacy' should be taken to mean 'normative legitimacy.' I will only ever refer to 'sociological legitimacy' by its full term

[90] Allen Buchanan and Robert O. Keohane, *Precommitment Regimes,* 46

[91] Allen Buchanan and Robert O. Keohane, *Precommitment Regimes,* 45

Instead, Buchanan and Keohane insist that while we should strive for the highest degree of moral conduct, we must only strip an institution of its legitimacy if it fails to uphold the bare minimum of moral standards.

The second substantive criterion is institutional integrity: there must not be a gross disparity between the institutions goals and its performance. If such a disparity exists, then the legitimacy of the institution can be seriously called into question.

The final criterion is comparative benefit: is the international arena better with this institution than it would be without it? Is this institution's existence necessary for the existence of the goods it provides? While these questions are complex and involve entertaining hypothetical outcomes, Buchanan and Keohane hold that there is some intuitive merit to them. Although we can never say with absolute certainty that the world is better off with an institution than it would have been without it, we certainly can make reasonable assumptions as to whether an institution has had a net positive impact on the world.

The Complex Standard is not meant to be the final word in the argument for an institution's legitimacy, rather this scale is simply meant to indicate which institutions can better serve us. This test will outline exactly how an institution will consider and weigh states' dependant reasons regarding an intervention. The higher an institution's score on the Complex Standard, the more likely it is to correctly interpret the dependant reasons pertaining to humanitarian intervention. Now that the nature of authority has been properly laid out we can now turn to the final question of this project; which sort of institution would best service the norm of humanitarian intervention?

Chapter 3
Alternatives to the Security Council

In the previous chapter I provided strong reasons to believe that a coherent

humanitarian intervention norm requires an authorizing body. In this chapter I will use

the Complex Standard to argue that a specific authorizing body is best suited for the task.

I will begin by testing the United Nations Security Council, as it currently has exclusive

authority over legitimate humanitarian interventions. After demonstrating certain serious

flaws in the Security Council's structure, I will explore alternatives and argue that the

best alternative to the Security Council is a system of Standardized Regional

Organizations.

I will not be the first to test the Security Council against the Complex Standard, in

a recent article Buchanan and Keohane applied their Complex Standard to it and found

that the council functions sufficiently well to deserve its claim to legitimacy. For this

reason they argue that it should not be replaced with another institution. They argue that

the international community should work to introduce institutions which would work

under the Security Council. These institutions would act only when the Security

Council's normal proceedings fail in certain ways, such as a deadlock or use of a veto.

While I broadly agree with their conclusion I believe their assessment of the Security

Council is far too charitable. If we are going to begin to consider true alternatives to the

Security Council, we need to think more clearly about their failings and Buchanan and

Keohane come up short in this regard. Though Buchanan and Keohane's critique is an

excellent first step it falls short two distinct ways. The first is that they are too lenient in

their application of certain standards, particularly accountability and flexibility. The

second problem stems from the standards themselves, Buchanan and Keohane frequently

narrow their standards' scope to such a point where it misses important failings of the

council's practices, such as failures of transparency and minimal moral acceptability. In

the following section I will unpack and criticise Buchanan and Keohane's application of

the Complex Standard to the Security Council. During this process I will highlight

instances where their application of the Complex Standard is sub-par as well as work to

ameliorate the standard itself.

3.1 Testing the Security Council against the Complex Standard

The Complex Standard has six separate criteria; transparency, accountability,

flexibility, minimal moral acceptability, integrity and comparative benefit. I will be

unpacking and criticising Buchanan and Keohane's application of each of these criteria to

the Security Council in turn.

The Security Council fares rather poorly on the first criterion of the Complex

Standard, transparency. Although the minutes of the council's formal meetings are made

public, many of its dealings are carried out in private, informal consultations.[92] These

meetings often pertain to budding international crises and the meetings are defended on

the grounds that privacy allows states to raise potential issues and discuss solutions

without publically divulging sensitive information.[93] Although these secret meetings are

highly controversial Buchanan and Keohane argue that this lack of transparency is

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[92] Allen Buchanan and Robert O. Keohane, *Precommitment Regimes,* 47
[93] Jeremy Greenstock, "The Security Council In the Post=Cold War World," in *The United Nations Security Council and War: The Evolution of Thought and Practice since* 1945, eds. Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum, (Oxford University Press: Oxford, 2008), 252

actually a boon to the Security Council's effectiveness. They hold that the states which compose the Security Council need to be able to speak freely and without fear of recourse in order to properly tackle a global security crisis. If these talks were not in secret then the Security Council would risk becoming another forum where governments debate and pander to outside influences. Buchanan and Keohane note that if kept to a minimum, these meetings can be beneficial to the functioning of the council. Thus the council trades a hit in its transparency score in exchange for a higher comparative benefit.[94]

However despite the benefits of these meetings the Security Council has taken steps to minimize their use and improve its transparency. The number of informal meetings has been reduced and non-members are increasingly allowed to formally express their opinions on a greater variety of topics.[95] The Security Council's increase in public meetings may go a long way towards improving transparency as Buchanan and Keohane understand it but unfortunately their criticism does not capture the whole picture. Even if the Security Council were to make every possible intervention deliberation public it would still suffer from transparency issues simply due to the nature of the deliberations themselves. The Security Council has yet to accept clear, standardized guidelines for which specific circumstances justify intervention and which do not. In 2005 Kofi Annan criticised the Security Council on this very point, arguing that council should work towards agreeing upon a common standard for intervention,

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[94] Buchanan and Keohane, *Precommitment Regimes,* 47
[95] Nico Krisch, "The Security Council and The Great Powers" in *The United Nations Security Council and War: The Evolution of Thought and Practice since* 1945, eds. Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum, (Oxford University Press: Oxford, 2008), 138

such as R2P.[96] Without a clear consensus on specific justificatory criteria every

intervention debate necessarily occurs at two levels simultaneously. On the first level

countries are debating whether or not a crisis merits intervention and on the second they

are arguing about what criteria should be used to make this judgment. Even if there is

broad unofficial consensus on the criteria which justifies intervention, there is still a risk

that individual countries would disagree on specifics or apply the criteria inconsistently.

Since the Security Council has no clearly stated criteria which outline threshold

conditions for intervention and each country may be applying slightly different, possibly

unstated criteria, in each individual case large a portion of intervention deliberations is

obscured. For this reason the deliberations cannot be considered truly transparent. If the

Security Council were to formally adopt R2P or another standard, then there would be a

consistent yardstick against which any crisis and be measured. A rubric of sorts which

would set clear terms of what is and is not relevant to an intervention debate. Although

each crisis is different and will require its own nuanced approach, consistent standards

will at least anchor the debate around certain features of the crisis and allow for a degree

of consistency from debate to debate. With these factors in mind it seems that while

Buchanan and Keohane are correct that the Security Council scores poorly on this

criterion, it is not a justifiable failure but rather a serious shortcoming of the institution.

Next we turn to accountability. Buchanan and Keohane argue that institutions

should have some mechanisms in place to ensure sufficient accountability but do not

specify what sort of mechanisms are ideal. So long as there is clear motivation for the

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[96] *In Larger Freedom: Towards Security, Development and Human Rights for all – Report of the secretary general,* UN doc. A/59/2005 of 2 Mr. 2005, para. 126

institution to maintain certain standards Buchanan and Keohane seem indifferent when choosing between an oversight body, public review or some other mechanism. Even with this broad understanding of the criterion Buchanan and Keohane argue that the Security Council does extremely poorly with respect to accountability. They point out two significant failings; the first is that there are simply no constitutional checks on the Security Council. There is no judicial body or any sort of review for their actions and so they are not at risk of having their decisions come under formal scrutiny. The second failing is the fact that the five permanent members have no incentives towards responsible veto use.[97] Without any sort of check they are free to use their vetoes without political or economic consequences and are under no pressure to provide a formal justification when vetoing an intervention. In this respect I agree with Buchanan and Keohane that these are serious problems which should not be present in an institution responsible for the authorization of humanitarian intervention.

