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„Armed Humanitarian Intervention's Sliding Scale of Permissibility"

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Abstract

This thesis puts forward a rights-based theory of the permissibility of AHI, which argues that permissibility varies along a sliding scale: it declines in probability as one moves through the three forms of AHI – humanitarian assistance, military rescue, and transformative occupation. In my argument, I first demonstrate that AHI is not impermissible in principle by refuting the three main principled objections to it. Second, I show that the permissibility of any AHI is determined by three factors - its implications for international peace and stability, its impact on the enjoyment of the right of political communities to collective self-determination, and its performance under the traditional jus ad bellum criteria of Just War. On the basis of these determinants, clear-cut conditions for permissibility are developed. Third, I demonstrate that it is possible to distinguish three forms of AHI – humanitarian assistance, military rescue, and transformative occupation. Fourth, I show that each of the three forms of AHI tends to fare differently under the conditions for permissibility, in fact, permissibility tends to become less probable as one moves through these three forms. Three case studies – Bosnia (1993), Libya (2011), and Iraq (2003) – are examined in order to illustrate how the theory is to be applied in practice.

Abstrakt

Die vorliegende Arbeit hat eine auf Grundlagen menschenrechtlicher Bestimmungen basierende Theorie über die Zulässigkeit militärischer humanitärer Interventionen zum Inhalt. Die Zulässigkeit militärischer humanitärer Interventionen gleicht einer absteigenden Skala und nimmt je nach Art der angewendeten Intervention, beginnend mit der humanitären Hilfe über die militärische Hilfe und die Besatzung ab. Zunächst wird gezeigt, dass militärische humanitäre Intervention grundsätzlich zulässig ist. Sodann werden die drei Faktoren, die die Voraussetzungen für die Zulässigkeit humanitärerer Interventionen festlegen aufgezeigt. Weiters wird dargestellt, dass es möglich ist zwischen drei Formen militärischer humanitärer Intervention, nämlich humanitärer Hilfe, militärischer Hilfe und Besatzung zu unterschieden und dass jede dieser drei Formen hinsichtlich dem Grad der Zulässigkeit unterschiedlich zu sehen ist. Zusätzlich nimmt die Wahrscheinlichkeit der Zulässigkeit je nach Form der humanitären Intervention, beginnend mit humanitärer Hilfe über militärische Hilfe und Besatzung ab.

(Word count: 32,948)

Pledge of Honesty:

"On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it."

"Applied ethics is not the province of the ethical philosopher, it is the domain of the student of the given field of application – as long as the student cares about moral issues"

Stanley Hoffman, *Duties Beyond Borders* (1981)

Contents

Chapter I: Introduction

1. The scope of this thesis

The focus of this study is armed humanitarian intervention (AHI). The particular question addressed is whether AHI is ever permissible, and if so, how permissibility may vary depending on the particular form that AHI takes. The scope of the research question can be qualified in two ways. First, it is *AHI* that is examined here. Thus, other forms of interference in the domestic affairs of sovereign states as well as humanitarian interventions that are non-military and military interventions that are non-humanitarian are not addressed. Second, I focus on the problem of *permissibility* – whether and under what conditions AHI is morally permissible. Therefore, the conditions for the overall justifiability of AHI and the idea of a duty to intervene are not discussed in this thesis.

AHI can be defined as the threat or use of military force on the territory of a sovereign state without the latter's consent, for the purpose of preventing or halting large-scale human suffering or death that is, in most cases, the result of government acts, omissions or failure[1]. In order to clarify the meaning of AHI and elaborate on the first qualification of the scope of the research question, it is necessary to make three important distinctions: 1) between intervention and interference; 2) between armed intervention and non-military intervention; 3) between humanitarian and non-humanitarian intervention.

First, it is essential to understand how intervention is different from interference. Non-interference in the domestic affairs of sovereign states is regarded as one of the foundational principles of the international system (Weiss, 2012:21). Non-intervention

[1] This is the standard definition of AHI. See, for example: Holzgrefe (2003:18); Scheid (2014:3).
[2] One of the implications of this definition is that the provision of support, including in the form of arms, to militant insurgents operating within the borders of a sovereign state would not qualify as a military intervention.
[3] This term is used primarily by those who for various reasons dislike the expression "humanitarian intervention"

could be understood as an aspect of the principle of non-interference. Scholars typically agree that it is the element of coercion that distinguishes intervention from other forms of interference (Himes, 1994:83-84; Weiss, 2012:22). A lack of consent by the target state is typically seen as another key characteristic of intervention (Coady, 2002:10; Coady, 2008:255). For the purposes of the present study, I will use a definition of intervention which accepts both coercion and the absence of meaningful consent by the target state as central characteristics of intervention.

With respect to the second distinction – between military and non-military intervention – it is important to emphasize that, while all forms of intervention by definition involve coercion, coercion does not necessarily entail the use of military force. It is possible to distinguish between several categories of the threat or use of coercion: military force, economic sanctions, arms embargoes, and international criminal prosecution (Weiss, 2012:113). AHI involves the threat or use of military force. In this thesis, the military aspect of AHI is defined as follows: the crossing of the land borders of a sovereign state by armed foreign military personnel or the threat or use of coercive air or sea power against a sovereign state[2].

Lastly, what distinguishes humanitarian from non-humanitarian interventions is their purpose. Also known as "intervention for human protection purposes"[3], humanitarian intervention has as its immediate goal prevention or halting of large-scale human suffering or death. By contrast, non-humanitarian intervention serves other purposes. These may vary but, by far, the most common type of non-humanitarian intervention is intervention for security purposes. The military variant of intervention for security purposes is permitted in international law in the form of collective intervention as a response to state aggression or state acts or omissions which are deemed to pose a threat to international peace and security (UN 1945: art.42,51).

After having elaborated on the first qualification of the scope of the research question, I shall now briefly discuss the second one – that it is the problem of *permissibility* that is

[2] One of the implications of this definition is that the provision of support, including in the form of arms, to militant insurgents operating within the borders of a sovereign state would not qualify as a military intervention.

[3] This term is used primarily by those who for various reasons dislike the expression "humanitarian intervention" (ICISS, 2001:11-12; Guiora, 2012).

examined in this study. Permissibility is only one aspect of the broader question of the justifiability of AHI. An inquiry into the overall justifiability of AHI would analyze what, according to Just War theory, are the three main temporal phases of the use of force in the international arena: the resort to war (*jus ad bellum*), the conduct of war (*jus in bello*), and engagement in the aftermath of war (*jus post bellum*)[4]. There is insufficient space here to examine all three aspects of the morality of AHI. The reason why I have chosen to focus on permissibility (*jus ad bellum*) is related to the fact the question of whether and under what conditions AHI may be permissible remains hotly debated and, as will be discussed in the next section, there is a significant gap in the existing literature on the permissibility of AHI.

The question of whether there may be not just a right but also a duty to intervene is also excluded from the present study. According to the "all-or-nothing" view on AHI, intervention is either impermissible or obligatory – it can never be "merely permissible" (Dobos and Coady, 2014:78-79). From this perspective, it would be an analytical mistake to treat the problems of permissibility, i.e. the right to intervene, and of the duty to intervene as separate. However, I regard these issues as analytically separate and will engage only with the former[5]. Contrary to possible objections from proponents of the "all-or-nothing" view, this approach will not compromise the quality of my analysis. Those theorists who argue that AHI is either impermissible or obligatory derive the right to intervene from an alleged duty to intervene (ibid). By contrast, the theory developed in this thesis maintains that permissibility can be established independently of any reference to a duty to intervene, and therefore omitting a discussion about the duty to intervene will not preclude a sophisticated moral discussion about the permissibility of intervention.

2. The debate on armed humanitarian intervention

[4] The relationship between these three aspects of the morality of war is the subject of a scholarly debate (Martinez and Bouvier, 2006:109-110; Mertus, 2006:115). Walzer famously argues that judgments with respect to each of these aspects are "logically independent" and should not be conflated (1977:21).

[5] For the main positions on regarding the idea of a duty to intervene, see: Lango (2001) and Nardin (2013).

The literature on AHI is vast and complex. In order to categorize the question of AHI, it is useful to consider the main disciplines that have addressed it. Academically, the problem of AHI has been examined mainly from the perspectives of moral philosophy, legal positivism, and political science. These disciplines tend to differ in their approach to the topic, the questions they ask, and the precise problems they formulate. To locate my thesis in the literature, let us briefly consider the historical evolution of the debate on humanitarian intervention

The first discussions about humanitarian intervention appeared in the work of the fathers of Just War theory – St Augustine and St Thomas Aquinas[6]. During the Middle Ages and the Enlightenment many natural law thinkers took up the problem of humanitarian intervention. Among the most prominent of these are Hugo Grotius, Samuel von Pufendorf, Christian von Wolff, and Emmerich de Vattel[7]. The main focus of those thinkers was the justifiability of the use of force against another state for the purpose of protecting the innocent. The questions they asked were essentially normative: is intervention ever permissible and could it ever amount to an obligation? With the decline of natural law theory and the rise of legal positivism, the main approach to the problem of AHI changed. Legal positivists tended to ignore normative issues and inquired mainly into the status of AHI under international law[8]. Nevertheless, normative theorizing about AHI never disappeared completely and now it has once again moved to the forefront of the debate – under the banner of moral philosophy and political theory[9]. Political scientists (with the exception of political theorists) focus primarily on the political issues surrounding AHI, namely how to reach consensus on common norms, build political will and operational capacity so as to

[6] St Augustine, *City of God*; St Aquinas, *The Summa Theologica*.

[7] Grotius, *De Jure Belli ac Pacis (On the Law of War and Peace)* (1625); Samuel von Pufendorf, *On the Duty of Man and Citizen* (1682); Christian von Wolff, *The Law of Nations Treated According to a Scientific Method* (1748); Emmerich de Vattel, *The Law of Nations, or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns* (1758).

[8] For an exemplary discussion of AHI from the perspective of legal positivism, see: Hall (1880).

[9] Classic works of moral and political philosophy addressing the problem of humanitarian intervention are Immanuel Kant's *Perpetual Peace* (1795) and J. S. Mill's "A Few Words on Nonintervention" (1859).

successfully implement the doctrine of R2P, and overcome the problem of abuse of the language of humanitarianism[10].

In terms of the question it addresses and the approach it takes, this thesis is closest to the work of ethical and political theorists. Despite the abundance of scholarly pieces on the topic of the permissibility of AHI, there is a glaring gap in the literature. Academics typically treat AHI as a singular and undifferentiated type. In their attempts to construct general theories about the permissibility of AHI, they largely disregard the different forms that the latter can take. This deficiency is also present in the works of the dominant figures in the humanitarian-intervention debate, including M. Walzer, who is famous for his minimalist account of intervention developed in *Just and Unjust Wars* (1977) and subsequent essays (1980; 1995; 2002); F. Tesón, whose account of AHI is based mainly on consequentialist reasoning and holds that permissibility depends solely on the performance of an intervention under "a full-blown theory of Just War" (2014:61-62); and H. Frowe, who proffers a "justifications-based account" of the permissibility of AHI that has two main criteria – a sound justification for intervention and reasonable prospects for success (2014:95-96).

An exception is S. Hoffman (1995:40-45), who distinguishes between three "methods" of AHI – "humanitarian policies", "peace-enforcement", and "resolution". However, his analysis is very brief and does not come close to providing a comprehensive classification of the forms of AHI. Furthermore, he does not look into the implications that the existence of different "methods" of AHI has for permissibility. The purpose of this study is to address this inadequacy in the academic discussion.

Before I proceed to discuss the question of methodology, I will briefly outline the legal debate on AHI. With regard to the legal status of AHI, it is possible to distinguish two main positions – of "classicists" and "legal realists"[11] (Farer, 2003:64-69). There are some scholars who do not belong to either of these camps but instead argue that the legality of AHI is "essentially indeterminate" (Hurd, 2011:293). The majority of legal scholars support the classicist view, which avers that AHI is illegal under international

[10] For examples of political science inquiries into the problem of AHI, see: Finnemore (1996) and Pattison (2008).
[11] For an example of the "classicist" position on the legality of AHI, see: Schachter (1984); for an example of the "legal realist" position, see: Tesón (2005) or Reisman (1985).

law. Classicists rely on the UN Charter, in particular on A. 2(4) which holds that states ought to "refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purpose of the United Nations", and on A. 2(7) – "nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (UN, 1945).

In response to the classicist position, legal realists develop three main arguments with respect to the meaning of the UN Charter (Holzgrefe, 2003:37). The first argument maintains that A. 2(4) prohibits the use of force only when it is directed against the territorial integrity or political independence of a state; as long as an AHI does not threaten a state's territorial integrity or political independence, it would be permissible (ibid). The second argument holds that the phrase "or in any other manner inconsistent with the purpose of the United Nations" means that if an AHI has a genuinely humanitarian purpose and the UNSC has failed to fulfill one of its main responsibilities – to protect human rights – AHI would be permissible (ibid:39). The third argument relies on an expansive interpretation of A. 39 which states that the UNSC may authorize the use of force in response to "any threat to the peace, breach of the peace or act of aggression" (ibid:40). Indeed, since the 1990s the UNSC has adopted a rather broad understanding of the meaning of the phrase "threat to peace" – taking it to mean internal conflicts, state failure, and even massive violations of human rights – as is demonstrated by its resolutions with respect to Somalia, Bosnia, and Haiti (Franck, 2003:216; Weiss, 2012:43-45, 51-52).

Classicists respond to these arguments by emphasizing that the *travaux préparatoires* of the Charter reveal an intention to have these articles interpreted in a way which is restrictive of the use of force (Holzgrefe, 2003:38). Essentially, at the heart of the debate about the legality of AHI is a disagreement about what method of interpretation ought to be used with respect to international legal treaties (Farer, 2003:61). Classicists try to uncover and adhere to the original intention of the creators, while legal realists are more willing to interpret the meaning of treaty provisions in light of new international developments (ibid).

3. Methodology

A distinctive feature of this thesis is that it addresses a normative question rather than an explanatory one. Many scholars underestimate the importance of looking into the problem of AHI from a normative angle; I contend that normative inquiries are an essential part of the study of the topic and should precede explanatory discussions. A normative approach to the question of AHI can be justified on ethical grounds. Justice requires that the permissibility of AHI be systematically and rigorously examined from a *moral* perspective. This is so because the permissibility of humanitarian intervention is a problem whose importance cannot be underestimated.

The occurrence or absence of intervention in a particular case has far-reaching implications for the lives of several categories of people: the civilians who are in the midst of a humanitarian crisis, any active combatants aligned with the government and/ or paramilitary groups in the target state, the military and civilian personnel deployed to carry out the intervention, and the citizens of the intervening state(s) who will bear the financial costs, as well as other potential costs, of the intervention. Some of these implications relate to the enjoyment of certain important rights, such as basic human rights, the right to collective self-determination, and the right to sovereignty.

Since different answers to the question of whether or not AHI is permissible would have different implications, and these different implications would have wildly different moral implications, if we want to determine when intervention is morally acceptable, it is essential to arrive at that answer to the question which guarantees the optimal outcome with respect to justice. It does not suffice to simply accept the current legal status of AHI and proceed to think about intervention on that basis. Rather, it is necessary to question the position of international law on humanitarian intervention. As Tesón (2014:61) astutely observes, the moral status of AHI and its status under international law may differ. Thus, from the perspective of justice, the claims of some legal scholars, such as W. E Hall (1880:284-288), that the permissibility of

humanitarian intervention should be addressed solely from a legal positivist perspective are unconvincing and, I might even add, dangerous.

Even if one accepts this justification of the normative character of this study, it is still possible to object that the normative issues surrounding AHI have already been resolved. For example, T. Weiss argues that after the achievement of a high level of normative consensus in the form of the R2P norm, the most contentious issues that remain with regard to the use of force for humanitarian purposes are the operational ones (2012:133). I disagree. Although R2P enjoys overwhelming normative support, it would be a mistake to think that the normative questions concerning AHI have all been successfully addressed. For example, a close analysis of the operational problems that plague the international community's efforts to implement the R2P doctrine (relating mainly to a lack of political will and capacity) reveals that these are at least partially the product of disagreements with respect to some normative issues.

More specifically, the main normative tension which is at the heart of the problem of AHI is not yet fully resolved – the tension between the allegedly conflicting values of sovereignty, self-determination and communal integrity, on the one hand, and the right of citizens to be free from mass atrocities and severe human rights violations that result from government activity, omission or failure, on the other hand. Many countries, particularly in the Global South, continue to express concerns that the recognition of a right to AHI would undermine their final line of defense against neo-imperialist agendas – sovereignty – and allow infringements on their right to collective self-determination (Bhatnagar, 2016; Ayoob, 2002:84– 85). The present study examines the relationship between these two clusters of values and assesses their relative weights.

With respect to the empirical part of this thesis, empirical analysis is used in two ways. First, historical examples are used to illustrate certain normative points in the chapters where the theory of permissibility is developed. Second, in order to illustrate how this theory is to be applied in practice, three cases studies are explored in depth – Bosnia (1993), Libya (2011), and Iraq (2003).

4. Main argument

This thesis puts forward a rights-based theory of the permissibility of AHI. What this means is that the value in relation to which permissibility is determined is that of human rights. There are two justifications for this. First, the rights and freedoms of individuals are of ultimate importance in politics (this is the liberal view of politics). It would be counter-intuitive to argue that political structures and institutions or even collectives are valuable in themselves. Rather, their moral status is derived from the benefit they bring to individual persons. Second, a rights-based framework enables us to compare the moral weight of values which would otherwise be incomparable. It is necessary for the moral weight of states, political communities, and international peace to be brought down to a common denominator – such as the value of human rights – in order to make it possible to compare them and assess their relative importance[12].

In essence, the theory developed in this study holds that *the permissibility of AHI varies along a sliding scale, on which permissibility declines in probability as one moves through the three forms of AHI – humanitarian assistance, military rescue, and transformative occupation*. There are four main steps to my argument. First, I demonstrate that AHI is not impermissible in principle by refuting the three main principled objections to it. Second, I show that the permissibility of an AHI is determined by three factors: 1) it implications for international peace and stability; 2) its impact on the enjoyment of the right of political communities to collective self-determination; 3) its performance under the traditional *jus ad bellum* criteria of Just War theory. On the basis of these determinants, I develop an account of the precise conditions for permissibility. Third, I demonstrate that it is possible to distinguish between three forms of AHI – humanitarian assistance, military rescue, and transformative occupation. Fourth, I show that each of the three forms of AHI tends to fare differently under the conditions for permissibility, in fact, permissibility tends to become less probable as one moves through these three forms.

[12] From the perspective of the three main approaches to international political theory - international moral skepticism, the morality of states, and cosmopolitan morality (Beitz, 1979:405-409) - the rights-based theory constructed here follows the logic of cosmopolitan morality.

The subsequent chapters follow the order of the four main steps of my argument given above. I conclude by looking into the implications of the theory for the legality of AHI and explore the possibility of reforming international law so as to narrow the gap between the moral status and the legal status of AHI.

