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A HUMAN RIGHT TO DEMOCRACY: FOR AND AGAINST

CHRISTOPH HANISCH*

I. INTRODUCTION

The idea that every person has a moral right to live in a democratic society has met staunch opposition in normative political theorizing. People shrink back from endorsing the claim that those in power violate a fundamental right when they deny some or all of their subjects an equal and fair say in the processes of legitimizing the monopolized force that citizens are subject to. Many of the opponents of a human right to democracy (HRD) presume a specific *functional role* that human rights are supposed to play in the international realm. According to the functionalist, it is a defining feature of a human right that its violation sufficiently undermines a state's legitimacy and licenses (some think, even requires) humanitarian intervention. Endorsing HRD would then imply that all non-democratic regimes were rightly subject to diplomatic pressure, sanctions, and even military force on the part of the international community. This is philosophically implausible and politically dangerous. HRD must therefore be rejected.

In this paper I defend the *possibility* of HRD against this particular objection. Defending the claim that HRD is possible amounts to establishing a specific conceptual space that the functionalist opponents rule out. This conceptual space makes room for the defense of HRD, without that implying that a violation of that right licenses (let alone necessitates) the use of military means to put an end to its violation. The right to democracy might turn out to be a human right and we should not be afraid of endorsing it because of the supposed inconvenient and embarrassing implications that functionalists are worried about. The definitional question of what human rights there are is a question that can and must be addressed independently of what should be done in response to their violation.

Since the argument presented here “only” establishes the possibility of HRD we cannot commit ourselves to any of the many positive arguments in support of it. Rather, I leave it open how the conceptual space defended here is filled in (actually, the argument presented here even leaves it open if that space can be filled in at all). My aim in this paper is to show that a certain kind of

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objection to HRD is misguided and that we shouldn't reject HRD on its basis. However, my argument turns out to be more ambitious than it might appear at first. A number of implications and complications arises in the course of HRD's defense. The argument suggests, for example, that a human rights violation in and of itself (i.e., absent any additional welfarist considerations) is *never* sufficient grounds for humanitarian intervention, a suggestion that many will find too extreme and that is defended towards the end of the paper.

II. DEMOCRACY AND THE HUMAN RIGHT TO DEMOCRACY

Recent political philosophy and normative legal theory have seen an increased interest in the question of whether international human rights should include an entitlement to live in a democratic society with a representative form of government. In this section I briefly highlight the features of democracy that for many make it the proper object of a human right, i.e., an individual moral right with respect to which there is sufficient justification to transform it into a legal right that all citizens can enforce. This moral right is one that all human beings have, regardless of their historical, cultural, and geographical location; it is a universal human right.¹ Needless to say, the corresponding positive legal right to democracy remains currently unrealized and under-fulfilled, but the point of the following reflections is that the regulative ideal of striving towards the realization of a world in which all humans have that legal right is a morally valid claim. That HRD is a moral right means that all humans actually possess it and its possession amounts to the universal claim to live in political and legal arrangements that honor the content of that claim in the form of a legally enforceable right to participation in the democratic authorization of those who execute and administer the state-monopoly of coercion.

HRD has been criticized on many grounds. One objection, that HRD shares with many other controversial human rights (social and economic ones in particular), is that such a right fails to fit into the traditional Hohfeldian framework with its central idea of claim rights.² HRD, as opposed to negative

1. Alyssa R. Bernstein, *Human Rights, Global Justice, and Disaggregated States: John Rawls, Onora O'Neill, and Anne-Marie Slaughter*, 66 AM. J. ECON. AND SOC. 87, 87 (2007). It does not constitute a qualification of the claim defended here that certain persons are not holders of that moral right, e.g., children or adults with mental diseases. It is a far more controversial issue if, for example, prisoners or resident aliens can be excluded from the human right to democracy. I put these controversial cases aside for the purposes of this paper.

2. See Wilfried Hinsch & Markus Stepanians, *Human Rights as Moral Claim Rights*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 117–30 (Rex Martin & David A. Reidy eds., 2006). The Hohfeldian framework supposes that the Constitution and its Amendments are a list of immunities as opposed to liberties or privileges. Stuart Macdonald, *Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy*, 15 ILSA J. INT'L & COMP. L. 95, 132–33 (2008).

individual rights to bodily integrity, conscience, association, etc., fails to generate corresponding duties and this turns it into an impractical device for the purposes of international legality. This objection can be overcome though. HRD's addressees are those in power, that is those who currently hold the Weberian monopoly of the legitimate use of violence over a certain set of individuals, namely subjects and citizens.³ HRD submits that all human individuals have a positive moral claim to, firstly, live in a state that maintains the rule of law and, secondly, that this state is a democratic one.⁴ Those who are in the position to violate this universal human right are, on the one hand, fellow citizens (when they, for example, coercively prevent others from voting) and, more importantly, the state officials who have it in their hands to either actively promote reforms toward democracy or at least remove obstacles that lie in the path of such reforms. These requirements result in the positive claim that citizens have with respect to their society's basic institutional structure and with respect to those individual and collective agents who occupy those positions to influence its design.⁵

A further preliminary that has to be settled at the outset concerns the object of HRD. Many misgivings regarding the prospects of HRD have to do with the plethora of, and often incompatible, definitions of "democracy." Related to these definitional quandaries is a standard problem that one encounters in the current debates. Opponents to HRD (but also its defenders) often presume an extremely demanding (and controversial) conception of democracy; one that even in well-developed democracies hardly meets with unanimous approval.⁶ These demanding conceptions tie democracy to substantive egalitarian social and economic policies, ideals of virtuous citizenship, and notions of meaningful public deliberation and discourse.⁷ Similar to the many cases of other human rights, it is no surprise then that such demanding conceptions of democracy will appear unrealistic candidates for HRD's content. Not even

3. See Macdonald, *supra* note 2, at 120–21. I am, of course, aware of the numerous empirical complications that come with this presumption of clearly delineated political units. It is not denied here at all that some real world states "fail," in exactly the sense that they unsuccessfully try to establish and maintain a Weberian monopoly over a certain group of individuals.

4. Heather Lardy, *Translating Human Rights Into Moral Demands on Government*, 9 INT'L LEGAL THEORY 123, 131–33 (2003).

5. Matthew J. Lister, *There is No Human Right to Democracy: But May We Promote It Anyway?*, 48 STAN. J. INT'L L. 257, 260–61 (2012). One has to distinguish between a violation of HRD and its "under-fulfillment." A currently non-democratic regime that sincerely promotes its reform towards a truly democratic one does not violate its citizens' HRD even though that right as yet remains unrealized. *See id.* at 274.

6. *See id.* at 268.

7. Andreas Follesdal, *Justice, Stability, and Toleration in a Federation of Well-Ordered Peoples*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 309–10 (Rex Martin & David A. Reidy eds., 2006).

very advanced democratic societies adhere to these moral ideals in their current and foreseen actual politics and legislation. They not only refuse to do so because they are not progressive enough; rather, the details of how to spell out the core ideas of democracy are disputed and subject to controversies. It is, for example, a complex question in comparative political theory if Anglophone two-party-democracies are more or less democratic than continental European multi-party electoral systems.

