The political and moral conceptions of human rights – a mixed account

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1. Introduction¹

One of the central issues in the modern human rights debate is the controversy over whether human rights should be primarily conceived as moral rights or as politico-legal concepts. Moral conceptions of human rights, developing themes from classical and modern natural law theory, typically take human rights to be moral rights which every human being possesses qua member of the human species. As Alan Gewirth put it: “We may assume, as true by definition, that human rights are rights that all persons have simply insofar as they are human” (Gewirth 1982, 41). Adherents of the moral conceptions typically try to derive these rights from central features of human nature or basic human interests. There exists, however, a considerable latitude in both the number and kinds of features and interests that are thought to provide the basis for human rights.²

Political conceptions of human rights, on the other hand, take their cue from the current, especially post-WWII human rights discourse and international practice, to whose central strands, they believe, every philosophical conception of human rights must do justice in order to qualify as an adequate conception.³ Accordingly, they see human rights essentially as individual rights that limit the sovereignty of states and whose infringement by state agencies is a cause of international concern and, possibly, a reason for intervention. According to John Rawls, the first prominent proponent of the political conception, “[h]uman rights are

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2 See the debate between Griffin and Tasioulas as to how many fundamental human rights should be posited, cf. Tasioulas 2002; Griffin 2008, 51 ff.

3 Cf. Beitz’s description of what he calls his “practical conception” of human rights (Beitz 2009, 102 ff.).

a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."⁴ Human rights violations need not always fully justify international sanctions and interventions, but they necessarily provide *pro tanto* reasons for other states to take interventive measures, and this provision is, conceptually, part of what it is for a right to be a "human right" (cf. Raz 2010; Beitz 2009, 109).

At first glance, the difference between the two approaches may appear to be extreme, and it may even seem that both kinds of conceptions are not engaged in the same kind of enterprise. While moral conceptions seem to be engaged in the *normative* enquiry as to what moral rights human beings possess *qua* human beings, political conceptions appear to address the primarily *descriptive* task of providing a conceptualization of current human rights practice. If this were true, then moral conceptions, though able to justify human rights independently of the current practice, might, for this very reason, have no impact on this practice, while political conceptions, though directly connected to this practice, might lack critical potential with regard to it.⁵ But both impressions would be mistaken: Adherents of the moral conceptions can well consider what John Tasioulas has called "fidelity" to the current practice as a key requirement of any conception of human rights⁶, while on the other hand features of the current practice can well be criticized on the basis of a political conception (cf. Beitz 2009, 105f.), for instance if a putative right accepted in international human rights conventions is not really of sufficient weight for its violation to provide *pro tanto* reasons for international intervention. Thus, adherents of both conceptions can both intend to relate their conceptions meaningfully to current human rights practice and, at the same time, to retain some critical potential in relation to it.

Similarly, the impression that political conceptions only attempt to provide an answer to the conceptual question of what it is for a right to be a human right, while moral conceptions additionally address the further questions of how human rights are justified and whence their

4 Rawls 1999, 79. A different kind of political conception, which focuses on the function of human rights as legal rights within the national legal order, is developed by Habermas 1992, 136, based on his strict separation of law and morals.

5 This worry is also raised by Gilabert 2011, 15.

6 Cf. John Tasioulas "On the Nature of Human Rights", in this volume, 18.

normative force derives,⁷ should be resisted. While it is true that, on the moral conception, the connection between the question about the nature of human rights and the explanation of their normative force is particularly close, adherents of the political conception regularly say something about the question of justification as well. Indeed, their accounts of the nature of human rights impose constraints on the possible justification of such rights, and often they have tried to demonstrate how these constraints can be met.

Although, accordingly, both the moral and the political conception are engaged in the same enterprise and address the same normative issues, the differences between both conceptions still seem to be quite stark. The most important points of divergence concern the following three questions:

(1) Are human rights part of individual morality or of political morality, i. e. do they only concern the conduct of political institutions? If, as it is claimed by the moral conception, human rights are rights held by human beings as such, the corresponding duties must (also) be part of individual morality, and these duties would have to apply to actions irrespective of any political setting within which they take place. If, however, human rights are essentially rights limiting state sovereignty, they are primarily objects of political morality, which need not necessarily impose duties on individuals unless the latter perform public functions.⁸

The answer to this first question is crucial for determining which group of agents can violate human rights and bears duties for their safeguarding. According to the moral conception, human rights are just a subclass of moral rights imposing duties on individuals; therefore individuals can, unproblematically, violate such rights⁹ and are, by way of obligations to help others, themselves the direct bearers of duties for safeguarding these rights. These two points are contested by a “statist” (Beitz 2009, 122; cf. also Nickel 2007, 38f.) or “institutional” (Pogge) view of human rights. Thomas Pogge, for instance, insists that violations of human rights necessarily involve “official disrespect” (Pogge 2002, 58), and argues that ascribing a human right to person

7 Cf. Beitz’s (2009, 103) claim that moral conceptions “treat the question of the authority of human rights as internal to the question of their nature.”

8 Cf. Raz’s (2010, 335) characterization of human rights as rights “which transcend private morality.”

9 Cf. Orend 2002, 133. Koller 1998, 100f., argues that human rights must impose duties on individuals, for otherwise states would have no reasons for enforcing them.

P primarily implies claims about how the society in which P lives should be organized (*ibid.*, 64f.). Insofar as human right claims do entail moral duties for individuals, for Pogge, these duties are only indirect and concern the individuals' contributing to a structure of society in which persons are protected from certain harms. Beitz insists that states are both the primary "subjects" of the duties derived from human rights and the principal guarantors in case of violations by other states. Whereas moral conceptions of human rights are directly at odds with an "institutional" or "statist" understanding of human rights, political conceptions, while not implying such a view *per se*,¹⁰ are clearly compatible with it.

(2) The (relative) (a)historicity of human rights. If we look at Rawls' characterization of human rights, it seems clear that the existence of such rights presupposes a system of states¹¹ whose relations with each other are either already governed by a Law of Peoples or, at least, can meaningfully be subjected to it. Therefore, the existence of something like the current system of states functions as an implicit background assumption for a political conception of human rights such as Rawls'. Consequently, on such a conception, ascribing human rights would not make sense either historically at a time where no system of states comparable to the present one existed, or in a hypothetical situation where all states have merged into one global state.

Against this conclusion, moral conceptions argue for a much more temporally extended, if not even timeless ascribability of human rights. While Tasioulas argues against a timeless existence of human rights, and wants to restrict their validity to the obtaining of the conditions of "modernity" (Tasioulas 2007, 76) – which still gives human rights a much wider span of 'existence' than they have on the Rawlsian conception – philosophers like Griffin argue for the existence of some abstract

10 Political conceptions are only committed to the claim that what distinguishes human rights from other rights is that they impose limits to state sovereignty; this does not exclude that some rights both impose such limits and directly generate individual moral duties on the part of other persons (see below).