5. An interdisciplinary thesis

Lastly, I would like to briefly review the interdisciplinary character of the thesis. The two main disciplines on which I focus are political science, in particular political theory, and international law, including legal philosophy and positive law. I use the methods of political theory and moral philosophy in order to construct a theory of the permissibility of AHI. More specifically, I rely on a combination of two types of moral reasoning – deontological and consequentialist. The study enters the discipline of international law through the discussion of the legality of AHI and the possibility of reforming the rules of international law that govern intervention. International history plays a role in the empirical part of the thesis.

Chapter II: Armed Humanitarian Intervention is Not Impermissible in Principle

This thesis holds that the permissibility of AHI varies along a sliding scale: permissibility declines in probability as one moves from humanitarian assistance, to military rescue, to transformative occupation. Thus, the thesis rests on the assumption that AHI is not impermissible in principle. In this chapter, I set out to defend this background assumption. I will do so by addressing the three main principled objections to AHI: from pacifism, international law, and communitarianism, respectively. I will demonstrate that AHI is not impermissible in principle by showing that these objections are either invalid or apply only in certain cases.

1. The principled objection from pacifism

One of the main principled objections to AHI comes from the tradition of pacifism. Absolute pacifists argue that AHI is morally impermissible because war is never permissible (Brown, 1915:59; Martin, 1974:439)[13]. Their argument rests on two premises: life is inherently valuable, and war is highly destructive of persons, property, and the environment (Brown, 1915:64). These premises are, in my view, correct. However, the conclusion which pacifists draw from these premises – that war is never permissible – does not follow. The problem with this conclusion stems from the fact that pacifists rely on pure deontology as a method of moral reasoning, which leads them to completely ignore consequences.

[13] It is important to emphasize that this position is espoused only by "absolute" (or "extreme") pacifists. Pacifism is a diverse philosophical tradition and there are various "brands" of pacifism that do not maintain that war is never justifiable, for example liberal pacifism (Stevenson, 1934:437,449; Buckham, 1916:89).

Deontology, as a theory of the right, maintains that values (or goods) ought to be honoured – by acting in ways which respect these values – regardless of what overall consequences this would create in terms of the value (Heinze, 2005:171). By contrast, consequentialism holds that values ought to be promoted – by acting in such a way so as to maximize the amount of the value produced in any particular situation (ibid). In the political world, the tension between deontology and consequentialism has been famously formulated by Max Weber as the choice between following an ethic of conviction (*Gesinnungsethik*) or an ethic of responsibility (*Verantwortungsethik*) (Weber, 1919).

Observing the precepts of an ethic of conviction at all times leads to a disregard of political realities. The practical application of pure deontological reasoning in international affairs, particularly with respect to issues of war and peace, would in many cases lead to more violence and destruction than would reliance on a balanced combination of deontological and consequentialist reasoning. The absence of an AHI, on the basis of a deontological conviction that military intervention is always wrong, in the wake of a severe humanitarian crisis – that could otherwise have been prevented through the use of force – is a classic example of such a scenario. Thus, it is illogical and self-contradictory for pacifists to accept the premises that life is inherently valuable and that war is destructive of life and yet to conclude that force should never be used.

The preoccupation of absolute pacifists with purity of motives has caused them to be subjected to the criticism that, for the sake of "keeping their own hands clean", they would allow for de facto more evil to occur (Hoffmann, 1981:46, Brown, 1915:59; Stevenson, 1934:440). That the argument advanced by absolute pacifists is incoherent is also demonstrated by the fact that it leads to the rather absurd conclusion that the use of force in self-defense is never permissible. This conclusion is highly problematic, particularly in light of the proposition that the use of force by an assailant renders them morally liable to attack (McMahan, 2005:7-8).

While absolute pacifism is worthy of philosophical discussion, I am skeptical as to whether this doctrine can make any real contribution to the field of applied ethics – to which the question of the morality of AHI pertains. No moral theory of international

politics can be oblivious to political realities and consequences in the way that absolute pacifism would demand. However, while the pacifist objection to AHI is invalid, its premises are nonetheless correct. But rather than inferring that war is never permissible on the basis of these premises, it would be much more reasonable to instead draw the weaker inference that there ought to be merely a strong moral presumption against war. Indeed, this presumption underpins the entire tradition of Just War theory (Walzer, 1977:86). Because of the existence of this presumption, the burden of proof therefore lies with those who argue that the use of force in a particular case would be permissible.

2. The principled objection from international law

The principled objection made from the perspective of international law maintains that AHI is impermissible because it is illegal under international law and the latter ought to be observed at all times. This objection takes two different forms: in one, the argumentation rests on deontological reasoning, while in the other, on consequentialist. I will address these in turn.

2.1. The argument from deontology

According to the first version of the objection from international law, AHI is impermissible because it is illegal under international law and *justice* requires that international legal norms be strictly observed. There are several problems with this argument. First, it is not at clear that AHI is illegal under international law. Second, even if we were to accept this claim, it would still not follow that carrying out AHI would be unjust at all times. The requirements of legal justice, on the one hand, and those of justice as understood in morality, on the other hand, may stand in conflict. Without becoming embroiled in deep discussions about which account of justice is preferable, I will briefly discuss the main issues surrounding the conceptualization of justice in

international law and, in relation to this, the moral quality of international legal norms[14].

International law is based on the doctrine of legal positivism[15], which avers that the formal sources of international law are those acts that are created through the direct or indirect expression of the will of states (Ago, 1957:698,701; Sellers, 2012:374). The fact that states are often more concerned with self-interest and political expediency than with moral standards of justice suggests that the legal norms to which they consent are not necessarily always "good" or "just". In fact, legal positivists do not pretend that it is otherwise – they argue that the content of particular rules may be problematic, but that if they are legally valid (i.e. enacted in accordance with accepted legal procedures), they are morally obligatory (Holzgrefe, 2003:35-36)[16].

The main argument put forward in order to justify this claim is that international law – at least its positivist dimension – reflects the logic of social contractarianism[17]. According to this logic, it is the actual (overt or tacit) consent of states to legal norms that makes those norms binding. However, the notion that the consent of states to particular norms thereby binds the whole citizenry to these norms is problematic. This is particularly so given that the majority of states are not democratic (though formal democratic institutions are present in many states, substantive democracy is mostly lacking), and so a decision by the state to consent to some particular norm may not even reflect the views of the majority of the citizenry. Legal positivists could respond that it is not the actual consent of states that makes legal norms binding but rather hypothetical consent. According to this version of social contractarianism, norms are morally obligatory if free, equal, rational, and informed agents *would* consent to them, given the

[14] I do not intend to argue that the prescriptions of legal justice and moral justice are profoundly different. Indeed, if their prescriptions were very dissimilar, laws would be ineffective as they would require individuals to act against their basic moral intuitions.

[15] It may be objected that international law is based not only on positivism, but also on natural law and process theory, which "infuse…[it] with plenty of moral content" (O'Connell, 2009:385-386). However, there are no general principles of law or peremptory norms (*jus cogens*) that address the problem of the use of force to protect the innocent. Thus, the governance of AHI appears to be left to the positivist aspect of international law.

[16] Such arguments have led some scholars to criticize positivism for being an amoral doctrine. For example, see: Gardner (2001:199).

[17] As a moral theory about the origin of moral norms, contractarianism holds that what makes norms binding is the mutual consent of the people who are subject to them (SEP, 2017).

opportunity to do so (SEP:2017). There are strong arguments to support the position that a rule allowing for AHI in certain cases would be agreed to by free, equal and rational individuals and thus would meet the criterion of hypothetical consent[18].

For all these reasons, it can be concluded that this version of the objection from international law is unconvincing. Much more convincing is the argument that it is not justice but *stability* that requires the observance of international legal norms, and it is to this argument that we now turn.

2.2. The argument from consequentialism

With respect to this version of the objection from international law, it is possible to distinguish two separate arguments. According to the first argument, AHI is illegal under international law and its occurrence would threaten international peace and stability by *breaking* the rule prohibiting the use of force. The second argument addresses the possibility of allowing AHI under international law – by either stretching or modifying existing legal rules. It holds that the legalization of AHI would threaten international peace by *weakening* the norm on the non-use of force.

The first argument reiterates the claim that AHI is illegal under international law, but, unlike the argument from deontology examined above, it holds that it is *stability* that necessitates the observance of international legal norms. This argument follows the logic of rule-utilitarianism. Rule-utilitarians argue that an act is just when the observance of the rule which would permit or require this act would maximize utility (Holzgrefe, 2003:21-24). This argument from international law reflects rule-utilitarian reasoning because it rests on the assumption that full compliance with international legal norms would bring about the most utility: the utility that might be gained through an act which is contrary to international legal rules – such as carrying out an AHI – would be insignificant in comparison to the disutility that would come about if the system of international law did not exist.

[18] For a detailed discussion, see: (Holzgrefe, 2003:28-32).

The argument develops as follows: AHI is illegal under international law; thus, its occurrence would be perceived by states as a violation of the norms of non-intervention and non-use of force; the *breaking* of the rule prohibiting the use of force would in turn lead to an unraveling of the international legal system; with the international legal system dysfunctional, international order and stability would crumble and international peace would be destroyed[19].

The logic of this argument is compelling. If the rule prohibiting the use of force is perceived to be broken, this might indeed have detrimental consequences for the international legal order. Not every illegal act could lead to an unraveling of the system of international law but this particular rule is at the very centre of the system. One of the main purposes of public international law is to regulate state behavior, in particular the resort to the use of force, and thus to create important international public goods, such as a basic degree of security and predictability (Moir, 2010:4; Farer, 2003:88). Severe violations of the rule prohibiting the use of force, if they were to remain uncondemned and unpunished, would lead to a loss of trust in the authority of international law and its ability to provide the international public goods that justify its existence. This may lead states to take the law in their own hands, for example by using force for the purpose of deterrence or retribution. Such an escalation of counter-interventions, if it were to occur, would indeed endanger the very existence of the international legal system[20].

The next step of the argument is that if the international legal system is seriously destabilized or becomes dysfunctional, this would endanger international peace and stability. I find this final step of the argument compelling and will respond to a criticism that has been directed against it. Buchanan (2003:147-148) objects that even if the international legal system were to unravel, it is neither certain nor likely that this would

[19] For a defense of this position, see: Ayoob (2002:92-93).

[20] It is possible to object to this step of the argument by pointing out that breaking the norm of the non-use of force would be likely to have detrimental consequences only if it remains unpunished. The UN system of collective security is in place precisely in order to condemn, police and punish such transgressions. However, such an objection would overestimate the effectiveness of the system of collective security. The UNSC - the organ responsible for managing collective security – is dominated by the five permanent members; these P5, perhaps with the exception of China, have been the most interventionist states, particularly in the post-Cold War period (Kreps, 2008; Curtis, 2003). The fact that those states that have a decisive voice when it comes to ascertaining and responding to state aggression are the very actors that are most likely to engage in intervention makes effective punishment for unlawful AHIs difficult.

lead to international chaos and violence. He points out that transnational economic connections and transnational society could be strong enough to maintain international stability (ibid). However, the importance of international law for international order and stability is much greater than Buchanan allows for.

International law is the main instrument for managing what is essentially a self-help system. It may be objected that the international system is no longer characterized by self-help as the increasing institutionalization of the international order is transforming the anarchical system into a non-anarchical one. However, it is important to recognize that, even if such a transformation is indeed under way, the driving force behind it is international law. The international institutions that manage anarchy are all based on public international law. Critics may object that even if the system of international law were to collapse, its socializing effects have already transformed states' identity in such a way that, if brought back to anarchy, states would no longer respond to it by resorting to self-help. In theory, such a transformation of identity is possible: constructivists argue that self-help is only one possible outcome of international anarchy, and whether states resort to self-help or not depends on their perceived identity, which in turn is determined by historical experience (Wendt, 1992:392-395).

However, even though such a transformation of identity might have occurred to some extent on a regional level (for example among the member states of the EU), it can be argued with certainty that it has not taken place on a global scale. For mistrust – a legacy of past experience – remains a central characteristic of the international system. It is through the institution of international law that mistrust and its potentially destabilizing implications are managed. Buchanan's proposition that transnational links would be enough to maintain international peace and stability appears too optimistic. States remain loci of power in important ways – they have control over the methods of war and, in the absence of international law, transnational economic links and civil society could hardly prevent them from resorting to war when they feel threatened.

So far, I have established that this second version of the objection from international law is indeed compelling. However, the objection need not always be valid. This is so because its premise need not always be true. The premise on which the objection is

based is that AHI is illegal and, thus, it would be the perception of the rule prohibiting the use of force being *broken* that would trigger the negative effects outlined above. One reason why this premise need not be true in all cases is that different forms of AHI may enjoy different respective legal statuses. A distinction can be made between legality and legitimacy and, while intervention may be illegal, it may nevertheless be legitimate (Farer, 2003:66-68). The vagueness surrounding the legal status of AHI undoubtedly influences perceptions as to whether an act of AHI constitutes a violation of the norm prohibiting the non-use of force. As will be demonstrated in chapters V, VI, and VII, some forms of AHI may be perceived as more legitimate than others. The occurrence of those forms that enjoy a greater degree of legitimacy would be less likely to engender a perception that international legal rules are being broken. A second reason why this premise need not always be true is because it is possible, at least in theory, to revise the legal norms that regulate intervention so as to legalize AHI. Thus, the objection does not render AHI impermissible in principle because it may not apply in all cases.

The second argument from international law that is based on consequentialist reasoning could be put forward as an objection to the above claim that the different forms of AHI may enjoy differing degrees of legitimacy and that AHI could be made legal. The argument goes as follows: allowing for AHI – either by stretching or modifying existing legal rules – would threaten international peace and stability by *weakening* the norm on the non– use of force. If legal rules are stretched so as to allow for AHI, this would create dangerous precedents and lead to an increase of the use of force internationally. If legal rules are modified so as to make AHI legal, it would open the floodgate to more interventions and again increase the use of force and endanger international peace[21].

It is a valid concern that allowing for AHI would make it possible for states to resort to the use of force more often. However, it is questionable whether the actual number of AHIs would increase. First, even if AHI were to be legalized, for an intervention to be allowed in a particular case, it would have to meet a number of stringent requirements of permissibility. Second, even if an AHI were to meet these requirements, states could be reluctant to intervene due to concerns about resources, security or prestige. (Tesón,

[21] For example, see: Ramsbotham (2011:278-279).

2003:113). Thirdly, even if we were to suppose that legalizing AHI would result in more actual interventions, this would not necessarily lead to an increase of the international use of force. Some forms of AHI use force to a much lesser degree than others. Thus, it may be possible for some forms of AHI to be legalized without fear that, if their occurrence were to increase, international peace would be endangered.

3. The principled objection from communitarianism

"Communitarians" are thinkers on the left side of the political spectrum who espouse the value of collective self-determination and vehemently oppose imperialism and neo-imperialism. They maintain that AHI is impermissible because the state rights it violates have a moral value – they protect the right of political communities to collective self-determination. I will qualify my response to the communitarian objection to AHI in the following way. There are different versions of the doctrine of communitarianism; the one that will be tackled here is what is known as "weak" communitarianism. For "weak" communitarians, the right to collective self- determination is grounded in the rights of individuals[22]. For lack of space, I will not be able to address the objection from "strong" communitarians. Moreover, I find their position much less convincing as it seems to espouse that collectives have an inherent value and rights of their own that are independent from the rights of individuals. Therefore, I will limit my inquiry to what I hold to be the more compelling version of communitarianism, namely, "weak" communitarianism.

In this section, I will advance my own argument with respect to the right of political communities to collective self-determination and its implications for the legitimacy of states and the permissibility of AHI. In the course of developing my argument, I will introduce and address the position of the most influential proponent of "weak" communitarianism – M. Walzer. My argument unfolds as follows: I accept the premise that political communities have a right to collective self-determination which is derived

[22] This shows that "weak" communitarians have a strong liberal tendency relative to proponents of other versions the doctrine.

from certain individual rights. However, I contend that not every political society is a genuine political community and not every state or government is legitimate from the perspective of collective self-determination. Thus, not every political society enjoys the prerogatives entailed by the right to collective self-determination and not every state or government enjoys the rights entailed by statehood.

3.1. What makes a genuine political community?

Communitarians, most notably Walzer, argue that the social basis of the state is the political community and that it is the latter's right to collective self-determination that underpins state rights (Walzer, 1977:53,61; Walzer, 1980:210). However, I would like to distinguish between genuine political communities and "mere" political societies and argue that only some states are indeed based on the former[23]. A political community is a special type of political society. The distinguishing feature of a political society is the presence of the elements of political life: political values, structures, institutions, and processes (both formal and informal) that determine how the society is to be organised and governed[24].

What distinguishes a political community from any other political society is that in the former the elements of political life are *common* – they are intersubjectively perceived as common by the members of the political society and they also qualify as being common in some objective sense. For this to be the case, and thus for there to be a genuine political community, two conditions need to be met: first, there has to be a

[23] The idea to construct an account of what makes a genuine political community was inspired by Doppelt's objection to Walzer's theory of the rights of political communities that not every political society or de facto historic community is a "true" political community (Doppelt, 1978:18-19).

[24] This use of the term "political society" should be distinguished from its use by poststructuralists. For the latter every society is political because the political is defined as the presence of power relations and such relations exist in all societies and indeed in all human associations. However, the power relations that postmodernists examine are deeply embedded in society and taken for granted by individuals (for example, structures that define the meaning of truth and normality). By contrast, in a political society, as the term is used in this paper, power relations are more or less visible, easily identifiable and consciously constructed and shaped. Power in a political society is consciously wielded, while in a postmodernist society the structures of power are compared to a spider's web with no spider (Cumings, 1999:74).

shared sense of common belonging among the members of the political society; and second, the political society has to guarantee respect for a number of basic human rights that enable individuals to meaningfully participate in the life of the collective. It is the second condition that is controversial and that is also of central importance to the theory of permissibility developed in this thesis. Thus, in the remainder of this subsection I will focus on the defense of this second condition.

The first condition necessary for there to be a genuine political community – a shared sense of common belonging – is foundational of any community. Parekh (1999:449) points out that there are two dimensions of the sense of common belonging to a community. First, individuals must feel that *they* belong to the community, which involves feeling a part of it, seeing it as their own, feeling a strong sense of commitment to it, and enjoying a special relationship with it (ibid). Second, individuals must feel that *the community* belongs to them – that they are entitled to make certain claims on it, that it accepts them as its valued members and feels protective about them (ibid)[25]. Importantly, Parekh emphasizes that these two aspects of belonging are "integrally related and neither can be sustained in the absence of the other" (ibid). Indeed, for there to be a sense of common belonging, both aspects need to be present. This is so for two reasons.