That democracy comes in many different institutional and cultural forms is the main reason for why the following argument employs a very minimal threshold conception of HRD's object. It is a threshold conception because it presents a minimal level that a society's institutions must pass in order to count as a democracy. For the purposes of our discussion it does not matter what happens above that threshold (though that does not mean that these questions are irrelevant from the point of view of domestic justice). State A, barely passing the threshold, counts as satisfying HRD in the same way as does state B, a "democratic paradise" in which robust notions of social and political justice are fully realized and in which all citizens participate in collective will formation processes as free and equal persons.

Now what does this threshold notion of democracy amount to? At a minimum, democracy has certain negative functions, first and foremost that it provides the lawful means to replace (or confirm) those currently in charge of the three branches of government on a regular basis.⁸ Benign hereditary monarchies fail to satisfy this minimum criterion, as do more obviously undemocratic cases like authoritarian dictatorships. The second constitutive feature of a democratic regime concerns the lawful means just mentioned. Free, fair, and regular elections, in which those who are determined who occupy the state offices, are considered the essence of institutionalizing a procedure that realizes the desideratum of all individuals being able to lead a non-dominated life.⁹

8. Leonardo Morlino, What is a "Good" Democracy?: Theory and Empirical Analysis 2, Presentation at the University of California, Berkeley Conference: The European Union, Nations State, and the Quality of Democracy (Oct. 31–Nov. 2, 2002) (on file with the University of California, Berkeley Institute of European Studies). Of course, the opportunities to replace those in the juridical branch are, first, indirect ones and, second, do not take place as regularly as elections do. There are good reasons for this that and for removing certain offices from the influences of the election cycle I cannot consider in this paper. Still, life-long tenure for judges and justices does not undermine the claim that the democratically constituted will of all is ultimately the basis of these offices' authority. INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, JUDICIAL APPOINTMENTS 4 (2014). Even if it sometimes takes quite long to do so, the composition of the US Supreme Court is ultimately changed by democratic decisions, mediated by elected officials who then appoint and confirm the justices. *Id.*

9. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 189–92 (1997). Those familiar with Philip Pettit's work on republicanism will certainly be reminded of his conception of "freedom as non-domination" when they acknowledge the above account of

Probably the most controversial feature of the minimal threshold conception of democracy is the egalitarian demand “one person one vote.” While the outright exclusion of a subset of all qualified citizens from voting clearly conflicts with the normative ideal of non-domination that underlies the other two features (having no vote at all renders one into a passive subject at the whims of those who have such a vote and of those the latter elect to rule), it is more difficult to establish that minimal democracy remains always objectionably under-fulfilled in case certain groups have *more* influence at the polls than others (as a matter of legal entitlement).¹⁰ Suffice it for the moment to highlight that not only the historical trajectory clearly points towards the gradual egalitarian inclusion of more and more adult citizens into the electorate. More importantly, we must remind ourselves that the minimal threshold notion of democracy that I suggest for the distinct purpose of an argument for HRD is not the end of the story regarding social and political justice. Withholding *equal* voting power from certain citizens can certainly be ruled out on other, justice-based, grounds. However, the abstract idea of democracy in and of itself, with the above-mentioned emphasis on having *some* say in determining whether those in power continue to do so, does not yet seem to necessitate the equal distribution of influence. I leave this controversy aside.

Putting together this minimal notion of democracy with the above conception of human rights, we arrive at the following notion of HRD (the possibility of which the next sections are going to defend). HRD is a universal individual (not a collective) right that every (adult) human person actually has,

democracy. And indeed, the minimal threshold conception, designed for the purpose of figuring in HRD, amounts to a fairly republican version of democracy that emphasizes the idea that democracy’s attractiveness rests fundamentally on its defensive and negative functions as opposed to its more demanding active dimensions in terms of collective self-legislation. *Id.* The latter are of course important normative ideals but focusing on them is another source of the resistance to HRD that is this paper’s concern.

10. See Jason Brennan, *Against Democracy* (2016) (unpublished manuscript); BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 1–3 (2007) (attacking the value of participating in democratic processes). This inequalitarian version of democracy does not merely come in the form of racist, sexist, and classist varieties. Recently, some have advocated lottery mechanisms in order to replace the one person one vote principle. Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L. J. 1283, 1283 (1984). Others, especially libertarian critics of democracy, have called into question the importance of symmetrical and equal shares of democratic authorization on epistemological grounds, calling into question the rationality and/or knowledge of voters. See CAPLAN, *supra*, at 3. I mention this to highlight that attacks on the one-person-one-vote principle cannot be tossed aside as mere relics from times long gone. The minimal threshold notion of democracy, deliberately designed for HRD, has to acknowledge that egalitarian democracy is more difficult to justify than democracy simpliciter.

everywhere and at all times.¹¹ It is a moral right that consists in the claim, against those who are in the relevant positions of institutional power, to promote (or at least not to resist) the establishing and maintenance of a legal order that passes a minimum threshold of democratic standards. Citizens who live in a political society that honors HRD are regularly given the legally established and protected opportunity to decide, in free and fair elections, whether those in power should be replaced by others or not.¹²

III. FOR AND AGAINST A HUMAN RIGHT TO DEMOCRACY

The recent opposition to HRD has one of its main inspirations in the highly influential political philosophy of John Rawls.¹³ Towards the end of his career, Rawls dedicated most of his work to the issue of global justice. His *The Law of Peoples* presents a “realistically utopian” vision of the international order that is very skeptical of the claims put forward by more ambitious liberal thinkers.¹⁴ An egalitarian liberal himself concerning domestic justice, Rawls’ just global order is extremely cautious when it comes to imposing liberal and democratic standards on non-liberal and nondemocratic peoples and states. The category of “decent [but non-liberal] societies”¹⁵ plays a central role in Rawls’ approach that many have criticized as disappointingly conservative, given the progressive and egalitarian conclusions that Rawls draws regarding domestic social, economic, and political justice.¹⁶

Important for our discussion is that decent societies are internally nondemocratic and non-liberal but are nevertheless full (and equal) members of Rawls’ society of peoples.¹⁷ They are *nondemocratic* because those in power, while not entirely unreceptive to their subjects’ needs and preferences, restrict political participation to a so-called “consultation hierarchy,” a mechanism that falls short of any kind of democratic entitlements to participate

11. Bernstein, *supra* note 1, at 87.

12. See Christoph Hanisch, *An Autonomy-Centered Defense of Democracy*, 53 INT’L PHIL. Q. *23–24 (2013). Elsewhere I try to establish the stronger claim that all competent human adults actually have a moral obligation to participate in the democratic will formation processes of their society. This argument, building on Kant’s thought that we have an unconditional duty to establish a “rightful condition,” lends support to the idea that there might be a legal requirement to vote. I obviously cannot discuss this controversy here but emphasize that such a universal obligation implies that a conclusive case can be made for a human right to democracy. If HRD cannot be established, it follows that the obligation fails to materialize (but not the other way round).

13. Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 PHIL. & PUB. AFF. 142, 142 (2011).

14. See JOHN RAWLS, *THE LAW OF PEOPLES* 11–12 (1999).

15. *Id.* at 71–78.

16. Fernando R. Tesón, *The Rawlsian Theory of International Law*, 9 ETHICS & INT’L AFF. 79, 88, 94 (1995); Charles R. Beitz, *Rawls’s Law of Peoples*, 110 ETHICS 669, 678 (2000).

17. See Tesón, *supra* note 16, at 79–80.

(though it allows citizens to nonviolently protest in case they think their government acts without paying any attention to their needs and preferences). Decent societies are *non-liberal* because they distribute fundamental rights and liberties (such as freedom of conscience, religion, and association) on an unequal and discriminatory basis. Rawls' hypothetical example of a decent society, the Islamic republic of "Kazanistan," promotes an established state religion, membership in which determines access to political power and public offices.¹⁸ Moreover, Kazanistan does not protect *equal* freedom of conscience and speech (though it protects some of it for each citizen).¹⁹ Rawls presents a list of requirements that every society has to satisfy in order to count as a decent one and the final requirement concerns the extent to which even decent states and governments are required to protect and honor a short list of human rights.²⁰ In so far as societies respect this minimal set of human rights (rights to subsistence, security, free conscience (though not equal), personal property, and freedom from slavery and serfdom) and are not threatening neighboring states, they are passing Rawls' threshold of international legitimacy and are equal members of the society of peoples that they populate together with liberal democracies.²¹ Crucially, passing this threshold of respecting human rights (plus external non-aggression) suffices to render these decent societies immune to external interference and humanitarian intervention.²² Decent societies are as legitimate as liberal democracies are for the purposes of establishing their equal standing as members of the global society of peoples.

This concern with the status of societies as minimally decent (and hence as being immune to infringements of their sovereignty) is crucial for understanding Rawls' method of determining the nature and content of his Spartan international human rights schedule and for explicitly excluding democratic rights from it. His theory of international relations rests on the premise that it must be *realistically utopian* and part of this premise is to assign human rights a specific *function*.²³ This function is that human rights are part of the realistic ("reasonable"²⁴) standards for judging societies' legitimacy from the point of view of the international community. What human rights (there) are is determined and constrained by reflecting on this functional role that they are supposed to play in the Rawlsian argument for international legitimacy.²⁵ This functionalism about human rights (the target of this paper),

18. THE LAW OF PEOPLES, *supra* note 14, at 75–76.

19. See THE LAW OF PEOPLES, *supra* note 14, at 75–78.

20. THE LAW OF PEOPLES, *supra* note 14, at 64–65.

21. See THE LAW OF PEOPLES, *supra* note 14, at 78–82.

22. THE LAW OF PEOPLES, *supra* note 14, at 67.

23. See THE LAW OF PEOPLES, *supra* note 14, at 78.

24. See JOHN RAWLS, POLITICAL LIBERALISM 212–254 (1993).

25. *Id.*

together with the commitment to present a “realistic” theory, then results in a list of human rights that many regard as too unambitious, especially when compared with actually existing international human rights documents and legislation that include HRD such as the Universal Declaration of Human Rights, to name just the most prominent one.²⁶

We have to understand Rawls’ account of human rights because many of his defenders have significantly expanded the functionalist method in their accounts of human rights. It is the premise that international legitimacy is of prime concern for the definition of human rights that renders these “political conceptions of human rights” so *minimalistic* with respect to their outcomes. Additionally, this is why Rawls refers to the aforementioned members of his short list as “human rights proper” (a strategy often employed by minimalists and discussed in the next section).²⁷ He uses this label in order to distinguish these rights that truly deserve to be called human rights from other, supposedly less urgent and important, ones. Rawls suggests that these derivative rights do not have enough to do with a society’s immunity regarding external intervention and its international legitimacy.²⁸ It is only “outlaw states,” states that are externally aggressive and that violate the internal standards of minimal decency (the Rawlsian schedule of human rights) that disqualifies them from membership in the society of peoples.²⁹ With respect to these regimes third parties are justified to use means that are normally incompatible with respecting state sovereignty.

Even though Rawls’ remarks on human rights are brief they have had a lasting impact on the debate regarding HRD and can be regarded as one of the founding statements of what I will call from now on “functionalist minimalism” regarding method and content of human rights. Rawls’ explicit rejection of the idea that democratic forms of government (along the lines presented in the previous section) are a necessary feature of all societies that join the global society of legitimate peoples has inspired the position of those

26. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

27. See THE LAW OF PEOPLES, *supra* note 14, at 80 n.23.

28. Alyssa R. Bernstein, *A Human Right to Democracy? Legitimacy and Intervention*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 278, 281 (Rex Martin & David A. Reidy eds., 2006).

29. THE LAW OF PEOPLES, *supra* note 14, at 63. Rawls’ taxonomy of societies is actually more complex and includes, in addition to liberal societies, decent societies, and outlaw regimes, also so called burdened societies and benevolent absolutisms. THE LAW OF PEOPLES, *supra* note 14, at 63. For the purposes of this paper I put these other cases, and the implications for political rights that come with them, to one side and focus on the critical point that even decent societies, while nondemocratic, are entitled to full and equal membership in Rawls’ society of peoples.

who defend a “minimalism about human rights.”³⁰ These philosophers and legal scholars acknowledge that the Rawlsian conception of human rights constitutes a significant departure from the global political consensus that has dominated the international arena after the Second World War. Most of the influential human rights documents, above all the UDHR, comprise a significantly more comprehensive list of human rights.³¹ A larger number of individual liberty rights (like *equal* freedom of speech and religion), social and economic rights, and substantive political participation rights in the form of HRD distinguish actual human rights practice from Rawlsian minimalism and from the functionalist paradigm.

However, for the purposes of this paper we are not interested in restating the facts about the current content of international human rights documents. Interested in normative questions we want to know if the more ambitious accounts of human rights can be justified. The *fact* that the post-World War II debates regarding what counts and what doesn’t count as a proper member of the list of human rights has exhibited the expansion of these lists does not suffice to answer the question of whether this trajectory *should* be welcomed and promoted. Rawls and his followers do not deny that the many actual developments and decisions concerning human rights run counter to their recommendation³²; but in this paper we focus on the question of whether one should find that recommendation better justified than those that underlie the movement to enlarge the list of human rights.

The core of the argument for human rights minimalism is to draw a sharp distinction between justice and international legitimacy. As mentioned above, according to Rawls’ exposition even decent societies like Kazanistan must incorporate some “consultation hierarchies” and they must act in accordance with some conception of the common good.³³ Legitimacy, in the sense of unqualified state sovereignty, is secured by nondemocratic regimes if they arrange their political and legal decision-making by somehow taking into consideration the interests of their subjects. Such decent legitimate regimes are not fully just societies. Respecting the demands of decency is merely a necessary condition for being a just society in the comprehensive egalitarian and liberal sense that Rawlsians defend in the domestic case and that very much incorporates democracy as an indispensable component.³⁴

30. See also Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 190 (2004); Lister, *supra* note 5, at 257; David A. Reidy, *On The Human Right to Democracy: Searching for Sense Without Stilts*, 43 J. SOC. PHIL. 177, 177 (2012).

