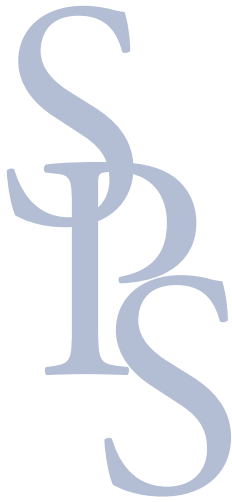


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SPS No. 2006/03



Right and Responsibility
What Kind of Right is the Right of
Humanitarian Intervention?

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ISSN 1725-6755

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50016 San Domenico di Fiesole (FI)
Italy

<http://www.iue.it/>
<http://cadmus.iue.it/dspace/index.jsp>

Abstract

This paper examines explicitly what kind of a right the right of humanitarian intervention is. It is argued that the most plausible right-holders would be the UN Security Council and any third party as authorized by the Council. It is argued that different right-holders would have a different kind of right. The implications of different kinds of rights are diverse and require both theoretical and practical considerations. Moreover, a link between the right and responsibility to intervene is made.

Acknowledgements

This paper has been presented at the ISA conference in San Diego 2006. The author would like to thank Prof. Friedrich Kratochwil, Prof. Christine Chwaszcza, Thomas Teichler, and the anonymous reviewers and panel participants for their helpful comments.

Introduction

Humanitarian intervention¹ has been widely discussed since the mid-1970s.² The main puzzle has been the connection between the rule of non-intervention and the right of humanitarian intervention as an exception to that rule. Moral considerations aside, the right of humanitarian intervention is usually established either by emphasizing custom³ or through a re-interpretation of international law as asserting the right or as allowing for an exception to the rules.⁴ Other ways include, for example, the shifting of focus by claiming a responsibility to protect⁵ or by

¹ I understand humanitarian intervention as the use of force across state borders by a state (or a group of states such as a coalition or an international organization) aimed at preventing or ending a grave humanitarian crisis of individuals other than its own citizens, without the permission of the state within whose territory force is applied, and in a manner which is consistent with the humanitarian aims of the intervention.

² It is impossible to list all authors here, but the following gives a brief overview: Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', *American Journal of International Law*, 67/2, 1973, 275-305; R. J. Vincent, *Nonintervention and International Order* (Princeton, N.J.: Princeton University Press, 1974); Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers, 1988); Jack Donnelly, 'Human-Rights, Humanitarian Crisis, and Humanitarian Intervention', *International Journal*, 48/4, 1993, 607-40; Friedrich Kratochwil, 'Sovereignty as Dominion: Is There a Right of Humanitarian Intervention?' in Gene M. Lyons and Michael Mastanduno (eds.), *Beyond Westphalia? State Sovereignty and International Intervention* (London: Johns Hopkins University Press, 1995); Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*. (New Directions in World Politics; New York: Columbia University Press, 1996); Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (Cambridge: Polity Press, 1996); Stanley Hoffmann, *The Ethics and Politics of Humanitarian Intervention* (Notre Dame Studies on International Peace; Notre Dame: University of Notre Dame Press, 1997); A. Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', *Journal of Political Philosophy*, 7/1, 1999, 71-87; Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (London: Pluto Press, 1999); Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Kelly M. Greenhill, 'Mission Impossible? Preventing Deadly Conflict in the African Great Lakes Region', *Security Studies*, 11/1, 2001, 77-124; International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', (Ottawa: International Development Research Centre, 2001); James Turner Johnson, 'The Question of Intervention', in James Turner Johnson (ed.), *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 2001), 71-118; Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington: Brookings Institution Press, 2001); S. Chesterman, 'Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law', *Security Dialogue*, 33/3, 2002, 293-307; Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park: Pennsylvania State University Press, 2002); Terry Nardin, 'The Moral Basis of Humanitarian Intervention', *Ethics and International Affairs*, 16/1, 2002, 57-70; Chris Brown, 'Selective Humanitarianism: In Defense of Inconsistency', in D. Chatterjee and D. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003); J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

³ Finnemore, 'Constructing Norms of Humanitarian Intervention'; Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*.

⁴ See for example Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*; Anthony C. Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the Un Charter Paradigm* (London: Routledge, 1993); Nardin, 'The Moral Basis of Humanitarian Intervention'.

⁵ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect'.

constructing a fresh legal interpretation based on ethical principles derived from world religions.⁶ Moreover, the connection between the right of humanitarian intervention and a possible responsibility to intervene or to protect⁷ has drawn attention in recent years. This connection has been addressed by for example shifting the focus from states to the victims of humanitarian crises.

However, there is another way to address the connection between the right of humanitarian intervention and a possible responsibility to intervene. This other way is to pay attention to the kind of right in question. It is the argument of this paper that there are several kinds of rights, and that it makes a theoretical as well as a practical difference which kind of a right the right of humanitarian intervention is considered to be.

Already in the early twentieth century, Hohfeld pointed out that there are many *kinds* of rights.⁸ Some of our rights are best considered as claim-rights. Yet, some rights are rights as powers, privileges or immunities.⁹ Both theoretically and practically it is highly significant whether we consider that the right of humanitarian intervention is for example a right as claim or as power; differing kinds of rights have different implications. Thus, this paper explicitly asks the question what kind of a right the right of humanitarian intervention is and attempts in this manner to address the possible connection between the right and the responsibility to intervene in grave humanitarian crises.