Buchanan and Keohane argue that the Security Council fares a little better with the third criterion, flexibility. An institution must be able to constantly revise its goals and adjust to fit present circumstances. While Buchanan and Keohane argue that the Security Council has demonstrated a willingness to change its goals to better match the shifting values and experiences of the global community, the lack of substantial change among the permanent five members is impossible to ignore.[98] The United Nations Security Council was crafted by the allies in the wake of the Second World War and although the realities of the international arena have drastically changed since 1946, the

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[97] Buchanan and Keohane, *Precommitment Regimes,* 47
[98] Buchanan and Keohane, *Precommitment Regimes,* 47

five permanent member seats have not. In order to pass the flexibility criterion, the Security Council should be expected to expand its membership so as to properly accommodate a wider variety of global perspectives. The fact that Security Council veto power is disproportionately relegated to western nations simply does not reflect the modern balance of global power, or the increasing need for diverse political opinion in issues of global security.

Furthermore, the ever present threat of a veto from one of the permanent five members undercuts any attempt at democratic decision making. Any intervention resolution can be quashed with a single veto from a permanent member. This convention gives five states a disproportionate amount of control over when an intervention is allowed to occur. The lack of global perspective and the unchecked veto use available to the permanent five are structural issues that were built in to the Security Council at its inception. A properly flexible institution would be able to recognise and work to resolve such serious problems.

The reason is that Security Council's structure has gone mostly unchanged since its creation in that the number of permanent members, along with their veto privileges, is entrenched in the UN charter. Thus, any substantive change will require a two thirds majority vote in the General Assembly as well as the unanimous consent of the five existing permanent members.[99] This consent has proven difficult to achieve. As recently as 2005 an attempt to expand the number of permanent members in the Security Council

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[99] Vaughan Lowe, et al *The United Nations Security Council and War: The Evolution of Thought and Practice since* 1945, eds. Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum, (Oxford University Press: Oxford, 2008), 33

failed when negotiations broke down and little was done in the way of council reform. By expanding the number of permanent members or by limiting their veto use, the council would benefit from a greater plurality of global perspectives. Since reform requires unanimous consent between these five, we are unlikely to see any meaningful change. This structure effectively eliminates any hope of the council reforming its structural issues but also its approach to humanitarian crises.

Although Buchanan and Keohane are correct in mentioning that the Security Council has altered its goals to appropriately respond to a changing global political landscape we cannot ignore the structural stagnation. The fact that Buchanan and Keohane argue that the Security Council passes the flexibility criterion highlights the limitations of the criterion itself. A global institution's flexibility should not be judged merely on its ability to formulate goals but also on its ability to institutionally change to reflect shifts in the international arena. Humanitarian crises are often rooted in profoundly complex cultural and political histories, if the Security Council is going to properly address the relevant reasons regarding a humanitarian crisis then it needs to adopt a truly global approach, rather than five nations deciding what is best for other parts of the world. The fact that the council refuses to alter its structure to include more recently powerful states such as India, Brazil or Japan points to a global blind spot in the council's international perspective. For these reasons Buchanan and Keohane are incorrect, the Security Council does not pass the flexibility criterion.

The fourth criterion is minimum moral acceptability. Buchanan and Keohane do not offer a very robust definition of this criterion and simply insist that in order to pass an

institution must not persist in perpetrating serious injustices, namely human rights violations.[100] By this narrow definition the Security Council easily passes.[101] This is not to say that the UN has a perfect record; there have been a number of instances where UN backed troops committed war crimes such as mass rape and murder.[102] However, the Security Council still passes the minimum moral acceptability test as there is no sign of systemic endorsement of these actions within the UN. These incidents seem far more like exceptions rather than the rule.

The problem here is that Buchanan and Keohane's definition of this criterion is far too narrow. While they are broadly correct in asserting that the UN, when it acts, does so in a morally acceptable manner they fail to address whether or not the Security Council is morally liable when it fails to act, such as in Rwanda or Darfur. Since the Security Council supposedly possesses a monopoly on the legitimization on force it seems they should be held equally accountable for the atrocities which they failed to act on as the ones which UN troops perpetrated. Much like a lifeguard can be held responsible for arbitrarily deciding not to save a drowning person, the Security Council should bear the moral weight for a crisis which is allowed to continue under its watch. This high moral burden seems reasonable considering that the Security Council was formed for the specific purpose of resolving international crises. Since proper authorization is necessary for a legitimate intervention and the Security Council is tasked with the duty of providing authorization it seems they are morally obligated to provide it

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[100] Buchanan and Keohane, *Precommitment Regimes,* 45
[101] Buchanan and Keohane, *Precommitment Regimes,* 48
[102] Buchanan and Keohane, *Precommitment Regimes,* 48

when circumstances dictate. Failure to do so makes the institution morally blameworthy. Although the Security Council lacks the power to force a member state to intervene in a given crisis, its authorization allows states to reflect on their dependant reasons regarding an intervention which they would not be able to do otherwise. While the Security Council may not be specifically perpetrating any violations of human rights their inaction directly allows for persisting human rights violations and reduces its claim to minimal moral acceptability. This issue highlights the risks inherent to an under permissive authorizing institution.

Although theorists are often most concerned with avoiding an overly-permissive authorizing institution, we must not forget that an under-permissive institution is also seriously problematic. An under-permissive institution serves as an obstacle against states that might otherwise have acted during a crisis and in this way could be worse than an intervention norm where states act on their own reasons at all times, without the added authority requirement.

While definitely a serious problem, I will stop short of arguing that the Security Council has a systemic propensity for inaction. They have authorized interventions in the past and generally work towards saving lives whenever possible and so some failures to act may be charitably taken to be exceptions to the rule. But even as exceptions they point to significant moral failings on the part of the Security Council. Buchanan and Keohane admit to designing this criterion to point to the absolute minimum moral acceptability but it seems we should be looking for more than the absolute minimum. I appreciate their reasoning; we obviously would not want to scrap an entire institution

based on a few simple errors. But it seems that an institution can merit either significant

overhaul or replacement well before its moral failings become systemic problems. Just as

with the flexibility criterion, it seems that the passing grade Buchanan and Keohane give

the Security Council is far more reflective of their narrowly defined criterion than it is of

the institution itself. When one considers the Security Council in light of the more robust

flexibility criterion, which includes inaction as well as action, the Council clearly fails.

       The fifth criterion is integrity. An institution fails this criterion if there is a gross

disparity between the institution's performance and its stated goals.[103] If an institution is

structured in such a way that it consistently undermines its own stated purpose, then its

claim to legitimacy will be seriously harmed. Buchanan and Keohane point out that while

every complex organization takes part in some sort of activity which would mar their

integrity, there is not a grievous discrepancy between the UN's stated goals and its

actions. There do not seem to be reports of rampant or even consistent corruption.[104] The

only major problem they make note of is that the UN's failure to act in the case of certain

major humanitarian emergencies points to a discrepancy between goals and actions.

However Buchanan and Keohane hedge on this judgement. They recognise that while the

UN does not display signs of rampant corruption, its occasional failure to act is a

considerable black mark on its record. I have already made a case for the severity of these

failures with regard to the minimum moral acceptability criterion so I will forgo

rehashing them here. I will simply note that in light of grand scale moral failings a lack of

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[103] Buchanan and Keohane, *Precommitment Regime, 45*
[104] Buchanan and Keohane, *Precommitment Regime, 48*

rampant corruption within the Security Council seems like a lesser issue and so the Council does not pass the integrity criterion.

The final criterion is comparative benefit. An institution passes this criterion if we can imagine that the world is better with it than without it. Since the success or failure of this criterion is based on imagining a counterfactual world in which the Security Council does not exist, it is by far the most difficult criterion to adequately judge. Buchanan and Keohane note that although the history of the UN has been rather rocky it has certainly played a positive role by introducing peacekeeping into the global crisis toolkit.[105] For that reason, they judge it to have passed the criterion of comparative benefit. The assertion that Security Council has achieved a net positive impact on international relations seems broadly correct, the stabilizing effect alone which it has on the international community is reason enough to view it as a positive influence over all, thus the Security Council passes the comparative benefit criterion.