31. THE LAW OF PEOPLES, *supra* note 14, at 80 n.23.

32. THE LAW OF PEOPLES, *supra* note 14, at 75, 78–80; POLITICAL LIBERALISM, *supra* note 24, at liii–iv.

33. THE LAW OF PEOPLES, *supra* note 14, at 78.

34. See THE LAW OF PEOPLES, *supra* note 14, at 80 n.23.

According to Rawls' followers, the mistake that defenders of HRD make is that they confuse the issue of standards of international legitimacy with the issue of standards of justice. The defenders of HRD wrongly employ the criteria of liberal justice as the criteria of a regime's global legitimacy.³⁵ Hence, what sounds like two contradictory claims is one of the central Rawlsian tenants: while the truth of the matter is that *all* societies should, in one sense, be liberal and democratic ones this is not true in the sense of "should" that is of relevance when the limits of state sovereignty are at stake. There is no contradiction according to the Rawlsian position to claim that a certain subset of all unjust societies nevertheless passes the threshold of international legitimacy and sovereignty, namely the decent ones.

However, even acknowledging the distinction between (complete liberal) justice and international legitimacy that characterizes the Rawlsian view, we still do not get a complete explanation of why the functionalist paradigm ends up endorsing the minimalist schedule of human rights that excludes HRD. After all, if it turned out that the standards of international legitimacy include democratic forms of government then the worse for Rawls' decent (nondemocratic) societies. They would then simply be illegitimate regimes and in turn be subject to potential third party intervention. HRD would then be part of the minimum of "human rights proper." Connecting human rights with the idea of legitimacy (as opposed to justice) is therefore *not* enough to defeat HRD. The basic functionalist move of defining human rights in terms of what is necessary for a state to be immune to third party intervention merely pushes back the crucial question regarding HRD onto the level of determining what (international) legitimacy consists in.

At this point a suspicion arises: The Rawlsian camp simply seems to presume that democracy *obviously* cannot be a criterion of international legitimacy and hence, given their functionalist approach of defining human rights in terms of legitimacy, violating the norms constitutive of democratic institutions, cannot amount to a human rights violation on the part of potential members of the society of peoples.³⁶ The conclusion that there is no HRD therefore ultimately rests on the (controversial) premise that securing democratic forms of government is a threshold too demanding and controversial for international legitimacy. The problem is that this presumption is never argued for in a satisfying manner but nevertheless drives the argument against HRD in the form of a seemingly obvious and uncontroversial starting point. We see this when we consider the implications of what would be the consequences for functionalist minimalism if, contrary to what is regularly silently presumed, democracy turned out to be a standard of international legitimacy: HRD would materialize! Regimes that deny democratic

35. See Bernstein, *supra* note 28, at 278.

36. LAW OF PEOPLES, *supra* note 14, at 71–73.

participation would be illegitimate and therefore possible objects of forceful military intervention. Since this was the case it would follow that democratic rights turn out to be human rights (proper) after all.

IV. BERNSTEIN'S FUNCTIONALIST MINIMALISM

Let us look at one specific example that illustrates minimalism about human rights and that shows why the shift towards the issue of legitimacy does not succeed in conclusively undermining the case for HRD. Discussing (and defending) Rawls' account of human rights, Alyssa Bernstein argues against HRD.³⁷ Bernstein too emphasizes that the demanding catalogues of requirements of (liberal) justice must not get confused with the question of what states have to do in order to pass the threshold of legitimacy that renders them immune to potential external intervention.³⁸ Only the violation of truly "basic human rights" (the ones that Rawls enumerates in *The Law of Peoples*³⁹) undermines legitimacy and, hence, the sovereignty of the state in question. Only when basic human rights get violated, is intervention justified. It is therefore crucial for Bernstein's argument to present a principled way to distinguish basic from derivative human rights. Bernstein is aware that the strategy of singling out a subset of human rights (and labeling them "basic") because they are required for legitimacy has to be careful not to commit the fallacy of "begging the question." She recognizes that "one must also make sure, if possible, not to interpret the idea of basic human rights in a way that logically presupposes or requires democratic governmental institutions (nor, conversely, in a way that logically implies that they cannot require them); otherwise the question gets begged."⁴⁰

This important insight notwithstanding, Bernstein's own argument for excluding HRD from the set of basic human rights seems to commit exactly that fallacy. She introduces a further legitimacy-relevant category that she calls "*the minimum respect-for-justice condition*" and this standard is another condition of a government's legitimacy.⁴¹ Things get interesting when we look at Bernstein's specification of what *the minimum respect-for-justice condition* amounts to. The two features of the *minimum* that Bernstein mentions are, firstly, the citizens' right to peacefully protest against perceived injustices committed by their government and, secondly, the citizens' right that their government not merely lets them protest but makes a "good-faith attempt to settle the conflict in a way that the people can see as giving due weight to their

37. See Bernstein, *supra* note 28, at 278–98.

38. See Bernstein, *supra* note 28, at 288.

39. See Bernstein, *supra* note 28, at 285–86.

40. See Bernstein, *supra* note 28, at 287.

41. See Bernstein, *supra* note 28, at 287.

claims.”⁴² These characteristics resemble the definition of Rawls’ “consultation hierarchies” (the presence of which renders societies into decent ones) and Bernstein claims that these two features of *the minimum respect-for-justice condition* “are quite weak or uncontroversial.”⁴³

Putting aside the worry that the two features might turn out to be everything but weak and uncontroversial (depending on how they are spelled out), it is the concluding step in Bernstein’s argument that is crucial for our purposes. She claims that accepting the two features of the *minimum* (and nothing above and beyond them) renders this condition of government legitimacy “plausible and avoids begging the question.”⁴⁴ If, on the other hand, the *minimum* incorporated something along the lines of democratic forms of government “then the proposed condition is too strong and begs the question. The strong interpretation states liberal criteria of a just society [as opposed to legitimacy-criteria].”⁴⁵

How does this maneuver of pushing back the question of what candidate rights count as *basic* human rights onto the level of the *minimum respect-for-justice condition* help determining the status of HRD? The line that Bernstein tries to draw between those rights-based requirements that are part of *the minimum* and those that are not seems arbitrary and question begging in exactly the way that she rightly regards as unacceptable. She claims that the right to protest and the right to have one’s interests acknowledged by the government (but nothing more than that) are uncontroversially constitutive of *the minimum* and this turns the legitimacy-condition of respecting *the minimum* into a “plausible” one that “avoids begging the question.”⁴⁶ At this point, the defender of HRD will simply reply that this claim exactly begs the question. Why does the legitimacy condition of *the minimum* become “implausible” and “too strong” when it incorporates democratic rights? That this implausibility ensues simply seems to be presumed in Bernstein’s argument. It is exactly the controversial point at stake whether or not democracy is the exclusive object of a demanding conception of liberal justice as opposed to being part of the narrow Rawlsian set of *basic* human rights and of *the minimum respect-for-justice condition*. Even if we grant that a state must honor *the minimum* in order to count as legitimate (and is thereby immune to external intervention), we need a substantive argument for why this minimum is as narrow and austere as Bernstein suggests and why democratic institutions are *not* part of it. Instead of avoiding begging the question, the argument that legitimacy consists in respecting *the minimum* too merely presumes that, given our current

