Is There a Human Right to Democracy? Beyond Interventionism and Indifference*

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I.

There is wide-ranging disagreement in contemporary discourse about the justification as well as the content of human rights. On the one hand, the language of human rights has become the public vocabulary of a conflict-ridden world which is increasingly growing together.[1] The spread of human rights, as well as their defense and institutionalization, are now seen as the uncontested language, though not the reality, of global politics. Yet "… in recent years, as political commitment to human rights has grown, philosophical commitment has waned."[2] Some argue that human rights constitute the "core of a universal thin morality," (Michael Walzer); others claim that they form "reasonable conditions of a world-political consensus," (Martha Nussbaum). Still others narrow the concept of human rights "to a minimum standard of well-ordered political institutions for all peoples"[3] (John Rawls) and caution that there needs to be a distinction between the list of human rights included in the Law of Peoples and the Universal Declaration of Human Rights of 1948.

Different justifications of human rights inevitably lead to variation in their content and to "cherry-picking" among various rights. Michael Walzer, for one, suggests that a comparison of the moral codes of various societies may produce a set of standards, a "thin" list of human rights, "to which all societies can be held – negative injunctions, most likely, rules against murder, deceit, torture, oppression and tyranny."[4] But this way of proceeding would yield a relatively short list. "Among others," notes Charles Beitz, "rights requiring democratic political forms, religious toleration, legal equality for women, and free choice of partner would certainly be excluded."[5] For many of the world's moral systems, such as ancient Judaism, medieval Christianity, Confucianism, Buddhism and Hinduism, Walzer's "negative injunctions against oppression and tyranny" would be consistent with great degrees of inequality among genders, classes, castes and religious groups.

Another suggestion is that a *nonparochial* view of human rights, while it may not be endorsed by all *conventional moralities*, would in fact, find favor in the eyes of main conceptions of *political and economic justice* in the world: understood thus, human rights would constitute the core of a *political*

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* I first developed the themes discussed in this essay in my Presidential Address to the American Philosophical Association, Eastern Division in December 2006. See Benhabib (2007a, 7-32). I have presented this lecture at the University of Kansas at Lawrence upon the occasion of the annual Lindley Lecture (October 26, 2007); during the annual meeting of the Yale Law School's Middle Eastern Seminar in Istanbul, Turkey in January 2008; at Yale's "Law and Globalization Seminar" on March 31, 2008; at Fordham University's Graduate Students in Philosophy Conference on April 12, 2008, and at the People for Women in Philosophy conference at the New School for Social Research on April 23, 2008. I wish to thank participants in these occasions for their lively engagement and comments and in particular, David Alvarez Garcia, for drawing my attention to Joshua Cohen's work on democracy as a human right.

[1] See Ignatieff (2001). I use the concept of "a public vocabulary" to distinguish it from the Rawlsian concept of "public reason." Public reason for Rawls is primarily the deployment of reason as a justificatory enterprise in a pluralistic, liberal society, in which many world-views compete for the allegiance of citizens. See Rawls (1996). A "public vocabulary," by contrast, is a shared normative language for all sorts of actors and agents in civil society, as well as state institutions, within, and often beyond national borders, through which moral and political claims are articulated. It would go beyond the limits of this essay to explore all the epistemological and methodological differences between the Rawlsian concept of public reason and the discourse-theoretic model which I will defend. For my early critique of Rawls, see Benhabib (1996).

[2] Mendus (1995, xliii, 10). For two recent contributions to the debate about human rights, cf. also Risse (2008); and Baynes (2009).

[3] Rawls ([1993], 1999, 552). To distinguish this essay from the book of the same title, I refer to each text followed by the dates 1993 and 1999 respectively. For an interesting critique of Rawls along these lines, see also Ferrara (2003, 3 ff.).

[4] Walzer (1994). It is unclear to me what a human right against "deceit" would imply? A right not to be lied to? This is a moral claim, not a human right.

[5] Beitz (2001, 272).

rather than *moral* overlapping consensus. Martha Nussbaum's defense of human rights follows this strategy.[6]

Certainly, the most provocative defense for limiting human rights to "to a minimum standard of well-ordered political institutions for all peoples," has been John Rawls's. Rawls lists the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to personal property and to "formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)"[7] as the basic human rights. The rights to liberty of conscience and association are pared down in *The Law of Peoples* (1999) such as to accommodate "decent, hierarchical societies," which grant *some* liberty of conscience to other faiths but not *equal liberty of* conscience to minority religions that are not state-sanctioned. Article 18 of the UDHR, by contrast, which guarantees "the right to freedom of thought, conscience and religion," including the right to change one's religion, "to manifest one's religion or belief in teaching, practice, worship and observance," is much more egalitarian and uncompromising vis-à-vis existing state religions than is Rawls's right to the "non-egalitarian liberty of conscience."

Most significantly, Rawls passes over without comment the all-too crucial Article 21 of the UDHR which guarantees everyone "the right to take part in the government of his country, directly or through freely chosen representatives," and which stipulates that "the will of the peoples shall be the basis of the authority of government."[8] There is no *basic human right to self-government* in the Rawlsian scheme.

Given that the Universal Declaration of Human Rights is the closest document in our world to international "public law," how can we explain this attempt on the part of many philosophers to restrict the content of human rights to a fraction of what is internationally agreed to – at least on paper? I am not precluding, of course, the possibility that these documents themselves may be philosophically confused, produced as a consequence of political compromises, as was the UDHR, which was the subject of continuous negotiations between the delegations of the United States and the Soviet Union.[9] As James Griffin has observed, however, it is at least necessary to consider seriously the "discrepancies between the best philosophical account of human rights and the international law of human rights."[10]

In a recent article Joshua Cohen has helpfully distinguished among two kinds of "minimalism about human rights." The first is "substantive," the second, "justificatory" minimalism.[11] *Substantive* minimalism concerns the content of human rights, and is "more broadly, about norms of global justice." On this view, human rights are largely confined to what was once known as "negative liberty." Michael

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[6] Nussbaum (1997-98, 273-300).

[7] Rawls (1999, 65). The earlier list in the 1993 article of the same title presented a slightly different formulation: included here as human rights were "the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration," Rawls ([1993], 554).

[8] See Rawls ([1993], 553-54, (1999), 79-80).

[9] Cf. Morsink (1999).