In answering the central question of the paper, certain assumptions and choices have been made. First, because there does not appear to be any concrete consensus on the right's existence, and because the aim is not to make any conclusive claims whether the right of humanitarian intervention in fact exists, it is assumed that the right exists. The assumption is made for heuristic purposes, because with the help of this assumption it is possible to make further considerations regarding other related matters. One highly relevant related matter is the question of who the right-holders would be. In this paper emphasis is placed on a reading of the contemporary international circumstances when determining the most plausible right-holders. In this regard, the United Nations Charter as well as a legal understanding of rights play important roles in this paper. Finally, it is acknowledged that the presentation of the United Nations Security Council may appear too simplistic. Naturally, the Council is formed of very diverse members, among whom political bargaining takes place, and some of the Council members have more say about the decisions the Council makes.¹⁰ Nevertheless, for the purposes of this paper it is possible to consider the Council as a

⁶ Leppard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*.

⁷ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect'.

⁸ Wesley Newcomb Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld, eds. David Campbell and Philip Thomas (Aldershot: Ashgate, 2001).

⁹ Ibid. For example, judges possess rights as powers in the sense that they may alter a person's rights. Privileges are normally understood as "freedoms" such as a right to free speech. Immunities are rights which protect their holders from the powers of others. An example could be the fundamental human rights which protect their holders from certain kinds of legislation.

¹⁰ For example, the permanent five Security Council members have a veto over any resolution.

single actor. As will be argued in the next section, the Security Council is the most plausible right-holder candidate for the right of humanitarian intervention. However, even if the *Security Council* possessed the right, it would not mean that the *individual members* of the Council would possess the right outside of the Council. Thus, the simplification of the Security Council appears excusable.

The argument in this paper is structured in the following way. The next section introduces what kinds of rights there are. The typology is by no means exhaustive but simply one reading of rights, from which the present discussion benefits. In order to suggest what kind of a right the right of humanitarian intervention is, it is beneficial to consider who the right-holders would be. Thus, the third section suggests the most plausible right-holder candidates. The fourth section applies the typology of rights of the second section on the right-holder candidates. Before a summary of the paper and some concluding remarks, section five reflects on some of the implications of section four.

A typology of rights

There are several ways in which to consider rights. For example, H.L.A. Hart's famous division between special and general rights is one way of distinguishing between rights.¹¹ However, his division is unhelpful for the purposes of this paper, because if general rights "are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights",¹² and if – as will be argued later – the right of humanitarian intervention is not held by all, one can only conclude that the right of humanitarian intervention is a special right. Such a conclusion does not warrant further interesting reflections.

A more useful division between different kinds of rights was introduced by Hohfeld. He makes a dual distinction between rights according to their correspondents and the reference group against whom a particular right is "claimed". Hohfeld's divisions can be combined into a two-dimensional typology of rights, which allows for further deliberation on humanitarian intervention.

One dimension of the typology of rights is the distinction between rights *in rem* and *in personam*, or multital and paucital rights as Hohfeld calls them. The main difference between these rights is the specificity of the group that holds the right's correspondent, and whether an implied duty¹³ requires positive action. Some examples help to clarify this distinction. It is normal to consider that rights as claims imply duties on other actors.¹⁴ Hence, a right may imply a duty of committing a positive act and not a mere omission, in which case the right is best understood as a right *in personam*.¹⁵ The best general example of such rights is contract obligations. For example, if Anne owes Bill hundred dollars, then Bill has the right to expect payment and Anne the corresponding duty to pay him hundred dollars. On the other hand, property rights serve as a contrasting example of different kinds of rights as claims. Namely, property rights imply duties on all persons including even future or hypothetical persons. These kinds of rights are usually referred to as rights *in rem*, where the "right holds, not against some specific namable [sic.] person or persons but rather, in the legal phrase, against the world at large".¹⁶ In 'saying that "the whole world" has a duty to stay off my land, all I can mean, of course, is that any person in a position to enter my property has a duty to stay out'.¹⁷ Noteworthy is that the implied duty to stay out can be fulfilled by mere omission and no positive action is required.

¹¹ H. L. A. Hart, 'Are There Any Natural Rights?' in R. Goodin and P. Pettit (eds.), *Contemporary Political Philosophy* (Oxford: Blackwell, 1997).

¹² *Ibid.* at 325.

¹³ In this paper "duty" and "responsibility" are used interchangeably.

¹⁴ See for example Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980); Timothy Dunne and Nicholas J. Wheeler, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999); Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld*.

¹⁵ Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* at 131.

¹⁶ *Ibid.* at 134.

¹⁷ *Ibid.*

The other dimension of the typology is Hohfeld's main contribution in pointing out that 'the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense'.¹⁸ Whereas rights in their strictest sense are best considered as claims, which imply correlating duties to others,¹⁹ privileges, powers, and immunities are rights but their strict correspondents are not duties but "no-right", liability, and disability respectively.²⁰ Starting with privileges I attempt to clarify the differences between these different kinds of rights with the help of examples.

Privileges – despite being "weak rights"²¹ – can be understood as follows: Anne gives Bill permission to use her car, if he so wishes, and if she is not using it.²² Thus, Bill can use Anne's car but he is under no duty to use it, but Anne cannot complain if Bill actually takes the car. Moreover, if Anne needs the car, Bill cannot complain either. In other words, Bill has the privilege to use the car, and Anne has no-right against Bill using the car when she is not using it.

Right as power "is an ability to cause, by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person or persons, or both".²³ For example, as a property owner I have the power to give rights of passage or entry to others. In addition, one could possess "meta-powers". According to Thomson, meta-powers could be understood as "the ability to cause oneself [sic.] and others to acquire or lose powers".²⁴ Persons of certain positions of authority, such as judges, normally possess not only powers but also meta-powers in the sense of being able to give rights as powers to other persons. For example, when passing judgment over the rightful owner of a piece of land, a judge exercises her meta-powers by establishing property rights containing powers (such as the ability to grant rights of passage) for the rightful owner. However, there is another way to understand what meta-powers are. A meta-power could be understood as an ability to determine how a given right as power is to be used and what are its limits. For example, in passing the judgment over property rights, a judge not only gives powers to the rightful owner but also determines that the rightful owner may use those powers within certain legally accepted limits. In other words, despite owning a given property the owner's use of his property rights is regulated by the meta-powers of the judge, or better of the law.