First, even if a person feels a sense of belonging, he or she cannot be deemed to belong to a community unless the other members of the community also accept him or her as a rightful member. In this sense, the sense of common belonging characteristic of any community is an inter-subjective experience. Second, a person who is systematically rejected by a community is very unlikely to feel a sense of belonging to that community. For this reason, individuals or groups that suffer under oppressive socio-political structures could hardly feel accepted by the larger whole as valuable members and thus it would be unlikely for them to feel a sense of belonging to the community. Therefore, as difficult as it is to ascertain or measure in practice the extent to which a sense of common belonging exists in a political society, it is plausible to suggest that in oppressive political societies this sense of common belonging is likely to be lacking. As a

[25] Emphases found in the original text.

sense of common belonging is a necessary condition for there to be a political community, an oppressive society is unlikely to be one.

Critics may object that it is impossible to make such judgments about the loyalties of other persons, in particular when they are members of societies whose culture and traditions are very different from one's own. Indeed, there may be truth to such an objection as individuals and groups who are denied some of their basic human rights may nevertheless feel a sense of loyalty and belonging to the community as a result of socialization processes which have profoundly shaped their views of themselves and their role in society. Nevertheless, there is another more compelling reason why an entity which does not respect the basic human rights of some of its members would not constitute a genuine political community.

The existence of a shared sense of common belonging entails that there is a shared perception by individual members that the elements of political life are common. To apply Parekh's analysis to the case of political communities, individual members feel that *they* belong to the community – they identify with and feel a commitment to the political values and goals embodied in the collective institutions and structures; they also feel that the *community* belongs to them – they believe that the political institutions work to protect their basic interests and feel that they are entitled to make certain claims on these institutions.

However, for a political community to be genuine, the elements of political life ought not only to be intersubjectively *perceived* as common by the members, but also to qualify as *being* common in some objective sense. What is meant here is that the elements of political life have to be a collective product – it has to be possible to reasonably attribute authorship of them to the individual members (Applbaum, 2007:383-385). The very reason why political communities are believed to be valuable is because their political culture and institutions could reasonably be said to be the common product of the collective endeavor of individuals who share a politically meaningful collective identity[26]. Moreover, it is for this reason that political communities can legitimately

[26] The collective identity in question ought to be politically meaningful because, as McMahan (1996:10) points out, not every type of collective identity can justify a right to political self-determination.

claim entitlement to negative rights against foreigners, in particular the right to non-interference in internal affairs.

I aver that for the elements of political life in a political society to qualify as common in this sense, it is necessary that the society allows for meaningful individual participation in the collective life. Only when it is possible for individuals to meaningfully participate in the life of a political society, can authorship of its institutions and culture be attributed to them. "Strong" communitarians may object that individual participation is not necessary for the elements of political life to be common. However, such an objection would reflect too "thin" an understanding of collective self-determination and would ascribe inherent value to collective processes. I agree with the view espoused by "weak" communitarians – that collective processes derive their value from the enabling role they play for the realization of certain individual rights.

According to Walzer, the individual rights that are served by the process of collective self-determination are "the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves" (1980:211). Theorists who have a more pronounced liberal tendency directly link the moral value of collective self-determination with respect for individual autonomy and self-determination[27]. In any case, the only form of collective self-determination which is morally valuable, and thus worthy of protection, is that which is an expression of individual autonomy and self-determination. Since collective self-determination is an expression of these individual rights only when there is the opportunity for meaningful individual participation in collective processes, it can be concluded that the latter is necessary in order for the elements of political life to qualify as being common in a sense meaningful enough to lend moral value to the process of self-determination.

I define the opportunity for meaningful individual participation as individuals being able to enjoy a degree of freedom with respect to the formulation and expression of their beliefs, opinions, interests and concerns and being able to have some influence on socio-political processes. I contend that for there to be the opportunity for meaningful

[27] For example, see: Philpott (1995:356-358**).**

individual participation, certain basic human rights ought to be respected by the community. These rights include the right to security and subsistence – also known as "socially basic rights" (Shue, 1996; Luban, 1980a:174) – and certain political, civil and social rights, such as the right to equality before the law, the right to own property, freedom of expression, freedom of movement, and the right to education[28]. These rights give individuals a basic degree of freedom so as to allow them to think and act with some independence within and with respect to their society.

The account of what makes a genuine political community formulated here is put forward as a critique of and an alternative to Walzer's conception of the political community. Walzer seems to equate the existence of a political community with the presence of "a common way of life" that is the result of a long period of "shared experiences, cooperative activity of many different kinds" (1977:53). As Doppelt (1978:19-20) points out, this is a profoundly empirical account because Walzer equates de facto historic communities with political communities. The mere fact that a society shares some form of common life – in the form of traditions, customs, history, and boundaries – is not a sufficient condition for there to be a genuine political community (ibid). Indeed, Walzer does not advance a clear theoretical account of the political community[29].

Walzer relies on the moral theory of social contractarianism, more specifically on the theory of the horizontal contract, in order to show the ethical underpinnings of the socio-political relations established among the members of a political community (1980). According to the theory of the horizontal contract, it is consent that is the source of the political rights and obligations of the members of a political community (Tesón, 2011:192– 194; Luban, 1980a:167). According to Walzer's account of the horizontal contract, consent is understood as being "of a special sort" – manifested through

[28] This is not an attempt to construct an exhaustive list of the rights that need to be in place in order for there to be the opportunity for meaningful individual participation in the collective life. What is more, some of these rights have multiple aspects (such as the right to freedom of expression) and further research is necessary in order to determine which of these aspects are essential for meaningful individual participation and which are not.

[29] J. S. Mill's account of the political community is even more minimalist. He argues that the societies underpinning states should be treated as self-determining communities (in Walzer, 1977:87), which effectively amounts to defending a presumption that every political society is a political community.

participation in the collective life (1980:211). Thus, for Walzer the horizontal contract is a "metaphor for a process of association and mutuality" (1977:54).

However, Walzer's notion of consent is deeply flawed and it cannot support a legitimate horizontal social contract. It is very minimalistic in the sense that it does not outline any requirements as to the terms of social participation. Doppelt (1978:21-22) brilliantly observes that is essential to distinguish between that social participation of individuals or groups which is "based on force, coercion, bare material survival, ignorance, or blind habit" and that which involves a degree of freedom sufficient enough to approximate "a meaningful sense of consent". Because of unfair and unequal terms of participation, the absence of resistance or rebellion cannot be deemed to signal consent to the dominant socio-political order (ibid)[30].

To conclude, political societies which do not respect the basic human rights that are necessary for there to be an opportunity for meaningful individual participation in the collective life, cannot be rightfully regarded as genuine political communities that enjoy a right to collective self-determination. I do not argue that for a political community to deserve the name its political values, structures, and institutions have to be of a particular kind. I only argue that there has to be minimal justice in the form of basic human rights that enable meaningful individual participation. If those are present, the right to self-determination can be rightfully granted. Moreover, if the other condition for the existence of a genuine political community – a shared sense of common belonging – is also met, this right *ought to* be granted. This is required by respect for individual autonomy and self-determination.

3.2. What makes a state legitimate from the perspective of the right to collective self-determination?

[30] Luban (1980b:394) expands on the critique of Walzer's use of social contract theory by pointing out that Walzer misses out a number of elements required for a legitimate "social contract", such as reciprocity and formal equality of parties.

From the perspective of social contractarianism, if the horizontal contract is the origin of the rights and duties that the members of a political community have with respect to one other, the vertical contract is the source of the entitlements and obligations that citizens have toward their state (Tesón, 2011:192-194). According to the communitarian interpretation of the theory of the vertical contract, a state is legitimate from the perspective of collective self-determination if its citizens consent to being governed and represented by the state, in other words, to having the state function as a vehicle for their collective self-determination (Luban, 1980a:168; Beitz, 2010:336-337). However, not all states could be legitimately regarded as vehicles for the collective self-determination of the political community underpinning them and thus not all of them would qualify as legitimate under the communitarian view. Walzer (1977:53) himself acknowledges that the state is an instrument for protecting the common way of life of the community underpinning it and when it fails to do so (or when there is no common life in the first place) its rights cannot be morally defended[31].

What conditions need to in place in order for a state to be legitimately regarded as a vehicle for the collective self-determination of the political community underpinning it? According to Walzer, a state is legitimate if there exists "a certain "fit" between the community and its government" – if the former is being governed "in accordance with its own traditions" (1980:212,214). The author argues that foreigners cannot know if such a "fit" exists, therefore, they are morally required to treat all states as presumptively legitimate (1980:212-214; 1977:57,90)[32]. This has crucial implications for the permissibility of intervention – AHI would only be allowed in cases where the absence of a "fit" is "radically apparent", which for Walzer is the case only when a state

[31] Walzer is wrong to argue that when there is no common life (in other words no political community) underpinning the state the rights of the state cannot be morally defended. Even in the absence of a common life, the rights of the state can be morally justified on the grounds of domestic order and human rights as well as international peace and stability. However, it would be correct to argue that if there is no political community the rights of the state cannot be defended from the perspective of collective self-determination.

[32] Walzer argues that state legitimacy has a dual reference: domestic and international legitimacy should be seen as separate. He points out that the implication is that a state can be presumptively legitimate in international society and actually illegitimate at home (1980:214-216).

engages in enslavement[33], massacre, or mass expulsion of part of its population (1977:90,101; 1980:214,217-218).

Walzer's position is criticized for accepting as legitimate not only undemocratic governments but also illiberal or tyrannical governments which deny their citizens basic personal and civil liberties (Doppelt, 1978:6-8; Beitz, 1979:416,422). From the perspective of the theory of political communities developed in this thesis, Walzer's position fails to recognize that self-determination is only valuable and thus worthy of protection when it is an expression of individual autonomy. If a state denies the human rights that are necessary for meaningful individual participation in the collective life, it cannot be regarded as legitimate from the perspective of collective self-determination. Contrary to Walzer's objection directed at his opponents (1980:224), I do not argue that a state has to be a liberal democracy in order to enjoy legitimacy; however, it does have to be minimally liberal and democratic. Of course, the consent of the people is still a requirement for a state to be legitimate from the perspective of collective self-determination; thus, even if the human rights in question are guaranteed, a state would be illegitimate if it does not enjoy the consent of its citizens[34].

Walzer's theory of the "fit" between a community and its government as the source of the latter's legitimacy seems to disregard the importance of meaningful consent as the only legitimate source of political obligation. He argues that if a society is governed in accordance with its traditions, the state would be legitimate. However, the mere fact of being born into a particular society – which is undoubtedly a morally arbitrary event – cannot morally bind a person to the structures and institutions of the society. Only in the presence of provisions that protect the basic human rights that enable at least minimal social and political participation, can the existence of meaningful consent be assumed. Walzer may object that the citizens of a state have a right to rebel if they do

[33] By enslavement Walzer means legal enslavement. However, his does acknowledge that de facto slaves are in the same position as legal slaves and thus intervention on their behalf would be justified (1980:217-219). It is a major inconsistency in his argument that he contends that "ordinary oppression" (anything short of enslavement, massacre, or forced expulsion) cannot justify intervention, but does not explain how "ordinary oppression" is different from de facto slavery in the more severe cases of oppression.

[34] As to what evidence is sufficient to demonstrate that a government enjoys the consent of its citizens, I do not have space to address this issue here. But I agree with Luban (1980a:170,180) that clear evidence can exist that a state does *not* enjoy consent, such as mass protests, open insurrection, and state repression.

not consent to their government (1980:215). However, as Luban (1980b:395-396), points out, under a tyrannical government rebellion is relatively unlikely because people are afraid and their ability to organize is constrained.

In conclusion, the objection put forward by communitarians would not apply in every case. In addressing the three main principled objections to AHI, I have demonstrated that they do not render AHI principally impermissible. The objection from absolute pacifism is invalid, while those from international law and communitarianism would apply only in some cases while not in others. However, the concerns expressed by the last two objections, namely that AHI may have a deleterious impact on international peace and stability and the enjoyment of the right of political communities to collective self-determination, do establish a strong presumption against intervention. Therefore, the permissibility of AHI can only be determined on a case-by-case basis.

Chapter III: The Determinants of Permissibility

It has been established that the permissibility of AHI ought to be evaluated on a case-by-case basis. In this chapter, I develop the second step of my argument which holds that the permissibility of any AHI is determined by three factors: 1) the intervention's implications for international peace and stability; 2) its impact on the enjoyment of the right of political communities to collective self-determination; 3) its performance under the traditional *jus ad bellum* criteria of Just War. Importantly, all three determinants are to be understood in terms of *probability*, evaluated on the basis of the information available at the time when the intervention is being deliberated. In the following sections, I justify my claim that it is these three factors that determine permissibility and outline clear conditions that need to be met in order for an AHI to be permissible. Importantly, an AHI ought to be permissible under each of the three determinants in order to enjoy overall permissibility.

The theory of permissibility developed in this thesis is an example of Just-War theorizing: first, it accepts that there is a strong moral presumption against military intervention, but holds that intervention is nevertheless permissible if it meets certain criteria; second, it relies on a combination of deontological and consequentialist reasoning – an approach which is typical for the Just War tradition[35]. The theory is novel in that it combines traditional Just War criteria for permissibility with criteria derived from the principled objections from international law and communitarianism.

[35] From the perspective of Just War theory, the justice of war can only be evaluated on the basis of moral reasoning which combines deontology and consequentialism (Hoffmann, 1981:28-29,41-43; Walzer, 1977:xvi). Interestingly, every Just War theorist tends to have a preference for one of the two methods of reasoning – for example, Walzer has a stronger preference for deontology (see Walzer, 1977:106-107; 2004:38-39), while Heinze – for consequentialism (see Heinze, 2005).

1. Implications for international peace and stability

This thesis argues that the value in relation to which permissibility ought to be determined is that of human rights. The three factors outlined above are regarded as determinants of permissibility because of their relevance to human rights. International peace and stability is essential for human rights and well-being for reasons that I take to be self-evident. Therefore, a theory of the permissibility of AHI ought to take into account the importance of protecting this value. From the perspective of the first determinant of permissibility – an AHI's implications for international peace and stability – it is possible to formulate the following conditions for permissibility. A necessary (but not a sufficient[36]) condition for an AHI to be permissible is that:

1) *An AHI is not likely to have a detrimental impact on international peace and stability*

or

2) *an AHI is likely to have a detrimental impact on international peace and stability, but another value – which the AHI aims to and can be reasonably expected to protect – overrides the value of international peace and stability*.

In order to assess the impact of an AHI on international peace and stability, two relevant factors need to be examined: the degree of damage that can ensue as a result of the intervention and the probability that this damage will occur. With respect to the second condition outlined above, it is unclear under what circumstances it could be met in practice. The value of international peace and stability is of enormous significance from the perspective of human rights and it is doubtful that it could be overridden by

[36] It is not a sufficient condition because, as explained in the beginning of this chapter, in order to be permissible an AHI ought to meet the requirements of each of the three determinants of permissibility.

another concern. Nevertheless, analytical rigour requires that this theoretical possibility be provided for.[37]

It may be objected that the implications of an AHI for international peace and stability should be subsumed under the *proportionality* requirement. However, it is important to keep the two requirements separate. As will be discussed in Section 3 of this chapter, only effects for which the intervention was a necessary causal factor ought to be counted toward *proportionality*. By contrast, an AHI's impact on international peace and stability is oftentimes a second-order or even a higher-order effect for which the intervention is only a contributing causal factor. Thus, subsuming the implications of an AHI for international peace and stability under the *proportionality* criterion would mean that in many cases important effects that an intervention has on international peace would not be considered. However, the value of peace is of critical importance and ought to be protected even in cases where the effects of an AHI that threaten it cannot be causally attributed to the intervention.

2. Impact on the enjoyment of the right of political communities to collective self-determination

As established in Chapter II, the self-determination of political communities is valuable and ought to be protected because it is an expression of the right to individual self-determination and autonomy. This determinant of permissibility follows deontological reasoning as it is concerned with the rights of individuals to have their autonomy respected. On the basis of the analysis developed in the previous chapter, it can be

[37] Some thinkers have expressed concerns that the value of international order and stability has been traditionally viewed as absolute (Spalding, 2013:6-9; Himes, 1994:85). They object that in some cases concerns for justice can override those for stability. A possible example is that of an intervention that seeks to uphold certain fundamental values, but which can have a negative impact on international stability. For instance, if a powerful state attempts to carry out genocide against a part of its population, intervention to prevent or halt this atrocity would be likely to destabilize the international system and even to cause a major war. Nevertheless, intervention might be justified in order to reaffirm the norm against genocide (which also has the status of *jus cogens*).

argued that for an AHI to be permissible, one of the following conditions (again, necessary but not sufficient) needs to be met:

1) *The target state is not legitimate from the perspective of collective self-determination*

In this case, the intervention would not violate the rights of the political community underpinning the state by infringing on the state's political sovereignty and right to non-intervention in its internal affairs, because the state would not enjoy these prerogatives in the first place. However, even if the state itself is illegitimate from the perspective of collective self-determination, it still needs to be established if there is a political community. If this is the case, the AHI would only be permissible if it intends to respect the rights of the political community[38].

2) *There is no genuine political community underpinning the target state*

In cases where there is no genuine political community underpinning the target state, there is no valid right to collective self-determination. Nevertheless, the people inhabiting the state do have certain entitlements that ought to be respected. The conditions for permissibility outlined here presuppose a distinction between the respective rights of states and political communities. Legitimate states enjoy a right to political sovereignty, territorial integrity, and non-interference in their domestic affairs (Walzer, 1977:61-62; Walzer, 1980:212). Political communities are entitled to collectively determine the nature and terms of their common life by constructing, sustaining and modifying common socio-political institutions, structures, and culture (Walzer, 1977:53-55; Doppelt, 1978:9).

In cases where there is no political community, an intervention ought to nevertheless respect the citizens' right to preserve their land and to not be subjected to foreign rule or

[38] A revised theory of *jus in bello* ought to include the following condition for the morality of an intervention: the conduct of an AHI has to respect the rights of the political community underpinning the target state, if such a community indeed exists.

hardships (Doppelt, 1978:8,24). These entitlements derive from individual rights relating to liberty and property[39]. Furthermore, it can be argued that the intervener(s) would also be prohibited from engaging in practices that constitute unjustified political paternalism. In the absence of a political community, the imposition of foreign political ideas and structures would be allowed from the perspective of collective self-determination. However, it might be prohibited by the requirement to respect *individual* self-determination and autonomy.

Paternalism is present when "A restricts B's liberty for B's own good" and, because it involves the restriction of an agent's freedom "for a reason that denies or discounts the importance of the agent's self-governance", it is regarded as a presumptive moral wrong (Applbaum, 2007:371-372). However, paternalism can be justified when the following three conditions are simultaneously met: the freedom of the agent is already impaired, the restriction of the agent's freedom is done for the sake of his or her future freedom, and the agent is likely to retrospectively endorse the paternalistic action (ibid:373). With respect to AHI, it is difficult to establish where the boundary lies between justified and unjustified paternalism. For example, the act of securing basic human rights by means of an intervention is likely to meet Applbaum's three criteria for justified paternalism. By contrast, the introduction of a Western-style liberal democracy would almost certainly constitute unjustified paternalism[40].