11 Officially, for Rawls, the actors to which the Law of Peoples is meant to apply are peoples rather than states, cf. esp. 1999, §2. However, the sovereignty-limiting function of human rights is best spelled out in terms of the duties of states or "regimes"; cf. Rawls own formulation "specify limits to a regime's internal autonomy", 1999, 79.

timeless rights, which, according to the specific circumstances of different epochs, may take on different forms.¹²

(3) The conditions for justifying human rights claims. For moral conceptions, justifying a human rights claim requires showing that a person possesses a moral right simply in virtue of being a human being. In other words, what distinguishes the justification of human rights from the justification of other rights is a certain restriction on *how* the rights-claim can be justified, i.e. the justification must not rely on characteristics a person does not have simply in virtue of being human. For political conceptions, a human rights claim is justified by showing that the person possesses an individual right that limits the sovereignty of states and whose infringement is a cause for international concern. The reasons justifying the rights claim may, but need not, according to all political conceptions, necessarily be *moral* reasons. What is distinctive about the justification of human rights claims is, therefore, not a restriction on possible ways of justification, but an additional characteristic of the alleged right which must be justified. That is, on the political conception, the distinction is based on *what* must be justified, rather than on *how* this is justified.

While points (1) to (3) undoubtedly state key points of divergence between adherents of the moral and political conceptions, one might still be doubtful whether we are not overstating the differences between the two positions. True, it might be conceded, when we look at paradigmatic proponents of these positions, such as Rawls or Gewirth, there will be considerable disagreement on all these points, as well as on others. But the differences will begin to dwindle once we look at political conceptions which claim that human rights are a subclass of individual moral rights, such as Joseph Raz's theory. Theories of this latter kind combine key elements of both the moral and the political conception, and in looking at them we may well begin to wonder whether there is really a substantial question at issue between adherents of the two conceptions.

As I will try to argue, however, there remain important points of contention between the two conceptions, which concern, primarily, the questions of how human rights are to be distinguished from other individual rights and what is required for justifying human rights claims. With regard to both these questions, I believe, there are clear advantages

12 Griffin 2008, 49f. Griffin admits, though, that the applicability of human rights could be restricted to human agents in society.

for adherents of a moderate version of the political conception, such as Raz's: Human rights are indeed to be distinguished by their function of limiting state sovereignty. But in developing a viable version of the political conception we must be careful both to connect the external limiting function, which has been stressed by Rawls, with an internal limiting function, which is both systematically and historically more fundamental, and not to lose sight of the connection between the rise of the *modern* state and the development of human rights theories. Spelling out the way in which human rights essentially limit the authority of the modern state will show that, even though they are singled out essentially by their political function, accepting human rights claims is not tied to the existence of an international system of states, nor even to the existence of states at all. And it will further rehabilitate the project of adherents of the moral conception, namely that of showing that there is a substantive list of rights possessed universally by human beings per se, when we see that universality of human rights is required to ground an obligation of other states, or of the international community, to interfere to protect human rights. So the account of human rights that I am going to argue for can aptly be called a mixed account: While it follows a moderate version of the political conception with regard to the distinguishing characteristic of human rights, it concedes that human rights can only be ascribed the role they have in international practice today if many of the central claims of adherents of the moral conceptions are true.

In the following, I will begin by briefly looking at three main exponents of the two conceptions: James Griffin as a defender of the moral conception, John Rawls as an exponent of what might be called the strictly political conception, and Joseph Raz, who has developed a moderate version of the latter. I will then go on to show why the moral conception fails to offer a convincing answer to the conceptual question of what distinguishes human rights from other individual rights, before turning to the task of developing a viable version of the political conception. In the final section, I'll look at some consequences of this theory, especially with regard to the justification of human right claims.

2. Griffin, Rawls, Raz

Though Griffin views his project in *On Human Rights* as situated within what he calls the “Enlightenment Project on Human Rights” (Griffin 2008, 9), which he connects to the moral conception, his version of the latter is a considerable development from the traditional version as expressed by Gewirth’s dictum quoted earlier. Human rights, for Griffin, are not just rights possessed by human beings per se, but essentially “protections of our human standing or [...] personhood” (ibid., 33), whose centerpiece is what Griffin calls the capacity for “normative agency”. The latter comprises the following three basic elements:

To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s path through life – that is, not be dominated or controlled by someone or something else (call it “autonomy”). And (second) one’s choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this “minimum provision”). And none of this is any good if someone blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this “liberty”) (ibid., 33).

Personhood is, however, not the only ground for human rights. For while the content and extent of some rights can be fixed in a sufficiently determinate manner simply by reference to their function of protecting one of the basic features of personhood – such as in the case of the right not to be tortured – this is not generally true: In most cases, this function alone does not give a sufficiently clear-cut rationale for what specific protections are to be included within the content of the right and which not, though such a rationale is clearly necessary for applying the rights in practice. We have to know not only what interest is supposed to be protected by a right, but also what it is supposed to be a right *to*, in order for the right to play an action-guiding role. Precisely determining the exact boundaries of a right is particularly difficult when the rights of one person are in potential conflict with the rights or essential interests of others. To give rights a tolerably determinate content in such cases, Griffin introduces the notion of “practicalities”, which are to serve as the second ground for human rights. “Practicalities” are “features of human nature and of the nature of human societies”, knowledge of which is required to make rights “socially manageable” (ibid., 38).

From the three basic features of personhood together with practicalities, it is possible, according to Griffin, to derive most of the conventionally accepted human rights. Many specific human rights, such as the right to a free press, will not turn out to be truly universal on this account, as Griffin recognizes; for, depending on historical circumstances, they may simply have no point in some social settings. However, the more abstract human rights from which they are derived by applying those abstract rights to particular historical and social circumstances can claim universality, at least within all human societies. As we have seen, the most abstract rights protect the standing of a human being as a normative agent, or self-decider – and this standing is in danger of violation, and in need of protection by human rights, in any social setting whatsoever (*ibid.*, 49f.).

What Griffin regards as essential for human rights – that they are moral rights protecting the status of personhood – becomes, on the strict version of the political conception proposed by John Rawls in *The Law of Peoples*, an accidental property of human rights at best. Rawls first introduces the notion of human rights into his account of the law of peoples when wondering which principles of international justice liberal societies might agree upon when put into an original position analogous to the one envisaged for deciding on the basic principles of justice within a society in his *Theory of Justice* (Rawls 1999, 37). However, the notion becomes truly important only when Rawls extends his account of the law of peoples to cover a society not only of liberal, but also of “decent” hierarchical peoples. The rules of international justice are generated, according to Rawls, by constructing an original position among decent peoples, which includes not just liberal peoples but also societies which are hierarchically ordered, i. e. do not accord their members all the rights conceded by liberal states, but that are nevertheless “decent” because they are – outwardly – non-aggressive, and because – inwardly – they safeguard their members’ human rights and impose moral duties and obligations on all persons within their territories and their law-administering officials reasonably believe that the law is guided by a common idea of justice (*ibid.* 64ff.). The principles such peoples would agree upon, in the original position, would include, according to Rawls, a rule excluding forceful intervention by other states, subject to the proviso that a state does not violate human rights.