¹⁸ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 12.

¹⁹ Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990) at 39-43; Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 13.

²⁰ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 12.

²¹ Thomson, *The Realm of Rights* at 45-52.

²² Hohfeld uses a salad example where Anne would give Bill permission to eat her salad if he can. In this case, Anne could not complain if Bill eats the salad but neither could Bill complain, if Anne manages to hold so fast on the plate that he cannot eat it.

²³ Thomson, *The Realm of Rights* at 57.

²⁴ *Ibid.* at 58.

Finally and in contrast to powers, immunities provide protection against powers: “for X to have an immunity against Y is just for Y to lack a power as regards X”,²⁵ or ‘an immunity is one’s freedom from the ... power or “control” of another’.²⁶ Fundamental human rights provide an example of immunities against the power of one’s state so that the state may not pass legislation that would override or contradict fundamental human rights.

However, the Hohfeldian model has overlooked at least one further distinction according to Thomson. Hohfeld equates privileges with liberties, yet Thomson shows how this ignores a certain detail.²⁷ In the car example, Bill has the privilege to use the car if he so wishes. However, Anne gives no assurance of the car’s availability; Bill may use the car only when Anne is not using it. In fact, Anne is in a position to frustrate Bill’s desires to use the car without breaking her promise. Therefore, Bill is not *at liberty* to use the car whenever he wishes but only when Anne is not using it. According to Thomson, liberties, unlike privileges, entail also a claim of non-interference, and therefore we cannot say that a person “is at liberty to do a thing unless both he is under no duty at all to not do it (thus has a privilege against everyone of doing it) and everyone else is under a duty toward him not to interfere with his doing of it”.²⁸ A proper liberty, then, is a right that contains rights.²⁹

In sum, the two dimensions of different kinds of rights can be brought together. Multital rights (or *in rem*) and paucital rights (or *in personam*) are not further types of rights like claims or privileges but different versions of those kinds of rights: “Claim-rights, privileges, powers and immunities can each of them appear in both multital and paucital versions”.³⁰ Thus, the two dimensions can be presented as a two by five matrix as shown on next page.

²⁵ Ibid. at 59.

²⁶ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 28.

²⁷ Thomson uses Hohfeld’s salad example but the distinction becomes clearer with the use of my car example. Thomson, *The Realm of Rights* at 53.

²⁸ Ibid. at 53-54. Emphasis removed.

²⁹ The merits of this distinction are debatable. However, in this paper it brings out certain details that are useful.

³⁰ ‘Introduction’ by Nigel E. Simmonds in Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at xvi.

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Table 1: Modified Hohfeldian model of different rights

KIND OF RIGHT	“VERSION” OF A RIGHT	
	<i>In rem</i> or multital	<i>In personam</i> or paucital
Claim		
Privilege		
Liberty		
Power		
Immunity		

The next step in my argument would be to locate the right of humanitarian intervention within this table of rights. However, this cannot be done without considering who the right-holders are. Thus, before suggesting what kind of a right the right of humanitarian intervention is, the next section asks who the most plausible right-holder candidates are.

Who are the right-holder candidates?

It is not necessary to rehearse the arguments over humanitarian intervention here. The arguments are complex and lengthy, and they have been covered elsewhere.³¹ Moreover, it is assumed in this paper for heuristic purposes that the right of humanitarian intervention exists. However, it is not clear who the right-holders would be, and it is the purpose of this section to suggest the most plausible holders of the right of humanitarian intervention.

Generally speaking there are three main options to consider as to the holder of the right of humanitarian intervention: 1) no legitimate nor legal³² right-holder exists,³³ 2) the Security Council has the right and it can authorize humanitarian interventions, and 3) unilateral or multilateral interventions even without Security Council authorization are at least legitimate if not also legal.³⁴

Out of these three possibilities, the second option is the most convincing one. The Security Council is highly relevant, because member states have forfeited the use of force bar self-defense³⁵ to the Security Council. If the Council determines that a breach of or threat to peace and security exists, the Council may act under Chapter VII powers and use force or authorize the use of force. Thus, humanitarian intervention, here understood to incorporate the use of force, requires Security Council's interpretation of the existence of a breach of or threat to international peace and security for it to be legal. Secondly, previously the Security Council has authorized humanitarian interventions which were considered legitimate and legal. The first clearest case of Security Council authorization is Somalia in 1992 with Resolution 794.³⁶ In that resolution, under Chapter VII mandate, the United States was given authorization for military enforcement action in Somalia. To name another example, in 1994 Resolution 929 authorized the French-led Operation Turquoise in Rwanda to use "all necessary means to achieve the humanitarian objectives set out".³⁷

Secondly, in light of the UN Charter a strong argument can be made that a grave humanitarian crisis may allow for the Council to intervene despite the protective provisions of Article 2.7. Not only does the Charter emphasize human rights in general but the promotion and respect of human rights in particular (for example Article 1.3). Moreover, the Security Council may use Chapter VII powers including

³¹ See ft. 2.

³² I shall return to this distinction between legal and legitimate below.

³³ For example Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force'.

³⁴ Nardin, 'The Moral Basis of Humanitarian Intervention'.

³⁵ As members of the United Nations, states have forfeited their right to use force bar self-defence, and even in self-defence force can only be exercised "until the Council has taken measures necessary to maintain international peace and security." See Article 51, United Nations, *Charter of the United Nations* (1945).

³⁶ United Nations Security Council, Security Council Resolution Number 794 of December 3 1992. (SC/RES/1992/794).