[10] Griffin (2001, 1-28). The result of such an examination may be that "Some of the items on the lists are so flawed that they should be given, as far as possible, the legal cold shoulder" (26). I agree, but Griffin proceeds from a rather conventional account of human rights as "centered on the notion of agency…We value our status as agents especially highly, often more highly than our happiness. Human rights can then be seen as protections for our agency – what one might call our personhood" (4). This defense of human rights is subject to the same criticisms as all other agent-centric views: that some condition is necessary for the exercise of *my* agency does not impose an obligation upon *you* to respect this condition, unless you and I also recognize each other's equality and reciprocity as moral beings. This is the first justificatory step in the argument. See fn. 24 below.

[11] See Cohen (2004, 192).

Ignatieff's, *Human Rights as Politics and Idolatry* (Ignatieff 2001, 173), but also Thomas Nagel's "The Problem of Global Justice" endorse this view.[12] "Justificatory liberalism," by contrast, is about how to present "a conception of human rights, as an essential element of a conception of global justice for an ethically pluralistic world – as a basic feature of ... 'global public reason'" (Cohen 2004, 192).

This is an important distinction. The attractiveness of "justificatory minimalism" flows out of a concern with finding an "overlapping consensus" in the international domain that would not be based on comprehensive world-views and doctrines which often are exclusionary or sectarian in outlook; instead, such a global overlapping consensus would need to be "free standing" in Rawlsian language. In a world where the concept of human rights has been much used and abused to justify all sorts of political actions and interventions, such caution is certainly welcome. A "free standing" global overlapping consensus is intended to enhance the prospects of world peace by assuring that the terms of agreement be acceptable to all peoples.

Yet this laudable concern with liberal toleration and peaceful coexistence in Rawls's *Law of Peoples* may also lead to liberal indifference, and even more, to an unjustified toleration for the world's repressive regimes such as many "decent, hierarchical peoples" may be and often are. Joshua Cohen's position vis-à-vis this implication of Rawls's work is complex. Unlike Rawls, Cohen argues that "any reasonable conception of collective self-determination that is consistent with the fundamental value of membership and inclusion, will…require some process of interest representation and official accountability, even if not equal political rights for all" (Cohen 2004, 213). In other words, even if the scope of representation and accountability defended by Cohen goes beyond the "consultative hierarchy" considered sufficient by Rawls, Cohen still considers "the recognition of equal political rights" for all not to be necessary for the condition of universal respect for all to be satisfied. How plausible is this limitation? How cogently can one distinguish "interest representation" and "official accountability" from democratic equality? Why compromise on "equal political rights for all ?"[13]

In this essay I wish to shift both the *justification* strategy and the derivation of the *content* of human rights away from *minimalist* concerns towards an understanding of human rights in terms of the "right to have rights" (Hannah Arendt).[14] I will defend a discourse-theoretic justification strategy which seeks to synthesize the insights of discourse ethics with Hannah Arendt's concept. I thereby hope to point the way toward a more robust defense of human rights within a global justice context. Whereas in Arendt's work, "the right to have rights" is viewed principally as a *political* right and is narrowly defined as the "right to membership in a political community," I will propose a non-state-centered conception of the "right to have rights," understood as the claim of each human person to be recognized and to be protected as a legal personality by the world community.[15] This reconceptualization of the "right to have rights" in non-state-centric terms is crucial in the period since the 1948 Declaration of Human Rights – a

[12] Nagel (2005, 1522). For Nagel, "negative rights like bodily inviolability, freedom of expression, and freedom of religion" are "morally unmysterious" in their defense (1522). To call "freedom of expression" and "freedom of religion" negative rights displays a very limited view of the meaning of human associations and of citizenship. This position completely occludes the problem of "democratic iterations," which I will discuss below. In strict terms, Nagel is both a "substantive" and a "justificatory" minimalist. But I will not be able to pursue this problem here.

[13] It is interesting that Risse and Baynes who enthusiastically endorse a "political conception of human rights" are silent about this particular aspect of Cohen's discussion. See Risse (2008) and Baynes (2009).

[14] Cf. Arendt ([1951], 1968 ed., 177). For an extensive discussion of some of the shortcomings of Arendt's own formulation of this concept, see Benhabib (2004b, 50-61).

[15] Again, there is a fascinating overlap here between Joshua Cohen's claim "that human rights norms are best thought of as norms associated with an idea of *membership* or *inclusion* in an organized political society" (2004, 197), and the "right to have rights."

period in which we have moved away from "international" toward "cosmopolitan" norms of justice. Contemporary rights discourse has sadly failed to take note of these transformations and to develop a justification of and content for human rights consonant with these juridical transformations.[16]

In what follows, I begin with a "discourse-theoretic" account of human rights. (II) This, in turn, leads to the question whether there are some minimal assumptions about human nature and rationality which must underlie any normative account of human rights.[17] I will argue that in any defense of human rights certain normative commitments are crucial and that justificatory universalism and moral universalism are deeply intertwined.[18] (III) I will then return to the problem of "minimalism" in the justification of human rights and claim that a robust right to self-government is essential for being able to make justifiable claims concerning the valid range of variation in the articulation of human rights at all. Cohen's argument that there is no "human rights to democracy" is indefensible and self-contradictory.

II.

I want to argue that rights claims are in general of the following sort: "I can justify to you with good reasons that you and I should respect each others' reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services." Some rights claims are about *liberties*, that is, to do or to abstain from doing certain things without anybody else having a moral claim to oblige me to act or not to act in certain ways. Liberty rights generate duties of forbearance. Other rights claims are about *entitlement to resources.* Such rights, as the right to an elementary school education or to secure neighborhoods, for example, entail obligations on the part of others, whether they be individuals or institutions, to act in certain ways and to provide certain material goods. As Jeremy Waldron observes, such rights issue in "cascading obligations."[19]

For the Kantian morally constructivist tradition,[20] rights claims are not about what "exists"; rather, we ask whether our lives within, outside and betwixt polities ought not to be guided by mutually and reciprocally guaranteed immunities, constraints upon each others' actions, and by legitimate access to certain goods and resources. Rights are not about what there *is* but about the kind of world we reasonably *ought* to want to live in.

How can we justify talk of human rights without falling either into the traps of naturalistic fallacy or possessive individualism? The answer is: "In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons means for me to respect your capacity for communicative freedom." I am assuming that *all* human beings who are speakers of a natural language are capable of communicative freedom, that is, of saying "yes" or "no" to an utterance whose validity claims they comprehend and according to which they can act. *Human rights*

[16] See note 25 below and also Benhabib (2004a, Introduction).