Thus, human rights, in Rawls’ account, have a twofold function: Firstly, their fulfillment is necessary for a society to qualify as “decent” in the sense of the law of peoples, and secondly their fulfillment is –

alongside a lack of outward aggression – sufficient to exclude outside intervention; or, to put it differently, human rights are the only individual rights whose violation gives *pro tanto* grounds for international intervention (ibid., 80). As these are the only features that essentially qualify human rights, the list of human rights Rawls accepts is considerably shorter than the lists accepted in the traditional moral conception (cf. ibid., 65). Furthermore, human rights as envisaged by Rawls need not be moral rights. Rawls especially stresses that their inclusion in the Law of Peoples cannot rest on any specific moral argument – for this would base them on a comprehensive doctrine, which would be incompatible with their general acceptance in the original position. Instead, the justification for these rights rests only on the (supposed) fact that decent societies in the original position would accept both the necessity for their protection and the possibility of intervention against their violations. And this justification does not guarantee that the rights of individuals picked out in this way will be *moral* rights of these individuals.¹³

The account of Joseph Raz, which follows Rawls in claiming that “setting limits to sovereignty [...] is the predominant mark of human rights” (Raz 2010, 334), parts company with him in acknowledging that human rights are *moral* individual rights. (For this reason one can call Raz’s position a moderate version of the political conception.) Still, human rights are only a *sub-class* of these moral individual rights, and are singled out among the latter by their function with regard to their political and institutional impact and the claim to institutional recognition transcending private morality – and not, as Raz stresses, by the fact that they are possessed by human beings *per se*, nor by their universality (ibid., 334 ff). (Nor by the fact that they protect essential features of personhood.)

Justifying a human rights claim, for Raz, involves three steps: First, an individual right must be established in the first place (e.g. by showing how it is required for the satisfaction of some individual interest). Second, it must be demonstrated that, under certain conditions, states are obliged to respect and protect this right. And last, it must be shown

13 It is important not to be misled into a moral reading by Rawls’ description of the relevant societies as “decent”. As “decent” societies are, for him, partly defined by their acceptance of human rights, it is clearly not possible to derive an independent moral justification for these rights from the fact that they are accepted by such societies.

that, with regard to this respect and protection, states should not enjoy the immunity from interference which the doctrine of state sovereignty normally accords to states with regard to their internal affairs.¹⁴

3. Between the moral and the political conception

Comparing Raz's version of the political conception and a refined version of the moral conception might well make one wonder whether the two theories are really fundamentally opposed to one another. True, both theories insist on different contents of the concept "human rights" and on different standards of justification of human right claims. But might not both approaches eventually converge and thus be combined into a unified account of human rights? E.g., to take Griffin's and Raz's theories, are not rights protecting personhood the ideal candidates, if there are any, for individual rights whose violation is sufficiently important to give cause for international concern? Would this not yield an attractive 'division of labor' between both approaches, presumably vindicating to some extent the (erroneous) impression mentioned earlier that the political conception is primarily concerned with the conceptual question and the moral conception primarily concerned with the question of justification of human rights claims?

While a positive answer to these questions would, undoubtedly, have many attractions, it is unfortunately not available, because this 'convergence' of both approaches cannot be expected. The role of rights possessed by human beings per se within an adequate theory of human rights is more complex, as we will see in the final section of the paper.

3.1 The failure of the moral conception

The moral conception is faced with a number of interrelated worries, the most important of which is the Irrelevance Objection, which has been raised by Raz (*ibid.*, 327f.) and goes as follows: If adherents of this conception want their theories to have any relevance for and impact on current human rights practice, they must aim at "fidelity" (Tasioulas)

14 Raz 2010, 336. There is a parallel to the three-step procedure for justifying human rights claims Beitz proposes, 2009, 137, though Beitz's procedure involves no step for deriving rights from interests.

to the main features of this practice. For, otherwise, though they may well succeed in establishing human right claims independently of this practice, e. g. by singling out a criterion X fulfillment of which qualifies a right as a human right, it would be unclear why any divergence between these claims and the human rights claims actually accepted in current practice should be considered as a fault in the latter and should give rise to rational pressure to modify it so that it accords with the human right claims on the basis of criterion X.

Among the chief features of the current practice is, indisputably, the role ascribed to human rights in international law, viz. that their violations give grounds for international concern and, possibly, humanitarian intervention. Each theory fulfilling the “fidelity” constraint must establish that all human rights do or should have this international role. Of course, one cannot, without begging the question at issue against the moral conception, require that this has to come out as a conceptual truth on any adequate theory; but such a theory must at least, by and large, “extensionally” fulfill this requirement.

Now, when one considers the moral conception’s traditional criterion for a right to qualify as a human right, i. e. that it is a right possessed by every human being as such, it is quite implausible to assume that the class of rights singled out in this way should either completely or approximately overlap with the class of individual rights whose violations would give ground for international concern. This difficulty is particularly glaring if we look at the ‘simple’ version of the moral conception, such as expressed in Gewirth’s dictum. Even when we presuppose that the task of singling out those rights which are possessed by human beings *as such* can be resolved, it is very hard to see why the violation of these rights, in comparison with the violation of other rights, should generally be of such a greater weight that it would justify their special role in international law.

Two kinds of rights possessed by human beings as such provide particularly strong grounds for skepticism. First, there are very trivial moral rights that are possessed by everybody:¹⁵ E.g. when I play cards with you, I have the moral right not to be cheated by you, and this right can be derived from my standing as a person and the moral duty of respect you owe to me in virtue of this standing. So, presumably, it is a right I have qua person. Nevertheless, it is not plausibly a human right, for it is clearly not a right whose violation – either by you, or

15 Following example from Griffin 2008, 41.

by the state when it fails to protect me from your cheating – provides a *pro tanto* reason for international concern. Even though states should do something to protect people against being cheated in private card circles, and even if there were no decisive practical obstacles, or costs to others, involved in doing so, it is not a failing of sufficient weight to provide grounds for international concern. For the whole point of the idea of sovereignty in international law is to protect states against the ‘butting in’ of other states or international agencies for minor injustices or failures to protect its citizens. And if we were to renounce the idea that states can legitimately reject some outside interference into their internal affairs, even when they have failed to fully live up to the standards of political justice, we would have altogether rejected the institution of state sovereignty as it presently exists in international law; and an account of human rights that was based on this rejection of sovereignty could hardly count as exhibiting “fidelity” to current human rights practice.