³⁷ United Nations Security Council, Security Council Resolution Number 929 of June 22 1994. (SC/RES/1994/929).

force in situations in which the Council has determined “the existence of any threat to the peace, breach of the peace, or act of aggression” (Article 39). Although in the past grave human rights conditions may not have been interpreted to constitute any threat to peace, they are gaining ground as becomes evident from Security Council statements and resolutions. For example the president of the Security Council has stated that “massive displacement of civilian populations in conflict situations may pose a serious challenge to international peace and security”.³⁸ Similarly, in another document the president of the Council acknowledges that the Council “has a responsibility to address humanitarian issues relating to situations of conflict and to take appropriate action”.³⁹ As a further example from the same document, the representative of France reminds the Council that the Council has the primary responsibility “to deal with situations in which violations of international humanitarian law and human rights threaten international peace and security”. Moreover, as for example the situation in the Great Lakes region of Africa in 1996 illustrated, grave humanitarian situations have been interpreted by the Security Council to constitute a threat to international peace and security.⁴⁰ Hence, both the UN Charter and international practice support the interpretation that the Security Council may legally exercise the right of humanitarian intervention.

In contrast, bypassing the Security Council has not been considered legal. As Byers and Chesterman argue, arguments that unilateral intervention is legal require unwarranted assumptions about the international legal system.⁴¹ International treaty law does not support such an interpretation, and international customary law’s perhaps only suitable supporting case – Kosovo – is too controversial. Furthermore, the Independent International Commission on Kosovo concluded⁴² that the NATO action was legitimate but illegal. NATO’s military intervention was illegal because it did not receive prior Security Council authorization, but it was legitimate because it was justified, all diplomatic avenues had been exhausted, and it resulted in liberating the majority population of Kosovo from Serbian oppression.⁴³ Thus, also the Commission’s conclusion emphasizes the illegality of interventions that have not been authorized by the Security Council.

The Kosovo case brought to the fore the distinction between legal and legitimate acts. In common parlance the two are often taken to be synonymous, yet a closer examination reveals that they differ significantly. The two terms are related in the

³⁸ United Nations Security Council, Statement by the President of the Security Council. (S/PRST/1997/34).

³⁹ United Nations Security Council, Maintaining Peace and Security: Humanitarian Aspects of Issues before the Security Council. (S/PV.4109/2000).

⁴⁰ See for example United Nations Security Council, Security Council Resolution Number 1078 of November 9 1996. (SC/RES/1999/1244).

⁴¹ Michael Byers and Simon Chesterman, 'Changing Rules About the Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) at 178-79.

⁴² Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Responses, Lessons Learned* (Oxford: Oxford University Press, 2000).

⁴³ *Ibid.*

sense that in most cases legal acts are also legitimate.⁴⁴ In contrast, legitimate acts are not necessarily legal. The distinction arises from the difference in the point of reference for each term. For legal acts the authority and reference point is existing law, whereas the legitimacy of an act is determined with the help of inter-subjectively shared norms and standards without any necessary reference to law. Furthermore, this distinction between legal and legitimate can be related to the difference between *having* a right and something *being* right. Having a right relates to some form of law, whereas something being right belongs in the realm of morality.

Thus, the Kosovo case appears to imply that humanitarian intervention without Security Council authorization might be legitimate or right in the sense of being in accordance with our consciences. In other words, exceptional measures during times of crisis may be justifiable and may not be condemned despite their illegality, but it is left to the moral choice of individual decision-makers to make such decisions⁴⁵ and to find support for their choices, because no clear legal right that would trump opposing arguments can be asserted. It is noteworthy that it might be a fundamental characteristic of legitimate acts that they receive their full legitimacy *a posteriori*.⁴⁶ In determining the legitimacy of an unauthorized intervention the arguments in support of the intervention as well as the manner in which the act is conducted are likely to be important elements in determining the legitimacy of the act. Moreover, the Security Council as well as other sources may act as legitimating sources. The Council, therefore, can act as the legitimate user of force as well as the legitimizer of the use of force.

A general discussion of what legitimating justifications an actor could give for her unauthorized intervention is not relevant for the purposes of this paper. However, I would like to draw attention to a point that sometimes causes confusion. It is sometimes claimed that multilateralism *per se* is a legitimating factor.⁴⁷ This is a strange argument because it does not follow that if many commit a wrong, that the wrong is somehow translated into right.⁴⁸ What is true, on the other hand, is that a group of states that intervenes without Security Council authorization may be in a better position to argue for the legitimacy of their action by for example claiming that multilateralism safeguards against the exploitation of the situation towards the national interests of a single actor. Nevertheless, one does well by remembering that if “governments have mixed motives, so do coalitions of governments. Some goals, perhaps, are cancelled out by political bargaining that constitutes the coalition, but

⁴⁴ This is not to say that legality necessarily produces legitimacy. Also, situations exist where valid law may not be congruent with inter-subjectively shared norms and standards.

⁴⁵ A similar conclusion was presented in relation to humanitarian intervention in general by Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force'.

⁴⁶ For example, NATO bombing campaign lasted from March 24 to June 10, 1999 and was justified along humanitarian reasons. However, NATO action was legitimized only *a posteriori*. See e.g. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Responses, Lessons Learned*.

⁴⁷ For example Finnemore, 'Constructing Norms of Humanitarian Intervention', at 180.

⁴⁸ The exception to the rule is when *opinio juris* is achieved, or when the “wrong” is committed by sufficiently many and constitutes a new practice.

others are super-added; and the resulting mix is as accidental with reference to the moral issue as are the political interests and ideologies of a single state".⁴⁹

In sum, if the above argumentation is correct, the Security Council would have the legal right of humanitarian intervention, and interventions without Council authorization are illegal and risk being illegitimate. Thus, despite the possibility that unauthorized interventions might be legitimate, the question about what kind of right the right of humanitarian intervention is should be restricted to considering the Security Council as the proper right-holder. The illegality of unauthorized interventions excludes such interventions from this discussion, because otherwise it would be implicated that a right to unauthorized interventions existed and thus that unauthorized interventions would be legal. Unauthorized interventions can be legitimate but not legal, and hence it cannot be concluded that a legal right to humanitarian intervention without a Security Council authorization exists.