The conditions for permissibility outlined above rely on a clear distinction between the government, the state and the political community. In order to determine whether an AHI would be permissible from the perspective of this second determinant and, if so, under which condition (which would determine the additional constraints upon the intervener), it would be necessary to determine which of these three aspects of the body politic is the source of the human rights violations that triggered the intervention. This is so because, if the source of oppression is the society itself, a genuine political

[39] Some of these rights are also effectively recognized in international law. For example, the law of war prohibits the annexation of land by an occupying force as well as mistreatment of the inhabitants of the occupied territory (Roberts, 2006:582).

[40] In a similar vein, Beitz (1980:389-390) employs the thought experiment of using a "wondrous" Swedish chemical to transform the inhabitants of another country into Swedish-style social democrats. He argues that such interference would be impermissible because it would infringe upon "individual integrity" and "the right to be respected as a rational being" (ibid).

community cannot be deemed to exist. In some cases, it will be relatively easy to establish the origin of oppression – if it is the incumbent government, the state or the society. However, in others it would be much more difficult. Knowledge of history and the political culture of the society will be necessary in order to make this determination.

Any analysis of the origin of oppression would be complicated by the reality of the interaction between these three aspects of the body politic. Tyrannical governments typically use the apparatus of the state to further their own goals – they enact laws that are unjust, and often alter the political system so as to increase and perpetuate their power. However, through these acts they are likely to transform the state into one that is illegitimate from the perspective of self-determination. The state, in turn, exerts strong influence on society by promoting the values and norms that are embodied in its institutions, laws and policies. In this way, the state may influence the character of the political community. Thus, even if history shows that a society was a genuine political community before a particular regime came to power (in the sense that it respected the basic human rights required for meaningful individual participation), it might be the case that the rule of the regime transformed the political community into an oppressive political society.

It may be objected that tyrannical regimes emerge from society itself and thus the root of oppression is always to be found in society. However, this is not necessarily the case. For instance, there are historical examples of oppressive authoritarian leaders who came to power as a result of foreign-imposed regime change that deposed legitimate democratically elected governments (Curtus, 2003). Nevertheless, even when an oppressive regime emerges from within society and is not imposed from outside, it is still possible that the society is a genuine political community. In every society – including in those where there is overall consensus on the value of basic human rights – there are illiberal elements. Under certain circumstances these illiberal factions can seize state power.[41]

[41] With respect to the two conditions for permissibility outlined in this section, it would be important to consider if a situation may exist where an AHI would violate the rights of a political community, but intervening would nevertheless be permissible because it would seek to protect another value that would override the value of collective self-determination (analogous to condition 2, under determinant 1). However, such a situation cannot

3. Performance under the traditional *just ad bellum* criteria of Just War

Just War theory was first put together in the late Middle Ages by Christian thinkers and its initial purpose was to restrain two opposing impulses of Christianity – absolute pacifism and crusadism (Hoffmann, 1981:48-50). Despite its pronouncedly Christian origins, the theory became secular and nowadays it is the most widely accepted theory of the morality of war (Hurka, 2005:34). The traditional formulation of *jus ad bellum* encompasses the following six criteria: *just cause*, *right authority*, *last resort*, *proportionality*, *reasonable hope*, and *right intention* (Scheid, 2014:10-11; Coady, 2002:19,24-31). In this section, I explore the meaning of each of these criteria and the moral rationale behind them and assess their relevance for the permissibility of AHI.

Some scholars argue that the relationship between the traditional *jus ad bellum* criteria for permissibility should be seen as fluid rather than rigid (Fixdal and Smith, 1998:295). What this means is that even though all criteria ought to be met in order for an AHI to be permissible, there is not a solid threshold that has to be reached in order for a criterion to be deemed met. For example, in cases where there is a very strong *just cause*, such as when force is required to prevent or stop genocide, it may suffice that the criterion of *right authority* is only met to a minimal degree and unilateral intervention may be permitted. From the perspective of this position, it is possible to argue that the conditions for permissibility sometimes relate to each other like communicating vessels: the fuller the degree to which one of these conditions has been met, the less stringent some of the other requirements become. This interpretation of the relationship between the traditional *jus ad bellum* criteria for permissibility adds nuance and subtlety to the analysis of permissibility.

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exist in practice. Any value that would be significant enough as to be able to override the value of collective self-determination could only relate to the protection of certain individual rights that are more important than the individual rights protected by the right to collective self-determination. However, because of my "thick" definition of the political community, I find it impossible to imagine a situation where a genuine political community would exist and, at the same time, there would be violations of human rights that are important enough to override the human rights protected by the right to collective self-determination.

3.1. *Just cause*

The criterion of *just cause* relates to the goal of war. One of the shortcomings of contemporary Just War theory is that it disregards the need for a comprehensive theoretical account of *just cause* and focuses almost entirely on substance – the actual goals that could be pursued by means of war. Two such goals are typically identified – self-defense and defense of others against aggression (Fixdal and Smith, 1998:296). Some contemporary theorists of Just War have attempted to address this gap in the literature by putting forward theoretical accounts of *just cause*. The account that I find most persuasive is that of Jeff McMahan and I will apply it to the case of AHI.

McMahan distinguishes between a *just aim* and a *just cause*. A *just aim* is an aim that can be legitimately pursued by means of war (McMahan, 2005:6; McMahan and McKim, 1993:502). A *just cause* is a *just aim* that can justify the resort to war (ibid). In this sense, every *just cause* is a *just aim* but not every *just aim* is a *just cause*. McMahan's formulation of a *just aim* rests on the assumption that war always entails killing and maiming (2005:11). The author draws on the writings of traditional Just War theorists –who argue that *just cause* is found in an injury committed by those who are to be warred upon – in order to demonstrate that the concept of *just cause*, and in general that of *just aim*, has to be understood in connection to the idea of moral liability to attack (McMahan, 2005:7-8). Only individuals and collectives that are morally liable to attack can be targets of war (ibid). If individuals who are not morally liable to attack are nevertheless warred upon, this would constitute a serious moral wrong. The implication is that the aim to halt or redress only certain types of acts – which render individuals morally liable to attack – could constitute a *just aim* (McMahan, 2005:6-8)[42].

I accept the premise that an individual can only be targeted if he or she is morally liable to attack. It is difficult to answer the question of whether an AHI necessarily involves killing and the infliction of severe harm. As will be explored in Chapter V, humanitarian

[42] The requirement of moral liability to attack is an element that is absent in other authors' accounts of *just cause*. For example, Tesón (2014:66) argues that any "morally impermissible coercive act" performed by a government would provide a *just cause* for an intervention (the remaining criteria of *jus ad bellum* also have to be met for an intervention to be permissible).

assistance, as a form of AHI, can be carried out without any use of force except potentially in self-defense. However, the other two forms of AHI, in particular military rescue, involve a significant degree of force and thus are certain to involve killing and harming. Therefore, the claim that only types of acts that give rise to moral liability to attack can provide a *just cause* for intervention holds true in most cases.

An important question is what gives rise to liability to attack. McMahan emphasizes that liability to attack arises only with respect to those wrongs which war against the perpetrators would prevent or redress (ibid:8). This means that interventions aimed at punishing past wrongs would not be permissible from the perspective of *just cause*. Moreover, it is both acts of commission and omission that can give rise to liability to attack (ibid). Further clarifications ought to be made with respect to the conditions under which one's omissions can render one liable to attack. For example, in a society where one group is being severely oppressed, what is the responsibility of bystanders who have not directly caused the violence but do nothing to stop it? For reasons of space, I cannot address these questions here.

On the basis of this theoretical formulation of *just cause*[43], what are the specific types of human rights violations that could justify an AHI? An intervention which seeks to prevent or redress acts that constitute a violation of the rights to security and subsistence, for example killings, forced famines, torture, rape, ethnic cleansing, would certainly meet the criterion of *just cause*. This is so because violations of this sort would meet the two requirements for there to be a *just cause*: they constitute *just aims*: first, by committing them the perpetrators render themselves morally liable to attack; and second, they are violations severe enough to justify the resort to war.

An important implication of the requirement for moral liability to attack is that the protection of individuals from many other types of human rights violations would not provide a *just cause* for war. For example, in the previous chapter, it was established that the protection of those civil, political, and social rights that are necessary for

[43] McMahan is not clear as to what factors need to be present in order for a *just aim* to be "sufficient", i.e. to constitute a *just cause*. He simply defends his reasoning that such a distinction has to be made by giving the example of deterrence, which on his account could be a *just aim* but not a *just cause* (McMahn and McKim, 1993:502-503).

meaningful individual participation in the collective life could be legitimately granted from outside and such an act would not violate the right to collective self-determination. However, the violation of many of these rights could hardly be deemed to constitute a *just aim*; thus, the prevention or halting of these violations could not qualify as a *just cause*. This is so because the individuals and collectives that are morally responsible for the violation of rights such as the right to equality before the law, property, and education cannot be considered morally liable to attack. The type of moral wrong for which they are responsible is not serious enough to for them to forfeit their right not to be attacked[44].

One of the main merits of McMahan's account of *just cause* is the clear distinction it draws between *just cause* and *proportionality*. Because *just cause* should be understood to cover the *types* of acts that can justify the resort to war, the scale of human rights violations is irrelevant with respect to this particular criterion (McMahan, 2005:3-4). Scale matters only from the perspective of *proportionality*. This is why, in principle, even isolated violations of human rights could permit AHI. However, in practice, AHI to prevent or redress isolated violations would be extremely unlikely to meet the *proportionality* requirement and thus would be impermissible.

3.2. Proportionality

The *proportionality* criterion requires that the harmful effects of a war be proportionate to the good effects. *Proportionality* is a key criterion in the evaluation of both the permissibility and the overall justifiability of an AHI. When it is used in order to determine permissibility, *proportionality* is understood in terms of probability – based on the information available at the outset, how likely is it that an intervention will be proportionate? When it is used to evaluate the overall justifiability of an AHI, *proportionality* looks into the actual effects of an intervention and seeks to establish

[44] However, the protection of human rights that cannot provide a *just aim* can be promoted within the context of an intervention by non-military means. For example, if the use of force to carry out regime change is justified by the *just cause* to ensure respect for socially basic human rights, the interveners can go further and ensure the protection of property rights and equality before the law.

retrospectively if it was proportionate or not. The criterion of *proportionality* is much less straightforward than it may seem on the face of it. It is necessary to establish: first, what is meant by "proportionate"; second, what moral yardstick ought to be used to measure the moral quality of the effects of an intervention; third, which effects should count toward *proportionality*.

With respect to the first question, there is a variety of divergent interpretations of what it means for the harmful effects of war to be proportionate to the good effects. Interestingly, the majority of authors do not take this to mean that the good consequences of a war should exceed the bad consequences, but that the bad effects should not be *excessive* with respect to the good effects. For example, Lackey (1989:40) argues that the proportionality test would be met unless the war produces "a *great deal* more harm than good"[45]. To apply this understanding to the case of AHI would mean to argue that an intervention would be proportionate even if its bad effects exceed its good effects, as long as the former do not exceed the latter substantively. However, this thesis argues that permissibility ought to be assessed from the perspective of human rights (hence, a rights-based theory of permissibility) and thus all criteria for permissibility ought to be reframed from that perspective. It would be illogical to permit an AHI (whose aim by definition is to protect human rights) if it would result in more damage than good, measured in terms of human rights[46]. Thus, *proportionality* in the context of AHI is more properly understood as the bad effects of an intervention not exceeding the good effects.

The second question – relating to the moral yardstick that should be used to measure the moral quality of the consequences of an intervention – has already been partially answered. "Good" would be those effects of an intervention that promote human rights and well-being while "harmful" would be those that undermine these values either directly or indirectly. When assessing the amount of harm that an AHI has prevented or redressed , it would be important to consider the number of people who (would) have been deprived of their rights, the type of rights that (would) have been violated, and

[45] Similarly, see: Hurka (2005:34) and Zuo and Yunpeng (2007:285).
[46] This understanding comes close to Heinze's position (2004:547-548) who argues that the justice of humanitarian intervention ought to be evaluated through the framework of what he calls "utilitarianism of rights".

perhaps even the manner in which those rights (would) have been violated. Heinze (2004:548) demonstrates that the manner in which human rights are violated matters for *proportionality* by using the notion of Kantian respect. He emphasizes that "disrespectful" violations are even more harmful than violations that would inflict the same amount of actual suffering but would not violate the principle of Kantian respect: they infringe upon the permanent interests of mankind, for example by institutionalizing injustice and thus undermining the very concept of justice and its authority, or by undermining the moral principle that human beings have inherent moral worth (ibid).

The third question relates to the type of effects that should count toward *proportionality*. First, the consequences of an AHI that ought to be taken into account relate to the war as a whole, not only to the actions of the interveners (McMahan and McKim, 1993:510). For example, if an abusive government responds to an AHI by increasing the scale and morbidity of the atrocities it commits, this effect should be seen as a consequence of the war and counted toward *proportionality*. Second, only effects for which the intervention is a necessary casual factor ought to be counted in the *proportionality* test (McMahan and McKim, 1993:510-511). Effects for which the intervention is merely a contributory causal factor – and thus not a necessary condition for the effect to occur – are causally too remote to be counted by *proportionality* (ibid).

3.3. Last resort

Last resort (a.k.a. the requirement of *necessity*) holds that force ought to be used only when alternative means for achieving the *just cause* are not available (Fixdal and Smith, 1998:302). A critical question to be asked with respect to this criterion is whether it is actually necessary for alternative means to have been used in practice. Examining *last resort* in light of the broader theory of Just War – which is based on the premise that war is highly destructive and a strong case has to be made for it – reveals that the rationale behind this criterion is to minimize harm. The requirement of *last resort* is

independent of that of *proportionality* – even if an AHI meets the *proportionality* requirement (its bad effects do not exceed is good effects), if there are other means available for achieving the *just cause* that would be less destructive, it would be impermissible to use force.

Bearing in mind the purpose of the criterion – to minimize harm – it would be illogical to conclude that all alternative means ought to have been tried in practice before force can be used. In certain cases, exhausting all other means short of the use of force could result in more damage overall. For example, the use of alternative means may fail to achieve the *just cause*, while at the same time aggravating the crisis and making it necessary that a more aggressive intervention be used (more aggressive relative to the intervention that would have been sufficient to achieve the *just cause* had it been employed before those alternatives) (Coady, 2002:28). Moreover, some coercive means short of the use of force could in certain cases result in more relative harm. An example in this respect would be economic sanctions (ibid:29). To summarize, the most appropriate way of interpreting the meaning of the requirement of *last resort* would be that there ought to be no alternative means available that would be less destructive than the use of force and would enjoy a comparable probability of achieving the *just cause* (McMahan and McKim, 1993:524; Mouch, 2006:243).

3.4. Reasonable hope

The requirement of *reasonable hope* (a.k.a. "*reasonable prospects of success*") asks that there be reasonable grounds for believing that the *just cause* will be attained (Fixdal and Smith, 1998:303; Coady, 2002:29-31). McMahan and McKim (1993:506) argue that this criterion need not be discussed separately because it is closely linked to *proportionality* and *last resort* (it concerns the probability of war being successful – in other words, of it attaining the *just cause* in a proportionate and harm-minimizing way). However, for the purposes of clarity, *reasonable hope* should be discussed as a separate criterion of permissibility, while keeping in mind its close connection to *proportionality* and *last resort*.

3.5. Right authority

The criterion of *right authority* concerns the problem of who can rightfully resort to the use of force (Fixdal and Smith, 1998:291; Coady, 2008:260). The moral rationale behind the criterion is to ensure that force is employed only in cases it is permissible, as well as that it is used in a legitimate way (proportionately and for the purpose of the *just cause*). *Right authority* in the context of AHI has a number of aspects; by far, the most contentious of them is the question of who has the right to *decide upon* an intervention. The issue of who can legitimately *carry out* an intervention is seen as much less problematic (Himes, 1994:99).

Many authors argue that unilateral intervention (unilateral in the sense that it is decided upon unilaterally rather than collectively) is never permissible (Martin, 2005:450). Multilateralism is regarded as a necessary safeguard against the use of humanitarianism as a justification for self-interested interventions (Himes, 1994:99). Interestingly, Walzer does not share this position and argues that a group of states can act just as selfishly as a single state (1977:106-107). Even if unilateral intervention is more likely to be selfishly motivated, this does not make it immoral – as will be demonstrated in the next subsection, the motivation of the intervener(s) per se does not affect the morality of AHI. A more important question to ask is whether unilateral interventions are more likely to be non-humanitarian in their purpose – in other words, less likely to genuinely strive to achieve the *just cause*. Indeed, multilateral interventions – which are not only collectively decided upon by also collectively supervised, monitored and controlled – are much more likely to pursue the *just cause*.

Does this mean that unilateral intervention is never morally permissible? I tend to side with scholars who argue that, while a strong preference for multilateral intervention under the mandate of the UNSC should be affirmed, unilateral intervention may nonetheless be permissible in certain cases (Himes, 1994:98; Walzer, 1977:106). In situations where there is a danger of an imminent humanitarian catastrophe or where egregious human rights abuses are being committed, unilateral intervention may be morally acceptable.

3.6. Right intention

In traditional Just War theory, the requirement of *right intention* was understood as being of central importance to the justice of going to war (Rengger, 2002:358; Kemp, 1988:62). Within the contemporary intervention debate, many authors continue to insist that unless *right intention* is present, AHI would be impermissible (Fixdal and Smith, 1998:299-300). Importantly, traditional Just War theorists and a large number of contemporary proponents of the doctrine take the criterion of *right intention* to mean right motivation[47]. However, I argue that the motivation of the intervener(s) is of no relevance to the permissibility of AHI. Rather, the criterion of *right intention* ought to be understood as the existence of an intention to pursue the *just cause*[48].

There are strong arguments against the view that motivation is relevant to the permissibility of AHI. This view would lead to the conclusion that in cases where right motivation is weak or absent it would be impermissible to intervene. However, I contend that as long as an intervener is determined to pursue the *just cause*, the criterion of *right intention* would be met, even if the underlying motivation is self-regarding. It may be objected that it would be empirically impossible for an intervener to have a selfish motivation and a humanitarian purpose. However, the examples of India's intervention in East Pakistan (1971) and Vietnam's in Kampuchea (1978) would refute this objection. The motivation behind both interventions was, to a large degree, self-regarding – the intervening states were concerned about the massive refugees flows crossing their borders (Tesón, 2011:205-208). Nevertheless, the interventions had a humanitarian purpose – to put an end to the humanitarian crises in East Pakistan and Kampuchea, respectively (ibid). Furthermore, some authors argue that intervention is not feasible unless there is a degree of self-regarding motivations. In cases where AHI has been driven solely by humanitarian motives, it has been very difficult for the intervening state(s) to sustain popular support for the intervention at home, especially if

[47] For example, see: Parekh (1997) and Coady (2002:10-13).