42. See Bernstein, *supra* note 28, at 287–88.

43. See Bernstein, *supra* note 28, at 288.

44. See Bernstein, *supra* note 28, at 288.

45. See Bernstein, *supra* note 28, at 288.

46. See Bernstein, *supra* note 28 at 288.

practices concerning international legitimacy, it is “unreasonable” to include equal democratic participation among the demands that legitimate governments respect in order to be equal members of the society of peoples.⁴⁷

Bernstein’s attempt to present a non-question begging way to exclude HRD from the schedule of the most urgent and important (“basic”) human rights is symptomatic for the current state of the debate: at some point in the argument the critics of HRD appeal to the supposed implausibility and to the overly demanding implications of including democracy in the core of the requirements that determine a society’s legitimacy. My suggestion in the remainder of this paper is that the appeal to the apparent “implausibility” of including HRD in the conditions of legitimacy results in “reasons of the wrong kind” to reject such a right. The tight definitional connection between human rights and international legitimacy standards (that functionalists presume) leads them to reject HRD out of the worry that that right’s violation licenses the use of military force to stop these violations (a worry that would indeed be justified if functionalism were the correct method of determining our conception of human rights).

V. WHO IS AFRAID OF THE HUMAN RIGHT TO DEMOCRACY?

Bernstein is by far not alone in tying together the ideas of (violating) human rights and (justified) humanitarian intervention in order to undermine the plausibility of HRD. Rawlsian functionalism rests on a general methodological assumption that not only Bernstein endorses. Fabienne Peter for example clarifies the “political” account of the nature of human rights when she “stresses the functional role of human rights, for example with regard to the justification of third-party interventions or the exclusion from the

47. See LAW OF PEOPLES, *supra* note 14, at 86–87; see POLITICAL LIBERALISM, *supra* note 24, at 35–36. The concept of the “reasonable” in Rawls’ late philosophy has been another source of why many have been dissatisfied with Rawls’ and his followers’ approach. That Rawlsian functionalists are skeptical about the prospects of universal human rights has many reasons, one of them being that these orthodox accounts are too controversial under conditions of pluralism, especially on the global scale. POLITICAL LIBERALISM, *supra* note 24, at 36. I cannot explore the problems that come with the Rawlsian method of “reflective equilibrium” and with his conception of (global) “public reason.” However, it must be noted that one of the issues that separates Rawls and his followers, on the one hand, from those who defend human rights in the form of absolute, timeless, and objective standards, on the other, is that the functionalist approach allows contemporary normative practices and institutions to codetermine not just what the standards of global legitimacy *are* but what they *ought* to be. POLITICAL LIBERALISM, *supra* note 24, at 37. Only when the diversity of all “reasonable” world views is made part of the methodology of human rights discourse, can the resulting human rights schedule be regarded as meeting the justificatory standards of global public reason. POLITICAL LIBERALISM, *supra* note 24, at 217–18. I share the worry that this methodology potentially leads to a troublesome relativism that is especially regrettable when human rights are at stake. Unfortunately, I must leave that avenue of criticizing the Rawlsian framework aside in this paper.

international community.”⁴⁸ And in opposition to those who regard human rights “as discovered rights that explicate certain universal moral facts,” the political conception of human rights (echoing Rawls’ and Bernstein’s accounts) rests on “contemporary human rights practice” that has “created a standard for international political legitimacy.”⁴⁹

As our analysis of Bernstein’s argument highlighted, the main problem with these “functionalist” and “political” conceptions of human rights is that they too often simply end up presuming what they have to establish, namely that a right to democracy is not an urgent and relevant enough moral claim. One of the functional roles of human rights is to present a catalogue of requirements that governments and states have to respect in order to enjoy the right to external nonintervention by third parties. If democracy were the proper object of such a legitimacy-enabling requirement it would follow that disrespecting it rendered governments illegitimate.⁵⁰ And the Rawls-inspired minimalists about human rights conclude that, since illegitimacy is tantamount to the loss of the protections of sovereignty, human rights are functionally defined as those rights, the violation of which permits third party intervention. If HRD existed, it would follow that its violation justifies humanitarian

48. Fabienne Peter, *A Human Right to Democracy?* in PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS 481, 482 (R. Cruft, S. M. Liao, and M. Renzo eds., 2015).

49. *Id.*

50. David Miller, *Is There a Human Right to Democracy?* 2 (Ctr. for the Study of Soc. Justice Dep’t of Politics and Int’l Relations Working Paper, No. SJ032, 2015), <http://www.politics.ox.ac.uk/materials/publications/13731/sj032is-there-a-human-right-to-democracy-final-version.pdf> (“If there is indeed a human right to democracy, and if, as many believe, for a state to be politically legitimate it must respect human rights, it immediately follows that the many undemocratic states that exist in today’s world are illegitimate, and don’t deserve the respect that we owe to all legitimate states.”) (demonstrating how Rawls’ functionalism has taken on this stronger form). In Rawls’ defense one must acknowledge that *The Law of Peoples*’ brief remarks on the role of human rights in its overall architectonic can be interpreted more charitably as I do in the text. When Rawls presents the argument, that I take to be one of the “founding documents” of contemporary functionalism (and minimalism), he says about his schedule of human rights that “[t]heir fulfillment is sufficient to exclude justified and forceful intervention by other peoples . . .” RAWLS, *supra* note 14, at 80. Employing the terms used in the text, what Rawls says here is that not violating his minimal schedule of human rights (~VHR) suffices to render a society immune to humanitarian intervention (~JHI). Strictly speaking, this formulation does not say anything about those cases in which human rights *are* violated (VHR). We would commit the fallacy of denying the antecedent if we were to derive from Rawls’ original formulation (~VHR → ~JHI) the logically different claim that the violation of human rights suffices to render humanitarian intervention justified (VHR → JHI). Still, Rawls himself at later points in *The Law of Peoples* where he discusses the case of (externally peaceful) outlaw states that internally violate human rights and, more importantly, the functionalist tradition that expands on his initial methodological statement, subscribe to the second claim that is also the subject of my paper, i.e., that the violation of human rights suffices to undermine a state’s immunity to external intervention. RAWLS, *supra* note 14, at 93–94.

intervention, a conclusion that we supposedly have to regard as overly demanding and politically dangerous.⁵¹

The suggestion I submit is to reject the functionalists' core assumption that human rights should be defined as those moral rights, the violation of which necessarily undermines a state's legitimacy and, hence, vindicates the international community's response in the form of military intervention (to stop that very violation). That defenders of the tight connection between human rights and humanitarian intervention have been growing in number is understandable in the face of recent events after the end of the Cold War.⁵² It is certainly true that the idea of "humanitarian intervention in the name of human rights" has been used (and abused) to justify military action that turned out to be motivated by anything but a genuine concern for human rights. It is also true that, in order to forestall the possibility of this kind of political exploitation of human rights, one way is to render the list of human rights as austere as possible. HRD is identified as an untenable idea, simply because humanitarian intervention in the name of nation building und democratization has been seen to result in inconvenient and even dangerous consequences. In order to protect the idea of human rights from becoming the instrument of dubious political decisions and military action we have to reserve the term "human rights" for a small subset of moral rights, namely those that *really* matter and the violation of which *truly* justifies the use of military action.