However, there are two further considerations in relation to the Security Council and the right of humanitarian intervention. Firstly, the rights held by the Council are not extended to its individual members but remain at the collective level. Admittedly the Council is often no more than the sum of its members, yet only when acting as a collective unit can the Council exercise its rights and powers. Secondly, the Council may exercise the right of humanitarian intervention in two ways. It can either intervene with blue-helmets thus retaining operational command or it can authorize a third party to intervene in its stead (e.g. Articles 48 and 53). Since the Council depends on member states for troop contributions, Council interventions are not a simple task. However, there is a difference whether the Council exercises the right directly or passes the right on to some other party. For one, authorizing a third party gives the right of intervention to that third party, and therefore there are in fact two possible right-holders: the Security Council and the authorized third party. Another significance of the Council's capability to authorize others is related to the kind of right the Council possesses in the first place, as will be discussed in the next section.

⁴⁹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn.; New York: Basic Books, 2000) at 107. Furthermore, "coalitions of the willing" are self-selective and rarely if ever altruistic.

What kind of a right is it?

So far it has been argued that the best candidates for the right-holders of humanitarian intervention are the Security Council and any third party as authorized by the Council. In section two a typology of rights based on Hohfeld's work was introduced and is utilized in this section for each right-holder candidate.

What kind of right would the Security Council have?

With a process of elimination we can determine what kind the right of humanitarian intervention would be for the Security Council. It seems fair to immediately rule out two kinds of rights: immunities and privileges. Immunities are ruled out because a right as immunity would be protection from intervention or from the use of force as prescribed by Article 2.4 of the UN Charter.⁵⁰ Privileges are ruled out because privileges do not contain assurances of non-interference by other actors, and it would be odd and in contradiction with the UN Charter if other actors could legally interfere with an intervention by the Security Council.⁵¹ Thus, out of five different kinds of rights three remain: claim, liberty, and power.

It is sensible to ask whether the right of humanitarian intervention is only a claim. Surely, the right has characteristics of a claim and a duty of non-interference corresponds with it. Yet, there is more to the story. The right incorporates an element similar to a privilege. In analogy with the above car example we can consider that states have agreed (both through explicit agreement and international practice) to give the Security Council the right to intervene, that we know that no duty to intervene exists as such but the Council can use its discretion to determine when intervention is necessary and/or desirable,⁵² and that states cannot challenge a Council decision to intervene, at least not on the basis of an infringement on their rights. Similarly, since it is left at the Council's discretion to make the decision, if the Council decides not to intervene, objections may naturally be voiced. But apart from taking the matter to the International Court of Justice or by intervening oneself there appears to be no clear path to voice one's grievances or to challenge the Council's decision. Moreover, recourse to the Court against the Council is most likely fruitless as the *Pan Am* case demonstrated.⁵³ Hence, if a humanitarian crisis existed, the Security Council's right to

⁵⁰ One might consider that peoples possess certain protective immunities from states including their own state. Some of the fundamental human rights represent these immunities. Furthermore, the rule of non-intervention is an immunity, since it is a "right" to remain free from the interference of other states.

⁵¹ See for example Article 51 of the UN Charter.

⁵² The Security Council is charged with the maintenance of international peace and security, it determines what constitutes a threat to or breach of international peace and security, and the Council can use its discretion in determining what means are required towards maintaining international peace and security (Articles 24 and 39).

⁵³ Generally speaking the Court is reluctant to become involved so that it would be brought into conflict with the Security Council. In the *Pan Am* case, the International Court of Justice found that it could not order provisional measures against an earlier Security Council decision, because according to Article 103 of the UN Charter obligations arising from the UN Charter precede over any other obligations. See International Court of Justice, Questions of Interpretation and Application of the 1971

humanitarian intervention could be understood as a liberty because the Council would be at liberty to intervene and other actors would be under a duty of non-interference.

On the other hand, since the Security Council may authorize others to intervene on its behalf, the Security Council's right of humanitarian intervention is not only a liberty but also a right as power. At its discretion, the Council may either exercise the right directly or pass the right on to another actor. In this sense the Council's right is a right as power.

However, whether the Council also possesses meta-powers is hard to determine. Above it was suggested that meta-powers can be viewed in two ways. On the one hand, meta-powers are the ability to give other actors powers. On the other hand, meta-powers can be understood as the ability to regulate the use of powers by other actors. If considering the right of humanitarian intervention of the Security Council, it seems that the Council would not possess meta-powers in the first sense of the term. If it were true that the Council possessed meta-powers in the sense of being able to give powers to others, it would mean that the Council could pass the right of humanitarian intervention on to a third party, who in turn could pass the right to a further party. This is not the case under contemporary circumstances. On the other hand, the Security Council has meta-powers in the second sense of the term. When authorizing a third party with the right of humanitarian intervention, the Security Council regulates the use of the right. Even if given a *carte blanche*, the right of humanitarian intervention of an authorized third party is against a certain other and within a certain context. Thus, even in the case of an open authorization of humanitarian intervention, the Security Council exercises its meta-powers in the second sense of the term. The importance of these details becomes clearer in the next section, when determining the kind of right an authorized third party could have.