This final passing grade is too little to justify keeping the Security Council as the exclusive authorizing agent for humanitarian intervention. Although Buchanan and Keohane argue that the council ultimately passes the Complex Standard, I have shown that their application of the test is problematic. While their analysis is correct in some instances they are often too charitable to the Security Council and occasionally they apply criteria that could stand to be greatly improved. Although Buchanan and Keohane argue that the Security Council only passes four of six criteria, I have demonstrated that its score is far worse than that, passing only comparative benefit. The Council does not

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[105] Buchanan and Keohane, *Precommitment Regimes, 48*

abysmally fail any criteria either but instead it routinely slides in just under a passing

grade. This failure casts deep doubt on the Security Council's ability to reliably judge the

relevant reasons regarding a humanitarian intervention. There is no standing guarantee

that the Security Council will get the relevant dependant reasons of states right, rather

there is a very real threat that it will misjudge or misapply them. In order for an

institution to consistently identify and weigh the relevant reasons regarding an

intervention, reasons such as sovereign concerns and human rights, it needs to have

certain structural safe guards, such as strong mechanisms to ensure accountability and

minimal moral acceptability. Without such mechanisms there is little difference between

an authorizing body and a humanitarian intervention norm where states act on their own

reasons without an authorizing body at all. These failings are important as they not only

demonstrate the issues inherent in the Security Council, but they also serve as a guide as

we move forward and search for an alternative to Security Council authorization.

Before alternatives are discussed I should note that I will not be arguing for a

replacement for the Security Council. Instead I will be arguing for an institution that will

work alongside of the Security Council which can offer a preferable alternative route to

intervention authorization.[106] Part of the reason for this is the fact that the Security

Council scores poorly on the complex standard it is still viewed, both internationally as

well as in modern scholarship, as the proper legitimizing agent for humanitarian

intervention. In order to properly assess the likelihood of another institution rivalling the

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[106] The purpose of this alternative is not necessarily to increase the net number of interventions. Instead my aim is to provide a more accountable and accurate decision making body. The reasons to follow such an institution's directives instead of the Security Council's would be rooted in the nature of its decision making procedures, rather than the content of its directives.

Security Council's ability to legitimise force, we need to assess why its tremendous shortcomings are often overlooked by the international community.

The importance of Security Council authorization for interventions is a post-cold war phenomenon. After WWII the great powers would routinely intervene in foreign states without so much as a nod toward the Security Council; two notable examples are the Russians in Afghanistan and the Americans in Vietnam. However after Operation Desert Storm, the Security Council started taking a much more active role in the global use of force. Before the Gulf War, the Security Council only adopted two Chapter VII resolutions, but between 1990 and 1998 they adopted 145.[107] There is also a correlative jump in the number of UN backed military missions and cases where the Security Council authorized the use of force by a coalition of the willing. It seems that the international community suddenly found Security Council authorization very important. However this sudden shift in the Security Council's perceived importance is rather difficult to pinpoint as the Security Council has done very little to change or improve its practices over the years.

Eric Voeten argues that the reason why the source of the Security Council's legitimacy is so hard to discern is because it does not adhere to traditional legitimacy standards. The reason the Security Council can do so poorly on the Complex Standard and yet still maintain its position as primary authorizer of force is because it functions more like elite pact than an institute which was purposely designed to govern moral or

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[107] Voeten, 531

legal norms.[108] To explain this point Voeten compares the Security Council to a medieval merchant's guild.[109] A merchant's guild would force trade centres to respect merchant property rights with the credible threat of a boycott, as a result trade centres which refused to heed merchants' demands were left void of merchants. Thus cooperation with the guilds became increasingly important and in time, actions which threatened cooperation came to be seen as illegitimate.

While this analogy does not perfectly track on to the international arena, it gives us an idea of the reasons behind the sudden importance the Security Council enjoyed after the cold war. The Security Council serves as an elite pact between the super powers to neutralize threats to stability.[110] Any actor who utilizes force without Security Council consent can be subject to punishment by the other great powers, usually in the form of reduced cooperation elsewhere. In this way, when the Security Council authorizes the use of force it is not so much making a claim regarding the moral or legal effects of the force but rather guaranteeing that the intervening party will not suffer adverse consequences for their actions.

Understanding the Security Council as an elite pact sheds light on two important points. The first is why the Security Council did so poorly on the Complex Standard. It cannot be trusted to properly assess the dependant reasons of foreign states concerning intervention because it simply was not designed to do so. Instead it was designed to maintain stability.

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[108] Voeten, 551
[109] Voeten, 542
[110] Voeten, 543

The second point is why the creation of a secondary authorizing agent will be difficult. The Security Council is a monument to the status quo. It does not need to be overly effective; it just needs to be powerful enough to protect its own interests and stable enough to avoid making any waves which could result in serious challenges. A new institution obviously cannot capitalize on these techniques. Rather any replacement must demonstrate that it can better take on the role of an authority. It must demonstrate that it can better act in accordance with a state's dependant reasons, it must show that states are better off listening to it than the Security Council, at least with regards to intervention questions. It will have to present itself as a well-structured, trustworthy alternative to make a strong claim to legitimacy. Of course there is no guarantee that sociological legitimacy will follow, after all the Security Council has a tremendously strong presence in the international community, however the best chance an alternative has to make a stronger normative claim and hope that it is found persuasive.

3.2 The Possibility of Alternatives

Before we can begin searching for the ideal authorizing body, we must address the question of whether or not alternatives to the Security Council are possible. It may be the case that the Security Council has exclusive rights to any and all intervention authorization power and the suggestion of an alternative is a non-starter. The strongest reason to believe that the Security Council is the only potential authorizing body is that it has exclusive authority over the legal status of an intervention. Since a humanitarian intervention does not fall under a nation's right to self defense, the violent breach of another state's borders is illegal as per Article 2(4) of the UN Charter, unless it is

sanctioned by the Security Council under a Chapter VII resolution. If an intervention's

being legally sanctioned is necessary for its being legitimate then the Security Council is

the only possible authorizing agent for a legitimate humanitarian intervention.

The debate regarding the exact role legality plays in determining an intervention's

legitimacy has been ongoing but was seriously altered after the Kosovo Report was

issued in 2000. The authors of the report, The Independent International Commission on

Kosovo, were tasked with determining whether or not the North Atlantic Treaty

Organization (NATO) should be penalized for their intervention in to Kosovo,

specifically for their highly controversial bombing campaign. Not only did the

commission find NATO's bombing undeserving of punishment; they explicitly stated that

the intervention was legitimate despite its being illegal.

> The Commission concludes that the NATO military intervention was
> illegal but legitimate. It was illegal because it did not receive prior
> approval from the United Nations Security Council. However, the
> Commission considers that the intervention was justified because all
> diplomatic avenues had been exhausted and because the intervention had
> the effect of liberating the majority population of Kosovo from a long
> period of oppression under Serbian rule. [111]

The commission grounded the legitimacy of the Kosovo on two points; the first is the

moral argument made in favour of intervention based on the facts of the crisis.

Specifically the fact that a significant number of people were at serious risk of harm and

intervention had a real chance of improving the situation. The second point is more

subtle, by citing that NATO had exhausted other diplomatic avenues before launching the

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[111] Kosovo Report, executive summary pg 4
http://www.oxfordscholarship.com.libaccess.lib.mcmaster.ca/view/10.1093/0199243093.001.0001/acprof-9780199243099-chapter-1

intervention, its authorization in this case was a legitimating factor. In this case, NATO was better able than the Security Council to judge the relevant reasons regarding the crisis and so issued a directive which dissolved the preemptive belief that The Federal Republic of Yugoslavia's sovereign rights should be respected.

The Kosovo report makes the idea of an alternative authorizing body a very real possibility. Note that the Security Council did not offer an explicit after the fact authorization; it only offered implicit support by refusing to punish NATO for its actions. Russia proposed a resolution which would condemn the NATO intervention but it was defeated by a margin of twelve to three in the Security Council. [112] The Kosovo intervention was not illegitimate and simply waiting for formal authorization from the council, rather the council recognized it as legitimate, independent of formal authorization and legal status. The nature of the Kosovo crisis combined with NATO's authorization were together sufficient to ensure the legitimacy of the intervention. Thus it is clear that although the Security Council has exclusive rights to authorizing legal interventions, it does not have exclusive rights to legitimizing humanitarian intervention.