[17] The juxtaposition of a "political" versus "metaphysical" conception of human rights, which Baynes proceeds from (see above Baynes 2009), strikes me as being very narrow. This contrast is by no means exhaustive of the range of justification of human rights. It is completely mysterious to me how one can have a conception of rights without basing it on some conception of human agency. Such a conception of the rights-bearing person as an agent can certainly be based upon metaphysical and other kinds of comprehensive views, but they need not be. The discourse ethics and the view of human agency I articulate here correspond best to what Risse has called "a principle-driven" account of human rights. See Risse (2008, 5).

[18] For further elucidation of these terms, see Benhabib (2007a, 11 ff.).

[19] Waldron (1984, xxx). I have also found very helpful, Smith, "The Normativity of Human Rights," (manuscript on file with the author).

[20] For a careful analysis of the self-contradictions of MacIntyre's own appeal to reason, see Forst (2002, 200-215).

or basic rights are moral principles that need to be embedded in a system of legal norms such as to protect the exercise of communicative freedom.

Certainly, the exercise of communicative freedom is also an exercise of agency, of formulating what goals and ends we wish to pursue and how to effectuate such pursuits. Unlike agent-centric human rights theories,[21] however, which are still the most commonly subscribed to accounts of human rights, in the discourse-theoretic model, we proceed from a view of the human agent as an individual embedded in contexts of communication as well as interaction. The capacity to formulate goals of action does not precede the capacity to be able to justify such goals with reasons to others. Reasons for actions are not only grounds which motivate me; they are also accounts of my actions through which I project myself as a "doer" on to a social world which I share with others, and through which others recognize me as a person capable of, and responsible for, certain courses of action. Agency and communication are two sides of the same coin: I only know myself as an agent, because I can anticipate being part of a social space in which others recognize me as the initiator of certain deeds and the speaker of certain words. It is the weakness of all agent-centric accounts of human rights that they abstract from the social embeddedness of agency in such shared contexts of speech and action, and instead focus on the isolated agent as the privileged model for reasoning about rights.[22]

First and foremost as a moral being capable of communicative freedom you have a fundamental *right to have rights.* The right to have rights involves the acknowledgment of your identity as a generalized as well as a concrete other.[23] If I recognize you as a being entitled to rights only because you are like me, then I deny your fundamental individuality which entails your being different. If I refuse to recognize you as a being entitled to rights because you are so other to me, then I deny our common humanity.[24]

The standpoint of the "generalized other" requires us to view each and every individual as a being entitled to the same rights and duties we would want to ascribe to ourselves. In assuming this standpoint, we abstract from the individuality and the concrete identity of the other. We assume that the other, like ourselves, is a being who has concrete needs, desires and affects, but what constitutes his or her moral dignity is not what differentiates us from each other, but rather what we, as speaking and acting and embodied beings, have in common. Our relation to the other is governed by the norms of *formal equality and reciprocity*: each is entitled to expect from us what we can expect from him or from her. In treating you in accordance with these norms, I confirm in your person the rights of humanity and I have a legitimate claim that you will do the same in relation to me.

The standpoint of the "concrete other" by contrast, requires us to view each and every being as an individual with an affective-emotional constitution, concrete history and individual as well as collective identity, and in many cases as having more than one such collective identity. In assuming this standpoint, we bracket what constitutes our commonality and focus on individuality. Our relation to the other is governed by the norms of *equity* and *complementary reciprocity*. Our differences in this case complement

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[21] See Gewirth (1983) and (1996).

[22] This is the major flaw in James Griffin's otherwise instructive account (2001, 4 ff.).

[23] See Benhabib (1992, 35-37).

[24] See the innovative interpretation of Arendt's "the right to have rights" by Birmingham (2006). Birmingham writes: "The right to have rights is inspired by a new principle of humanity; the principle of publicness that demands that each actor *by virtue of the event of natality* itself has the right to temporary sojourn on the face of the earth" (58). Italics mine. Although I cannot go into greater detail within the compass of this essay, let me simply mention that Birmingham addresses but, in my view, does not resolve, the problem of "the lack of normative foundations" in Hannah Arendt's thought.

rather than exclude one another. In treating you in accordance with these norms, I confirm not only your humanity but your human individuality. If the standpoint of the generalized other expresses the norm of respect, that of the concrete other anticipates experiences of altruism and solidarity.

Concepts of the generalized and the concrete other do not describe human nature; rather, they are phenomenological accounts of conditions of human experience. Admittedly, the standpoint of the "generalized other," in the very universalistic form which I have given to it, presupposes the diverse experiences of modernity. I am not maintaining, in some Hegelian fashion, that these views are the necessary end-products of the course of history. Rather, they are contestable, fraught and fragile experiences through which the standpoint of "generalized other," as extending to "all of humanity" becomes a practical possibility, but certainly not a political actuality.

Such reciprocal recognition of each other as beings who have the right to have rights involves political struggles, social movements and learning processes within and across classes, genders, nations, ethnic groups and religious faiths. This is the true meaning of universalism: universalism does not consist in an essence or human nature which we are all said to have or to possess, but rather in experiences of establishing commonality across diversity, conflict, divide and struggle. Universalism is an aspiration, a moral goal to be strived for; it is not a fact, a description of the way the world is.

Let me emphasize how this justification of human rights through a discourse-theoretic account of communicative freedom differs from others. In the first place, the justification of human rights is viewed as a dialogic practice and is not mired in the metaphysics of natural rights theories or possessive individualist selves. This justification of human rights also differs from *agent-relative* accounts (such as Alan Gewirth's),[25] because in these accounts it is assumed that human rights are enabling conditions of the exercise of agency under some description. This then leaves unanswered the question why the claim that some condition or another is essential to the exercise of *your* agency imposes a moral obligation upon *me* to respect that claim. By contrast, in the discourse model we argue that the recognition of *your* right to have rights is the very precondition for you to be able to contest or accept *my* claim to rights in the first place. *My* agent-specific needs can serve as a justification for you only if I also presuppose that *your* agent-specific needs likewise serve as a justification for me. And this means that you and I have recognized each others' right to have rights.