Whether the Security Council's right to intervene is more paucital than multital is difficult to answer. Admittedly, one could say that the right arises from a "contract" among states and from their practices, and in this sense it has some paucital characteristics. Also, the right is to be practiced against a certain other as recognized by the Security Council, and it is in this sense very specific. Moreover, if we concluded that there existed an implied duty of humanitarian intervention, it could be stated that the right is of paucital character. After all, paucital rights require positive action, not mere omission. However, it has *not* been argued that the *right* of humanitarian intervention implies a duty to intervene nor could such an argument be made convincingly. Hence, one must doubt the right's paucital character.

There are additional reasons to question the paucital character of the right. Firstly, although states are to be the targets of the right of humanitarian intervention, it is not specified in detail against whom the right is to be exercised. It is only suggested that those states which massively abuse their citizens could face outside intervention. Secondly, the right clearly implies a duty of non-interference on all other parties bar

Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom). See also International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

the Council, and this duty of non-interference can be fulfilled by mere omission and requires no positive acts.⁵⁴ This implies that the right would be of multital nature.

In sum, arguments in favor of the right of humanitarian intervention being either multital or paucital can be found. Perhaps the greatest tension lies in determining whether the right implies positive action. The exercise of the right implies that positive action must be taken, yet the only clear duty that is implied by the right requires only non-interference. If keeping in line with Hohfeld's original ideas, and if allowing for flexibility in the concept of humanitarian intervention, I would argue that the right of humanitarian intervention is more multital than paucital. This is, because the positive action must be implied by the duty that corresponds with a right and not by the exercise of the right, and because no actor is to be protected by exclusion but all actors could be potential targets of humanitarian intervention. The other cannot be defined clearly (which is an indication multital character) because then all those, who have not been defined exclusively, could not be targeted.

In conclusion, for the Security Council the right of humanitarian intervention could be best understood as having a dual character. The right is a multital liberty in combination with right as power to grant other actors the right of humanitarian intervention. Alternatively, one might say that the right of humanitarian intervention for the Security Council is a bundle of rights, because embedded in the notion of the right are the Council's right to determine whether a grave humanitarian crisis exists, whether there is a need for outside intervention, who is to intervene and how. In other words, despite it being possible to simplify the Council's right one should not lose sight of its complex nature or inter-related aspects.

⁵⁴ One could argue that a Security Council decision to intervene implies a duty on member states to contribute to the intervention. However, there is little support for this argument because all contributions are on a voluntary basis.

What kind of a right would an authorized third party have?

As argued above, the Security Council's right of humanitarian intervention operates also as a power denoting that the Council may authorize others to act in its stead. Through the process of authorization, the third party gains the right to intervene as instructed by the Council. The question, then, is what kind of a right the authorized third party would have. Similar to above, I follow a process of elimination in order to suggest an answer this question.

As above, three of the rights can be excluded quickly. The right of humanitarian intervention for an authorized third party is not a power, because the Security Council's right is not a meta-power in the sense that it could give powers to others. Hence, the authorized third party does not have a right as power, and it cannot transfer its right to intervene to a further party. In addition, the authorized third party would not enjoy the right as immunity, because immunity would refer to the opposite of what the right of humanitarian intervention means. Finally, the right does not appear to be a privilege, because if authorized by the Security Council the right-holder can expect the non-interference of others when executing the intervention.

The first kind of right that might correspond with the right of humanitarian intervention is right as claim. However, if the right of humanitarian intervention were a claim, then there would necessarily need to be a corresponding duty. Supposing that state X has the right to intervene in state Y, what would be the corresponding duty of Y with regards to X?⁵⁵ Is it possible to imagine a corresponding duty for Y that would make sense? Any of the alternatives that one can imagine resembles a duty of allowing or welcoming the intervention. Not only is it simply implausible that such a duty could exist in contemporary world, but it would create definitional problems for humanitarian intervention as uninvited intervention in another state. Therefore the right does not appear to be a simple claim either, and the only candidate left is right as liberty.

In sum, the right of humanitarian intervention to an authorized third party appears to be a right as liberty. In other words, the right seems to be similar for both the Security Council and an authorized third party with the exception that the Council may pass on the right whereas the authorized third party may not give the right to some further party.

However, a closer examination reveals that further differences exist. The right as enjoyed through authorization would actually be a mix between a privilege and a liberty, because it would exist with certain general and particular limitations. Regarding general limitations, it would be assumed that the intervention should be executed in a particular state and in a certain manner. Moreover, the right would be valid only as long as exceptional circumstances prevailed, intervention was required, or the Security Council did not revoke its authorization from the third party. In addition, the authorizing resolution might contain more particular, case-sensitive limitations. Finally and arising from this specificity of the right and in contrast with



⁵⁵ The idea of correspondence is illustrated by the familiar example of Anne owing Bill hundred dollars, where Anne has a duty to pay Bill and Bill the right to be paid.

Security Council’s right, the right of a third party would be more paucital than multital, because the right would be held against a certain other and not against the world at large; the authorization is vis-à-vis a specific state in a given point in time. We would not consider that having been authorized once, the authorized state could intervene always in the future but that for each intervention authorization must be acquired separately.

The specificity of the right for an authorized third party seems to imply that the right would be best understood to have a paucital character. For one, the right is held against a specific other and not against the world at large. Secondly, the possession of the right implies certain positive acts. Authorization is given with the implication that the authorized third party exercises the right of humanitarian intervention. I return to this implication in the following section.

In conclusion, the kind of right that the right of humanitarian intervention is appears to depend on the right-holder. Table 2 summarizes the suggestion that the Security Council’s right would be both a multital liberty and a power, whereas an authorized third party would have a restricted or special paucital liberty. Notice that due to the special nature of the right for an authorized third party, the right is placed between liberty and privilege. Before drawing a final summary, the next section considers the implications of these conclusions by considering the correlatives of these rights.