51. One issue that is conspicuously absent from the functionalist account of human rights is a clear analytical distinction regarding a normative complication that follows from the violation of human rights. That military humanitarian intervention is "justified" vis-a-vis a state that violates these rights can mean two things: it can mean, on the one hand, that third parties are now *permitted* to use force in order to ensure that the object of the human right is protected. On the other hand, such a justification can be read in the much stronger sense that the international community has a positive *obligation* to intervene in the cases in question. The conclusion concerning HRD that I develop in the text will apply to both versions of the functionalist account but will explicitly address the first variety (permissibility of intervention) only. The obvious reason for this choice is that undermining the permissibility of humanitarian intervention necessarily also undermines the obligation (but not the other way round). Opponents to HRD insist that not even the permissibility of such intervention can be justified, let alone an obligation.

52. See generally *Humanitarian Intervention and relief – The Post-Cold War Era*, ENCYCLOPEDIA OF THE NEW AMERICAN NATION, <http://www.americanforeignrelations.com/E-N/Humanitarian-Intervention-and-Relief-The-post-cold-war-era.html> (last visited Mar. 6, 2016); Most recently, Russia has justified its military intervention in Eastern Ukraine and Syria in terms of protecting human rights (especially the human right to collective self-determination) as well as in terms of fighting international terrorism. Richard Gowen, *U.S., Russia Duel Over Humanitarian Interventions in Iraq and Ukraine*, WORLD POLITICS REVIEW (Aug. 11, 2014), <http://www.worldpoliticsreview.com/articles/13990/u-s-russia-duel-over-humanitarian-interventions-in-iraq-and-ukraine>. The recent US led interventions and invasions in Afghanistan and Iraq too have partly been justified in terms of promoting the cause of human rights, one of them being the right to democratic self-government. *Id.*

However, this approach is not the only one available. We can protect the idea of human rights from getting abused for the purposes of militarily-driven intervention by means of severing the conceptual ties between human rights, on the one hand, and external intervention and its justification, on the other. We have to radically keep separated the question of what human rights there are (and how they are justified) from the question of what should be done in response to their violation. Admittedly, this suggestion too will strike many a reader as an extreme and implausible alternative. And indeed, the remainder of this paper will have to openly confront scenarios that seem to lend clear support to the minimalists' insistence that (basic) human rights (proper) must be understood in terms of the functional role that only they play in international affairs, i.e., the role of legitimacy-granting devices. I will argue that even these cases can be dealt with within the alternative conceptual framework that I defend. The result of this conceptual reconfiguration will be that no one needs to be afraid of HRD, especially not those who worry that admitting HRD inescapably comes with legitimizing military intervention in the name of establishing and promoting democracies abroad.

Let us begin by observing that an important cluster of normative concepts has been conspicuously absent in the above-rehearsed debate on human rights. These concepts are those prominently put at center stage in utilitarian and welfarist moral theories: "welfare," "suffering," "happiness," and so forth. It is to some extent understandable why this is the case. Given the focus on the nature of rights that dominates not only the philosophical debates on human rights but also its politics, a preoccupation with deontological (as opposed to welfarist and utilitarian) approaches is to be expected. Individual (human) rights are one of the core elements of the deontological ("natural rights") framework advocated by Locke, Kant, Rawls, and Nozick (to name just a few deontologists that advocate otherwise very diverse theories of justice).⁵³ Moreover, deontology is known for its stark opposition to utilitarian approaches to morality and justice that rest on the aforementioned welfarist concepts.⁵⁴ The conflict between these two influential ethical theories becomes apparent, when we learn that according to the utilitarian maximizing aggregate welfare might very well justify compromising the status and rights of individual persons. Rawls and Nozick in particular have forcefully argued against this claim and have promoted the strict priority of certain inalienable rights that are not affected by considerations of well-being and utility.⁵⁵ Utilitarians have always had a strained relationship, vis-a-vis the idea of

53. See generally *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 12, 2012), <http://plato.stanford.edu/entries/ethics-deontological/>.

54. *Id.*

55. See generally JOHN RAWLS, *A THEORY OF JUSTICE* 27 (1971); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 32–33 (1974).

absolute (natural) rights, understood as deontic side constraints on individual action and public policy. Bentham famously referred to the latter as “nonsense upon stilts.”⁵⁶ If at all, rights play a restricted role in utilitarian thought.⁵⁷ Their normative relevance is merely derivative of the more foundational considerations concerning the consequences that honoring such rights have for promoting the ultimate goal of maximizing (aggregate) utility and welfare.

In order to overcome the conceptual impasse that I diagnosed with regard to the relationship between human rights and military intervention we need to reconsider the narrow methodological focus on deontological considerations in debates about human rights. We will be able to do so without thereby denying the crucial and indispensable role that traditional deontological notions such as respect for persons, autonomy and moral rights play for determining the proper schedule of human rights. On the contrary, also on the account defended here human rights and responses to their violation are strongly related with each other for the purposes of the justification of using military force on the international level. However, when it comes to the question of whether or not humanitarian intervention is conclusively justified, an exclusive focus on human rights, understood as a deontological category, will not satisfyingly answer it. The conceptual and definitional relationship between human rights (the definition’s *definiendum*) and humanitarian intervention in the face of their violation (the definition’s *definiens*) cannot be established.

In order to better see what this argument about the interplay between deontological and welfarist considerations amounts to, let us introduce four cases. These cases illustrate the four logically conceivable scenarios that can be envisioned in terms of the relationship between deontological and utilitarian normative considerations, i.e., rights and welfare. In the first of these scenarios, we encounter a society in which certain urgent moral claims are violated but no large-scale suffering is present or expected as the result of these violations. In the second scenario, a society’s government does not violate such urgent deontic constraints, but is confronted with large scale suffering of its citizens. In the third scenario both states of affairs occur, rights are violated and large-scale suffering occurs as a result of these violations. The fourth scenario exhibits neither rights violations nor large-scale suffering.