Does not this discourse-theoretic justification of human rights prove too much or too little: aren't my formulations dependent upon some prior understanding of what constitutes "good reasons" in discourses? Obviously such shared understandings of 'good reasons' can hardly be non-controversial. Surely, discourses, to be distinguished from bargaining, cajoling, brain washing or coercive manipulation, are dependent upon certain formal conditions of conversation: these are the *equality* of each conversation partner to partake in as well as initiate communication, their *symmetrical* entitlement to speech acts, and *reciprocity* of communicative roles: each can question and answer, bring new items to the agenda and initiate reflection about the rules of discourse itself. These formal preconditions, which themselves require reinterpretation within the discursive process, impose certain *necessary* constraints upon the kinds of reasons that will prove acceptable within discourses, but they cannot, nor should they be required to, provide *sufficient* grounds for what constitute "good reasons." Indeed there is a circularity here, but this is not a vicious circle. It is the hermeneutic circularity of practical reason which Aristotle had noted long ago in his *Ethics* to be an essential feature of all reasoning in morals and politics: we always already have to assume *some understanding* of equality, reciprocity and symmetry in order to be able to frame the discourse model in the first place, but each of these normative terms are then open to reflexive

[25] See Gewirth (1983).

justification or recursive validation within the discourse itself. Such "recursive validation" of the preconditions of discourse has been misunderstood by many as indicating a vicious circle. I disagree with these claims which often ignore the "hermeneutical structure" of practical reason and wish to have practical reason proceed as if it were theoretical reason – that is, from uncontested first premises.

This limitation of the range of what can or cannot count as "good reasons" in the light of the necessary conditions of recursively validated discursive structures may still not convince some;[26] nevertheless, let me emphasize the principle that communicative freedom is what makes normative justification at all possible,[27] because if human beings cannot assent to or reject each other's claims on the basis of reasons the validity of which they can accept, then there can be no justificatory enterprise at all. Even if the reasons we invoke in such a practice are utilitarian or Kantian, Nietzschean or Christian, in doing so we must always already presuppose the capacity of our conversation partner to assent or dissent from our claims on the basis of reasons the validity of which she comprehends. At the heart of reason as a reason-giving enterprise then is the recognition of the other as a being entitled to the "right to have rights." There is an unbreakable bond between reason understood as a justificatory enterprise, as reason-giving, and the justification of human rights. Justificatory universalism presupposes moral universalism.

Human rights and the various public law documents in our world define both a *minimum* to be maintained and a *maximum* to be aspired to. There will always be debate about their meaning as well as their comprehensiveness; any list we provide of them will necessarily be incomplete. New moral, political and cultural struggles will bring forth rights that need to be added to the list and will extend the maximum that humans can aspire to. For example, technological developments in human cloning, gene therapy and gene manipulation will most likely result in the formulation of some basic rights protecting human beings' biological and species integrity in the near future.[28] Precisely because they emerge out of such struggles and learning processes, human rights documents cannot simply be said to embody an "overlapping consensus" or "minimum conditions of legitimacy"; they give voice to the aspirations of a profoundly divided humanity by setting "a common standard of achievement for all peoples and all nations" (Universal Declaration, Preamble).

It will not have escaped notice that defenders of a Rawlsian view would argue that my mode of proceeding amounts to justifying human rights in the light of a "comprehensive moral doctrine." Others, such as Martha Nussbaum and Amartya Sen, will be concerned about my insistence that human rights, although they articulate moral principles, must assume legal form as well. Let me first address this second objection.

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[26] I wish to thank Richard J. Bernstein for pressing me on this point. In *The Claims of Culture* I addressed this question from within a mode of deliberative democracy and distinguished between "the syntax" and "semantics" of public-reason giving. Reasons, I suggested, would be counted as good reasons because they could be considered as being in the "best interest of all considered as moral and political beings." And to parse X or Y – a policy, a law, a principle of action, to be "in the best interests of all", would mean "that we have established X or Y through processes of public deliberation in which all affected by these norms and policies take part as participants in a discourse" (Benhabib 2002, 140 ff.). I said that there is no way to know in advance which semantically specific claims or perspectives may count as "good reasons." What discourse ethics, as well as deliberative democracy modeled on discourse ethics, rules out are *some kinds of reasons* – these are ones which cannot be syntactically generalizable.

[27] This is not a metaphysical claim. It results from the generally accepted philosophical method of analysis which focuses on the necessary presuppositions underlying many human practices. This kind of analysis was called "transcendental" by Kant, who associated the transcendental with the lack of conceivable alternatives in any universe thinkable by human beings. After Strawson's path-breaking work on *Individuals*, it is more common to refer to this type of claim as "presuppositional" analysis and leave open whether or not any alternative can be conceived to it.

[28] See the very instructive reflections by Bobbio (1996, 12-32).

III.

Martha Nussbaum suggests that a *nonparochial* view of human rights, while it may not be endorsed by all conventional moralities, may, find favor in the eyes of main conceptions of *political and economic justice* in the world: understood thusly, human rights would constitute the core of a *political* rather than *moral* overlapping consensus.[29] We can indeed view the following public law documents as embodying such "a political overlapping consensus":[30] the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, and the Geneva Conventions of 1951 Relating to the Status of Refugees and Stateless Persons, as well as their Protocol of 1967, the 1948 Genocide Convention, and many other documents such as CEDAW. Nevertheless, Nussbaum's method of philosophical deduction, which ties in rights concepts all too narrowly to a philosophical anthropology of human capabilities, is problematic. No distinction is made in her account between rights as "moral principles" and rights as "legal entitlements," on the one hand, and "the principle of rights" and "the schedule of rights," on the other.

Rights articulate moral claims on behalf of persons, and may be even on behalf of non-human agents such as animals and the environment which can also be deeply and irretrievably affected by our actions. Although to raise a moral rights claim puts pressure on political and legislative institutions to generate a justiciable legal entitlement, not all such rights claims result in "legal entitlements." For example, to speak of the right of endangered species is a moral claim which can eventually be translated into a legal entitlement. *Whether* this takes the form of forbidding whaling off the coast of Japan or instituting positive measures to protect the Gold Eagle in the United States is an open question. Moral rights do not directly dictate the specific content of legal entitlements. This is a point which is blurred in Nussbaum's account.