My use of NATO's intervention in Kosovo should not be read as express support for its actions. NATO's conduct in Kosovo was controversial at best, although Kofi Anon applauded NATO's fundamental goal of protecting human rights, others have criticised the disproportionate force which they used during the air campaign.[113] I do not wish to

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[112] United Nations Security Council 3989th meeting, S/PV.3989, March 26th, 1999, pg 6 available at http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.3989

[113] For examples of critical analyses of the NATO bombings see Allen Buchanan, From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, *Ethics*, Vol 111, No 4, (July 2001), or Henry Shue, "Bombing to Rescue?: NATO's 1999 Bombing of Serbia in *Ethics and Foreign Intervention* eds Deen Chaterjee and Don E. Scheid, (Cambridge University Press), 2003

settle the scholarly debate on whether or not the NATO intervention specifically was

legitimate, rather I am focussing on the precedent which was set by the international

acceptance of the intervention's legitimacy. The conclusions of the Kosovo Report

combined with the failure of Russia's punitive measures provide strong reason to believe

that the international community is at least open to the idea that illegal intervention can

be legitimate. This recognised distinction means that illegal methods of reforming the

norm of humanitarian intervention, specifically authorization from sources other than the

Security Council, can be reasonably pursued.[114] While some may shy away at this sort of

international civil disobedience, there are a number of reasons in favour of illegal reform.

Allen Buchanan has offered an extensive defence of the moral justification of illegal

reform of international norms and while I will not open the full discussion here, I will

note a few of his points in its defence.

By illegal reform of international law I am referring to illegal acts which are

committed with the intention of reforming or replacing an existing, morally defective

norm within the international legal system with a new, morally preferable norm.[115] This

process is nothing new; Buchanan notes that some of the most venerable tenets of modern

international law can be traced back to acts of illegal reform. The most impressive

example is the Nuremberg trials. A strong case has been made that there was no

customary norm or treaty at the time which prohibited what the Nuremberg Tribunal

called 'Crimes against Humanity' and the entire ordeal has been called little more than

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[114] I do not mention illegal reform because I think it is a preferable avenue of change. I would much rather pursue legal means of change, through a UN resolution for example. However current international law dictates that all intervention which occurs without Security Council authorization is illegal, as such any alternative I suggest will be illegal.

[115] Allen Buchanan, From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, 675

'Victors' Justice' which was explicitly illegal at the time. However, this illegal act generated a landmark reform to international law: The outlawing of genocide. [116] Since the Nuremberg trial directly contributed to the outlawing of genocide and indirectly to the elevation of human rights within international law, it seems that the trials should be considered morally justified, despite their being illegal.

In our case the defective norm in question is a standard of humanitarian intervention which depends on a highly defective authorizing body for legitimacy. Thus, if we can identify an authorizing body which can better recognise and deal with the dependant reasons regarding humanitarian intervention, then adherence to a norm which defines this new body's authorization as necessary for legitimate intervention should be viewed as justified. As such, we can justify illegal actions, which serve to promote a superior authorizing agent.

3.3 Alternative Authorization Institutions

In this section I will review a number of potential alternatives to the Security Council. In order for an institution to be a viable alternative it must possess a number of characteristics. First, it must guarantee a certain degree of normative legitimacy. To do this it must demonstrate that it can properly weigh the reasons relevant to a given humanitarian crisis and issue directives which are more strongly justified than those issued by the Security Council. I will use the Complex Standard to test an institution's ability to properly and consistently issue directives which will serve to dissolve the presumptive reason for respecting a state's sovereignty.

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[116] Allen Buchanan, From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, 681

Beyond normative legitimacy the institution must demonstrate a reasonable chance at achieving sociological legitimacy. Since it is impossible to predict if an institution will be taken as authoritative this will be a fairly charitable criterion. Unless there is a strong reason to believe that other states would not respect the institution, we will assume that strong normative legitimacy will be sufficient.

Finally the institution must be designed to act independently of the Security Council in matters of intervention authorization. To be clear, I am not advocating the dismantling of the Security Council, rather I am stressing the need for a reasonable alternative. The institution must carry sufficient respect that its directives are authoritative regardless of Security Council authorization. The relationship between these two bodies would most closely mirror the relationship between a supreme court and a lower court. The lower court has clear and undisputed authority over any case which is brought before it, however that authority can later be overturned or corrected if the case is brought before a higher court. In this way, the institution we are imagining would be able to legitimize an intervention without waiting for acquiescence or inaction from the Security Council. But any directive issued by the institution could ultimately be overruled by the Security Council. There are two good reasons for maintaining this restriction. The first is that the purpose of this institution is to provide an alternative to Security Council inaction, not to totally replace it as a decision maker. The second reason is that we can leave the Security Council in place while significantly reducing the power permanent members have to arbitrarily veto an intervention. If the council is voting on an intervention any of the permanent five members are free to veto the action, thus

unanimity is required. However, if the intervention is authorized by an outside institution, then the question the Security Council is changed from whether or not to call for an intervention to whether or not to condemn an institution's call for an intervention. Now, unanimity is required to actively condemn rather than allow an intervention. This new structure favours the outside institution for any veto use would remove condemnation. Now that the relationship between an alternative authorization institution and the Security Council is clear we may begin to test what sort of institution is best suited for the role.

3.3.1 The United Nations General Assembly

Perhaps the most obvious alternative to the Security Council is the United Nations General Assembly. In fact the ICIS commission recommends that when the Security Council fails to act, either through threat of veto or a breakdown in talks, that the General Assembly convenes an Emergency Special Session to vote on the legitimacy of an intervention.[117] The authors suggest that if the motion for intervention should pass with a two thirds majority, such a vote can serve to lend 'a high degree of legitimacy for an intervention.'[118] However, in its current form the General Assembly is a non-starter. It does not have the formal authority that the Security Council has to direct that any action be taken.[119] The purpose of its vote in favour of intervention is not to remove the preemptive reason to respect a nation's sovereignty. Rather its purpose is to lend support in favour of intervention and request that the Security Council rethink its position. While support from the General Assembly may well assist a morally laudable intervention in

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[117] R2P 6.29
[118] R2P 6.30
[119] R2P 6.30

gaining international support, it was designed to leave the final word on legitimacy in the hands of the Security Council. However, perhaps if we granted the General Assembly the powers to direct action, it would be an effective alternative to the Security Council. Since the General Assembly is already designed to serve as a safety net on occasions where the Security Council fails to take action, it seems to be the perfect candidate to step up as a new primary authorizing agent. All that may be needed is to expand its current powers. But before we can be sure that it is the preferred authority we must test it against the Complex Standard.

At first blush it certainly seems like an excellent alternative to the Security Council. The General Assembly's open discussion and debate is a marked improvement on the transparency criterion. It also scores higher in institutional integrity and minimum moral acceptability, as the General Assembly does not fully share the blame with the Security Council for failed intervention attempts. However despite its numerous advantages over the Security Council it suffers from a number of problems which put it beyond the scope of reasonable alternatives.

Even if the General Assembly's authorizing power was greatly expanded it will still do poorly in the comparable benefit criterion. If we are going to advocate for an alternative institution we must show that a world where it was to exist in a similar capacity to the Security Council would be preferable. While the General Assembly is invaluable as a platform for international debate, it is unclear whether it will be more successful than the Security Council at properly weighing dependant reasons. This is because there is little reason to believe that the political issues which bring the Security

Council to loggerheads will not plague the General Assembly as well.[120] Considering the

gross discrepancy in size between these two organs any issues present in the fifteen

member Security Council are likely to be exacerbated when brought in front of the 193

member General Assembly. Although a General Assembly vote will be free from the

stresses brought on by the ever-present threat of a veto, there is little reason to believe

that member states would be more willing to cooperate with one another to the extent that

a two thirds majority can be reached. The lack of cooperation entails the risk that the

General Assembly would be a grossly under permissive authorization agent and possibly

refrain from authorizing interventions that are desperately required. For these reasons,

even a General Assembly with expanded powers is by its own design ill-suited to be the

primary authorizing agent for humanitarian intervention. These reasons eliminate it from

the list of contenders before the Complex Standard need even be applied.