The second kind of case involves moral rights possessed by human beings *per se* that cannot be enforced or protected by state agencies. Take the right to gratitude for beneficiary acts one has performed. Obviously, it would be perfectly senseless for state agencies to enforce such a right, if only because such enforcement would be self-confuting: No action enforced by state agencies could count as a fulfillment of the moral right to gratitude. These moral rights, which for reasons of principle resist transformation into institutional or legal rights, cannot play the roles assigned to them by the current human rights practice. So, if “fidelity” to current human rights practice is a desideratum for which rights can count as human rights, these rights cannot be considered as human rights, though they would qualify as human rights on the criterion defended by the traditional view of the moral conception.

These cases provide strong grounds for thinking that there will be considerable extensional divergence between rights possessed by human beings as such and rights whose violation gives grounds for international concern. But once we accept such divergence, the Irrelevance Objection becomes pressing: Why should we adjust our current human rights practice to fit a criterion the fulfillment of which does not guarantee one of the central roles of human rights in the current practice?

Now, an adherent of the moral conception might respond at this point that he need not ascribe human rights *merely* on the basis of moral rights or of interests shared by all human beings as such, but that only rights possessed by all human beings as such that fulfill further

conditions qualify as human rights. One important condition of this kind would be a “threshold of importance” condition: Only rights whose protection is sufficiently crucial to its bearer can count as human rights. Therefore, completely trivial individual rights, even when possessed by all human beings as such, need not qualify as human rights, nor need the right to gratitude if its implementation would be self-defeating.

However, there is one major difficulty for this kind of response. When an adherent of the moral conception spells out the additional conditions, in particular a “threshold of importance” condition, he seems to be faced with the following dilemma: Either these conditions make explicit or implicit reference to these interests having sufficient weight to limit state sovereignty – but then the proposal turns out to be a version of the political conception in disguise. Or else these conditions lack such reference – but then it’s hard to see how the original difficulty is overcome, i.e. how the gap between what qualifies as a human right on the proposed criterion and what is to play the role human rights do in fact play in contemporary international law is to be bridged. Call this the Threshold Objection¹⁶ to the moral conception.

These considerations provide a strong case for the claim that the ‘simple’ version of the moral conception, which simply equates human rights with individual rights possessed by human beings per se, will not succeed in fulfilling the “fidelity” constraint, because the class of rights that would qualify as human rights according to this version would not even approximately coincide with the class of individual rights whose violations provide grounds for international concern.

However, it is not immediately clear whether the same kind of criticism also applies to more sophisticated versions of the moral conception such as Griffin’s, which considers human rights to be rights that protect the essential ingredients and preconditions of personhood and “normative agency” (see 2.). E.g., the objection based on trivial rights obviously fails to apply here, because these rights do not protect their bearers’ essential standing as persons and self-determining actors. With regard to the second kind of case mentioned above – individual moral rights that resist transformation into legal rights, such as the right to gratitude we have considered earlier – Griffin can appeal to his second ground for

16 Also Raz 2010, 325f., criticizes the moral conception (in Griffin’s version) for its inability to spell out in a principled way minimal standards for human rights.

human rights, practicalities. Knowledge of human nature and society will tell us that such rights are no good candidates for legal enforcement.

But there are two central difficulties remaining for Griffin's account. The first, as Raz has argued, lies in dealing with the Threshold Objection. As we have seen, Griffin is faced with the task of giving a clear-cut formula for which rights protect essential ingredients and preconditions of personhood. In attempting to provide such a formula, he is "torn" between two different poles: On the one hand, he could restrict the class of human rights to those rights whose enjoyment is essential for *bare* human status, or for the *bare* status as an intentional agent. And, officially, that is the course he is taking: "they are rights not to anything that promotes human good or flourishing, but merely to what is needed for human status".¹⁷ However, *de facto*, Griffin believes that he can qualify a much larger class of rights as human rights than those rights which protect bare intentional agency; e.g. he also includes the right to education within his list of human rights. But as these further rights cannot be plausibly seen as rights protecting the essentials of personhood, Griffin, who explicitly does not want the class of human rights to coincide with the class of individual rights *tout court*, needs some principled way to distinguish among those rights that do not merely protect bare personhood. He attempts to do so by adding the proviso "minimal" to the content of those further rights – but that is hardly a principled distinction.¹⁸ The only way to draw this distinction in a

17 Griffin 2008, 34. Again, in Griffin 2010, 348, he insists that "being a normative agent" is a threshold term.

18 For this criticism cf. Raz 2010, 326. Griffin 2010, 348, in his answer to Raz, argues that in order to draw the dividing line between states below the threshold of normative agency and states at or above it, "we should consider the general run of people" and "we should focus on the conditions necessary to ensure that this general run of people will be at or above the threshold." At least general literacy, Griffin argues, will, on this criterion, be required, because in some parts of the world literacy "is the most efficient way of reducing infant mortality". While this answer, arguably, goes some way to drawing the distinction in a more principled way, it is still not fully convincing: For it has the consequence that the status of the right to basic literacy does not derive from the interests of the right-bearers themselves, but from the interests of other persons (e.g. newborn or future infants). So, it turns out, on Griffin's new strategy, human rights do not always, or even essentially, protect the status of the right-bearer as a normative agent! And this is hardly compatible with the traditional view of human rights as founded in the interests and needs of the right-bearers themselves, to which Griffin wants to do justice in his account.

way that guarantees fulfillment of the “fidelity” constraint, it seems, is to add some requirement of the form that violation of these rights by state agencies should be sufficiently serious to justify international concern. But doing so would amount to espousing a version of the political conception of human rights.

The second central difficulty for Griffin springs from the question of how to account for the historical ‘growth’ in human rights lists. The group of particular human rights accepted almost generally today (and accepted by Griffin himself) contains many rights that would have been either absurd or pointless to posit as human rights in the 17th or 18th century, such as a general right to literacy. If Griffin were right in his assumption that human rights are “minimal” protections of personhood and that the elements of personhood itself are timeless in the way described, the explanation for this change could only lie in a change in the historical circumstances,¹⁹ for personhood itself is the same for people then and now. Two possible changes, it seems, could explain an expansion: The rise of new threats to personhood, and the enlarged ability of other people, or the state, to deal with those threats. But while for some human rights, the expansion could be explained in this way – e.g. for the right of freedom of the press – such an explanation is not plausible for all rights.

Take the right for elementary education, for instance, as possessed by an illiterate peasant in a remote and isolated rural region in the Andes whose social and economic structure has changed little since the 17th century. Certainly, even without elementary education, this peasant is able not only to be a true self-determiner²⁰ – within limitations, of course, but this applies to everyone – but even to live a decent and happy life. This was as true of many illiterate peasants in the 17th century as it is now. However, in the 17th century, it would have been pointless to assume that the peasant had a human right to elementary education – not only due to both the lack of an institution to provide universal elementary education and the comparatively much smaller need for literate working people than nowadays, but also because he could be a normative agent without it. If we look at the peasant’s situation today, we see differences in external circumstances, which, as Griffin would say, allow us to derive his right to elementary education from

19 Rather than in a change of what Griffin 2008, 38 calls “practicalities”, for these latter are supposed to be more general features.