The distinction between the "principle of right" and the "schedule of rights" is related to the differentiation between the moral form of rights and their legal content, but it is not identical to it. When a person's right to have rights is recognized in a duly constituted regime of the rule of law by the acknowledgment of that person as a member, then the "principle of right" is acknowledged; but this leaves open the question as to *what level of variation* in the enumeration, content and interpretation or rights is permissible among different "schedules of rights." Many legislatures which we could consider legitimate by widely shared standards of democratic authorization, transparency, public accountability, etc. can nevertheless proceed from a different schedule of rights. By "permissible" here I mean normatively defensible.[31] Nussbaum envisages a one-to-one correspondence between a philosophically

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[29] Nussbaum (1997-98, 273-300).

[30] The UN Commission on Human Rights, created in 1946, drafted "major international human rights standards, including the two international human rights covenants, which, together, with the earlier adopted Universal Declaration of Human Rights (1948), form what is known as the International Bill of Human Rights," (Terlingen 2007, 168). For the documentation of the Declaration and Covenants, see: Steiner and Alston (2000). Louis Henkin writes: "As of 1999, some 140 to 145 (of the near 190 members of the United Nations) have adhered to each of the two Covenants, albeit in some cases with significant reservations. Contrary to expectations and earlier trends, about as many are parties to the Covenant on Civil and Political Rights as to the Economic and Social Rights Covenant." Louis Henkin, "Ideology and Aspiration, Reality and Prospect" (2000, 15).

[31] Human rights are often considered to constitute that defensible minimum which must be respected by any range of variation. I agree but what I am insisting upon is that the significance of democratic self-government to the articulation of that range of variation among schedules of rights has been neglected. I am grateful to my colleague Alex Stone Sweet for bringing the

derived list of human rights, based upon a moral theory of capabilities, and the enactments of specific legislatures. She thereby neglects how legitimate variations in the interpretations, contextualization and application of human rights can emerge across self-governing polities.

In "Elements of a Theory of Human Rights," Amartya Sen criticizes Nussbaum's attempt to identify an "overarching 'list of capabilities,'" on the grounds that such a "canonical list," as well as the weight to be attributed to the various items on this list, cannot be chosen without a further specification of context. More importantly, Sen sees in such a procedure "a substantive diminution of the domain of public reasoning."[32] Sen wishes to consider human rights as "primarily ethical demands," which relate to the "significance of the freedoms that form the subject matter of these rights." Although he refrains from an exhaustive listing of these freedoms himself, for Sen freedoms are actualizations of capabilities, both in the sense of opportunities and also of processes requisite for capabilities to be unfolded. "Rather, freedom, in the form of capability, concentrates on the *opportunity* to achieve combinations of functionings…" he writes (Sen 2004, 334).

By situating human rights so centrally within an ethical theory of freedom and capabilities, Sen disregards the political history of the concept of rights which were always closely tied to claims to legitimacy and just rule. Rights are not simply about strong moral entitlements which accrue to individuals; they are about claims to justice and legitimacy enframing our collective existence as well. We cannot simply reduce rights to the language of moral correctness. Violating a right is different than inflicting a moral harm on a person. We can do the latter, that is inflict moral harm on a person, without engaging in the former, that is violate their rights; certainly some violations of rights, but not all, are forms of moral harm. By humiliating you in front of your family, friends and your loved ones, for example, I inflict moral harm upon your dignity as a person; but I have not thereby violated your "human right to dignity," which I would be doing if I were to subject you to torture and other forms of "cruel and unusual punishment." All violations of basic human rights, by contrast, that impinge upon the communicative freedom of the person, also inflict moral harms. If I hinder you from exercising your capacity to express your opinion freely within the boundaries set by the law, then I have not only violated your right to freedom of expression, but I have also harmed your moral capacity to be a person capable of communicative freedom in engaging in dialogue with others. I do not see that on Sen's account we can make such necessary distinctions between "moral harm" on the one hand and "rights violations" on the other. The lack of a clear distinction between rights as moral claims and their legal form is common to both Nussbaum's and Sen's approaches for quite different reasons. In this respect the discourse-theoretic justification of rights differs from both.

What about the Rawlsian argument then that the discourse-theoretic justification presented above is by no means a "minimalist one" and in fact presupposes a comprehensive moral theory? Let us recall that Rawls's principal motivation in limiting the list of human rights to certain essentials is to formulate a "political conception" of rights that would or could be endorsed by all the known and recognized moral, religious, scientific etc. comprehensive world-views in the global community. If the core of political liberalism is to formulate a political conception that citizens could endorse despite their widely divergent comprehensive views within a national community, likewise the core of public reason on a global scale is

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relevance of Article 29 of the UDHR to my attention on this respect: "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." (Universal Declaration of Human Rights).

[32] See Sen (2004, 333. fn. 31).

to formulate a "minimalist conception of human rights," which could be endorsed by peoples with divergent religious and moral traditions. Joshua Cohen spells this out clearly: "Justificatory minimalism is animated by an acknowledgment of pluralism and embrace of toleration. It aspires to present a conception of human rights without itself connecting that conception to a particular ethical or religious outlook" (Cohen 2004, 192).

Is a discourse-theoretical approach subject to the objection that it represents a narrow ethical outlook? Let me first observe that there is a methodological divide between the Rawlsian and discourse-theoretic approaches about the use of counterfactual choice and/or dialogue situations. The justification strategy proposed by the discourse-theoretic approach respects the pluralism of world-views not by counterfactually imagining, let us say, what a Buddhist and a Catholic may hypothetically agree to as construed by the theorist, but by framing and encouraging a *real rather than a virtual dialogue* among a Buddhist and a Catholic such that a reasonable agreement among them may result. The emphasis in discourse ethics is on the constraints necessary for the dialogic procedure, which admittedly ought to be "thin" enough not to be identifiable with any particular worldview, and yet on the other hand, "thick" enough to guide the conversation toward rationally justifiable agreement, even if this is to be understood as a regulative principle. This is at least my aspiration in defending discourse-ethics. Discourse ethics is intimately related to political and institutional practices of communication and justification.

There is a further methodological problem in the Rawls-Cohen approach: When the constituent addressees of global public reason are identified to be "world-views" rather than individuals, or even whole peoples with complex histories, who ascribe to such moral theories and world-views, what results is a "methodological holism." Clashes of interpretation and even breaks in tradition within such outlooks are minimized such as to present an overly coherent picture of a particular moral, religious or even scientific world-view and outlook. A Rawlsian would argue that without such a simplification the representation of these positions would be overly complex; but with this kind of oversimplification, the Rawlsian position ends up abstracting from the *lived history* of traditions and world-views to such a radical extent that points of overlap between such worldviews and the liberal tradition and among these worldviews themselves are underestimated.[33] Rawls has made it amply clear that in proceeding in such fashion he wishes to avoid normative cosmopolitanism by insisting that peoples, construed along such idealized devices of representation, and not individuals, are the agents of justice in a global context.