[48] For a similar position, see: Bellamy (2004:216,225-227) who distinguished between motivations and intentions and argues that only the latter are relevant to the justice of an intervention; and Wedgwood and Dorn (2015:347) who aver that the criterion of *right intention* does not preclude the existence of ulterior motives as long as the aim of the intervention is "consistent with the wider interests of peace and international security".

the intervention involved casualties (Himes, 1994:101-103). An example in this respect would be Somalia (Himes, 1994: 102).

The purpose of this chapter has been to show that the permissibility of any AHI depends on three factors: its implications for international peace and stability, its impact on the enjoyment of the right of political communities to collective self-determination, and its performance under the traditional *jus ad bellum* criteria of Just War. Importantly, an AHI is morally permissible only when it meets the conditions for permissibility under each of the three determinants.

Chapter IV: Classifying the Forms of Armed Humanitarian Intervention

In this chapter, I develop the third step of my argument, which holds that it is possible to distinguish between several forms of AHI. The classification of the forms of AHI that I construct here is based on one main criterion: the purpose of intervention. I argue that, from the perspective of this criterion, it is possible to distinguish three forms of AHI: humanitarian assistance, military rescue, and transformative occupation.

The overarching goal of all forms of AHI is by definition humanitarian – to protect civilians. However, the protection that the different forms of AHI aim to provide differs in scope. The purpose of humanitarian assistance is to provide immediate relief to civilians. Thus, this form of AHI seeks to protect from the most severe effects of an ongoing humanitarian crisis. Military rescue aims to prevent an imminent humanitarian crisis or to end an ongoing one. Therefore, it seeks to provide full protection against the effects of a present crisis. The purpose of transformative occupation is to end an ongoing humanitarian crisis and to prevent its recurrence. Thus, transformative occupation aims to provide full protection from the effects of present as well as future humanitarian crises.

Because of their different purpose, the three forms of AHI tend to differ in terms of their temporal duration, level of political engagement, and the degree of threat or use of military force they employ. As will be demonstrated in the next chapter, the tendency of the forms of AHI to fare differently under these three indicators is closely linked to their tendency to differ in terms of their performance under the conditions for permissibility.

1. Humanitarian assistance

The purpose of humanitarian assistance is to provide immediate relief to civilians in the midst of a humanitarian crisis (Hoffmann, 1995:41). Humanitarian assistance can take the form of an intervention when the state within whose borders there is a humanitarian crisis refuses or fails to provide access for humanitarian workers to civilians in need. In such a case, the international community may choose to use coercion in order to get the state to allow access. A milestone in the evolution of humanitarian assistance as a form of AHI is UNSC Resolution 688, which was signed on 5 April 1991 and demanded that Iraq grant "immediate access" by humanitarian organizations for the purpose of delivery of aid (Himes, 1994:88). According to the definition of AHI used in the present study, humanitarian assistance comes to qualify as a form of AHI when it involves the crossing of the borders of the target state by foreign armed military personnel, or the threat or use of coercive air or sea power against the state. Three types of humanitarian assistance, as a form of AHI, are the most prominent: safe zones, safe havens, and no-fly zones.

The terms "safe zone" and "safe haven" are often used interchangeably, but there is an important difference between the two. Safe zones are created in areas where the victim population lives and their purpose is to protect civilians while allowing them to lead relatively normal lives and to provide for their own sustenance (Posen, 1996:77-78). An example would be Operation Provide Comfort, whose purpose was to protect the Kurdish population of Iraq from the atrocities of Saddam Hussein and the Ba'ath Party (ibid). The safe zone was protected by means of the threat of the use of ground and air force in the case of a trespassing on its boundaries (ibid:78).

By contrast, safe havens are circumscribed areas, created for the specific purpose of providing protection and sustenance to endangered civilians close to their homes but not in them (ibid:78). As they were initially conceptualized in international humanitarian law, safe havens were not intended to constitute an intervention, let alone a military one. According to the Geneva Convention Concerning the Protection of Civilian Persons in Times of War, a central tenet of the policy of establishing safe havens should be the consent of the parties to the conflict (Haspeslagh, 2003). However, as they were used later on, especially in the 1990s, safe havens significantly deviated from this policy model – most importantly, they were established and maintained without the

consent of the target state (ibid). Examples of safe havens, as a form of AHI, would be: Congo (1960), Somalia (1992), and Bosnia (1993) (Posen, 1996:78).

No-fly zones are designated physical areas in a sovereign state that are being patrolled by the airpower of another state or coalition for the purpose of denying an enemy the use of the designated airspace (Benard, 2004:455; Neethling, 2012:26). No-fly zones are typically used in the context of Peace Support Operations (PSO) and they can have multiple objectives, including "air cover" – the provision of tactical support to ground troops (Benard, 2004:455-456). However, as a type of humanitarian assistance, they provide immediate relief by deterring an enemy – by means of preventing him from using the designated airspace and intimidating him with their sheer presence – and by providing aid in the form of dropping supplies and medication to the protected groups (Benard, 2004:457-458). Prominent examples of the use of no-fly zones would be Northern and Southern Iraq in the 1990s (Operations Northern and Southern Watch), Bosnia in 1993 (Operation Deny Flight) and Libya in 2011 (dubbed Operation Dawn Odyssey).

Humanitarian assistance, as a form of AHI, aims to provide a relatively limited degree of protection (from the most severe effects of a humanitarian crisis). Thus, humanitarian assistance by itself does not aim to (and cannot) put an end to a crisis or prevent its future recurrence. With the exception of natural disasters, the causes of humanitarian crises are always linked to particular relations of power. Humanitarian assistance aims to maintain political neutrality and does not engage with the power relations on the ground (Weller, 1998). Thus, it does not intend to engage politically with the situation but targets the symptoms of the problem[49].

Because of the nonpolitical nature of its purpose, humanitarian assistance tends to employ a relatively limited degree of the threat or use of force. The mandates of the foreign military personnel entrusted with the task of carrying out an intervention

[49] Even though humanitarian assistance may be nonpolitical in its purpose, it can never be politically neutral in its effects –these inevitably have political significance and affect the power relations on the ground. The political consequences of humanitarian aid are the subject of a heated discussion (Morris, 1998). Absolute political neutrality is unattainable also for humanitarian assistance as a form of AHI. For example, no-fly zones reduce the power of the actor who would normally make use of the designated airspace.

typically allow for force to be used only in self-defense – as in the case of the no-fly zones in Northern and Southern Iraq (Benard, 2004:465-466). Furthermore, in comparison to the other two forms of AHI, humanitarian assistance tends to be of shorter temporal duration. However, if it is not combined with policies aimed at bringing the crisis to an end and addressing the root causes of the problem, humanitarian assistance can last for a significant period of time.

2. Military rescue

What I call "military rescue" is a form of AHI, which aims to prevent an impending humanitarian crisis or end an ongoing one. Military rescue seeks to achieve its purpose through two mechanisms. The first mechanism involves the employment of threat and/or actual use of military force to pressure the actor(s) deemed responsible for the crisis into rectifying their acts or omissions that have brought about the crisis. The second mechanism involves the use of military force to alter the power relations on the ground to the detriment of the responsible actor(s) so as to remove them from their position of power. These two mechanisms could be described as "coercion" and "deposition", respectively. The second mechanism is normally employed after the first one has been either considered in theory and deemed unlikely to succeed or employed in practice and proved ineffective.

Three are the most prominent types of military rescue: ground invasion, strategic bombing, and regime change. It is important to point out that these are ideal types and in most historical cases of military rescue some combination of these three has been used in practice. Ground invasion involves the deployment of "boots on the ground". It has been used in the context of an AHI in a number of cases, such as India in East Pakistan (1971) and Vietnam in Kampuchea (1978). However, its use in recent years has declined substantively. There are two important reasons why ground invasion is being used much less frequently: first, ground invasion involves a much higher risk for the soldiers on the ground in comparison to aerial attacks; second, there is international

opposition to ground invasion in the context of intervention for fear that it can easily grow into an unauthorized military occupation.

Strategic bombing for the purposes of preventing or bringing to an end a humanitarian crisis has been used in cases such as Bosnia (1995), Kosovo (1999), and Libya (2011). Strategic bombing has a number of distinct classes of possible targets, such as the industrial infrastructure, communication and transportation knots, and the political leadership (Posen, 1996:87). Each of these sets of targets is linked to a different logic of achieving the strategic objectives. For example, attacks on the industrial capital and infrastructure disrupt the economy aim to diminish the target state's national prosperity and power (the logic of "weakening") and to undermine its social support (the logic of "political destabilization") in order to convince it to change its policies (Lake, 2009:94-95,100).

With respect to regime change, it is important to emphasize that this term can be used to mean different things. Regime change can be envisioned on a continuum representing different levels of political change – ranging from the replacement of one government by another, to a limited transformation of some state structures and institutions, to an overhaul of the political system. As a type of military rescue, regime change involves the deposition of one government (administration) and its replacement with another for the purpose of preventing or ending a humanitarian crisis, or the enforcement of secession of foreign territory[50]. Thus, it involves a rather limited degree of political transformation. When the level of political transformation that an intervention involves expands, regime change moves from the sphere of military rescue into that of transformative occupation.

Regime change as a type of military rescue can be either direct or indirect: it can involve the direct deposition of the governing regime by the intervener (exogenous regime change) or the indirect effecting of regime change through the provision of support for

[50] This definition draws upon Butler's (2014:504) and Walzer's (2004:19) analyses of regime change.
The term "foreign imposed regime change" (FIRC) is also used to indicate the deposition of a government and its replacement with another by a foreign intervener. However, this term cannot be used to signify regime change as a type of military rescue. FIRC is typically not humanitarian in its purpose: it is done for strategic reasons and thus comes close to the notion of "rollback" (Denison, 2014).

the opponent(s) of a regime (hybrid regime change involving a combination of exogenous and endogenous factors). Military rescue, due to the demanding nature of its purpose – to prevent or end a humanitarian crisis by coercing or deposing the assailants – tends to involve extensive employment of the threat and/ or actual use of military force. Unlike humanitarian assistance, military rescue has a fundamentally political purpose. With respect to its level of engagement, military rescue targets political actors and their behaviour. Its temporal duration varies depending on the case but, overall, it is much shorter than that of transformative occupation.

3. Transformative occupation

Transformative occupation[51] seeks to end an ongoing humanitarian crisis and to prevent its future recurrence. Thus, it tries to provide protection from the effects of present as well as future humanitarian crises. Transformative occupation aims to address the root causes of a crisis through effecting socio-political transformation. Its focus on helping to build a durable peace and promoting good governance and sustainable development has lead it to be characterized as a "transformation *away* from repressive closed political systems and *towards* democratic systems that more closely adhere to international standards of governance and individual rights" (Fox, 2012:241; Chesterman, 2004:63).

Historically, military occupation during or in the aftermath of war has not been uncommon. The legal rules that govern military occupation are to be found in the body of international humanitarian law (the Hague Regulations and Geneva Conventions) (Butler, 2014:505; Chesterman, 2004:51,53). Among the most notable instances of military occupation are those of the Allied powers in Germany and Japan in the immediate aftermath of World War II, Israel in the West Bank and the Gaza Strip, and Turkey in Northern Cyprus (Roberts, 2006:602-603; Fox, 2012:245; Butler, 2014:522). It was not until after the end of the Cold War that *transformative* military occupation became common (Fox, 2012:244-245). Until then, the majority of occupations had been

[51] Among the first to use the term was Prof. A. Roberts (2006:580), who defined "transformative occupation" as having the "stated purpose (whether or not actually achieved)…to change states that have failed, or have been under tyrannical rule".

non-transformative and the few transformative ones had been illiberal (Fox, 2012:244-245).

Importantly, only *liberal* transformative occupations (liberal in the sense that they aim to promote respect for human rights and democratic governance) can be regarded as form of AHI, since only they can be said to have a humanitarian purpose. Even though transformative occupations have become quite prominent since the 1990s, de facto occupying powers have been reluctant to use the language of occupation to describe the nature of their involvement. The origins of this attitude are to be found in the prohibition of the use of force introduced by the UN Charter and the experience of decolonization (Chesterman, 2004:52-53)[52].

In different cases of transformative occupation, the scope of the involvement of the occupying power(s) has ranged from the exercise of some civilian authority and the organization of elections in Namibia (1990) and Cambodia (1993), to the restoration of a democratic government in Haiti (1994), the oversight of Bosnia and Herzegovina after the Dayton Peace Agreement (1995), the administration of Eastern Slavonia (1996-1998) and Kosovo (1999-2012), and the governance of East Timor (1999-2002) (Chesterman, 2004:51-52,57; Fox, 2012:251; Roberts, 2006:604).

The most common type of transformative occupation is international territorial administration. The structural changes that occurred in the 1990s increased the instances of violent internal conflict and state failure, which in turn led the UNSC to expand its interpretation of the term "threat to peace" so as to include the latter issues (Bhuta, 2005:722; Fox, 2012:241; Zahawi, 2007:2299). Thus, the UNSC found itself administering territories on a temporary basis (although no such mandate is to be found among the its formal powers) (Chesterman, 2004:56,57). Drawing on Chesterman's analysis (ibid:62-63), it is possible to distinguish two subtypes of international territorial administration. The first one includes cases where the institutions of the state are divided – either because they are the object of contestation between different groups claiming power (Cambodia, Bosnia), or because of ethnic tensions within the

[52] The concept of military occupation is a child of classical international law which did not put a limit on states' freedom to resort to the use of force, including for purposes of territorial expansion (Bhuta, 2005:724).

institutions themselves (Kosovo) (ibid). The second one includes cases where the structures and institutions of the state have failed or simply do not exist (Namibia, East Timor, Afghanistan) (ibid).

Transformative occupations typically take place in the aftermath of a military intervention. The latter can be either humanitarian or non-humanitarian. An example of a transformative occupation that occurred in the aftermath of a humanitarian military intervention would, arguably, be the case of Afghanistan (2001), where a US-led international coalition helped the Afghan Northern Alliance to overthrow the Taliban who were de facto governing the state (Butler, 2014:527-527). The intervention was followed by the establishment of an assistance mission (UNAMA) whose purpose was to make sure that the political and administrative power void created by the regime change was "filled appropriately" (ibid). It is also possible for a transformative occupation to be preceded by a non-humanitarian intervention – such as one provoked by the international conduct of the state in question (Roberts, 2006:582). In such cases, the transformative goals of the occupation can emerge at a later stage – even after the occupation has already begun (ibid).

With respect to its level of engagement, transformative occupation targets the legal, political, social, and economic structures of the occupied territory (Roberts, 2006:580). It is at these levels that the root causes of most (if not all) man-made humanitarian crises is to be found. Because of its ambitious purpose – to bring about positive transformations at the level of structures, institutions, and culture – the temporal duration of transformative occupation tends to be much longer than that of the other two forms of AHI. As for the degree of military force employed in such campaigns, it is very difficult to generalize. Depending on the context, military occupation may involve a greater or lesser degree of force. As a transformative occupation evolves, the civilian component of the mission grows (or at least ought to grow) in importance, while the military component gradually decreases (Fielding, 2008:258-261). This means that, as the institutions of the state grow stronger, the use of military force is being gradually substituted by the type of force employed by the state (exercised by the police and civilian militia) (ibid). However, as occupations involve the presence of large numbers of

foreign troops (Chesterman, 2004:52), the threat of force is likely to be present throughout the entire period of occupation.

This chapter has demonstrated that it is possible to distinguish three forms of AHI depending on the purpose of intervention – humanitarian assistance, military rescue, and transformative occupation. However, these forms are ideal types. In most cases, a combination of these three is employed in practice. In Kosovo, for instance, no-fly zones were followed by an aerial bombing campaign and in its aftermath an international territorial administration was established (Petras, 1999:1414; Shank, 1999:4-5). Furthermore, some cases do not fall neatly in any of these three categories. For example, the introduction of democracy, depending on the context, could come closer to military rescue (regime change) or to transformative occupation. In the next three chapters I am going to present the fourth step of my argument, which maintains that the different forms of AHI tend to fare differently under the conditions for permissibility.

Chapter V: The Permissibility of Humanitarian Assistance

In this chapter, I examine the permissibility of humanitarian assistance, as a form of AHI. By looking into the performance of humanitarian assistance under the conditions for permissibility (as outlined in Chapter III), I demonstrate that this form of AHI enjoys a high probability of being permissible, relative to military rescue and transformative occupation.

1. Performance under the conditions for permissibility

1.1. Implications for international peace and stability

The first condition for permissibility maintains that for an AHI to be permissible it should either not be likely to have a significant detrimental impact on international peace and stability or, if it is likely to have such an impact, another value which it aims to and can be reasonably expected to protect should override the value of international peace and stability. The second version of the objection from international law (see Chapter II, Section 2) argues that AHI would negatively impact international peace whether it retains its current legal status of being illegal, or is legalized. I explore the potential impact of humanitarian assistance on international peace and stability in these two separate cases and demonstrate that in neither of them is this form of AHI likely to have a negative impact.

Although it does not enjoy a formal legal status under international law, humanitarian assistance (as a form of AHI) nonetheless enjoys a substantial degree of legitimacy. For example, it was the UN that authorized a significant number of safe havens – the UNSC in Bosnia and Rwanda and the UNHCR in Somalia (Orchard, 2014:2). The same is true

of no-fly zones – in Libya, authorization was given by the UNSC. Furthermore, the use of humanitarian assistance in the majority of these cases was supported by a significant number of international actors. In Libya, the League of Arab States, the Organisation of Islamic Conference, and the Gulf Cooperation Council all called for the establishment of a no-fly zone over the entire country (Odeyemi, 2016:6). Objections to the no0fly zone were voiced by the African Union[53], Russia and China; however, not a single actor voted against UNSC Resolution 1973 that established the no-fly zone. The resolution was passed with ten votes in favour and five abstentions (Brazil, Russia, India, China and Germany). Abstention in the UNSC decision-making process is widely understood to signify qualified support, especially for the P5 members that have a power to veto (Odeyemi, 2016:10). Importantly, even South Africa – a member of the BRICS and a strong opponent of imperialist politics – voted in favour of the resolution. South Africa did express strong criticism after the resolution was passed; however, this criticism was directed not against the no-fly zone as such, but against the manner in which it was being implemented (Neethling, 2012:30-31).

This analysis demonstrates that in the eyes of the overwhelming majority of states – including those that have traditionally opposed military intervention – humanitarian assistance as a form of AHI is legitimate. Thus, the objection from international law which argues that AHI, through being perceived by states as a violation of the norm on the non-use of force, would unleash a sequence of domino effects that would ultimately lead to the breakdown of international peace does not apply to the case of humanitarian assistance. The origins of the perceived legitimacy of humanitarian assistance appear to be the latter's relatively non-political and non-interventionist character – this form of AHI involves a minimal degree of political engagement and coercion upon the target state.