20 As Griffin himself accepts, 2010, 348.

his more abstract right to autonomy. But as we have constructed the case, the change in external circumstances has no relation to the peasant's own life – to how he determines (or not) what course of life to pursue! How, then, could it relate to new threats to *his* standing as a normative agent, or how could there be old threats to this status which could now better be safeguarded against? But if there are no such threats, how could the change in outward circumstances justify a new human rights claim?

The correct analysis of this case seems to be the following: What provides the grounds for ascribing the right to elementary education to the peasant now are basic considerations of equality: It is a grave mark of disrespect to persons to treat them unequally with regard to important interests, even when these are not essential to normative agency, because this at least implicitly shows that one denies them equal moral status with others. Griffin explicitly excludes equality as a third ground of human rights in addition to the protection of personhood and practicalities (Griffin 2008, 44). But equality-based considerations do have an independent role to play in justifying human rights. This role, however, is not one adherents of the moral conception can easily capture: For demands of equality arise as often from considerations about the particular agent who is acting and his special characteristics as they do from considerations about the nature of the person towards whom the agent is acting. In other words, considerations of equality are as often agent-based as they are patient-based. Some demands on what the agent must do follow only from the particular agent he is and what he can do overall. For instance, an individual human being in his private dealings can well display a significant amount of partiality; he is not required to treat “equal things equally”, and can, at least to a certain degree, act according to his own principles or even arbitrary preferences. E.g. when deciding which charities I'll support I am perfectly at liberty to pick out those whose religious background I can identify with or even to choose at my whim. This kind of partiality or arbitrariness is, however, considered illegitimate in actions of state agencies: State officials are not allowed to base state support for private charitable organizations on their own sympathies or their religious background. And much less are they allowed to let such considerations influence their decisions when then intervene in people's rights.

Looking at such cases, and keeping in mind that the state is a special kind of agent, both with respect to the extent of its power and to its claim to legitimacy in exerting force, it is very plausible to assume

that, for the state, there exist special kinds of demands that derive only from the kind of agent it is – in particular concerning which considerations it can legitimately base its decisions on. And it is equally plausible to expect that these specific kinds of demands will be relevant to human rights claims. But insofar as these demands are linked to the special kind of agent a state is, it is very hard to see how adherents of the moral conception, who only focus on the human person vis-à-vis whom the state or another agent is acting, can adequately capture these specific demands.

If these considerations are correct, they show that even a more sophisticated version of the moral conception, such as Griffin's, cannot evade the Irrelevance Objection without somehow taking into account the special status of the state as an agent *sui generis* if they want to fulfill the "fidelity" constraint. But it is very hard to see how they can do so without covertly accepting the central tenet of the political conception of human rights, namely that there is a conceptual connection between what makes a right a human right and its imposing requirements on the state. We can therefore conclude that a moral conception developed along the lines of the traditional conception cannot provide for the required overlap between the rights it singles out itself and the rights the violation of which is legitimately seen as a matter for international concern. The only way to ensure such overlap, it seems, is to accept some form of the political conception that builds this connection into its very concept of human rights.

3.2 Towards an adequate version of the political conception

Hence on the conceptual level, the political conception is preferable. However, as we are going to see, this does not make the project of the moral conception – that of showing that there are rights possessed by human beings *per se* – redundant. Nor does it mean that current versions of the political conception are not in any need of modification.

To develop an adequate version of the political conception, let's take as our starting point Rawls' characterization of human rights: "Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy." (Rawls 1999, 79) While Rawls is undoubtedly correct to stress the international dimension of human rights, focusing just on this international role

would nonetheless be a distorting oversimplification and amounts to neglecting an essential aspect of the history of the concept of human rights. One main concern is that Rawls' view ties human rights too strictly to the existing system of national states and its concomitant international legal order.²¹ As a critique of Rawls' exaggerated reliance of the law of peoples as the primary locus of human rights, this worry seems justified: Human rights are clearly not *just* rights whose violations give grounds for international concern. Instead, they are rights that have this limiting function on the international level *because* they already limit any legitimate state power on the purely national level.²²

To bring this important point into better focus, we must remind ourselves that the set of individual rights whose violations give grounds for international concern and the set of human rights are not necessarily co-extensive. For instance, it is quite conceivable that international law would legitimately give states a limited power to interfere, under certain conditions, into the affairs of another country in order to protect the individual rights of its own citizens because of particular interests *of the state itself*, without the range of these rights being restricted to human rights of these citizens. E.g., states could have the right to interfere in order to protect certain property rights of their own citizens when another state is no longer able to protect them within its territory. Such intervention rights might be justifiable when it is of particular importance for the intervening state that the individual rights are respected, because, e.g., they concern the trade of important commodities for the other country's economy. In this case, the individual rights in question are rights violations of which give grounds for international concern by providing possible grounds for interventions. However, this would not turn the individual property rights in question into human rights, even though they limit state sovereignty. (It is not that these rights could not be human rights – the point is that if they are, they must be so even without the special intervention rights just mentioned.)

What the exclusive focus on the international role of human rights misses is the centrality of the function of human rights of imposing *internal* limits on state power, i.e. limits directly within the relationship between state and citizen. This function is clearly both systematically and historically primary, and must be so in any adequate account of

21 Cf. John Tasioulas "On the Nature of Human Rights", in this volume, 47f.

22 This dependence is recognized by Raz 2010, 336, in his three-step procedure for justifying human rights claims.

human rights. These rights only limit state sovereignty on the international level because they limit (any) state power internally, and the former function derives from the latter.²³ In the case we've constructed in the last paragraph, this derivation relation is precisely what is lacking; the property rights in question do not limit any legitimate state power, because, for instance, the two states in questions could, by a concerted procedure (e.g. a treaty and parallel national legislation), abolish their existing intervention rights.

This derivation relation is signally neglected in Rawls' account of human rights. Though in the law of peoples the sovereignty of states is, on his account, restricted by human rights, only in the case of liberal states is there a preceding internal limitation of state power by human rights, because their basic structure is "chosen" in accordance with Rawls' version of the social contract model and its justification depends on this model. For non-liberal decent states, though, Rawls cannot argue for their internal limiting power independently of the law of peoples, because the internal authority of such states toward their citizens does not depend on any clearly specified model that would make its authority depend on the safeguarding of human rights.²⁴ Hence the binding role of human rights for such states arises *only* from the law of peoples – and this cannot be correct, given the primacy of the internal limitation.