3.3. 2 A Coalition of Democratic States

Buchanan and Keohane have argued that the ideal institution to authorize

humanitarian intervention would be a Coalition of Democratic States. Their argument has

two parts. First they outline certain institutional standards which would be necessary for a

legitimate alternative to the Security Council and then they assert that these standards are

best applied to a democratic coalition.[121] The institutional standards are very promising

and we shall look at them later in this chapter. For now we shall focus on the plausibility

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[120] Cristina G. Badescu "Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers" *Canadian Journal of Political Science*, 40, vol 1 (March 2007), 59
[121] Allen Buchanan and Robert O. Keohane, "The Preventative Use of Force: A Cosmopolitan Institutional Proposal," *Ethics & International Affairs*, vol 18, no 1, (2004), 18

of granting a Coalition of Democratic States the power to authorize humanitarian intervention.

A state can be considered democratic if it has reasonably fair elections, entrenched basic civil and political rights, representative government and otherwise displays prominent liberal governing values.[122] Buchanan and Keohane argue that democratic governments are more reliable because democracies tend to have fewer mass human rights violations and when they violate cosmopolitan principles they are more susceptible to criticism from their citizens.[123] For these reasons they are more trusted decision makers. A democratic coalition is not meant to replace the Security Council, instead it is only meant to take the take action when an intervention request is vetoed or deadlocked in the council. The coalition would function more like a safety net than a true alternative, but since Buchanan and Keohane argue that it would be able to authorize and direct action it is a more promising contender than the General Assembly which could only pass decisions back to the Security Council. Still, democratic coalitions are plagued by a number of issues which must be addressed before we can even begin to apply the Complex Standard.

The first issue is whether we are justified in assuming that democracies are better suited than other types of governments to authorize and responsibly use force. Buchanan and Keohane ground this trust on the nature of democratic institutions, and the increased accountability they instil in the governments of democratic nations.[124] Christian Reus-

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[122] Buchanan and Keohane Cosmopolitan Institutional Proposal, 18
[123] Buchanan and Keohane Cosmopolitan Institutional Proposal, 19
[124] Buchanan and Keohane Cosmopolitan Institutional Proposal, 19

Smit criticises Buchanan and Keohane by arguing that they confuse the mere existence of democratic institutions with the championing of democratic principles and values.[125] Simply because a democratic state holds technically fair elections and legally enshrines equality does not mean that they functionally uphold the core principles of democracy. To demonstrate this point Reus-Smit singles out David Beetham's two democratic principles; a society's system for making collectively binding decisions must be under the control of all society's members and decision makers are considered equal.[126] Unless a democracy can demonstrate that it achieves these two democratic principles in practice, we cannot be certain that its government is truly accountable to its people. Reus-Smit goes on to assert that although many major democracies formally advocate these principles, their practice falls well short of the cosmopolitan ideals Buchanan and Keohane attribute to them. In most modern democracies powerful lobby groups and politicized media undermine the control citizens have over their own government and systemic discrimination often radically decreases any real equality regardless of legal status.[127] If democracies fail to realise Beetham's two principles, then they are not as open to criticism from their voting constituents as Buchanan and Keohane believe them to be. Without this open criticism, democratic states will not be in a preferred position to identify and act upon the relevant reasons regarding a humanitarian intervention. For this reason a Coalition of Democratic states cannot be expected to better act on the relevant reasons than an authority which encompasses both democratic and non-democratic states.

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[125] Christian Reus-Smit, *Liberal Hierarchy and the License to Use Force*, Review of International Studies, Vol 31, Force and Legitimacy in World Politics, (Dec., 2005), 82
[126] Reus-Smit, 82
[127] Reus-Smit, 83

Unfortunately Reus-Smit's argument is not particularly persuasive. Although discrimination and lobby groups certainly present an issue for democracies it is hyperbolic to say that modern democracies are hobbled by these problems. These issues definitely make them flawed and undeniably impact certain decision making procedures. However, despite how problematic a given democracy's internal political system is, democracies as a group still routinely demonstrate a greater respect for human rights than non-democratic nations. Thomas Christiano recently argued that a clear pattern can be seen which shows that the more democratic a nation is, the greater the respect it pays towards human rights.[128] A country's level of democracy is measured strictly by the presence of certain institutions. At the point which nations have accountable legislatures, free and fair elections and serious checks on executive power they begin to demonstrate a serious respect for human rights.[129] The fact that this correlation appears regardless of the presence of politicized media or lobby groups seems sufficient to cast serious doubt on Reus-Smit's claim that the mere existence of democratic institutions is insufficient to ensure heightened moral accountability on the part of their government. However there may still be elements of Reus-Smit's argument which survive this rebuttal.

Christiano's argument primarily refers to a government's respect for human rights within its own borders; we may not be justified in expecting this respect to extend to foreign peoples. While it is unlikely that a government with an excellent domestic rights record would commit wide scale atrocities abroad, we cannot assume that democracies

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[128] Thomas Christiano, "An Instrumental Argument for a Human Right to Democracy," *Philosophy and Public Affairs*, vol 39, no 2 (Spring 2011), 149
[129] Christiano, 151

are superior decision makers when it comes to humanitarian intervention. For example, a respect for human rights does not directly translate into a respect for reasonable use of force. There may be good reason to believe that democracies are in fact more likely to use excessive force. Since democracies rely so heavily on public opinion, their ability to wage a domestically supported intervention is hindered with every soldier they lose. This provides a high incentive to rely on strategic bombing and other low risk yet heavy handed tactics to accomplish their military objectives. Although these tactics have proven effective on occasion they are often accompanied by high collateral damage.

Reus-Smit, as well as Buchanan and Keohane in their most recent article, all raise one final issue: the problem of sociological legitimacy.[130] [131] There is simply no way that an institution which leverages democratic states above non-democratic states can gain sociological legitimacy in the global arena. Such an institution would effectively shift the norm of non-intervention from all UN member states having an equal right to sovereignty to democratic states having an elevated right to violate sovereignty.[132] Furthermore the fact that China has publicly stated that it will not support a democratic coalition of this sort effectively ends any prospect of a democratic coalition. This outward hostility towards a democratic coalition would at best result in lowered cooperation and at worst heightened militarism in response to the perceived threat felt by non-democratic states.[133] Even an ideal democratic coalition is a non-starter due to reluctance from non-democratic nations to show support for the institution.

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[130] Reus, Smit, 88
[131] Buchanan and Keohane, *Precommitment Regimes*, 54
[132] Reus Smit, 88
[133] Buchanan and Keohane, *Precommitment Regimes*, 54

3.3.3 Precommitment Regimes

Buchanan and Keohane have recently proposed a new alternative to the Security Council, Precommitment Regimes. Precommitment Regimes would consist of a fledgling democracy entering into a contract with a group of democratic states where in the fledgling democracy would authorize an intervention by those states in the event that its government is overthrown.[134] Thus a Precommitment Regime offers a certain amount of security for young democracies that fear military coups. While interesting and likely effective, Precommitment Regimes deal with a very narrow niche of intervention cases. They cannot properly deal with genocide or ethnic cleansing, for it is unlikely that the same government that would commit war crimes against its populace would take measures to ensure foreign interference. If we wish to advance the norm of humanitarian intervention, we need to focus on institutions which can advance the norm in every aspect. For these reasons Precommitment Regimes will not be addressed in this paper. That said there is no real reason why Precommitment Regimes cannot function independently of the conclusions drawn here.