Obviously, the fourth case is mentioned here merely to complete the set of logically possible combinations. Absent both any rights violations *and* any large scale suffering that threatens to afflict members of the society in question, the case for any third-party intervention on humanitarian grounds is justificatory void. In examples of the first kind rights are violated but no immediate and urgent suffering ensues because of this violation. This is the case when a government restricts liberties such as freedom of speech, religion,

56. See generally JEREMY BENTHAM, ANARCHICAL FALLACIES 5 (1838).

57. *Id.*

and assembly *without* having to resort to any violent means to execute these restrictions. Of course, if the aforementioned rights and liberties are suppressed by means of inflicting significant amounts of suffering on the (resisting) population things are different. This variety of the first case obviously blends into the third type of case, the scenario that constitutes the least controversial one regarding humanitarian intervention. These are cases in which a government violently ignores urgent deontic moral claims of its citizens. I have to discuss a potential objection that emerges in conjunction with the distinction between cases one and three shortly. Before we move on to these intricacies, we need to acknowledge an important qualification regarding the second scenario though. This qualification will also help us with clarifying the relationship between the first and the third case.

An uncontroversial example of scenario number two is a natural disaster striking a decent or just society. In this case large parts of the population are confronted with an event that is beyond their control and the control of those who govern them. According to the plausible conclusions of most secular and religious doctrines of global justice, such scenarios trigger international obligations, first and foremost the requirement to support the affected societies regarding the immediate disaster relief efforts.⁵⁸ Moreover, long term assistance with rebuilding destroyed infrastructure, economic and educational facilities, and devastated agricultural lands are components of those obligations that other nations and international organizations have in the face of scenarios that fall into the second category. Forceful intervention, on the other hand, that consists in coercively providing the forms of assistance just mentioned is not considered a legitimate option. The suffering that is the result of a natural disaster is morally highly relevant, as the many available arguments for global duties of assistance clearly show; but the presence of large scale suffering in and of itself (that is, independently of how it came about) does not conclusively undermine a state's sovereignty and its legitimacy, to put it in the terms that the defenders of functionalism have been using in the above arguments.

However, it would be too quick if the analysis of scenario number two were to end at this point. How difficult it is to draw the line that separates scenarios of type two from those of type three (deontic claims violated and large-scale suffering) is shown in Amartya Sen's groundbreaking work on famine.⁵⁹ Sen has demonstrated that mass starvation is seldom the result of

58. See generally Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. AND PUB. AFF. 229, 231–32 (1972) (offering a utilitarian case for global justice); Thomas W. Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT'L AFF. 1, 5(2005) (offering a deontological alternative).

59. See generally AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1982).

natural factors alone.⁶⁰ In most cases it is institutional shortcomings, corrupt elites, and unjust regimes of socio-economic justice that turn a crop shortfall into an instance of large-scale suffering.⁶¹ In addition, the ensuing suffering can be the result of the governing elite's deliberate refusal to accept foreign aid and assistance.⁶² This can happen out of national pride and arrogance, because of fear that foreign aid agencies publicize other grave domestic shortcomings, or because governments are worried that patterns of political and economic dependence will be the long term consequence of admitting foreign assistance on one's soil. These varieties of the second scenario raise complicated issues, for example the philosophically controversial distinctions between doing and allowing, on the one hand, and intending and foreseeing, on the other.⁶³ However, it is quite clear that a government's responsibility for bringing about the large scale suffering of victims of natural disasters is a highly relevant component in explaining why these varieties of the second scenario are actually located in the close normative vicinity of the clear-cut cases in which humanitarian intervention is justified (type three). The force-backed refusal to admit international aid (that, if it were admitted, would reduce the suffering of those in severe and life-threatening dire straits) is making many natural disasters resemble those cases in which governments lose their legitimacy and sovereignty because they actively inflict large-scale suffering. However, and this is the important conclusion regarding these complexities of the second type, the explanation for why we have gotten that close to dealing with a case of scenario number three is that we now have both components in place that the argument defended in this paper identifies as *individually necessary and jointly sufficient conditions* for third-party intervention to be justified: large scale suffering, on the one hand, and the under-fulfillment of a right that is causally responsible for the occurrence of that suffering, on the other. In this case the rights violation consists in the regime's refusal to satisfy the most basic needs and interests of its citizens, and given the fact that this satisfaction would have been possible, had the government not deliberately restricted the provision of foreign aid.

The set of even more intricate complications arises in the context of distinguishing scenarios of type one (violation of moral rights but no large scale suffering) from examples of type three (violation of moral rights plus large scale suffering). This complication can be summarized in the form of an objection that the functionalist minimalist might employ. Contrary to what has been argued so far, there seem to be cases of deontic moral claims that, when

60. *Id.* at 39–44.

61. *Id.* at 1.

62. *Id.* at 86–112.

63. See generally FRANCES KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITY, AND PERMISSIBLE HARM 17–26, 30–31 (2007).

violated, constitute sufficient justificatory grounds for humanitarian intervention and military force. These deontic constraints, for example the prohibition of systematic torture and genocide, are *in themselves* so urgent and morally powerful that their violation deprives states and governments of their legitimacy, period. Crucially, utilitarian appeals to welfare considerations and to the suffering and wellbeing of individuals do not seem to play any decisive role in these special cases of scenario three. The *pure* outrage of the constraints' violation suffices to legitimize the use of military force in order to put an end to this violation. If that were true, however, we would have resurrected the functionalist's rationale for human rights minimalism: There would be those deontic moral claims that share the exclusive property of their violation in itself constituting sufficient justification for forceful intervention. Violating claims to democratic self-government obviously falls short of such a justification for military intervention. Hence, democratic rights cannot count as a member of this exclusive subset of moral rights. We are back at square one because the functionalist's rationale for minimizing the schedule of human rights (and for excluding HRD from it) remains viable.

However, this is too quick and the minimalist's proclamation of victory over HRD is again premature. The reason is that even those cases of rights, such as the prohibition of systematic torture and genocide that seem to provide sufficient, welfare-independent, grounds for justified humanitarian intervention do not do so on closer inspection. The rejoinder to the functionalist objection is that even in these special cases we can and should continue to make the analytical distinction between the right that is violated, on the one hand, and the suffering that ensues in case of its violation, on the other. The deontic and the welfarist components retain their independence and as long as this is the case the functionalist cannot establish a subset of unique rights that alone exhibits a definitional relationship with the sufficient vindication of humanitarian intervention.

Take the examples of genocide and widespread systematic torture. The reason for why we are tempted to make the shortcut of declaring the violation of the rights against torture and genocide to be sufficient grounds for justified third party intervention is that in these cases there is indeed an *inherent connection* between the right being violated and large scale suffering ensuing as a consequence of it. It is *practically* and *empirically* impossible to commit an act of large scale murder (on the grounds of the victims' ethnic, religious, etc. affiliations) without at the same time inflicting a large amount of suffering on many human individuals. There are then indeed cases in which the occurrence of a rights violation is always accompanied by quantities and qualities of systematically inflicted misery that are so horrible that they cannot be ignored by the international community and ask it to stop these rights violations.