The historical precedence of the internally limiting function is also obvious: Until the 20th century, the idea of international enforcement was practically completely absent from the human rights discourse. The *only* function of human rights was to set limits to the power of any legitimate state, and this was the only role of human rights envisaged in the documents of the American and French revolutions. Redress from violation of human rights was not to be had by international intervention, but either by the state's own jurisdiction, or, if that failed, by the armed resistance of the citizens themselves.²⁵ Only after the horrors of the 1930s and 40s and their mostly trans-border perpetration had shown especially vividly that international back-up was necessary to en-

23 Pace Pogge 1998, 398, who argues for viewing human rights as standards for judging *global* institutions.

24 Cf. Rawls 1999, 64f. and 70.

25 Somek 1995, 56 is quite right in tying the origin of human rights discourse to the right to resistance: "Ohne Widerstand keine Menschenrechte".

force human rights did the international role of human rights come into prominence.

Human rights limit any legitimate state power in two respects: Either as negative limits on what positive actions the state can legitimately take, or as positive claims on what the state must do, i. e. which individual interests it must protect. However, in view of the historical development of the idea of human rights, this claim needs a further qualification. Human rights, historically, came to the fore as devices for countering the threats arising from a particular kind of state – namely the *modern* state (which began to emerge, roughly, with the rise of absolutism, in the 17th century) with its special range of powers. That the human rights discourse historically developed as an ‘answer’ to the inherent dangers arising from the modern state with the extensive range of powers it possessed, in comparison to its predecessors – such as a developed bureaucratic system, large police and (standing) armed forces, and an extended legal system – has been convincingly argued by Jack Donnelly.²⁶ However, even more than the general growth of resources available to the modern state, the following three key characteristics crucially distinguished it from its predecessors and made it especially important to restrict its authority by safeguarding human rights: (i) the monopoly of power claimed by the modern state within the borders of its territory, (ii) sovereignty on the international level and (iii) the state’s claim to regulate, in principle, every area of its citizens’ lives.

Factor (i) was, historically, the key step in the development of the modern state. 17th century France, which provided the ‘role model’ in the development of the absolutist state, took this step most dramatically with Richelieu’s suppression of the Huguenot security places, which had not been subject to centralized power, and Mazarin’s and Louis XIV’s suppression of the nobility as an independent power factor of its own, which left the French centralized state as the only bearer of military and political power within its own territory. The suppression of rival bearers of powers, which had earlier been tolerated, went hand in hand with the abandonment of the idea that several systems of political authority could co-exist side by side, and that there could be regional exemptions from state power in favor of another source of legitimate authority.

Factor (ii) was the ‘other side’ of the coin in international politics; and in political systems like the Holy Roman Empire, where particular

26 Donnelly 2003, 46ff.

territories evolved as autonomous political entities by simultaneously eliminating internal rival bearers of political power within their boundaries and by emancipating themselves from the authority of the central institutions of the Empire, the development of factors (i) and (ii) was, perforce, so closely linked that it does not even make sense to regard them as historically separate.

Factors (i) and (ii) combined to make the individual citizen vulnerable and helpless in the face of state threats in a way that was both historically new and clamored for a new method of protection. For these factors eliminated the authorities rival to the state to which the citizen, at least in theory, had been able to appeal for help and protection against unjust measures by the state. By this elimination of any extra-state juridical procedure for the protection of rights and redress in cases of violation, the only remedy in cases of rights violations by the state itself was, ultimately, technically illegal armed resistance. And human rights very quickly emerged as the major resource to justify such technically illegal resistance – as we can clearly see from Locke's justification of the English Glorious Revolution, as well as from the justification of the American Revolution in the Declaration of Independence (cf. Locke 1988, 202ff.).

Lastly, factor (iii) implied a fundamental change in the range of the state's functions: From the early Middle Ages onwards, the task of the state had been mainly restricted to outward defense and to the settlement of quarrels between smaller social organizations like clans, tribes or federations, so that the state's authorities were thought to have 'no business' settling quarrels arising merely within these organizations. In the 17th and 18th century, this view changed, and the state was gradually seen to have both a general duty and authority to safeguard the citizens' well-being. It is obvious that not only did the potential dangers from state authority become more pressing and 'global' with this change, but also that a much more comprehensive protection of individual interests by the state could reasonably be expected. This latter aspect was crucially important for the development of human rights: E.g., only when it is considered that state's business to regulate intra-family relations and to protect individual interests within such relations can it make sense to ascribe a claim-right to individuals against the state to provide such protection.

As the function of human rights has consisted in protecting human beings specifically from the dangers arising from the institution of such a state, it seems plausible to modify our claim about the nature of human

rights in the following way: Human rights are individual rights that constrain any state power of comparable extent as the one claimed and possessed by the modern state (or would do so, where such a state to be instituted) – i.e. a state power having, in particular, a monopoly of force within its territory and sovereignty vis-à-vis other states, and concerning itself with all, or most, areas of its citizens' lives. So the modern state and its characteristic threats provide the benchmark by which to determine whether an individual right can count as a human right or not.

4. Consequences

As we have been arguing, human rights are, essentially, individual rights that set limits to any state power which is comparable in extent to the one claimed and possessed by the modern state. Their limiting role is both from the outside – as their violations provide reasons for international concern – and from the inside – they limit any state power directly within the relation between person and state. In fact, both these aspects of the limiting role can be described as limits of “sovereignty” in the traditional sense of the term, which not only concerns the relation of one state towards others, providing the basis of non-interference, but was, as originally introduced in the modern discussion by Jean Bodin, also a characterization of the internal structure of the state; in the latter respect, the idea of sovereignty expressed the state's possessing the highest authority against which no appeal “under heaven” or rightful resistance was possible (Bodin, *Six Livres*, esp. book I, ch. 8). Therefore both the ‘internal’ and ‘external’ aspect of the limiting role of human rights are tied together.

What does it mean that human rights impose limits on any legitimate state power? Of course, it means, *inter alia*, that any state authority which systematically violates human rights cannot be legitimate – but the condemnation of illegitimacy, by itself, does not carry very much weight unless we know what follows from it. As far as the ‘external aspect’ of the limiting role is concerned, the violation of human rights provides cause for international concern, so that international sovereignty is impugned. ‘Internally’, the limiting role manifests itself in restricting the state's rightful claim to obedience by its citizens. Violations of human rights provide citizens with *pro tanto* reasons for civil disobedience and, in the extreme case, armed resistance, because they override

the state's claim to obedience even in cases where this claim has a strong moral foundation, e. g. because a well-functioning process of democratic legitimization is in place. In Raz's terms, if we see the claim of legitimate state authority to obedience as "protected" by exclusionary reasons to disregard counteracting considerations which speak against acting as the authority orders one to act,²⁷ then human rights are those individual rights whose violations provide reasons overriding even these exclusionary reasons. Of course, this does not mean that every human rights violation *per se* justifies civil disobedience or even armed resistance: Only when violations are systematic and when they cannot be remedied within the state system of legal redress can they justify these measures. But human rights violations are, in any case, the right kind of consideration to override the state's claim to obedience by its citizens.