Take a country like Turkey for example to understand how wrong-headed this form of argumentation is: ninety-nine per cent of the population of Turkey are Muslim. If we wished to represent this country in terms of the religious beliefs of its citizens, we would be completely mistaken. Much like the rest of the world, since the 16th and 17th centuries, Ottoman Turkey has encountered modernity, has struggled with the compatibility of Islam and modernity, in a process which has left neither the Turkish understanding of modernity nor the Turkish understanding of Islam unchanged. Many arguments about human rights, equality, and democratic representation have been part of the political vocabulary of reform and transformation since the early 19th century. How can a Rawlsian methodology even account for such complex transformations of worldviews? In case it is argued that Turkey is a special case because of its close and sustained encounter with the West for many centuries, consider Malaysia: at the present an authoritarian form of Islamic orthodoxy rules in this country. But Malaysian history exhibits Buddhist, Confucian as well as forms of liberal secular thinking. These traditions often constitute resources for dissidents to draw form in opposing the regime. How is this complex history to be represented in a "law of peoples"? I fear that it is not represented at all. The assumption that in reasoning about global human

[33] For an extended discussion of the problem of "methodological holism" in Rawls's work, see Benhabib, (2004a, 1761-1787).

rights the relevant units are to be considered comprehensive worldviews simply reduces peoples and their histories to a holistic counterfactual, which then results in the flattening out of the complex history of discourses and contestations within and among peoples.

Far from exhibiting liberal tolerance this approach in my mind displays liberal ignorance. It leads us to assume that individuals from other cultures and traditions have not entertained throughout their histories similar kind of debates and concerns about human rights, justice and equality as we have in ours. It ignores that there have been complex cultural conversations throughout human history and that secular Enlightenment liberal ideas have themselves been a part of the conversation of many peoples and traditions of the world since the inception of western modernity. By not giving this complex conversation its due, the minimalist approach preaches liberal tolerance but results in liberal indifference.

In "Is There a Human Right to Democracy?" Joshua Cohen responds in the negative. For him a philosophical account of human rights considers them as "entitlements that serve to ensure the bases of membership."[34] "Just membership" in his account is distinct than "mere membership;" while just membership does entail democratic self-government mere membership does not.[35] According to Cohen, "the central feature of the normative notion of membership is that a person's good is to be taken into account by the political society's basic institutions: to be treated as a member is to have one's good given due consideration, both in the process of arriving at authoritative collective decisions and in the content of those decisions" (Cohen 2006, 237-38).

Yet, as Cohen admits, to have one's good to "be given due consideration" must entail freedom of opposition and dissent. So membership is not simply a matter of benevolent despotism but of decent representation. Yet how can the right of dissent and opposition be protected in the absence of representative institutions? What does "decent" representation mean without ongoing institutions of representation? Without an enduring commitment to the independence of institutions which express opinions about the members' good which may not be consonant with that of the regime or of the majority, how can Cohen's demanding conception of membership be satisfied? Cohen does not provide a single empirical example of what such a regime might look like. Of course, in a normative argumentation he is not required to do so. But we do not find the equivalent of a Rawlsian "Kazanistan" in Cohen's work. And indeed we cannot, for Cohen's understanding of membership is more ambitious than Rawls's. So we are left with the uneasy impression that either some form of enlightened or benevolent despotism may very well fulfill this criterion of membership, or Cohen must reduce the normative content of what is entailed in such membership to the preservation of the decent life of the members of a polity rather than to "the good of the person," as he wishes to. Cohen's normative account of membership inevitably leads to robust forms of self-government than he is willing to grant; his own account sets him on the slippery slope towards self-government whether through representative or more participatory forms of institutions.

Cohen is aware of this and boldly asserts that since democracy involves a rigorous commitment to egalitarianism and since such egalitarianism cannot be made compatible with major moral and religious worldviews such as Confucianism, Islam, Buddhism etc., a human right to democracy cannot be an aspect of a global conception of justice. Its defense is not "free-standing" but involves recourse to controversial individualistic and egalitarian moral assumptions. He asks: "Is the equal right to participate that I have associated with democracy a human right? And is the democratic conception of persons as free and equal … a plausible component of a conception of human rights comprised within global public reason? We know that the conception of persons as free and equal is not universally accepted by different ethical and

[34] Cf. Cohen (2006, 226-248).

[35] Cohen writes: "The distinction between the rights that must be assured in a just political society and human rights is associated with Rawls's distinction between liberal and decent but non-liberal peoples" (2006, 228).

religious outlooks…"[36] As I have argued, however, this appeal to what other traditions and worldviews may or may not consent to, would or would not consider acceptable, is based upon a faulty device of representation and a thin methodology. It repeats the Rawlsian mistake that in reasoning about such matters we must proceed from conceptions of moral, religious or other world-views rather than the messy history of concrete collectivities in whose lives such world-views always clash, compete and dialogue with one another. It is of course a poignant historical irony that in 2007-2008, just as philosophers build arguments as to why there is no universal human right to democracy, Buddhist monks in Myanmar and Tibet have abandoned their monasteries and risked death, torture and reprisals by challenging the oppressive Burmese and Chinese regimes on behalf of human rights and democracy.

IV.

One further important distinction between my position and those of Nussbaum, Sen and Cohen is the sharp distinction they each make between human rights as "urgent requirements of political morality," in Cohen's words (Cohen 2006, 230), whose "force does not depend on their expression in enforceable law," and my insistence that human rights must assume legal form. I wish to argue that human rights embody principles which need contextualization and specification in the form of legal norms.[37] How is this legal content to be shaped? The right to have rights seems quite abstract and formalistic and will make many natural right theorists and others uncomfortable since it abstains from prescribing the content of civil and political rights to which one would be entitled once the right to have rights was recognized. In response to this concern, one possible approach may be to proceed from the right to have rights, which I have already claimed to protect the communicative freedom of the person, to the norms of equal respect and concern and to derive a concrete list of basic human rights in this fashion. Human rights then would find their place in moral philosophy.