Still, and this is the controversial suggestion which I defend in conclusion, the rationale for why genocide triggers the international permissibility (and probably obligation) to forcefully interfere with the internal affairs of an otherwise sovereign state consists of the two separate components defended above that have to occur together in *all* instances of type three scenarios. It is true that these two components are more easily distinguishable in the case of, for example, the right to free speech: violating free speech rights often results in the first type of case in which the respective deontic claim of equal respect is violated but no large scale suffering ensues because of this violation. In the variety of cases of type three, on the other hand, when free speech rights are suppressed violently, the very same two-part distinction continues to hold but suffering actually ensues. The complication emerges because in some type three scenarios this distinction holds on the conceptual and normative level only. In the case of genocide, the violation of the deontic component consists in the disrespectful treatment of the victims' status as persons culminating in a direct attack on their existences as autonomous and self-determining agents. This is a moral outrage. However, notice that this is an outrage that does not exclusively attach to rights against genocide and torture; it is implicated in exactly the same way when freedom of conscience, speech, religion, association, and, well, the freedom to collective self-determination are attacked and severely curtailed by those in power. Consequently, these deontologically-conceived moral outrages can be isolated in *all* cases that are subsumed in categories one and three. It is why we can talk about human rights being violated there. The large scale suffering that automatically ensues in some type three scenarios remains a separate and independent normative consideration that is not conceptually indistinguishable from the specific moral outrage constituted by the human rights violation itself, which is the same in all scenarios of type one and three.

Now the relevance of successfully defending this strict conceptual separateness of rights violations from the suffering that they generate is that we have successfully protected the conceptual space that is needed for the possibility of HRD in the face of the functionalist challenge. Keep in mind that if that defense had been unsuccessful the minimalists would have carried the day: they would again have been able to carve out a unique subcategory of rights, namely those rights that satisfy the functionalists' criterion, i.e., that their violation suffices to justify humanitarian intervention.⁶⁴ In order to reject the possibility of this subcategory, my strategy was to discuss the difference between the two types of scenarios (one and three) and to highlight that they always are in an important respect analogous. They both exhibit rights violations of the same kind (disrespect, attack on the equal moral status of

64. THE LAW OF PEOPLES, *supra* note 14, at 79–80, 80 n.23.

persons, etc.) even though in type three there are some cases in which this violation is inevitably accompanied by large scale and immediate suffering. Even in these latter cases, however, it is still both of these factors that only when taken *together* provide the rationale for justified third party intervention.

Hence, my claim is that *no* deontic right is of the kind that its elevated status of being a *human* right depends on its violation alone constituting sufficient grounds for humanitarian intervention (not even the rights against torture and genocide are of this kind). Consequently, the fact that democratic rights (in and of themselves) do not fulfill the criterion of their violation sufficing for such intervention to be justified does *not* constitute a case for declaring it to be impossible qua human right. As it turns out, no moral right satisfies this criterion! Most instances of cases that involve HRD fall squarely into scenarios of type number one, in which state authorities undermine democratic practices and hinder democratic reform without actually resorting to violent means. There, democratic rights can still be human rights even if their violation does not suffice to vindicate humanitarian intervention (because no large scale and immediate suffering ensues in the course of their violation). HRD can be a human right because not even those cases of type number three (that involve rights that automatically implicate large scale suffering) lend support to the minimalists' strategy of carving out yet another subcategory of rights that then gets labeled "human rights (proper)."

This argument in response to the latter part of the attack on HRD has been complex but is successful for the conceptual and normative purposes pursued here. Even in the special cases of type three the moral rights in question do not in and of themselves satisfy the functionalist criterion of their violation sufficing to justify humanitarian intervention. Even in their case it is a rights violation *plus* related suffering that constitutes that justification; not the violation of the right taken by itself. No one needs to be afraid of HRD then on the grounds that it commits us to the dangerous practical and political outcome of having to forcefully intervene in non-democratic societies. No human right in itself, qua deontic constraints on individual action and international politics, has this kind of power.

VI. CONCLUSION

My strategy for defending the normative conceptual space in which a possible HRD is located has consisted of two parts. The first stage of my response to "functionalist minimalists" (Rawls, Bernstein, and Peter) went along with their central methodological assumption that human rights have to play a specific role in international affairs. That assumption is that the precious label of "human rights" must attach only to those moral claims that vindicate harsh international reactions when these claims are not respected since their violation sufficiently undermines the perpetrating state's legitimacy and sovereignty. I argued that these functionalists fail to avoid the fallacy of

“begging the question” when they try to draw a wedge between standards of international legitimacy, on the one hand, and standards of (liberal) justice, on the other, and try to exclude democratic rights from the schedule of human rights on the basis of that distinction. They merely presume that it is “obviously” “implausible” (given the current state of the world) to consider democracy to be an international standard of legitimacy as opposed to a parochial demand of liberal conceptions of domestic justice.

The second part of my rejoinder attacked the functionalist methodology directly. The problem with functionalism lies with its central methodological presupposition, which comes with *defining* human rights in terms of particular responses that the international community should engage in (in response to their violation). That presupposition, together with the plausible political desire to reduce the use (and abuse) of military force qua means of human rights policy, ultimately results in “reasons of the wrong kind” for rejecting the possibility of HRD. A couple of intricate complications emerged in the course of refuting functionalist minimalism. Most critically, we saw that in order to ensure that HRD is in fact possible we have to defend the controversial claim that there are *no* moral rights (not even those against genocide and systematic government-sponsored torture) that sufficiently vindicate humanitarian intervention. Even in these cases, in which we are tempted to regard the rights-violation alone as sufficient grounds for the use of force, it is the rights-violation *plus* large scale suffering that together constitute that jointly sufficient set of normative conditions. We had to establish this stronger claim in order to block the minimalists’ rejoinder of carving up yet another subset of rights that then again were to exclude democratic rights from belonging to “human rights (proper).”

Whether HRD *actually* is justified is of course a different story that has to wait for another occasion.⁶⁵ In order to make the positive case for HRD we need substantive arguments that come in instrumentalist, intrinsic, and constitutivist varieties.⁶⁶ This paper engaged in the seemingly more modest project of refuting a particular and popular argumentative strategy that opponents of HRD use. *That* particular strategy has been shown to be misguided. It defends a reason of the wrong kind to reject the possibility of HRD. There still might be other reasons for rejecting HRD; nothing I said in this paper rules out this outcome. However, the functionalists’ argument for curtailing our schedule of human rights to a minimally short and uninspiringly modest one does not constitute such a reason. What human rights there are and

65. Christoph Hanisch, *Why The Law Matters To You: Citizenship, Agency, and Public Identity*, in 16 PRACTICAL PHILOSOPHY 141–80 (Herlinde Pauer-Studer et al. eds, 2013).

66. Christiano, *supra* note 13, at 1, 2, 44 nn.i–iv (presenting some of the most powerful instrumentalist and intrinsic arguments in support of HRD and introducing the reader to the primary sources of the substantial debate for and against such a right).

what should be done in response to their violation are by definition distinct concerns, the latter having to be answered in partly welfarist terms that go beyond the deontic content of any human rights taken by themselves.