If humanitarian assistance were given a formal legal status, it would again be permissible from the perspective of international peace and stability. The objection from international law also argues that a legalization of AHI would open the floodgate to more interventions and significantly increase the international use of force. In response,

[53] The objection on the part of the AU did not indicate a rejection of the legitimacy of the no-fly zone. Rather, it was linked to the AU's historical and financial connections to Qaddafi's regime (Wedgwood and Dorn, 2015:346)

I would agree that if humanitarian assistance were made legal, the number of actual instances of it may indeed increase (the establishment of safe havens, safe zones, and no-fly zones does not tend to be very costly). However, even if the number of actual instances of humanitarian assistance were to increase, this would not lead to a dangerous increase in the use of force in the international arena. This is so because humanitarian assistance relies mainly on the mere threat of force; even in cases where force is employed, it is only used to a limited degree – in self-defense or to protect civilians from an enemy trespassing on the borders of a designated safe area.

1.2. Impact on the right of political communities to collective self-determination

Humanitarian assistance has a limited impact on the target state's ability to enjoy its sovereign rights. It precludes the state from exercising sovereign power over only a very small portion of its territory or air space. No-fly zones could potentially be implemented over the entire territory of a country. However, this is only likely to happen in cases where the country is relatively small as the enforcement of large no-fly zones is very difficult (Neethling, 2012:26). The use of humanitarian assistance presupposes that there is an imminent threat or actual occurrence of grave human rights violations. Therefore, states subjected to this form of AHI are likely to be illegitimate from the perspective of collective self-determination. Furthermore, humanitarian assistance entails a very limited degree of political engagement and, thus, it does not meddle in the socio-political affairs of the country and so could not infringe upon the rights of the political community underpinning the state.

The only potential problem arises with respect to safe zones. Some scholars have pointed out that safe zones constitute "de facto secession" (Posen, 1996:94). The political effect of safe zones will depend on the context. If the area that is being protected is inhabited primarily by a threatened minority that has historically aspired for self-governance, actual secession may indeed follow. However, secession in such cases would not necessarily constitute a violation of the right to collective self-

determination because it is likely that there would not be a single political community underpinning the state in the first place.

1.3. Performance under the traditional *jus ad bellum* criteria of Just War

With respect to the criterion of *just cause*, it is important to emphasize that in the majority of cases of humanitarian assistance the mandates of the military personnel entrusted with the task of enforcing safe areas or no-fly zones have only allowed for the use of force in self-defense. In cases such as these, humanitarian assistance does not involve the active use of force against individuals and groups in the target state and, therefore, the *just cause* that could justify intervention would not have to be linked to moral liability to attack. Thus, the *just cause* could be much "thinner" than in the case of AHIs that involve direct attacks.

However, in order to be effective, humanitarian assistance might need to be enforced by means of a credible threat of force, which would involve a preparedness to fight to protect civilians. Thus, the cases of humanitarian assistance that are likely to be permissible from the perspective of the criterion of *reasonable hope* are those that might involve the use of force against assailants for purposes other than self-defense. Those cases would require compliance with McMahan's "thick" account of *just cause*. Nevertheless, the types of acts that call for humanitarian assistance are normally grave atrocities threatening the right to security or subsistence. Thus, humanitarian assistance would normally meet even the "thick" account of the criterion of *just cause*.

With regard to *right authority*, humanitarian assistance typically performs well. Since this form of AHI does not involve a significant degree of political engagement or use of military force, it might not be necessary to have a multilateral body monitor the intervention. However, close supervision by an international actor is important with respect to no-fly zones as, at least in theory, the enforcement of a no-fly zone could potentially transform into a full-scale bombing campaign.

The criterion of *last resort* aims to minimize the damage caused by an intervention. Because of the non-aggressive character of humanitarian assistance, this criterion is met easily. Humanitarian assistance also fares very well under the requirement of *proportionality*. Even when humanitarian assistance does involve the use of force to protect civilians, the employment of force would be in response to an imminent threat or actual attack on a civilian population. In such cases, the use of force would be likely to prevent the occurrence of gross human rights violations. One issue that could potentially arise with respect to *proportionality* is that in some cases the establishment of a safe area or no-fly zone could aggravate the assailants and lead to an intensification of the atrocities they commit (a possible effect that ought to be counted toward proportionality).

The only traditional *jus ad bellum* criterion which humanitarian assistance might have a difficulty meeting is that of *reasonable hope*. With respect to no-fly zones, enforcement requires considerable capabilities and political commitment. With regard to safe areas, effectiveness would require that either the consent of the target state is acquired – in which case there would be no AHI – or that the safe areas are backed by credible military force (Haspeslagh, 2003). Therefore, for an intervention to meet the criterion of *reasonable hope*, strong evidence of sufficient capabilities and commitment on the part of the intervener would have to be provided.

In general, humanitarian assistance tends to be able to meet the conditions for permissibility relatively easily and thus enjoys a high probability of being permissible, in comparison to the other two forms of AHI. In the next section, I explore the case study of Bosnia (1993) in order to illustrate how an analysis of the permissibility of humanitarian assistance under the theoretical framework developed in the present study is to be conducted in practice. Importantly, evaluations of permissibility ought to rely only on information available prior to an intervention. The moral assessment of an intervener's resort to the use force should be separated from the actual outcome of an intervention. For as McMahan and McKim (1993:520) point out, the outcome of a war can be the product of sheer luck. Therefore, an intervention can be permissible even in cases where retrospective analysis reveals that it resulted in more harm than good and vice versa.

2. The case of Bosnia (1993)

In Bosnia, the international community focused the major part of its efforts on humanitarian assistance, monitoring, and mediation. Under the aegis of the UN Protection Force (UNPROFOR), six "safe areas" and a no-fly zone over Bosnia were established. The purpose of the intervention was to mitigate the effects of the fighting by maximizing the amount of humanitarian aid that could reach the civilians who were in need (Dewar, 1993:34). I will examine the permissibility of humanitarian assistance in this particular case and conclude that the intervention may have been impermissible due to a failure to satisfy the criteria of *proportionality* and *reasonable hope*.

According to Goldstein and Pevehouse's analysis (1997:520-521), the first phase of the conflict was characterized by territorial conquest and ethnic cleansing by the Serbs and a cautious response by the international community, which authorized UNPROFOR. It was during the second phase of the conflict that the UN declared as "safe areas"[54] six cities held by the Bosnian government – Srebrenica, Sarajevo, Žepa, Goražde, Tuzla, and Bihać (UNSC, 1993a:para.2; UNSC, 1993b:para.3). As the atrocities committed by the Bosnian Serbs grew in their intensity and morbidity, the international community became increasingly willing to make use of the threat or actual employment of force. NATO's threats to use coercive airpower were followed by "pinprick" air attacks and ultimately culminated in sustained airstrikes in September 1995 (Goldstein and Pevehouse, 1997:521-522; Akyol, 2012). The aftermath of the airstrikes saw renewed negotiations, a cease-fire, and finally the Dayton Agreements (Goldstein and Pevehouse, 1997:522).

First, the permissibility of the intervention ought to be assessed from the perspective of international peace and stability. The UN was determined to maintain political neutrality with respect to what it saw to be a civil war (Goldstein and Pevehouse, 1997:518; Sharp, 1993:31) and thus it chose to employ the least "interventionist" form of AHI. Because of the low degree of political engagement and employment of military force entailed by humanitarian assistance, it could not have reasonably been expected

[54] The "safe areas" established by the UNSC follow the model of safe zones more closely than that of safe havens as the citizens were allowed to remain in their own homes.

that the intervention would have any negative effects on regional or international stability.

However, given that the international community did not intend to use humanitarian assistance as part of a larger political strategy to help bring the crisis to an end, it should have been considered that humanitarian assistance might end up prolonging the conflict. Indeed, in retrospective analyses of the intervention, some scholars have argued that, by choosing a midway between traditional passive peacekeeping and full-scale military intervention, the international community in effect constructed an "artificial life-support system" for parties that were determined to continue to fight (Hillen, 1995). This outcome could have easily been predicted – it is an inherent flaw of the existing system of aid delivery that a significant portion of the aid falls into the hands of belligerents and, by ameliorating war weariness, it facilitates the continuation of the conflict (Addison, 2000:394).

Did the considerable prospects that the intervention would end up prolonging the conflict render it impermissible from the perspective of the first determinant? A prolonged conflict would have a destabilizing effect – especially at the regional level – as a result of the massive and uncontrollable refugee flows it would generate. However, the intervention involved the establishment of safe zones – a policy which is often regarded as a tool by which to prevent large refugee movements by providing protection and support within the borders of the target state (Arulanantham, 2000:9-10). Thus, the intervention could have been expected to curb the main negative effects of a potential prolongation of the conflict. For these reasons, the intervention in Bosnia appears to be permissible from the perspective of the first determinant.

Second, in order to evaluate whether the intervention was permissible from the perspective of the right to collective self-determination, it ought to be established whether a genuine political community existed prior to the intervention. The very nature of the Bosnian war – an inter-communal ethnic conflict between the Bosnian Muslims, Bosnian Serbs, and Bosnian Croats – clearly indicates that there was no single political community underlying the state. It may be objected, however, that each of these ethnic groups constituted a political community in itself and that a foreign

intervention would violate their respective rights to collective self-determination. Even if this were the case, the form of AHI chosen by the international community – humanitarian assistance – does not involve socio-political transformations of any kind[55]. Thus, the intervention was certainly permissible from the perspective of the second determinant.

Third, the permissibility of the intervention ought to be assessed from the perspective of the third determinant – performance under the *jus ad bellum* aspect of Just War theory. With respect to the requirement of *just cause*, by the time the UNSC authorized the enforcement of the safe areas and no-fly zone, severe violations of human rights had already taken place, including murder, incarceration, rape and torture of civilians in detention camps, and ethnic cleansing (Dewar, 1993:34; Sharp, 1993:30). Indeed, these types of acts were atrocious enough to have been able to provide a *just cause* for a much more forceful form of AHI – such as military rescue – let alone for humanitarian assistance.

With respect to *right authority*, the intervention was not only decided upon by the UNSC, but was also carried out mainly by UN peacekeeping forces. *Right authority* is important for a number of reasons, one of which is to prevent so-called "mission creep" whereby what was initially a limited intervention gradually expands into a full-scale intervention or even an occupation. Interestingly, "mission creep" did occur in the case of Bosnia, as UNPROFOR was, over time, given additional mandates that required the use of force (Hillen, 1995). However, this was the result of poor planning and a lack of political vision rather than of a clandestine intent to expand the scope of the mission. Because the intervention was monitored by the UN from the very beginning, the criterion of *right authority* (and, relatedly, that of *right intent*) was met.

As demonstrated in the previous section, the criterion of *last resort* is of little relevance with respect to humanitarian assistance because of the low degree of military force

[55] The Dayton Agreements and the international community's post-conflict involvement in Bosnia have been criticized for infringing upon the right to collective self-determination of the three political communities living in Bosnia (Hayden, 2007:105). However, this argument is of no relevance here, since what I am evaluating is the permissibility of the intervention, not the nature of the political settlement or post-conflict reconstruction (*jus post bellum*).

employed by this form of AHI. Much more interesting, and indeed more problematic, is the performance of the intervention under the criteria of *proportionality* and *reasonable hope*. Because these criteria are intimately connected – *reasonable hope* relates, to a large degree, to the probability of attaining the *just cause* in a proportionate way – they will be examined together.

The safe zones and no-fly zone could have reasonably been expected to ameliorate the suffering of civilians, to prevent a significant number of civilian deaths, and to contribute to regional stability by reducing the number of refugees. However, in terms of *proportionality* we ought to consider the casualties and destruction that could have been expected to result from the potential prolongation of the conflict by the intervention. To estimate the prospective costs of a prolonged conflict and weigh these up against the lives that were expected to be saved is a difficult, if not impossible, task.

However, even if we deem these to be relatively equal in weight, the risks associated with using a safe-zone policy in the context of an ethnic conflict ought to have been added toward the potential costs of the intervention. There is an inherent difficulty in trying to protect civilians who are being targeted because of their ethno-religious identity by means of safe areas (Haspeslagh, 2003). Furthermore, the prospects of this policy being successful in the case of Bosnia were further reduced by the fact that the terms of the intervention would not permit the use of active force to protect the safe zones. The military personnel deployed lacked adequate military training, preparation, and equipment (Hillen, 1995; Akyol, 2012). Thus, it could not have reasonably been expected that the intervention would succeed in deterring belligerents through the "sheer presence" of armed troops[56].

Many of the alleged benefits of an intervention that were proposed at the time should not be counted in *proportionality* calculations at all. For example, some authors argued that an intervention would be beneficial from the perspective of international security. Intervening on behalf of the Bosnian Muslims would send a message that Western states were not anti-Muslim and thus would help to dissipate the tension between Christian

[56] This point was proven correct retrospectively by the fall of the safe zones of Srebrenica and Žepa and the massacres that followed (Cushman and Meštrović, 1996:1-5).

and Muslim countries that was brewing at the time (Sharp, 1993:31). But even if we accept that humanitarian assistance would be a policy strong enough to have such a positive effect (which is doubtful), the consequence itself would be causally too remote to be counted toward *proportionality*. It was also suggested that an intervention would deter other actors, particularly in some former Soviet republics, from engaging in ethnic cleansing (Sharp, 1993:31). However, it is debatable whether humanitarian assistance is a strong enough sign of Western condemnation of this practice to be able to act as an effective deterrent.

To conclude, the intervention did not fare well under the *jus ad bellum* criteria of *proportionality* and *reasonable hope*, implying that the intervention might have been impermissible. This might be a surprising conclusion given that the analysis of the permissibility of humanitarian assistance as an ideal type suggests that this is the form of AHI that enjoys the highest probability of being permissible. However, the inadequacy of the intervention in Bosnia stemmed, to a large degree, from the fact that humanitarian assistance was intended to be used by the UN on its own and not as part of a larger scheme to bring about a political solution to the crisis. It was also due to the specific context of the crisis – an inter-ethnic conflict – which made the use of safe zones problematic. Thus, the conclusion of this cases study analysis does not contradict the argument developed in the previous section.

For reasons of space, I cannot adequately address here the issue of whether another form of AHI, such as military rescue, would have been permissible in the case of Bosnia. But it is worth briefly noting that, there is evidence to suggest that such an intervention would also have struggled to meet the criteria of *reasonable hope* and *proportionality,* albeit for different reasons. Among the main obstacles would have been the lack of political will, the low military capacity of Western states due to their engagement in other areas, and the nature of the conflict which suggested that intervention would be of a long duration and would be likely to cause a lot of civilian casualties and a high degree of destruction (Dewar, 1993:32-34; Akyol, 2012).

Chapter VI: The Permissibility of Military Rescue

In this chapter, I evaluate the permissibility of military rescue. By examining the performance of military rescue under the conditions for permissibility, I demonstrate that this form of AHI enjoys a lower probability of being permissible relative to humanitarian assistance.

1. Performance under the conditions for permissibility

1.1. Implications for international peace and stability

Similarly to the analysis of the permissibility of humanitarian assistance, I will look into the applicability of the objection from international law to the case of military rescue in order to evaluate the extent to which this form of AHI is likely to have a deleterious impact on international peace and stability. With respect to the argument from international law which relies on the premise about the illegality of AHI, it is difficult to assess the relative legitimacy of military rescue. Whether or not ground invasion and strategic bombing are deemed legitimate depends on their performance under the other criteria of Just War, in particular the requirements of *just cause*, *proportionality*, and *last resort*.

An important reason why some states consider military rescue to be illegitimate relates to its alleged failure to meet the criterion of *right intent*. Such states argue that interventions are selective and carried out for strategic rather than humanitarian purposes. This is a valid criticism. Selectivity as such is not a problem – it is a natural consequence of Just War calculations (Smith, 1998:78-79). However, the selectivity that has historically characterized states' resort to military rescue is unjustifiable because it is inconsistent (Himes, 1994:103-104). Unjustified selectivity leads military rescue

interventions to be perceived as violations of the international norm prohibiting the use of force, which could potentially undermine the international legal system.

This perceived illegitimacy could endanger international stability also by negatively impacting the behaviour of non-state actors. An example in this respect would be the rise of international terrorism, which is at least partially the product of imprudent foreign policy on the part of some Western powers, including military interventions for allegedly humanitarian purposes that were perceived as unjust by the target societies, as in Iraq and Afghanistan. However, it is important to emphasize that these negative effects that military rescue can have (and arguably has had) on international peace and stability are not due to an inherent flaw of this form of AHI. Rather, they are directly linked to the way military rescue interventions have been carried out in practice.

The second argument from international law holds that if AHI is legalized, this would negatively impact on international peace and stability by increasing the international use of force. With the exception of the rare cases where the mere threat of force might prove sufficient to coerce an assailant into changing their behaviour, military rescue always involves the employment of a significant amount of military force. This is also the case because military rescue campaigns tend to be of a considerable temporal duration. It is not uncommon for them to last longer than initially planned – as demonstrated by the case of NATO's aerial bombing campaign in Kosovo (1999) (Lake, 2009:83-84).

Although military rescue does employ a significant degree of force, how likely is it that if it were made legal the number of actual interventions would increase? If military rescue were allowed by means of stretching the existing legal rules – for example, by having the UNSC authorize more such missions under Ch. VII of the UN Charter – the obstacle to the number of interventions increasing would be the veto powers of the P5, in particular Russia and China who have historically opposed multilateral interventionism. If military rescue were given a formal legal status, whether the actual instances of intervention would increase would depend on how stringent the legal requirements of permissibility would be. It ought to be noted that even in cases where the legal criteria for permissibility would be met, states might be reluctant to resort to the use of military

rescue. This form of AHI is costly and requires significant military power, thus, not many states could afford to engage in it. Nevertheless, the most powerful states that have sufficient military capabilities as well as coalitions of states which could pool military resources would be able to carry the burden of intervention.

To conclude, no inherent characteristic of military rescue renders it impermissible from the perspective of international peace and stability. However, interventions that are perceived as illegitimate do pose a threat to the system of international law. Thus, it is important that an intervention performs well under the remaining conditions for permissibility and thus enjoys a sufficient degree of legitimacy in the eyes of states before it is attempted.

1.2. Impact on the right of political communities to collective self-determination

Unlike humanitarian assistance, military rescue has a significant impact on the target state's ability to enjoy its sovereign rights. Ground invasion and strategic bombing constitute a rejection of the state's claim to a monopoly of the legitimate use of force within its territory[57]. Strategic bombing involves the denial of the right of the sovereign state to exclusive use of its airspace. Military rescue that relies on the mechanism of coercion goes against the state's right to pursue its chosen policies with respect to its own population. Finally, military rescue that relies on the mechanism of deposition (regime change) directly or indirectly causes the ruling government to be ousted.

To the extent to which military rescue limits state rights, it does so on a temporary basis and only with respect to the right of the government in power to use the state apparatus. Thus, unlike transformative occupation (which will be discussed in the next chapter), military rescue does not limit the rights of the state as such. As soon as the incumbent government alters its behaviour or is replaced by a new administration, the restriction that the intervention poses on the exercise of state rights is lifted.

[57] A paraphrase of Weber (1919).