Basic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights, i.e. rights that require embodiment and instantiation in a specific legal framework. As Ronald Dworkin has observed, human rights straddle the line between morality and justice; they enable us to judge the legitimacy of law.[38] The core content of human rights would form part of any conception of the right to have rights as well: these would include minimally the rights to life, liberty (including to freedom from slavery, serfdom, forced occupation, as well as sexual violence and

[36] Cohen (2006, 242-43). I am assuming that the equal right of persons to take part in the affairs governing their collective existence through the medium of law and the articulation of their opinions and preferences in a political community is the essence of the democratic form of government. How this is institutionalized – whether through period elections; a multi-party system; proportional representation; mandates and recalls, etc. – belongs not to the idea of democracy but to its concretization in specific socio-historical contexts, and there can be legitimate disagreements about them.

[37] I have been asked to clarify the force of this "must." If there is a human right to democracy who is responsible for enforcing this right? Or does this mean that the world community ought to intervene in non-democratic societies to enforce this right? As I will argue in the final sections of this essay, human rights violations do no create obligations to intervene except under conditions specified by the Genocide Convention, and as necessitated by self-defense, as formulated in Article II (7) of the UN Charter, and as authorized by permanent members of the UN Security Council. The human right to democracy is "an aspirational claim," which as the formulators of the UDHR very pertinently say, formulates "a common standard of achievement for all peoples and all nations" (Universal Declaration, Preamble). The force of such aspirational claims is manifest in processes of "democratic iterations" which they sometimes set into motion and help sustain.

[38] See the classical essay by Dworkin, "Taking Rights Seriously" ([1970], 1978, 184ff.).

sexual slavery);[39] some form of personal property; equal freedom of thought (including religion), expression, association and representation and self-governance. Furthermore, liberty requires provisions for the "equal value of liberty" (Rawls) through the guarantee not only of socio-economic goods, including adequate provisions of basic nourishment, shelter and education, but also through the right of self-government.

Let us return at this point to the question of the legitimate range of rights: if we agree on the centrality of a principle such as "freedom of religious expression," are we committed to accepting that minority religions are entitled to rights to public expression equally with the majority, as I would argue, or can we maintain that freedom of religious expression is compatible with some reasonable restrictions upon its exercise, as Rawls has claimed? It is at this point that the human right to self-government becomes crucial, and why I would claim that, contra Rawls and Cohen, it is a basic human right. *My thesis is that without the right to self-government which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.* If the difficulty with Martha Nussbaum's conception of human rights is that no distinction is made between the philosophical account of human rights and their legal embodiment, the weakness of the Rawlsian "minimalist position" about human rights is that one is forced to accept whatever a legal regime stipulates to be the content of human rights as legitimate, as long as such a regime meets certain minimum criteria of being a "decent, well-ordered society." Among other things, this is compatible with the denial of equal freedom of religion, expression and association to religious and ethnic minorities, as well as with the rejection of the right to democratic self-government.

Certainly, the juridical, constitutional, as well as common law traditions of each human society, the history of their sedimented interpretations, their internal debates and disagreements will shape the legal articulation of human rights. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel and India, this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic and religious groups.[40] There is, in other words, a legitimate range of variation even in the interpretation and implementation of such a basic right as that of "equality before the law." But the legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government. Only when this condition has been fulfilled, can we also say that there is legitimate "unity and diversity" in human rights among well-ordered polities.

Only if the people are viewed not merely as subject to the law but also as authors of the law can the contextualization and interpretation of human rights be said to result from public and free processes of democratic opinion and will-formation. Such contextualization, in addition to being subject to various legal traditions in different countries, attains democratic legitimacy insofar as it is carried out through the interaction of legal and political institutions with free public spaces in civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of

[39] Since I consider individuals as "generalized" and as "concrete" others, taking into account their embodiment, the protection of the bodily integrity of persons, who are sexed differently, is an important human right. It is not only women who are subject to sexual violence, many gay men are as well; however because of their capacity to become pregnant, forced and arbitrary violence against women affects their personhood and capacities for communicative freedom differently than gay men. The important point is to keep in view the different kinds of violence that one can be subject to as a result of sexual difference and to incorporate this into our understanding of human rights. For example, many governments, including the USA and Canada, now recognize and grant as legitimate, requests for asylum for women escaping Female Genital Mutilation.

[40] For further elucidation, see Benhabib (2002, ch. 5 in particular).

western paternalism often associated with them. I will call such processes of appropriation "democratic iterations."

By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.[41]

Every iteration transforms meaning, adds to it, enriches it in ever so-subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is reposited and resignified via subsequent usages and references. Meaning is enhanced and transformed; in the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. When the creative appropriation of that authoritative original stops making sense, then the original loses its authority upon us as well.[42]

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards or norms to be properly evaluated? I accept here Jürgen Habermas's insight that "the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung)* of all citizens in a discursive process of legislation which has been legally constituted" (Habermas 1996, 110).

The "legal constitution of a discursive procedure of legislation" is only possible in a society that institutionalizes a communicative framework through which individuals as citizens or residents can participate in opinion – and will-formation regarding the laws which are to regulate their lives in common. The right to have rights then is not only a right to conditions of membership but entails the right to action and to opinion in the public sphere of a polity the laws of which govern one's existence. Only through the public expression of opinion and action can the human person be viewed as a creature who is capable of self-interpreting rights claims.[43] To have rights does not mean to possess a physical attribute such as green eyes or to possess an object such as a red shirt. It means the capacity to initiate action and opinion to be shared by others through an interpretation of the very right claim itself. We have had an all-too passive understanding of the agency involved in the entitlement to rights. Human rights and rights of self-government are intertwined. Though the two are not identical, only through institutions of self-government can the citizens and residents of a polity articulate justifiable distinctions between human rights and civil and political rights and judge the range of their legitimate variation.

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[41] See Benhabib (2006, 45 ff.). See also Michelman (1999, 1009-1028).

[42] I offer democratic iterations as a model to think of the interaction between constitutional provisions and democratic politics. It may be possible to extend democratic iterations as a model for the "pouvoir constituant," the founding act as well. In this essay, I am assuming that democratic iterations are about ordinary as opposed to constitutional politics; though I am claiming that ordinary politics can embody forms of popular constitutionalism and can lead to constitutional transformation through accretion. There is a lot more that needs to be said about the relationship of a discourse-theoretic analysis of democratic iterations and political liberalism than I can within the scope of this paper. See Rawls's final reflections in his "Political Liberalism: Reply to Habermas" (1995, 172 ff.). Thanks to my student Angelica Bernal for her observations on this problem.