3.3.4 Regional Organizations

A Regional Organization (RO) is an international organization comprised of member states bounded by a specific geographic area or economic or political interests. This definition is not meant to be overly exact but rather offer a general description of what does and does not qualify as a Regional Organization.[135] Some examples of ROs are

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[134] Buchanan and Keohane, *Precommitment Regimes*, 55
[135] Within the literature there is a tendency to distinguish between regional and Sub-Regional Organizations such as Economic Community of West African States (ECOWAS). However, this distinction seems to only ever function semantically as regional and Sub-Regional Organizations seem to be praised, condemned,

the African Union (AU), the Organization of American States (OAS), the European

Union (EU) and the North Atlantic Treaty Organization (NATO).

The use of Regional Organizations for humanitarian intervention has been often

touted as the preferred alternative to the Security Council. UN Secretary General Boutros

Boutros-Ghali as well as the authors of R2P have called for Regional Organizations to

take a more active part in peace keeping operations. Regional Organizations seem to be a

promising choice considering that they have a number of pragmatic advantages that serve

in their favour. The first is that they have, compared to the UN, a much smaller purview.

A Regional Organization is not going to be bogged down with the same number or range

of problems that the UN must face and so when a crisis arises they can prioritize it more

easily. Regional Organizations also benefit from their proximity to a given crisis, which

allows them to respond much faster and at a lower cost than the UN.[136] When the UN

directs an intervention it must collect forces and resources from all over the world and

move them to the crisis zone. While this is hardly an impossible task it is certainly time

consuming and expensive.

These advantages, while true of ROs in theory, are not necessarily true of specific

organizations. The AU in particular is woefully underfunded; a fact which came to light

recently in the crisis in Darfur when the AU's initial attempts to stop the crisis fell well

short of their stated goals both militarily and logistically.[137] While this does not speak to

every Regional Organization it represents a problem which is systemic to this sort of

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promoted and criticized interchangeably by theorists. For that reason I will not make a firm distinction
between regional and Sub-Regional Organizations.
[136] Badescu, 69
[137] Bellamy, 44

fragmented alternative to the Security Council. Whatever money which is currently available for humanitarian concerns would be divided up between a multitude of groups, instead of being put into a single pot.

Furthermore, Regional Organizations are legally bound to request Security Council authorization before initiating an intervention, which means that they are technically unable to act as an independent authorities regarding intervention. However, there have been a number of notable cases where ROs have stretched this tie to the Security Council by launching interventions without prior authorization and then sought the Security Council's authorization after the fact. The Economic Community of West African States' (ECOWAS) interventions into Liberia and Sierra Leone were both granted Security Council approval after the fact.[138] Since they rely entirely on the authorization of the Security Council they are currently more of an accessory to the Security Council than an alternative. However, their ability to push the limits of that relationship makes them a more promising solution than the General Assembly which suffered from a similar constraint. However, practical benefits have little to do whether or not ROs can be considered normatively legitimate. We will now turn to the question of whether they could, in their current state, present a viable alternative to Security Council authorization by testing them against the Complex Standard, specifically the accountability and comparative benefit criteria.

The immediate problem with attempting to judge ROs against the Complex Standard is that there are a large number of ROs, each of which is substantially different

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[138] R2P 6.5

from each other. To properly judge each one's institutional integrity, transparency, flexibility and minimum moral acceptability criteria would require a thorough review of each RO's institutional makeup and is a task which is well beyond the scope of this project. However, we may still use certain qualities which tend to pertain to ROs as a group to apply the remaining criteria of the Complex Standard.

Regional Organizations fare very well on the accountability criterion, for their powers are checked in two distinct ways. The first is by their constituent member states. Since any act of intervention authorized by an RO will likely affect the very same states which sign off on the intervention, we can assume that there would be a strong desire to institute checks and safeguards to prevent error or abuse. While it is possible that an RO could function with a very low level of accountability to its members, the institutional structure is generally disposed towards a greater degree of accountability. The second check against Regional Organizations' powers is their direct link to the Security Council. At present ROs are expected to work very closely with the Security Council on security matters and submit to UN oversight. Although I have argued that the Security Council is not the ideal institution to authorize interventions, it may still serve as a functional review board. My criticisms were targeted primarily at its inability to properly handle the norm of humanitarian intervention, their decision regarding Kosovo indicates that they may be more balanced when effective at reviewing decisions after the fact.

It also seems that ROs have, at least the potential, for achieving the comparative benefit criterion. The primary advantage Regional Organizations have over other alternatives is their unparalleled appreciation of the customs, politics and culture of the

country in which the crisis is occurring. Unlike Precommitment Regimes, a democratic

coalition or even UN sanctioned operations, interventions authorized by Regional

Organizations are very likely to be led by a neighbouring state. The advantage here is that

a neighbouring state is far more likely than an international one to understand the history

and context which informs a humanitarian crisis. This increased familiarity can lead to a

more nuanced response to a crisis as well as more thorough solutions to any underlying

issues.

Regional organizations offer a further comparative benefit in that they are highly

motivated to act. When a humanitarian crisis occurs neighbouring states are seriously

affected. Mass migrations of refugees and the pervasive risk of violence spilling across

borders pose a significant risk to the economies and territories of nearby nations.[139] This

aspect of regionalization is particularly appealing when we consider the fact that

countries are not, by and large, in a rush to spend time, money and lives to fix a problem

halfway across the world.[140] A mere moral obligation is often insufficient to motivate

states to assist with a catastrophe. The fact that regional actors have both self-serving and

moral reasons to act makes them far more likely to intervene in the event of a conflict.

However, proximity to a crisis is not necessarily a feather in ROs' collective cap.

Brian Job argues that often a state's proximity to the crisis can stall rather than spur their

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[139] Badescu, 69

[140] Michael Byers and Simon Chesterman, "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law" in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press: 2003), 202

involvement.[141] States are frequently reluctant to act for fear of offending a neighbouring ally or making themselves a target for future interventions. Furthermore, those who do act will occasionally use a crisis as grounds to advance their own interests within the region, or settle grudges with other states both of which often cast doubt on the motivations of any would be interveners in the area.

While ROs have some very promising characteristics they suffer from a number of crippling problems. The fact that there are so many varied ROs casts doubt on the ability of the collective institutions to be reliable decision makers. Each one may weigh the relevant reasons differently, some better than others and we find ourselves with an inconsistent application of the intervention standards. Furthermore, of the two elements of the Complex Standard which they all share they only excel at accountability; their comparative benefit is highly disputed. Clearly they cannot compete with the Security Council their current form. The particulars of each institution vary too much to allow for an in depth analysis of the practise and what consistencies do arise tend to offer both promising benefits and disastrous problems. Regional organizations, in their current state do not appear to be the next plausible step for the norm of humanitarian intervention. There are too many inconsistencies and individual problems between various ROs to hope that intervention would be handled evenly and fairly across the globe.

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[141] Brian Job "The UN, Regional Organizations and Regional Conflict: Is There a Viable Role for the UN?" in *The United Nations and Global Security*, ed Richard M. Price and Mark W. Zacher (New York: Palgrave MacMillan, 2004), 235

3.3.5 Standardized Regional Institutions

The current selection of alternatives to the Security Council is not particularly promising. Precommitment Regimes have far too narrowed a scope and while a Coalition of Democratic States may likely be a workable solution, its inability to gain sociological legitimacy renders it a non-starter. Regional organizations have certain undeniable advantages concerning proximity and understanding of a humanitarian crisis but struggle with normative legitimacy due to there being a multitude of ROs, each with a unique institutional design.

However, there is one last option that has not been discussed. Although the idea of a democratic coalition is not a reasonable alternative to the Security Council, Buchanan and Keohane outlined a series of institutional standards pertaining to a potential coalition which are very promising. In the remainder of this section I will argue that by combining the institutional standards of the democratic coalition with the sociological advantages of ROs we can form an extremely promising alternative to the Security Council. The idea is that Regional Organizations would reorganize their decision making procedures, with specific regard to humanitarian intervention, in accordance with specific and universal standards. Although each Regional Organization would act independently, when considering an intervention their institutional guidelines and procedures would be identical to every other Regional Organization. They would have a standardized decision procedure built in to their organizations which would include mechanisms specifically designed to ensure that the relevant reasons are properly weighed and considered. These Standardized Regional Organizations (SROs) would

enjoy the standing advantages of ROs but they can also make the strong claim that they

are best suited to weigh any and all the relevant reasons concerning an intervention

within their sphere of influence. The standardized model is composed of three areas

where minimum standards are applied as well as two types of mechanisms which

increase accountability and lead to more decision making. First I will explain the three

standards.