It could be objected that, by limiting the policies of the ruling regime or by deposing it, the interveners infringe upon the right of the local population to be ruled by a government which they themselves have chosen. However, a government whose policies have brought about a humanitarian crisis severe enough to provide a *just cause* for a military intervention would most likely be illegitimate from the perspective of collective self-determination. What would be problematic from the perspective of the right to collective self-determination, however, would be regime change that involves the imposition by the foreign intervener of a new administration that does not enjoy the support of the local population.

1.3. Performance under the traditional *jus ad bellum* criteria of Just War

With respect to *just cause*, it is crucial that the individuals and groups that would be targeted by an intervention have through their actions of omissions rendered themselves morally liable to attack. Overall, military rescue tends to meet the criterion of *just cause* relatively easily – as the name suggests, this form of AHI is employed as a response to an imminent or unfolding humanitarian crisis. Thus, in most cases when the use of military rescue is considered, there are atrocities severe enough to provide a *just cause* for a military intervention.

Meeting the requirement of *right authority* tends to be relatively difficult for this form of AHI. First, an intervention ought to be decided upon multilaterally in order for it to be perceived as legitimate, which is important – among other things – from the perspective of international peace and stability. Second, an international body ought to assume responsibility for monitoring the conduct of the intervention. This is particularly important with respect to military rescue as this form of AHI involves the employment of considerable military force. As multilateralism under the auspices of the UN is often blocked by the P5 members of the UNSC, *right authority* might require that an

intervention be carried out under the umbrella of a regional organization, such as NATO, the EU, or the AU.

With respect to the criterion of *proportionality*, military rescue tends to fare much better nowadays than it did in the past. Historically, aerial bombing campaigns have caused significant casualties among civilians. However, progress has been made in reconnaissance and precision delivery systems, which has allowed to greatly reduce the number of civilian casualties that result from strategic bombing (Wedgwood and Dorn, 2015:350). Furthermore, recently there has been a tendency to refrain from the practice of bombing civilian infrastructure, which in the past caused significant hardship for civilians – as illustrated by the case of the invasion of Iraq (2003) (ibid).

Toward the potential good effects of an intervention ought to be counted all *just aims* (aims that can be legitimately pursued by military means), among which would be the suffering and death that the intervention can reasonably be expected to prevent as well as – in the case of regime change – prevented future oppression by a tyrannical regime. Nevertheless, military rescue effectively amounts to a full-scale war and meeting the *jus ad bellum proportionality* requirement is a difficult task. The long-term effects of an intervention (as long as they are causally relevant to *proportionality*) also ought to be considered. For example, regime change would be likely to destabilize the target state and open up a power void (Denison, 2014:4,16). It has been demonstrated that regime change lowers the infrastructural power of the state, at least temporarily, and thus increases the likelihood of civil war (ibid:11).

Last resort is a difficult criterion to meet given the fact that military rescue is a very aggressive form of intervention and is likely to cause a significant degree of destruction. This is particularly true for strategic bombing campaigns. Similar is the case with respect to the requirement of *reasonable hope*. To enjoy a sufficient probability of success, military rescue would require that there exists a substantial degree of political commitment and that considerable military capabilities be available to the interveners. This is particularly true for military rescue that aims to compel – to get an assailant to change their behaviour – rather than to deter (Posen, 1996:79-86).

For the purposes of the criterion of *reasonable hope*, it is important to consider how "success" ought to be defined with respect to this form of AHI. There is a tendency to interpret the notion of success in a narrow way – military rescue would be successful if it prevents or ends a humanitarian crisis. However, such an understanding is problematic from the perspective of *proportionality*. An intervention that does not take into account the importance of post-conflict engagement would generate effects that might make it impermissible from the perspective of *proportionality*. This is why for an intervention to meet the criterion of *reasonable hope* (and relatedly – that of *proportionality*) it would be necessary for the intervener(s) to be ready and able to provide assistance to the country in the aftermath of the intervention.

In conclusion, it is significantly harder for military rescue to meet the conditions for permissibility, in comparison to humanitarian assistance. In the next section, I examine the case of Libya (2011) in order to illustrate how the permissibility of military rescue is to be evaluated in practice from the perspective of the theory of permissibility developed in the present study.

2. The case of Libya (2011)

Inspired by the events of the Arab Spring, a fledgling rebellion broke out in Libya in March 2011, to which Col. Muammar Qaddafi responded with violence and brutality (Wedgwood and Dorn, 2015:341,343). As the protests continued to grow, Qaddafi resorted to the use of airstrikes and cluster munitions to suppress them (ibid:343). In Resolution 1973 – which included a reference to the R2P norm – the UNSC declared that "all necessary measures" may be used for the purpose of protecting civilians and enforcing a no-fly zone over Libya (UNSC, 2011a:para.4,6). Following a preliminary intervention by the US, Britain, and France aimed at enforcing the no-fly zone, NATO sponsored a full-scale military intervention – Operation Unified Protector – which lasted seven months (Wedgwood and Dorn, 2015:341,346).

It is the permissibility of the NATO intervention that I would like to assess here. Operation Unified Protector was a large-scale military campaign that involved the use of coercive air and sea power. In effect, the intervention also helped to bring about a regime change. NATO contributed to the ousting of Qaddafi by supporting the rebels in various ways, including through the provision of arms, and by targeting the leader (Pugliese, 2012)[58].

Let us first examine the permissibility of the intervention from the perspective of international peace and stability. It is difficult to evaluate the effect that the intervention could have been expected to have on the behaviour of other tyrannical regimes in the region, such as that of Bashar al-Assad in Syria. On the one hand, the intervention could deter dictators from using violence to suppress their opponents by demonstrating the international community's intolerance to regime brutality. On the other hand, it could have the exact opposite effect and embolden power-holders by suggesting that, due to its engagement in Libya, the international community would not have the resources to get involved elsewhere.

A potential negative implication of the intervention was that, if regime change would be perceived as going beyond the mandate of UNSC Resolution 1973, it could decrease the UNSC's willingness to intervene in future crises[59]. Nevertheless, this prospect was not enough to render the NATO intervention in Libya impermissible from the perspective of the first determinant. The UNSC has a legal responsibility to maintain international peace and security; thus, even if the intervention in Libya were to influence the future positions of some of its members with respect to intervention, it could not have been expected to cause international inaction in the face of severe crises and thus to seriously endanger international peace and stability.

Under the second determinant, the intervention also appeared to be permissible. The regime was clearly illegitimate from the perspective of collective self-determination –

[58] Libya is an example of regime change (as a type of military rescue) rather than transformative occupation because no occupation took place in the aftermath of the intervention and the degree of political transformation enacted by external actors was rather limited.

[59] In retrospection, it is evident that the intervention did have this effect, as illustrated by the UNSC's reluctance to authorize the use of military force in Syria (Wedgwood and Dorn, 2015:352).

the absence of consent to its rule was expressed through the mass protests that spread through the country like wildfire. Thus, those aspects of the intervention which would normally infringe upon the rights of a legitimate state – such as the use of airpower to coerce the establishment to change its behaviour and ultimately the facilitation of regime change – were permissible from the perspective of collective self-determination. Furthermore, as the interveners did not intend to occupy Libya or to carry out social or political transformation in the country, the intervention could not have been expected to infringe on the rights of the Libyan people as a political community[60]. It also has to be emphasized that the regime change was not intended to be exogenous – rather, it was to be brought about by a mixture of endogamous and exogenous factors, whereby the interveners would contribute largely by aiding the rebels represented by the NTC.

With respect to *just cause*, the intervention certainly met the requirement. An important aspect of the *just cause* of the intervention was to prevent the atrocities that were about to be committed by Qaddafi's forces in the city of Benghazi. The government was also responsible for severe human rights violations against the protestors, including murder, torture, arbitrary detention, and summary executions (UNHRC, 2012:7,13,14). The nature of these crimes was grave enough to render the persons responsible for them morally liable to attack and thus the goal of ending them did constitute a *just cause* for a military intervention.

The intervention fared well also with respect to the criterion of *right authority*. The legal basis for the intervention was Resolution 1973, which was enacted with an impressive degree of international consensus (Davidson, 2013:318; Western and Goldstein, 2011:55). The question of whether the resolution sanctioned a large-scale military intervention is the subject of a heated debate (Gazzini, 2011:3-4). The wording of the resolution ("all necessary measures") and the context in which it was passed (while Qaddafi's forces were advancing toward the city of Benghazi) suggest that an AHI in the form of military rescue was permitted by the resolution.

[60] This is why it is not necessary to examine whether the Libyan people constituted a genuine political community in order to determine the permissibility of the intervention.

However, even if the resolution did not permit it, the situation was urgent enough to make an intervention without UNSC authorization permissible. Furthermore, Operation Unified Protector had an additional source of legitimacy with respect to *right authority* – it was decided upon multilaterally, under the auspices of the Libya Contact Group – an international forum of 40 countries, among which were the member states of the EU, NATO, the Arab League, and the OIC (Toaldo, 2016:40; Wedgwood and Dorn, 2015:346). Despite the absence of the AU and Saudi Arabia from the Libya Contact Group, this multilateral forum was representative enough to legitimately decide upon an intervention.

The intervention was multilateral also with respect to its execution – it would be carried out under the umbrella of NATO and the Arab League (Toaldo, 2016:39). More than a dozen states were expected to take part in the military campaign (IISS, 2011). Furthermore, Obama declared that the US would pass the responsibility to NATO, in particular to France and Britain, and would "lead from behind" (Boyle, 2011). This could be interpreted as a sign that the intervention was going to be truly multilateral (rather than just having a façade of multilateralism behind which powerful actors could dictate the course of the campaign).

The criterion of *right intent* was also met to a sufficient degree. It is unclear if the interveners had the intent to enact regime change from the outset, or if the objectives of the intervention changed as the operation unfolded. NATO's military planning ostensibly adhered to the mandate of UNSC Resolution 1973 (Toaldo, 2016:43), however, after the resolution was signed, a number of NATO member states openly called for regime change (Western and Goldstein, 2011:48). Importantly, even if the intent to effect regime change was present from the very beginning, this did not render the intervention impermissible. There was evidence to suggest that regime change might have been the only way to achieve the goal outlined in Resolution 1973 and ensure civilian protection (Wedgwood and Dorn, 2015:349,356). Qaddafi had refused to alter his criminal behaviour and a large-scale retribution could have been expected had the interveners withdrawn without deposing him (ibid). The situation was further complicated by the fact that Qaddafi was threatened with international criminal prosecution for crimes against humanity. *Right intent* was also present because there

was no evidence to suggest that the interveners intended to occupy Libya and thus to violate the provision of the UNSC resolution that prohibited foreign occupation.

The intervention fared very well with respect to *last resort*. Other means, short of the use of force, were not only considered, but employed in practice. Ten days after the initial protests (which began in Benghazi on 16 February), the UNSC passed Resolution 1970 with which it referred the situation in Libya to the International Criminal Court, imposed a travel ban and an asset freeze on certain members of the regime, and established an arms embargo (UNSC, 2011b:para.4-21). Despite these sanctions, there was clear evidence that, unless active force was rapidly employed, terrible atrocities would be committed. Qaddafi's ominous rhetoric ("We will come house by house, room by room…We will have no mercy and no pity" (US Department of State, 2011)) was backed up by deeds as on 16 March government forces marched toward the city of Benghazi – the centre of the rebellion – with the clear intention of crushing it (Wedgwood and Dorn, 2015:344). The international community felt it had to act in order to prevent an imminent massacre (Gazzini, 2011:4).

Let us turn to the requirement of p*roportionality*. The human rights violations that were expected to be prevented by the intervention were very significant. For example, the city of Benghazi, which in the absence of an intervention was almost certainly going to be run over by Qaddafi's forces, had some 600,000 inhabitants (Wedgwood and Dorn, 2015:350). Furthermore, the intervention would prevent the retaliation that Qaddafi would have enacted on the dissidents after he had managed to crush the protests (ibid). Also, to the potential good effects of the intervention had to be added the future repression that regime change would prevent (ibid:357).

With respect to the number of civilian casualties that would be caused by the airstrikes, it can be concluded with certainty that these could have reasonably been expected to be much fewer than the deaths that would be prevented by the intervention[61]. As mentioned in the previous section, important developments in coercive airpower had

[61] In practice, the airstrikes resulted in a very small number of civilian deaths – relative to the toll that had been taken by strategic bombing campaigns in the past. Around 60 deaths were reported (UNHRC, 2012:17). However, what is important for permissibility is that such a small number of casualties could have reasonably been expected before the intervention was approved, which was indeed the case.

taken place which would allow for more precise targeting and thus greatly decrease civilian casualties (Wedgwood and Dorn, 2015:350). Furthermore, NATO had made a commitment not to bomb civilian infrastructure – unlike in the Iraq war where the latter was regarded as a legitimate target (ibid:353).

It has to be acknowledged that there were a number of factors that negatively affected the expected *proportionality* of the intervention. NATO's rules of engagement provided not only for "deliberate" targeting – which would be carried out in accordance with a detailed strategic plan – but also for "dynamic" targeting – which would be decided upon on the spur of the moment (Vincenti, 2016). It is this latter type of targeting that runs a much greater risk for civilians. Furthermore, NATO was committed to a practice, which in the past had often led to civilian deaths, namely striking a target more than once (Wedgwood and Dorn, 2015:354). Lastly, NATO was prohibited from sending ground troops by Resolution 1973; this lack of ground presence could have been expected to decrease the military personnel's awareness with respect to the situation on the ground and amplify the risks for civilians (ibid:354).

Finally, considerable prospects existed that the ousting of Qaddafi would create a power void and thus could seriously destabilize the country. Toaldo (2016:39) argues that, as a consequence of long-standing features of state and society, the intervention caused a movement from Qaddafi's centralized authoritarianism to a new decentralized authoritarianism with multiple overlapping centres of power that left room only for formal democratic institutions. However, it is difficult to assess to what degree this outcome could have been predicted before the intervention was decided upon. Furthermore, the international community was ready to offer Libya its assistance in post-conflict reconstruction and stabilization, which would ameliorate the potential negative effects of regime change[62]. Overall, it can be concluded that the intervention did meet the *jus ad bellum* requirement of *proportionality*, especially in view of the great amount of death and suffering that it could be expected to prevent.

[62] After the intervention, UNMIL was established – its mandate was limited to the provision of assistance to local authorities and did not allow it to intervene in the governance of Libya (Lamont, 2016:388).

Lastly, a few words need to be said about the criterion of *reasonable hope*. The intervention was backed up by an impressive degree of political resolve and military strength. The coalition was determined not to allow for another Rwanda, Bosnia, or Darfur to happen as a result of international inaction (Wedgwood and Dorn, 2015:356-357). Although the US had relinquished the leadership position, it was still committed to the cause and its great airpower capability was an important resource that could be put to use if necessary. Therefore, it can be concluded that the Libyan intervention was permissible.

Chapter VII: The Permissibility of Transformative Occupation

In this chapter, I look into the permissibility of transformative occupation. I examine the performance of transformative occupation under the conditions for permissibility and demonstrate that, of all three forms of AHI, transformative occupation enjoys the lowest probability of being permissible. Thus, this chapter completes my argument that the permissibility of AHI varies along a sliding scale, on which permissibility declines in probability as one moves through the three forms of AHI – humanitarian assistance, military rescue, and transformative occupation.

1. Performance under the conditions for permissibility

1.1. Implications for international peace and stability

First, I examine whether the objection from international law applies to the case of transformative occupation in order to evaluate the extent to which this form of AHI is likely to have a deleterious impact on international peace and stability. With respect to the objection from international law that is based on the premise about the illegality of AHI, it is important to emphasize that transformative occupation *per se* is not perceived as illegitimate. Interestingly, under international humanitarian law – the law governing military occupations – transformative occupation would be illegal in most cases. The law allows an occupying power to interfere only minimally with the governing structures of the target state, unless exceptional circumstance are present (Fox, 2012:237; Chesterman, 2004:52-54,56; Butler, 2014:503,506,511). This legal rule is known as the "conservationist principle" (Roberts, 2006:580; Fox, 2012:238). However, the very purpose of transformative occupation is to enact socio-political change, which would make it illegal from the perspective of this body of law.

Nevertheless, international territorial administration – which also happens to be the most common type of transformative occupation – is seen as legitimate by the overwhelming majority of states. In practice, the power of the UNSC to administer territory on a temporary basis and to delegate this authority to the Secretary General or his or her representative is widely accepted (Butler, 2014:537; Chesterman, 2004:57)[63]. Clear evidence for this perceived legitimacy is to be found in the fact that most states have largely commended past transformative occupations (Butler, 2014:522). Unilateral transformative occupations enjoy a far lesser degree of legitimacy. In fact, some states have expressed deep concerns that the allegedly humanitarian purposes behind many military occupations are simply a pretext for neocolonial interference in the domestic affairs of states (Butler, 2014:505). Thus the objection from international law applies with respect to unilateral occupations – carrying out unilateral occupations, given their perceived illegitimacy, may indeed undermine the authority of international law.

The second argument from international law maintains that, if AHI is to be legalized, it would lead to an increase in the international use of force. However, it is unlikely that the legalization of transformative occupation, if it were to occur, would have such an effect. First, formal codification would introduce stringent requirements for permissibility and, as it will be demonstrated in the remainder of this section, it is difficult for this form of AHI to meet the traditional *jus ad bellum* criteria for permissibility. Second, even in cases where occupation would be allowed, states might be reluctant to embark on such an arduous endeavour. Transformative occupations are very expensive and require a strong commitment over an extended period of time. With respect to international territorial administration, the prospects that the actual instances of this type of transformative occupation would increase if legalization were to take place are diminished by the fact that the UN does not have an independent military capacity (Chesterman, 2004:57). Furthermore, the UN Charter explicitly prohibits the use of the trusteeship system on the territory of UN member states – a provision which arguably applies to territorial administration as well (ibid:58).

[63] Interestingly, some authors argue that through its recent practice of international territorial administration the international community has "updated and modified" the existing law on military occupations (Butler, 2014:506).

1.2. Impact on the right of political communities to collective self-determination

Of all three forms of AHI, transformative occupation is the one that enjoys the lowest probability of being permissible from the perspective of the right to collective self-determination. The degree of transformation introduced may vary across occupations; however, the majority of transformative occupations involve the enaction of "fundamental changes in the constitutional, social, economic, and legal order" of the occupied territory (Roberts, 2006:580). This characteristic of transformative occupations has led many scholars, statesmen and observers to express dire concerns that this form of AHI would infringe upon the right to collective self-determination of the population of the target territory (Walzer, 1977:86). From the perspective of the theory of permissibility developed in the present study, in cases where there is no political community in the target territory, transformative occupation would be permissible as long as it does not establish foreign rule, annex land, impose hardships on the local people, or carry out acts that constitute unjustified paternalism (see Chapter III).