Table 2: Summary of suggested kinds of rights for the candidates

KIND OF RIGHT	“VERSION” OF A RIGHT	
	<i>In rem</i> or multital	<i>In personam</i> or paucital
Claim		
Privilege		
Liberty	 SECURITY COUNCIL	 THIRD PARTY
Power		
Immunity		

Correlatives of the kinds of right in question

There are several implications that arise from the conclusions of previous sections. In this part some additional implications are proposed with the help of Hohfeld's correlatives of rights. The previous implications and those that arise in this section are brought together in the final part of the paper.

According to Hohfeld, the correlative of a right as claim is duty, whereas a right as privilege correlates with "no-right", right as power with liability, and right as immunity with disability.⁵⁶ Multital and paucital rights do not have their correlatives because they represent two different versions of claims, privileges, powers, and immunities. For the purposes of this paper, it is sufficient to focus on the correlatives of liberty and power, because the right of humanitarian intervention can be characterized as either one of these types of right.⁵⁷ However, the problem is that Hohfeld did not make a distinction between privileges and liberties as is done in this paper. Thus, in order for me to continue this discussion and regardless of the risk of reducing the whole merely to the sum of its components, I must breakdown liberty into its components: into a privilege and a duty of non-interference by others.⁵⁸ Therefore, in what follows I examine no-right and the duty of non-interference by other actors as the correlatives of the right as liberty and liability as the correlative of the right as power.

The conception of no-right is fairly simple. As Hohfeld put it in the form of a comparison, 'the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter'.⁵⁹ In other words, Y has no rightful say with regard X and his entering his own (X's) property. Hence, within the humanitarian intervention framework, this can be interpreted to denote that the here assumed privilege of intervention correlates with other actors' no-right that the intervener intervenes. However, since it was distinguished above that a privilege (unlike a liberty) does not necessarily entail an assurance of non-interference at all times,⁶⁰ the correlating no-right might not amount to a perfect duty of non-interference. To put it differently, if the right were a privilege, others could at least legitimately if not also legally interfere with a right-holder's legal intervention, because a privilege does not imply a duty of non-interference. Such would be indeed a strange circumstance.⁶¹

⁵⁶ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 12.

⁵⁷ Remember that rights as liberty incorporate a notion of rights as privilege.

⁵⁸ Admittedly an argument could be made that in this case the whole (liberty) is greater than the sum of its parts (non-interference and privilege) but in the present discussion it can be overlooked.

⁵⁹ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* by Wesley Newcomb Hohfeld at 14.

⁶⁰ See the above car example.

⁶¹ In the Just War tradition it is sometimes considered that external intervention in a war is justified only if a previous intervention by another external party has taken place. See for example Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* at 86-108. However, a similar consideration does not seem plausible in relation to humanitarian intervention where the point is to intervene in order to stop the atrocities and not to balance the warring parties.

However, as discussed above the right of humanitarian intervention is best understood as a liberty and not as a mere privilege. Thus, the right incorporates a duty of non-interference by other actors.⁶² This argument seems straightforward if considering that the right-holder is the Security Council who decides to exercise the right directly by intervening with blue-helmets. Other actors should not interfere with the Security Council's action, especially because in maintaining international peace and security (Article 24.1) they have authorized the Council to act on behalf of all international actors. On the other hand, when the right-holder and the exerciser of the right is an authorized third party, matters are more complicated. Despite having authorized an actor with the right of humanitarian intervention, the Security Council would still retain its power to revoke the right by passing further resolutions. In contrast to an authorized actor, the Security Council would not share the duty of non-interference.

If considering the duty of non-interference further, the implied duty of non-interference would include the targeted state where intervention would occur. By extension, this could mean that the right of self-defense of the targeted state would conflict with the Security Council's right of humanitarian intervention. In a way there is nothing new in this. As stated in Article 51 of the UN Charter, the right of self-defense remains unimpaired "until the Security Council has taken measures necessary to maintain international peace and security".⁶³ Moreover, this possible implication that the inherent right of self-defense may be overridden lends support to John Stuart Mill's old argument about "savage" nations not being protected by the rule of non-intervention.⁶⁴ However, there is a difference in asserting a right for the Security Council to take measures in order to maintain international peace and security, and in denying that one may not legally defend oneself by force if necessary, especially since the right to self-defense is one of the most fundamental rights.⁶⁵ Moreover, if considering this matter more generally, rights of different actors are bound to be in conflict and perhaps it cannot be otherwise. The point is to take note of such possibilities and develop ways in which those conflicts may be resolved.

Lastly, the correlative of power is liability. Hohfeld argued that powers are correlated with liabilities, where liability is understood as "responsibility", as the "opposite of immunity", or as "subjection".⁶⁶ As an example, innkeepers are under present liabilities rather than duties: "Correlative to those liabilities are the respective powers of the various members of the public. Thus, for example, a traveling member of the public has the legal power, by making proper application and sufficient tender, to

⁶² In any case, other considerations such as UN member states having forfeited their right to use force except in self-defence imply a duty of non-interference.

⁶³ Emphasis added.

⁶⁴ John Stuart Mill, 'A Few Words on Non-Intervention', in John M. Robson (ed.), *Essays on Equality, Law, and Education. Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1984), 109-24. See also Donnelly, 'Human-Rights, Humanitarian Crisis, and Humanitarian Intervention'.

⁶⁵ In this relation, the question is of course whether it is the self-defence of states or their peoples that we are concerned with. Recent work such as the International Commission's work appears to shift to the peoples' right instead of rights of states. See International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect'.

⁶⁶ Hohfeld (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* at 27.

impose a duty on the innkeeper to receive him as a guest”.⁶⁷ In analogy, the Security Council’s right of humanitarian intervention as power may cause a liability for states and relevant international organizations to be charged with the right of humanitarian intervention. In turn, this liability may bring about duties, because once charged with the responsibility to intervene, the authorized state *ought to intervene* as instructed by the Council. Authorization is given with the implication that the authorized right-holder will exercise the right of humanitarian intervention once she is in possession of it. In case of failure the Security Council would not be to blame but the authorized actor.⁶⁸ In other words, states are liable to have a duty of intervention imposed on them, and although states may have more say about it than innkeepers, they would not be able to escape the pressure created by the process of authorization.