The characterization of human rights as individual rights which limit state sovereignty in the two ways described, may easily give rise to the impression that the existence of human rights, on the account proposed here, presupposes an actually existing system of nation-state and international law, or at least the actual existence of some state power. But this impression would be mistaken: For individual rights of the sort described can exist even without the actual existence of any state – it is merely necessary that these individual rights are such as to set limits of the kind described on any state power that the right-bearers might enter into. I.e. it is necessary that a right should set limits to state sovereignty if there is or would be a state possessing power comparable in extent to the one claimed by the modern state. The latter conditional can obviously be true even if there exists no state of this kind. This separation of human rights from the actual existence of states or legal institutions shows that they are not simply legally created rights, but rather must have their basis in pre-positive morality. In this sense, they are indeed 'natural' or 'moral rights'.

This raises the question, though, what it means to describe an individual right as a human right without an already existing system of states. In order to answer this question, we must spell out in general the conditions an individual right has to meet in order to set limits to any legitimate state power in the ways we have described – i.e. we must answer the general question of what we have to show in order to justify the

27 For the concept of 'exclusionary' reasons cf. Raz 2006, 49ff. Raz himself argues that "authoritative" claims should be seen as constituting second-order reasons, loc. cit., 82ff.

claim that a particular individual right must be included in the set of human rights. How one answers this question ultimately depends on the model for justifying state authority one subscribes to. While I cannot argue for this theory here in any way, for the following considerations I will assume for the sake of illustration that the correct theory to rely on for the justification of political authority is some version of the social contract model which derives the authority of the state from some form of rational agreement, based on the individual interests of the persons participating in this agreement.²⁸

On the basis of such a theory, it seems tempting as a first approach to pick out as human rights those individual rights that people, when contracting to enter into a society with institutions that are comparably strong and far-reaching as in the modern state, would reasonably want safeguarded within this society in appropriate ways. In other words, human rights would be those rights persons would rationally agree to have safeguarded by the internal structure of the state they agree upon.

The problem with this answer is that it fails to capture the special importance or urgency of the protection of human rights. Rational agents would, in the original contract situations, plausibly want *all* their rights to be appropriately safeguarded, not just their *human* rights (but also, e.g., consumer rights in case of defects of purchased goods). But not all rights are human rights, nor is a state whose organization in some respect violates principles of justice per se a state that violates human rights. The point that not all rights are human rights is often expressed by the claim that human rights only provide a *minimal* standard for government behavior.²⁹ This point is of special importance for political conceptions, because, plausibly, not all infringements of rights should provide even pro tanto reasons for international intervention.

How can we capture the idea that human rights are in some sense minimal? One approach would be to distinguish *human* rights from others by the special *kinds* of safeguards persons would reasonably want for the rights in question. For instance, one might argue that while some rights might reasonably be considered to be accessible to change or abolition by otherwise legitimate political decisions, e.g. by democratic decisions, as there may arise practical need for such changes, no one could reasonably want *human* rights to be subject to majority decisions of this

28 Be it a Hobbesian account or a Rawlsian original position model.

29 Nickel 2007, 36. Shue 1996 described human rights as specifying “lower limits on tolerable human conduct”.

kind.³⁰ This special need for protection even against democratic decisions is what characterizes human rights.³¹

However, even this proposal, though it considerably narrows the number of human rights in comparison to its predecessor, would still yield too inclusive a criterion for human rights. In particular, rights of democratic participation – e.g. the right of equal access to political office, the right to a free and equal vote – would plausibly count as rights whose possession should not be subject to change by democratic decision. It is very questionable, though, whether (all) such rights should properly be regarded as human rights. Hereditary monarchies do not guarantee equal access to all political offices for all their citizens – in particular, the position of the monarch is only accessible to a very limited number of people. Nevertheless, the existence of monarchies does not per se seem to constitute a violation of the human rights of their citizens. Even if we consider this form of state organization as inferior to republican democracy, the fault lacks the urgency of redress that is characteristic of violations of human rights.

The key to an answer lies in the role of sovereignty and the monopoly of force of the modern state. Clearly, this monopoly, which the modern state characteristically claims, provides its citizens with obvious benefits, especially concerning personal and property security, in comparison with a state that lacks this monopoly and would therefore be in danger of regular internal violence and civil strife. In a comparable way, sovereignty – now used in the technical sense of giving the state the possibility of rebutting unwanted outside interference in its home affairs – plays a protective role, both by strengthening the state monopoly on power and by reducing foreign interference that might itself endanger the citizens' security.

The advantages accruing to the individual citizen from the state monopoly on power and sovereignty may not be as enormous as they were

30 An alternative way to stress the special standing of human rights is Rawls' account of basic liberties in the *Theory of Justice*, Rawls 1971, esp. §11. Rawls argues that, in the original position, when determining the principles of justice applying to the basic structure of society, rational agents would choose equal basic liberties for all, and that these basic liberties could not be "bargained" against social or economic advantages (principle of serial ordering). However, the following objection, with regard to an account of *human* rights, also applies to Rawls.

31 Also Wildt 1998, 142, considers it an essential characteristic of human rights that their protection may not be subject to political majority decisions.

thought to be by Thomas Hobbes in the *Leviathan*, but clearly they will compensate the individual, to a large degree, for many of the injustices within the organization of the state. This is particularly clear in the case of unjust judicial decisions: Even when judicial systems generate many such decisions to the detriment of one person, this person will, provided these decisions are not too invasive, still be better off when such a system for pressing claims exists and efficiently excludes other violent alternatives of doing this, than he would be without it. Therefore, a person might quite reasonably go along with a considerable amount of suppression if, in exchange, he can enjoy the benefits of the state monopoly on power and state sovereignty, which would otherwise be denied to him.

There will, however, be a turning-point, where the benefit-loss balance will no longer be in his favor. Notoriously, Hobbes went so far as to claim that the benefits from the institution of a sovereign state were so large compared with a situation where there was no state that they outweighed every disadvantage arising from state suppression short of direct danger to one's own life or basic physical well-being. This claim rested on his own dire view of what the state of nature without any sovereign state would be like. But this view is hardly compelling, and other writers, such as Locke, have held a much more benign view of the state of nature. Besides, the relevant comparison we have to draw here is not the one between the modern sovereign state and a situation completely lacking any state institutions, but between the modern sovereign state and a considerably weaker type of state, which, while enforcing some measure of internal and external security, lacks both the power monopoly and sovereignty in the modern sense and has (as it was the case with the pre-modern state) a considerably more restricted range of tasks.

On the basis of a contract model for justifying political power, human rights thus appear as the 'baseline' for reasonable people that must be met if they are to be able to reasonably enter into any state possessing the key characteristics of the modern state, especially power monopoly and sovereignty. Thus, safeguards for human rights are not only part of any constitutional structure people *would* rationally agree upon; inclusion of such safeguards is a precondition for any constitutional structure people *could* rationally agree upon – where rational choice is seen as taking place against the background of the alternative of not instituting a (modern) state at all, with its concurrent disadvantages. Failure to safeguard human rights means that, for rational agents, it will never make sense to institute such a state, no matter what the other ad-

vantages of this institution might be compared to a situation without that institution. This function of human rights captures Rawls' idea that political regimes, in order to make any minimal claim to legitimacy, must be schemes of social cooperation for (at least minimal) mutual benefit.³² Regimes violating human rights per se fail to satisfy this criterion because the disadvantages caused by their establishment are necessarily greater than any compensatory advantages it might bring.