The standardized model is a series of procedures and safeguards which are meant

to increase both accountability and transparency within a given institution. Buchanan and

Keohane outline three areas which organizations must achieve certain minimum

standards in. The first standard is action. An SRO must set clear and attainable goals for

itself and then take steps which are in keeping with achieving those goals. In our case

goals would likely involve a commitment to utilize a standard guideline for intervention,

such as R2P and to work quickly to effectively respond humanitarian crises. These stated

goals and codes of conduct will act as guidelines against which the SROs' actions can be

judged. Since achieving these goals will keep SROs' actions consistent with their stated

purpose, they score extremely well in the integrity criterion. It follows that failure to live

up to its own stated goals will result in serious damage to an SRO's claim to

legitimacy.[142]

The second standard is sharing of information. In order for the institution to have

properly functional decision making procedures; there needs to be mechanisms in place

to ensure that relevant information will be shared with the appropriate agents. While this

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[142] Buchanan and Keohane Cosmopolitan Institutional Proposal, 11

does mark an increase in transparency from the Security Council's secret meetings, it

does not need to be wholly transparent. There is still room for secrecy and discretion

when the circumstances dictate. This standard can be achieved so long as member states

and external observers need to be reasonably certain that no state is withholding relevant

information regarding a crisis or intervention. Any attempt to hide or misrepresent

information would cast serious doubt on an SRO's ability to properly deliberate on the

relevant reasons regarding an intervention. It is important to note that this standard does

not make any claim on how this information shall be interpreted; it is simply

guaranteeing that the member states have the ability to consider all the relevant factors

for an intervention.

The third standard is the use of sanctions. Institutions must be willing and able to

enforce their values on theirs members by use of sanctions or other penalties. If a member

state breaches a rule, law or otherwise acts in ways not in keeping with the goals of the

organization, there must be clear and uniformly applied penalization. This use of

sanctions provides clear and public incentives for states to behave in a way which better

reflects the purpose of the organization. In this way there can be global assurance that

organization is functioning properly and will be able to defend its directives on a global

forum. This is far more than can be said about the Security Council. The use of sanctions

within SROs is a marked improvement over the Security Council's un-restricted veto use

and for that reason it passes the accountability criterion where the Security Council

failed.

We can already see certain advantages which SROs have over the Security Council. These standards mean that SROs score extremely well in the integrity, transparency and accountability criteria of the Complex Standard. Since these are three areas where the Security Council did poorly SROs are already appearing as a promising alternative. However, before a judgement can be made two further accountability mechanisms have to be explained.

The two further sets of safeguards that Buchanan and Keohane recommend are measures which occur both *ex ante* and *ex post* intervention.[143] These measures are best explained through the use of a hypothetical example. Imagine a humanitarian crisis occurs within the sphere of influence of a particular Standardized Regional Organization and it becomes clear that this crisis may require intervention. The first step in authorizing an intervention is for either a member state or a foreign state to bring the case for intervention before the SRO.[144] The state or states who request the intervention would have to present evidence to the SRO that the humanitarian crisis merits intervention. Once their case has been presented and all available information has been reviewed, the issue will be openly debated and voted on by the member states.[145] The debate will center on the available information regarding the crisis and whether or not it meets the organization's stated standards of action. Since this debate is structured around pre-determined standards for intervention, SROs avoid the transparency issues which plague Security Council intervention debates. If the SRO reaches a two thirds majority decision

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[143] Buchanan and Keohane Cosmopolitan Institutional Proposal, 13
[144] It is entirely possible that a non-member state could bring the case for intervention before the institution
[145] Buchanan and Keohane Cosmopolitan Institutional Proposal, 13

in favour of intervention, then it will authorize the intervention. Anything less than a two third majority will be considered insufficient justification for authorization. This process of deliberation and voting secures the institution's *ex ante* requirement, it demonstrates that the HRO has given the crisis serious and genuine consideration and is acting in a manner that is consistent with its stated purpose. Since this deliberation is structured and designed to test whether a crisis meets specific standards of intervention, it avoids the criticisms levelled against the Security Council earlier in this chapter. Namely that its unrestricted debate on humanitarian crises can be muddled and lead to transparency issues.

The *ex post* accountability describes the second round of justification which takes place after the intervention is complete. It involves an independent commission reviewing both the intervention itself and the justification originally offered. This step is key to an SRO's ability to pass the integrity criterion. The commission would attempt to answer two primary questions.

The first question is whether the information available after the intervention is consistent with the information available before. Should serious inconsistencies arise the SRO will take appropriate measures to attempt to avoid repeating whatever error occurred. Whether it was a failure to properly uncover all the facts or misrepresentation of information, errors of this sort pose a serious threat to an SRO's ability to maintain its mandated purpose and properly fulfil its function. The *ex post* accountability measures serve to keep the SRO on track.

The second question the *ex post* measures deal with is with whether the military

actions of the intervening state(s) were consistent with just war doctrine and did not

exceed what was required to halt or prevent the crisis.[146] Failure to demonstrate sufficient

military restraint would be an error which must be immediately remedied. Once those

questions are answered the commission will issue a verdict on whether the intervention

was justified or not, depending on that verdict, states who voted for an unjustified

intervention or against a justified one could be held accountable and subject to sanctions.

The military actions of a state during the intervention can also be punished if required.[147]

The purpose of the *ex ante* accountability measure to ensure that states take their voting

responsibility seriously and to ensure their votes are directed by the nature of the crises

and not by extraneous factors. This measure helps avoids some of the problems inherent

in Regional Organizations, such as the risk of grudge settling, or fear of reprisals. If there

is an expectation that sanctions will be applied to states who unjustifiably vote against a

just invention or in favour of an unjust one then they have strong incentives to vote

exclusively on the content of the crisis. Furthermore this measure takes strides to improve

the minimal moral acceptability criterion. Where the Security Council is broadly

unaccountable for its actions, SROs must strongly justify their position whether they are

for or against a given intervention. Now that the SROs have been properly explained, we

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[146] Buchane and Keohane Cosmopolitan Institutional Proposal, 14

[147] This measure is slightly problematic as there is no guarantee that all of the military forces involved in the intervention would be provided by member states. It could easily be the case that an African SRO authorizes an intervention which is then carried out by a force which includes German troops. Should those solders act in a way unfit for the intervention, the SRO would have little direct recourse against Germany. There is the possibility that the SRO could respond with trade limitations or some other economic recourse, but cannot be guaranteed.

may now test them against the Complex Standard, to evaluate if they can serve as an alternative to the Security Council.

The standards outlined above stress increased accountability within SROs and so the institutions do extremely well in the accountability criterion. Their score is boosted further by the fact that the Security Council would serve as an overseer, which would punish any abuses or mismanagement of responsibility. This is a significant improvement over the Security Council's unchecked power and indicates that SROs may be more inclined to weigh the relevant reasons regarding an intervention in a more consistent and unbiased fashion.

The next criterion is minimum moral acceptability. While this will ultimately vary between organizations, we can make far more concrete observations since we are testing standards which would be universally applied to the security arm of any given RO. Since any Standardized Regional Organization's authorization of an intervention will be supported by highly transparent steps designed to increase accountability, its moral acceptability will be consistent and predictable. So long as the institutional mechanisms are clearly and openly followed its decisions to authorize or prohibit intervention will be very difficult to challenge on moral grounds. The only major risk is the actions of overzealous states during an intervention and the *ex ante* safeguards are designed to reduce the likelihood of such incidents.