There is a further aspect to liability as for example Wade L. Robison’s discussion on trust and the rule of law illustrates.⁶⁹ He argues in relation to state troopers that “because the officer has such special powers ... an officer also has a special liability to have a duty to ensure” that for example evidence is properly collected, handled and so on.⁷⁰ In other words, a power may also give rise to liabilities on the power-holder. With regards to humanitarian intervention, the Security Council’s right as power gives rise to liabilities on the Council. One of those liabilities could be the liability to intervene, or at a minimum a liability not to turn a blind eye on grave humanitarian crises. This conclusion is in its essence similar to the move made by the International Commission on Intervention in their advocacy of a responsibility to protect.⁷¹ Similarly, Kofi Annan has argued that if a state is unable or unwilling to protect its citizens against extreme violence, the Security Council must assume responsibility.⁷²

⁶⁷ Ibid. at 25.

⁶⁸ However, since the Security Council retains the power to revoke the right of humanitarian intervention, the Council cannot wash its hands completely but must remain seized on the matter and follow up on the exercise of the right.

⁶⁹ Wade L. Robison, 'Trust and the Rule of Law', [PDF], (2003) <www.rit.edu/~wlrgh/Trust&law.pdf>, accessed April 2005

⁷⁰ Ibid.

⁷¹ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect'.

⁷² United Nations Secretary-General, If State Unable, Unwilling to Protect Citizens against Extreme Violence, Security Council Must Assume Responsibility. (SG/SM/10000, SC/8444).

A summary and some implications of the discussion

This paper began by assuming for heuristic purposes that the often challenged right of humanitarian intervention existed. This method helped to clarify some of the complexities related to the right of humanitarian intervention. For one, it was possible to suggest who the right-holders would be given the contemporary circumstances. It was argued that the right-holders would be the Security Council and a third party as authorized by the Council. The second benefit was to bring out the difference between acts which are legal and legitimate. It was argued that in the absence of Security Council authorization, humanitarian interventions could be legitimate but not legal. However, since the focus of the paper was on the *right* of humanitarian intervention, possibly legitimate interventions were excluded from further discussion. The third benefit of this approach was teased out with the help of a modified Hohfeldian typology of rights. It appears as if the kind of right depends on the right-holder, and for example the Security Council's right might be best described as a bundle of rights. In addition and as the fourth benefit, by utilizing Hohfeld's typology further, it became clear that unlike other actors the Security Council could legally interfere with humanitarian interventions even if it had authorized a third party to act in its stead. Finally, the right of humanitarian intervention *per se* does not imply a duty to intervene. However, if duties can be said to arise from the existence of a right of humanitarian intervention, they arise from the fact that the right can be seen as a power of the Security Council. This last point requires further clarification.

If the right of humanitarian intervention existed,⁷³ the Security Council's right as power would imply liabilities. In other words, the Council's power to provide a third party with the right of humanitarian intervention would make other actors liable to have a right of humanitarian intervention imposed on them.⁷⁴ If authorized to intervene, the authorized actor would have certain responsibilities to use the right as instructed by the Council. The third party ought to exercise its right since it has been authorized with the right to that purpose. Thus, if responsibility to intervene can be said to exist to the authorized actor, it would arise from the act of authorization and not from the right itself.

On the other hand, the situation is different for the Security Council. The Council's right as power could make the Council itself liable to either exercise the right and intervene with blue-helmets or to authorize some other actor(s) to act in its stead. Hence, at a minimum the existence of the right of humanitarian intervention would make the Security Council responsible to address grave humanitarian crises.⁷⁵ Furthermore, if the Council authorized an actor to intervene on its behalf, the fact that the Council would be the only authority to interfere legally in any consequent

⁷³ Again, the existence of the right is not at the locus of this paper. The interest here is the right's meaning if it existed.

⁷⁴ Naturally the Security Council does not impose the right on an unwilling member or regional organization. Normally member states, coalitions of members, or regional organizations seek authorization.

⁷⁵ Since the Security Council appears to address grave humanitarian crises anyway, this conclusion may be of little interest. However, it makes a difference whether the Council feels a sense of obligation or simply a pressure from for example human rights groups. This point, nevertheless, should be examined better elsewhere.

intervention implies that the Council would have some responsibility to monitor the intervention and take action itself if necessary. In other words, if a third party is authorized to exercise the right of humanitarian intervention, the Security Council should operate as a safety measure guarding against any abuse of the right of humanitarian intervention. This naturally has very concrete implications in terms of monitoring the situation and ensuring that the Council retains sufficient authority to interfere if necessary.

In conclusion, it has been argued that the implications of the existence of the right of humanitarian intervention are manifold and require further consideration. In addition to the liabilities that the right would create for international actors, the right would vest more power in the hands of the Security Council but it would also demand more of the Council. In order to meet such a challenge and given that the Council has long suffered from allegations of protecting only the interests of the Great Powers, the Council would receive even further pressure to reform itself in order to correspond better with the economic, political, military as well as moral challenges that it is charged with. Moreover, since the Council would be in a position to authorize other actors to act in its stead, questions arise as to the possible candidates of authorization, because only a few states or international organizations have a global or even regional reach. Thus, if might is not to be right, and the right of humanitarian intervention is not supposed to be about the powerful and the Security Council acting as their instrument, but if the right is supposed to be about the protection of the weak, the question remains how to address these concerns. After all, the question over humanitarian intervention is not simply a question over the place of morality in international politics but also of practical matters.

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