This clearly distinguishes the standard of human rights as a minimal standard from an ideal standard of (international) justice: Faced with the alternative of a situation without a modern state, rational agents can agree upon a system that is significantly unjust, e.g. gives many special privileges to some individuals. As long as they can rationally do so, the ensuing system will, as we have argued, not violate human rights, though it may be substantially unjust. By contrast, human rights are those rights whose violation cannot be compensated for by any other economic or security advantage the modern state might bestow on its citizens.

Viewing human rights as the 'baseline' for rational agreement to a social contract has two important consequences: First, human rights cannot ever be bargaining stakes. For otherwise their violation could be compensated for by other advantages the system bestows upon people entering into it – and, as we have argued, this is precisely what is impossible for human rights, though it may be possible for other rights. Second, the alternatives that form the background for the decision for or against instituting the modern state can change to some extent due to a change in historical circumstances. Four factors that form the background of the quasi-“original position” decision for or against instituting the modern state are especially subject to change, and this change will make it reasonable for persons to give much greater, or much less, power to the state. (i) The economic situation of the population; e.g. in countries subject to severe crises of famine, it can be reasonable to give the state large powers of intervention into the economic process, thereby considerably cutting in on the economic liberties of its citizens. (ii) The situation of external security; again, in countries in danger of constant aggression by their neighbors, it will be reasonable to give to the state the necessary means for defending its citizens, which may include extensive authority to intervene in the citizens' lives. (iii) The

32 Rawls 2001, 6. This idea also figures importantly in Williams' account of human rights (Williams 2006, 62–64).

possibility and potential form of international intervention; if there is a fairly just and well-functioning system of international redress for violations of individual rights – as there is, arguably, in the EU – rational agents will stand for considerably less intervention by the state and, in consequence, will considerably restrict the limits of the sovereignty of their own states (cf. Raz 2010, 330). (iv) The danger of civil war and internal conflict in case there is no central authority with the three basic characteristics of the modern state.

What do shifts in conditions (i) through (iv), which can change the parameters for what agents could rationally acquiesce in, mean for human rights? Most importantly, they lead to some degree of relativization in human rights standards: Improving overall economic conditions and an improving situation of international security and international institutions mean (surprisingly) that the number and extent of human rights will grow – simply because under these conditions, agents could rationally concede less power to the state or accord the state sovereign power only under a greater number of caveats. But this does not lead to a total relativization: For some individual rights will be sufficiently important that even under dire external circumstances, giving up these rights cannot be worth the advantages produced by instituting a modern state.

Furthermore, the kind of relativization that follows from the version of the political conception defended here is only relativization to external circumstances. This does not imply cultural relativism per se, i. e. the claim that the validity of human rights claim must be “relativized” to a particular culture. Instead, relativization to external circumstances is fully compatible with the possibility that the list of human right claims valid for every human being is the same once the external circumstances are fixed.

But what about cultural relativism – does our version of the political conception not lead to this form of relativism, too? For even if, even under dire circumstances, rational agents cannot acquiesce in a system that allows pervasive violations of some of their individual rights, what guarantees that these rights, for all agents, are the same? Or, accepting that there may be differences, what guarantees that there is a sufficient overlap between those individual rights such that we can say that there exists, interculturally, *one* system of human rights – instead of several such systems? If there are several such systems, they would still all count as systems of human rights when these rights fulfill the criterion

we have proposed earlier, even though their contents could greatly diverge.

The answer to the question of whether there is one system of human rights or many ultimately depends on the success of the project pursued by adherents of the moral conception of human rights of showing which rights are possessed by human beings *per se*. If they can show that there are fundamental interests common to all human beings *per se*, then these interests – or, rather, those of them that are of sufficient weight – will provide the basis for a set of individual rights that are valid interculturally. It's highly plausible to suppose that there will be *some* such common set of interests (life, bodily integrity, etc.). How large this set will be, however, is a different question – and if adherents of the moral conception should fail to show that there is a substantial such set, then, indeed, we might have to conclude that there is no substantial single system with global validity.

Such a negative result would not only show that the project of adherents of the moral conception is doomed to failure for reasons quite different from the ones we have discussed here. It would also be deeply damaging to the political conception itself. For, as we have seen earlier, it is one of the chief features of human rights in the current human rights practice that their violation gives *pro tanto* grounds for international concern and humanitarian intervention. For whom does it provide these *pro tanto* grounds? Primarily, at least, for other states and the international community. When human rights violations of sufficient magnitude occur and there are no sufficient reason against intervening, the other states and the international community not only have the possibility of legitimate intervention, i. e. they are not only allowed to intervene; but they even have a duty to intervene under these circumstances, which corresponds to a claim to assistance of those persons whose human rights are violated.

Now, if we assume that there is no universal system of human rights, but, e.g. that there are, in different cultures, fundamentally diverging such systems, it becomes very hard to see why states from one of these cultures should have a duty of political morality to intervene to prevent or stop violations of rights which are, in their own culture, not accepted as human rights. They may be *allowed* to do so once a right that sets limits to the sovereignty of the offending state is violated; but why should they have a *duty* to intervene in protection of rights that

they need not themselves accept as human rights, or need not even accept as individual rights at all?³³ The same question arises at the level of international organizations in which states from different cultures participate.

The only way to convincingly account for an obligation of all other states to help prevent human rights violations is to show that a sufficiently robust set of individual rights is held universally by all human beings, at least at a certain time.³⁴ And the most promising way to establish that there are rights of this kind is to show that such a set of individual rights are possessed by human beings per se. Not all of these rights will count as human rights, if our earlier arguments have been correct, and the set of human rights to be picked out from the set of the rights universally possessed by all human beings may be larger or smaller depending on different external circumstances. But at least there will be enough overlap in the human rights that are to be accepted whatever the external circumstances may be to explain why, in general, both other states and international organizations have a duty to intervene in order to protect human rights.

Therefore, the success of the projects pursued by the political conception of human rights – showing which rights can play the role assigned to them in the current practice of international law – and of the moral conception – showing which rights can be derived from interests common to all human persons – are much more closely related than one may be tempted to think from a look at the contemporary discussion.

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33 This point is overlooked in Raz's 3-step procedure for justifying human rights claims: the third layer, namely that states should not enjoy immunity from interference with regard to violations of such rights, does not yet show why other states have a positive duty to interfere (Raz 2010, 336).

34 Skorupski 2010, 370, argues against Raz for the need for universality in a different, though related, way, claiming that only thus can it be explained why other states have the standing to demand rectifications of human rights violations.

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