SROs also score well in the transparency and institutional integrity criteria. The purpose of standardizing the mode of authorization rather than the entire organization itself is to ensure that the security arms of Regional Organizations can be judged on their

merit independently of the organization as a whole. While it is unlikely that an RO which is rife with corruption will be able to properly execute these institutional changes, an RO that might otherwise fall slightly short of passing the Complex Standard could reasonably adjust their intervention practices to meet these requirements. Since the legitimacy which SROs possess is largely dependent on their ability to be reliable decision makers and the Security Council's legitimacy is dependent on their maintaining the status quo, we can safely assume that SROs would be more motivated to maintain high degree of transparency and integrity.

It is difficult to know whether or not the criterion of flexibility will be improved. The high degree of accountability which this model brings to bear on a given institution may encourage states to shift and change to meet the new problems of a given crisis, or it could support stagnation and an unwillingness change course from what has worked previously. Ultimately this criterion will still be left in the hands of each individual organization, while this standard does support altering goals to meet modern problems, if there is a state level unwillingness to do so then little can be done. All that can be said is that SROs are highly capable of demonstrating flexibility, whether or not this bears out is impossible to tell in advance.

Finally we may turn to comparative benefit. The benefits of the standardized model should be clear at this point, it stresses high levels of accountability and strong procedural decision making guidelines. It remedies many of the problems which are systemic of Security Council decision making procedures, such as permanent member veto and unclear intervention standards. Furthermore SROs promote the major benefits of

Regional Organizations, mainly cultural understanding, reduced cost and high motivation

to act. While also effectively limiting many of their short comings such as unwillingness

to invade neighbours or settling grudges.

However, a critic may note that there are certain drawbacks as well. The first is

the financial limitations. Many existing Regional Organizations suffer from a severe lack

of funding. This poses a serious problem for SROs. Although participation is not

formally limited to SRO member states, it is likely the case that they will often be

spearheading any intervention which an SRO authorizes. For this reason a lack of money

and resources can mean the difference between successfully halting a humanitarian crisis

and just watching helplessly as it unfolds. However, this issue does not provide a strong

reason to abandon SROs as the preferred alternative to the Security Council. Should

SROs become more trusted and utilized there will be a strong incentive for the UN,

individual states or private organizations to provide them with a greater amount of

funding, resources or physical participation. Although there is no guarantee that funding

would shift, there is no reason to believe that funding is impossible to come by. At

present, nearly half of all global peacekeeping is funded by only two countries; The

United States which accounts for 27% of funding and Japan which accounts for 20% of

funding. The next highest spender is The United Kingdom at 6%.[148] The Americans and

the British can be expected to continue to depositing funds in existing avenues where

they hold a disproportionate amount of power such as the Security Council or NATO.

However Japanese funding as well as the other half of global peacekeeping funding may

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[148] Badescu, 57

be more liquid. Should SROs gain a sufficient level of recognition, there is a chance that

some countries may view their peacekeeping dollars as better spent in these institutions.

Although the financial issues which plague some Regional Organizations present a

serious threat to their effectiveness, it is not reason enough to abandon SROs as a

meaningful alternative to the Security Council.

Another major problem facing SROs is that they present an isolationist approach

to humanitarian crises. The Security Council, since it is a global institution has the

advantage of facing issues as a global force, utilizing states on every continent.

Conversely SROs would only have the authority to legitimize intervention within each

organization's sphere of influence this model would foster a norm of 'self-help' amongst

Regional Organizations. The risk is that should SROs become the primary mode of

intervention authorization, states which exist outside the affected SRO will not feel

obligated to assist, regardless of its directives. A state may feel that although an

intervention is required and legitimate, it has no obligation to act since it is not a member

of the particular SRO which authorized the intervention. Thus the critic may assert that

the rise of SROs will not only result in the fragmentation of the global community, but

also in a lowered rate of efficacy in interventions.

There are two responses to this objection. The first is to note the nature of the

directive which SROs would issue. Although SROs can only authorize an intervention in

a state within their purview, this does not diminish the authoritative nature of the

directive. States will be motivated to treat SRO directives as authoritative based on the

fact that they can act as a superior decision maker to the Security Council. If states treat

SRO directives as equally authoritative as directives from the Security Council, then there is no greater risk of fragmentation than already exists. A call for intervention from an SRO is just as global in its reach as an authorization from the Security Council. Therefore there is no reason to believe that the shift from Security Council authorization to SRO authorization will lead to further splintering of the global community.

Which leads to the second response: humanitarian intervention is already heavily splintered. There is already substantial reluctance to act on humanitarian crises that occur on the other side of the planet. Michael Byers and Simon Chesterman note that 'states are not chomping at the bit to intervene in support of human rights around the globe.'[149] They go on to credit states' inaction in the face of humanitarian crises to a general lack of will rather than a problematic Security Council. The point here is that there is already a strong sense of fragmentation, states possess a real reluctance to risk lives for a problem on the other side of the world. However, by shifting legitimizing authority to those states which are most effected by a given crisis then there is little risk of increasing this fragmentation.

Finally, the critic may charge that Standardized Regional Organizations have too many practical implementation limitations. The standards which are outlined place a number of serious burdens on existing Regional Organizations and for that reason are unlikely to be taken up. The fact that this alternative depends on altering existing organizations rather than creating new ones from scratch is a serious draw back to the proposal.

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[149] Michael Byers and Simon Chesterman, "Changing the rules about rules?" *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press: 2003), 202

Regional Organizations have two good reasons to adopt these standards. The first is that this proposal does not entail a top to bottom re-structuring of the institution. These standards apply strictly to the security arm of the organization, specifically when it is considering authorizing an intervention. Due to the limited scope of these standards, adoption hardly constitutes an extensive overhaul of the institution. The second reason is the potential gain in power and authority which Regional Organizations stand to enjoy. If, by making these changes, an RO is elevated to a position to make directives in favour of intervention which states outside their effective area find just as compelling as a directive from the Security Council, then these changes will be very tempting.

However, the increase in authority would be clearly capped. The adoption of SROs would not formally diminish the power which the Security Council wields. While the directives issued by an SRO would be as authoritative as Security Council directives as far as states are concerned, an SRO cannot directly override a Security Council decision. If the Security Council authorized an intervention within the territory of a given SRO, that SRO does not have sufficient authority to override that directive. However, since SROs are not bound to wait for Security Council debates to deadlock or fall to veto, they can act independently of the council. If a norm develops in the international community that identifies SROs as the preferred decision makers regarding humanitarian interventions then states will look to SROs for authorization before turning to the Security Council. She Security Council will be relegated to a more supervisory role.

Instead of acting as the primary authorizing agent, it would instead punish and sanction

SROs that commit questionable or otherwise unjustified interventions.[150]

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[150] An example would be the Security Council's treatment of NATO's intervention. It reviewed the facts of case, NATO's over all conduct and the findings of the Kosovo Commission and ultimately rejected the use of sanctions

Conclusion

The Security Council suffers from certain intractable flaws which diminish its ability to make reliable decisions regarding humanitarian intervention authorization. However the norm of humanitarian intervention is too liable to abuse and misuse to be left without an authority. This means that the best option for a functional humanitarian intervention norm is to identify an alternative to the Security Council.

Of the available options only Standardized Regional Organizations are able to demonstrate that they have the institutional structure to function as a reliable authorizing body. The other alternatives; The General Assembly, A Democratic Coalition, Precommitment Regimes and Regional Organizations all suffer from serious short comings which disqualified them as possible candidates for intervention authorization.

Standardized Regional Organizations offer unique advantages over the all present alternatives. The more theoretical benefits are demonstrated by its high scores in the Complex Standard. SROs are designed to be careful, transparent and reliable decision makers and as such are better at weighing the relevant reasons regarding any humanitarian crisis. When these theoretical benefits are summed with the practical benefits which Regional Organizations already present, such as willingness to act and appreciation of cultural nuances the comparative benefit is extremely high. SROs take the states that are in the best position to act and add rigour to their decision making procedures to ensure that their actions are tempered and justified. Finally, SROs are among the most reasonable alternatives to implement. Regional Organizations already exist. The adjustments which are called for here are not only reasonable in scope but also

ones which Regional Organizations will likely find appealing and be willing to

implement. The theoretical and practical advantages together make Standardized

Regional Organizations the most promising step forward for a functional norm of

humanitarian intervention.

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