[43] For a discussion of traditions besides liberalism which do not acknowledge that individuals are "self-authenticating sources of valid claims," see Cohen (2004, 207).

Democratic legitimacy reaches back to principles of *normative justification,* though the two are not identical.[44] Democratic iterations do not alter conditions of the normative validity of practical discourses that are established independently of them; rather, democratic iterations enable us to judge as *legitimate or illegitimate* processes of opinion and will-formation through which rights claims are contextualized and contested, expanded and revised through actual institutional practices in the light of such criteria. Such criteria of judgment enable us to distinguish a *de facto consensus* from a *rationally motivated* one.

V.

The 1948 Universal Declaration and the succeeding era of human rights reflect the moral learning experiences not only of western humanity but of humanity at large. The World Wars were fought not only in the European Continent but also in the colonies – in the Middle East, Africa and Asia. The national liberation and anti-colonization struggles of the post-World War II period, in turn, inspired principles of self-determination.[45] The public law documents of our world – the UDHR; the various international human rights covenants, the Genocide Convention of 1948, and the Geneva Conventions of 1951 Relating to the Status of Refugees and their Protocol of 1967 – are distillations of collective struggles as well as of collective learning. It may be too utopian to name them steps toward a "world constitution," but they are more than mere treaties among states. They are global public law documents which, along with many other developments in the domain of *lex mercatoria*, are altering the terrain of the international domain. They are constituent elements of a global and not merely international civil society. In this global civil society, individuals are rights-bearing not only in virtue of their citizenship within states but in virtue of their humanity as well. Although states remain the most powerful actors, the range of their legitimate and lawful activity is increasingly limited. We need to rethink the law of peoples against the background of this newly emergent and fragile global civil society, which is always being threatened by war, violence, and military intervention.

We should free human rights discourse from the interventionist rhetoric that so often accompanied it in recent times. Undoubtedly, much of the philosophical reticence in arguing for a human right for democracy is related to the wish to distance oneself from the disastrous foreign policy of the Bush Administration which has deployed the language of human rights as fig leaf to justify its preemptive and interventionist foreign policy ambitions.

But it will be asked, in appealing to civil society and the public sphere as the privileged arenas for norm-articulation and democratic iteration, isn't one ignoring the frequent cases of such grave human rights abuses that intervention via the use of military force maybe be essential to maintain any allegiance to legal cosmopolitanism? First, let me note that Chapter II (7) of the United Nations Charter permits wars of self-defense on the part of members, while Article 51 of the United Nations Charter authorizes military actions in the event of an armed attack against a member of an organization such as NATO.[46] Both these Articles were appealed to after the attack on the World Trade Center. The Genocide Convention obliges states to undertake military action such as to prevent genocide, slavery, and ethnic cleansing – provided that the UN Security Council authorizes such actions. As most students of international affairs admit, therefore, we are now poised on a slippery slope, where judges seem to be

[44] I have elucidated this distinction further in: Benhabib (2007b, 445-463).
[45] For an account of how the decolonization struggles inspired the "right to democratic self-governance," see Frank (1992, 46-91).
[46] Cf. Doyle (2001, 219-241).

creating law, while statesmen are clamoring for the need to make new laws in this arena.[47] The grounds for humanitarian intervention are expanding into the principle of "the responsibility to protect" (Kofi Annan.) Who the responsible parties for such an obligation to protect are is all too unclear. If it is the United Nations which is thus responsible, then in fact the current practice of considering military intervention on behalf of the United Nations legitimate only when authorized by the permanent members of the Security Council would need to be revised. The obligation to protect could not be simply subject to the veto power of the five permanent members of the Council; these commitments are pulling the United Nations in opposite directions with no clear resolution in sight.

We have entered uncharted waters in the international arena. On the whole, I am opposed to the creeping interventionism behind the formula of the "responsibility to protect," placing my hope for as long as possible, and for as long as necessary, upon the forces of civil society and civilian organizations to spread cosmopolitanism norms and move all societies closer together to compliance with the UDHR. My commitment to global civil society actors in this arena should not be mistaken for neo-liberal anti-statism. Within the boundaries of existing polities, the state is the principle public actor that still has the responsibility to see to it that human rights norms are both legislated and actualized. However, many states have willingly undertaken to commit themselves to the various public human rights documents, with the consequence that they are also subject to the criticisms and demands of a range of cross-border and transnational actors and groups that are the principal agents of spreading legal respect for, compliance with, and the monitoring of human rights.

When, why, and under what conditions military intervention to stop massive human rights violations is justifiable remains a question in political ethics. By "political ethics," I mean the balancing between intentions and consequences, between an ethics of responsibility and an ethics of conviction (Max Weber). Particularly when states are considered the unique agents of intervention and when intervention means the use of military force, *only* the prevention of genocide, slavery and ethnic cleansing can justify such acts. Regime change is not justified. As members of a global community, there are myriad other ways in which we can work across borders to spread democracy, civil society and a free public sphere. The range of activities of global citizens go much beyond military intervention and the use of force.

There is need for a new Law of Humanitarian Interventions which is clearer about the conditions under which intervention by the UN in the affairs of a country is justified. As cases of recent interventions, as well as failure to intervene, in Kosovo, Rwanda, Iraq, Darfur and others prove, the Genocide Convention and the United Nations Charter alone are not adequate for this task in guiding the world community. Yet these will remain hard choices that will always entail the exercise of political judgment. As Allen Buchanan asked, "is illegal international legal reform" in the international arena possible through unauthorized interventions?[48] Such questions impose upon citizens, leaders, and politicians the "burden of history." I think that philosophy can neither guide us all the way down in such deliberations nor can it guarantee that our good intentions will not be destroyed by contingent events and turn into their opposite. Nor should it do so. Nevertheless, as Kant observed,[49] there is a distinction between the "political moralist," who misuses moral principles to justify political decisions, and a "moral politician," who tries to remain true to moral principles in shaping political events. The discourse of human rights has often been exploited and misused by "political moralists"; its proper place is to guide

[47] See Holzgrefe and Keohane (2003); for the view that judges are creating law in this domain, see Marsten Danner (2006, 2-63).
[48] See Buchanan (2001, 673-705).
[49] Kant ([1795] 1994). Second and enlarged edition, appendix II.

the moral politician, be they citizens or leaders. All that we can offer as philosophers is a clarification of what we can regard as legitimate and just in the domain of human rights themselves.

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