However, the analysis becomes more complicated if there *is* a genuine political community in the target territory whose members have a right to collectively determine their political fate. Could transformative occupation ever be permissible in such cases? I argue that it can be. Under certain circumstances, external assistance may be required in order to *enable* the members of a political community to collectively govern their common life. An example in this respect would be "failed" or "failing" states[64]. In such cases, the minimum conditions necessary for collective self-determination to take place – such as public order and security and functioning collective institutions – may be absent. Thus, a transformative occupation aimed at (re)creating these conditions may be necessary. To put it in Bhuta's (2005:737) words, during a period of transformative

[64] It needs to be acknowledged that cases of "failed" or "failing" states where there is nevertheless a political community might be rare. This is so because one of the reasons why states experience collapse is because there is no genuine political community underpinning them. Examples in this respect would be many African states which only emerged as independent political entities during the period of decolonization and whose borders were drawn with little consideration of the internal cohesiveness of the population.

occupation the temporary exercise of sovereignty by the occupying power(s) is legitimized by the "promise of the order to come" and the prospect that a locally chosen government will exercise that sovereignty after the end of the occupation.

Another case where transformative occupation may be permissible despite the existence of a political community would be in the aftermath of tyrannical rule. When a political community has experienced a period of authoritarian or tyrannical governance, a foreign intervention may be necessary in order to erase the harmful influences of the former regime. Germany after World War II could be given as an example in this respect. Before the rise of Hitler, the German society undoubtedly constituted a genuine political community in that it had a strong sense of common belonging and respected the human rights necessary for meaningful individual participation in the collective life. However, Hitler's rule fed on and strengthened the illiberal elements in the society. The occupation carried out by the Allied powers had as one of its main goals the "denazification" of Germany and the restoration of democratic governance (Chorley, 1945:128-129). Thus, the occupation could be seen as permissible from the perspective of collective self-determination.

In cases where a transformative occupation is permitted in a territory where there is a genuine political community, the occupying power(s) would nevertheless need to fulfill a number of positive and negative duties. For reasons of space, I cannot address this issue in detail. However, I can briefly discuss two such duties. First, as an example of a positive duty, the occupier ought to ensure that the political community is involved in the processes of transformation that take place during the occupation. It is unrealistic to demand that the political community be allowed to govern the process of socio-political transformation, because if it had a governing capacity, there would be no need for a transformative occupation in the first place. However, participation by the political community is a must. Historically, this has taken a number of different forms. For example, in East Timor a National Consultative Council was established, whose composition broadly reflected the society and the results of the independence referendum (Butler, 2014:539). The purpose of this and other similar institutions in East Timor was to accord respect to the right of the local people to collective self-

determination, while allowing for the authoritativeness necessary for new institutions protective of human rights to be built (Butler, 2014:539).

Second, as an example of a negative duty, the occupier(s) ought to refrain from making fundamental changes that are not necessary for the construction of a functioning state. What this means is that priority ought to be given to the goal of building a local capacity for self-government so that the political community as quickly as possible reaches the stage where it can take many of the important decisions concerning the restructuring of the society by itself. As Roberts (2006:621) emphasizes, the fundamental decisions with respect to a number of issues, such as the economic structuring of the society, ought to be made by the newly (re)built sovereign institutions of the state.

It would also be essential that even during the phase when the territory is being administered by the occupying power(s), fundamental decisions with far-reaching implications be made by representatives of the people. An important example in this respect would be the enaction of constitutional frameworks. In East Timor, the task of writing a new constitution was given to an elected Constituent Assembly (Butler, 2014:540). By contrast, in the case of Kosovo, it was UNMIK that put together a new Constitutional Framework and the territory was governed in accordance with that document from 2001 until 2008, when Kosovo unilaterally declared independence and set out to create a new constitution for itself (Butler, 2014:536).

Another question that needs to be addressed is whether it is permissible – from the perspective of the right to collective self-determination – for a transformative occupation to establish a democratic system of governance. If there is substantial evidence that the people of the target territory have democratic aspirations and would consent to such a transformation, it would be permissible to aspire to introduce democracy. However, the particular model of democracy would have to be decided upon by the people themselves. If it is not clear whether consent is present, it would nevertheless be permissible to establish a minimal level of liberalism and political pluralism – so as to ensure respect for those human rights that enable meaningful individual participation. However, the establishment of a Western-style liberal democracy in a society that has no familiarity with or aspirations for this model of

governance would be impermissible from the perspective of the right to *individual* self-determination and autonomy (as shown in Chapter III, this would constitute an act of unjustified political paternalism).

To conclude, in most cases it would be difficult for transformative occupations to meet the criteria for permissibility under the second determinant. Nevertheless, in certain circumstances, and provided that the occupying power(s) fully intend to respect certain restrictions on their behavior, transformative occupations would be permissible from the perspective of collective self-determination.

1.3. Performance under the traditional *jus ad bellum* criteria of Just War

It is debatable whether the "thick" account of *just cause* – understood in connection to moral liability to attack – would apply to transformative occupation. For the most part, a transformative occupation relies on the threat of force rather than its actual employment. Nevertheless, some cases of occupation, in particular those that follow a regime change, would involve the active use of force – for example for the purpose of suppressing the members and supporters of the former regime. In such cases, for there to be a *just cause*, the individuals against whom force would be used ought to have rendered themselves morally liable to attack.

Nevertheless, every transformative occupation employs the threat of force against those who oppose it and obstruct the attainment of its objectives. What justifies this is the very purpose of the occupation – to resolve a humanitarian crisis and prevent its recurrence by helping to build a peaceful, well-functioning society that respects basic human rights. This means that for *just cause* to be present, there ought to exist serious reasons for wanting to enact socio-political transformation in a society. These reasons could relate to the absence of functioning social institutions – as in states that experience collapse (Somalia, Namibia) or in territories that have recently seceded and

have not yet attained full independence (East Timor, Kosovo)[65]. Thus, *just cause* is a difficult criterion to meet in the case of transformative occupation.

The criterion of *right authority* is of great importance with respect to transformative occupation. It is essential that a transformative occupation is not only decided upon or at least sanctioned by an international body, but also that its conduct is supervised and, if possible, controlled by one[66]. An occupier has extensive powers over almost every aspect of the state apparatus of the occupied territory. It is crucial that the behaviour of the occupying power is monitored by a multilateral body, preferably the UNSC, in order to ensure that it respects the requirements of morality and law and does not, for example, annex territory or establish a puppet regime. Historically, the UN, in particular the UNGA, has played a critical role in ensuring the observance of human rights by an occupying power (Roberts, 2006:595).

The requirement of *last resort* may not apply to transformative occupation. The purpose of this criterion is to minimize the destruction caused by a military intervention. However, transformative occupation is an unusual form of AHI in that it does not involve the use of considerable military force but instead relies on civil authority and the military units of the state (police and civilian militia) to pursue goals such as reconstruction, institution-building and nation-building.

The criteria of *proportionality* and *reasonable hope* are among the most difficult to meet for transformative occupation. This form of AHI is a very large and complex endeavour – the responsibilities of occupying powers include ensuring public order and security, protecting human rights and minority rights, promoting representative local government, and assisting with post-conflict reconstruction (Butler, 2014:507,544). To be successful, such a campaign needs to be backed by an enormous amount of political will, commitment of resources, and expertise. The current international institutional

[65] It would be important to note that the goal of establishing a democracy would not constitute a *just cause* as such, unless there is a severe humanitarian crisis that can only be resolved through the introduction of democratic governance.

[66] It has been suggested that unilateral transformative occupations should be allowed only in exceptional circumstances, such as in cases where they are necessary in order to prevent genocide and ethnic cleansing (Zahawi, 2007:2299,2336). However, such reasoning goes against the logic of Just War theorizing which requires that permissibility be assessed on a case-by-case basis.

capacity is hardly sufficient to meet these requirements (Chesterman, 2004:57-58; Butler, 2014:561). Furthermore, *reasonable hope* requires that clear lines of responsibility and accountability be established. As important as multilateralism is from the perspective of *right authority*, it tends to have the negative effect of diffusing responsibility and removing pressure from the occupying powers to fulfill their duties quickly and effectively (Chesterman, 2004:64).

The performance of an occupation under the criterion of *reasonable hope* would also depend on the scope of the transformations envisioned by the intervention. Sudden and large-scale transformations can hardly be expected succeed (Roberts, 2006:621). Therefore, it would be important to prioritize the goal of "getting the basic structure of society to work" before more ambitious transformations are attempted (ibid). This is why *reasonable hope* may be particularly difficult to attain with respect to transformative occupations that aim to introduce democracy. Even in cases where such an endeavour would be permissible from the perspective of individual and collective self-determination, it would be difficult for it to succeed. Many authors have expressed severe concerns about the prospects of success of campaigns that impose democracy from outside (Greig and Enterline, 2014:166-168; Roberts, 2006:580-581). In some cases, the "sudden imposition of democracy" may lead to chaos, civil war, or dictatorship (Roberts, 2006:621).

In conclusion, it is difficult for transformative occupations to meet the traditional *jus ad bellum* criteria of Just War as well as the conditions for permissibility from the perspective of the right to collective self-determination. This is why, of all three forms of AHI, transformative occupation enjoys the lowest probability of being permissible. In the next section, I look into the case of the occupation of Iraq (2003) in order to illustrate how the permissibility of transformative occupation is to be evaluated in practice from the perspective of the theory of permissibility developed in this thesis.

2. The case of Iraq (2003)

Historically, the relationship between the US and Iraq has been a complex and tumultuous one. During the Iran-Iraq War (1980-1988), the US provided military and financial support to Iraq (Zahawi, 2007:2296). However, in the 1990s a hostile US policy toward Iraq – justified by an alleged possession by Iraq of WMD – led to the Gulf War (1991) and the crippling international sanctions imposed in its aftermath (Cirincione, 2003; Jawad, 2016:28; Zahawi, 2007:2296). In the context of the post-9/11 global "War on Terror", the US invaded Iraq on 20 March 2003 (Zahawi, 2007:2315). After only forty days, the fighting ended and the US and Britain announced their intention to administer the state of Iraq in place of Saddam Hussein's deposed Ba'ath regime (ibid). The occupation lasted until 30 June 2004 (Fox, 2012:250).

In order to assess the permissibility of the occupation of Iraq, it would be necessary to establish a clear temporal standpoint from which permissibility can be evaluated. This choice will inevitably affect the evaluation as the information available at different points in time was different. Some authors argue that the occupation began with the deployment of US ground troop at the outset of the invasion (Roberts, 2006:609), while others – that the interveners became legal occupiers only after the fighting ended (GPF, 2007:i-ii). Both arguments are correct – the first refers to the physical beginning of the occupation, while the second – to the legal. I choose to evaluate permissibility from the second temporal standpoint as it was only after the end of the fighting that the actual transformation of Iraq began. I conclude that the occupation was impermissible.

With respect to the occupation's prospective implications for international peace and stability, there were a number of potentially deleterious effects that ought to have been taken into account by the interveners. An unsuccessful occupation – one that would cause more harm than good and would be perceived as illegitimate by the local population and the international community, would greatly undermine the status of the US as a norm-carrier. This would be a significant obstacle to any future efforts on the part of the US to promote democracy and human rights (either through multilateral and bilateral programmes, or as a role model).

Furthermore, an occupation that would not succeed in stabilizing post-Saddam Iraq and catering to the essential needs of the Iraqi population would be sure to engender

resentment toward the US and provide a breeding ground for terrorism. Lastly, an unsuccessful occupation might undermine the international community's status as a territorial administrator and obstruct its future projects of post-war reconstruction and state-building. However, whether or not the occupation would have these dangerous implications depended on how it would be carried out. Thus, these dangers did not render the occupation impermissible *per se*, but they did raise the stakes if the occupation were to prove unsuccessful. It could be argued that the threshold for meeting the criterion of *reasonable hope* was raised.

With respect to the occupation's impact on the right to collective self-determination of the Iraqi people, there was considerable evidence to suggest that the Iraqi society constituted a genuine political community at the outset of the occupation. Despite the ethnic and religious diversity of the Iraqi society, there seemed to be a shared sense of common belonging, in the form of a relatively strong national consciousness (Williams, 2004:9). Furthermore, the Iraqi society did appear to respect those human rights necessary for meaningful individual participation in the collective life[67]. If this conclusion is correct, the occupation would have to respect the rights of the political community, among which would be the right of the Iraqis to collectively determine the terms, institutions and culture of their own political association. Had the occupying powers fully intended to enable meaningful participation by the Iraqi people in the process of socio-political transformation of Iraq and to allow their representatives to make the most fundamental decisions during that process, the occupation might have been permissible. However, no such intention seemed to exist.

In fact, in all probability, at the time when the occupation legally began, the intention that Iraq would be governed solely by the occupying powers had already formed in the US. This is suggested by Regulation №1 of the Coalition Provisional Authority (CPA), which was released only two weeks after the legal beginning of the occupation (CPA, 2003). That the CPA would be the de facto government of Iraq was made clear by the provisions that it would have "all executive, legislative and judicial authority necessary to achieve its objectives", including the power to issue regulations and orders that would

[67] For example, there was no oppressive caste system, women enjoyed important rights (albeit far from being equal to those of men) (Metz, 1990:109-114; HRW, 2003).

take precedence over all Iraqi laws deemed inconsistent with the function and purposes of the CPA (ibid:1(2),3(1))[68].

Moreover, there is evidence to suggest that a vision of the post-Saddam Iraq had already been put together within the US administration – rather than being developed within Iraq or by Iraqis (Barakat, 2005:577). Not only did this make the post-war reconstruction process inherently unworkable (ibid), but it made the entire occupation impermissible from the perspective of the right to collective self-determination. It was not the idea to introduce democracy as such that made the occupation impermissible – there was plenty of historical evidence to suggest that the Iraqi people wanted greater political freedom (Dodge, 2005:708; Barakat, 2005:574) - rather, it was the intention to completely disregard the right of the Iraqi people to participate in and control the most important aspects of the process of reconstruction and state-building.

Even though it has already been established that the occupation was impermissible due to a failure to meet the conditions for permissibility under the second determinant, since the purpose of this case study is to demonstrate how the theory developed in the present thesis is to be applied in practice, it is important to complete the analysis. It is dubious if the occupation succeeded in meeting the criterion of *just cause*. Before the invasion, Iraq was experiencing chronic economic depression and a severe humanitarian crisis caused primarily by the international sanctions regime established in the aftermath of the Gulf War (Zahawi, 2007:2314). However, this could hardly provide a *just cause* for an occupation.

The purpose of the occupation was to transform the administrative, political, economic, and legal structures of post-war Iraq (Zahawi, 2007:2315). However, prior to the invasion Iraq had been a stable totalitarian regime – neither a "failed" nor a "failing" state (Barakat, 2015:574). It was the invasion and the topping of the governing regime that destabilized the country and opened up a power void that needed to be filled. Thus, in a perverse way, it was the invasion of Iraq that created the conditions that could justify an occupation from the perspective of *just cause*. Even so, in the aftermath of the

[68] Permissibility can only be evaluated on the basis of the information available prior to an intervention. However, the intent of how to govern Iraq during the occupation had already formed at the time when the occupation was being deliberated. Thus, post-factum evidence revealing the existence of this intent can be used here.

invasion the human, institutional, structural, and economic resources of Iraq were much greater than those of other states in which international actors had exercised civilian administration in the past (Chesterman, 2004:62).

With respect to *right authority*, the occupation performed very poorly. It was not formally authorized by the UN or any other international body (Zahawi, 2007:2315). In fact, some members of the UNSC opposed the occupation, albeit ineffectively (Jawad, 2016:30). Nevertheless, in Resolution 1483 the UNSC recognized the US and Britain as occupying powers and reaffirmed the legal responsibilities entailed by this role (UNSC, 2003). This amounted to an acceptance of the occupation *post factum*. Not only was the occupation decided upon unilaterally, but it was to be carried out in the same manner. The US strongly opposed the establishment of an international administration under the auspices of the UN and insisted that it exercise nearly full control of the Iraqi state (Diamond, 2004:34-35; Zahawi, 2007:2317). Thus, the US planned to execute the occupation with no international supervision, monitoring or control. For all these reasons, the occupation failed to meet the criterion of *right authority*.

Since the two criteria of *proportionality* and *reasonable hope* are closely connected, I will examine them together. The occupation performed very poorly under the requirement of *reasonable hope*, which in turn decreased the prospects that it would be proportionate. What this means is that the prospects that the beneficial effects that could justify the occupation from the perspective of *proportionality* would actually occur were very low[69].

Given the extraordinarily ambitious nature of the undertaking (Dodge, 2005:706), proper planning, adequate resourcing, and expertise would be critical if the occupation were to have any prospect of succeeding. However, there was considerable evidence of a lack of planning with respect to the occupation. The Department of Defense (the main body responsible for designing the military campaign) only began post-war planning two months prior to the invasion (Zahawi, 2007:2318; Cordesman, 2006; Chesterman,

[69] One of the main formal justifications for the occupation was that regime change and a subsequent democratic transformation of the Iraqi state and society would trigger democratic revolutions in the rest of the region (Barakat, 2005:571-572). However, even if such effects were to occur, the socio-political change in Iraq would only be a contributing causing factor in this respect. Thus, it could not be counted toward *proportionality*.

2004:60). Preparation for the occupation was largely ignored, as senior officers in the Pentagon were told "not to bother themselves with plans for the occupation" and preliminary studies of the Iraqi context were hardly conducted (Roberts, 2006:608).

Thus, it could not have reasonably been expected that the multiple responsibilities of the occupying powers, such as ensuring public order, public hygiene, protection of property, cultural and religious heritage, and providing humanitarian aid in the chaos of the post-war situation, would be successfully fulfilled[70]. Lack of planning and preparation also rendered the military and civilian personnel dispatched by the US ignorant with respect to important aspects of Iraqi culture and society. For example, the US administrators responsible for the invasion and the occupation claimed that the campaign in Iraq would not be met with any hostility on religious grounds as there were no sacred Islamic sites in the country (El-Din Haseeb, 2009:1-2). This statement was very far from the truth, as sacred religious sites were spread all over the country and the occupying forces were likely to encroach on them (ibid).

Not only was the occupation poorly planned, but it was also poorly funded. The Bush Administration failed to request sufficient appropriations from Congress so as to meet the costs of the extensive security, reconstruction, and humanitarian needs of post-war Iraq (Zahawi, 2007:2314). The US's determination to marginalize the UN and prevent it from playing a meaningful role in the occupation impoverished the knowledge basis upon which the occupying powers could draw. As a result, the occupiers could not make use of the UN's considerable expertise in post-conflict management and reconstruction (Scheffer, 2003).

Reasonable hope was also affected by the perceived legitimacy of the occupation in the eyes of the Iraqi people. The Americans expected that their arrival would be greeted by the Iraqis with gratitude and appreciation (Barakat, 2005:572). However, there was little reasonable ground for this expectation. The US hardly had a good reputation among the Iraqis, given the experience of the Gulf War and the devastating sanctions

[70] Indeed, the lack of planning was among the main enabling factors for the mass looting and destruction that took place in the immediate aftermath of the war, particularly in the city of Baghdad (Zahawi, 2007:2319). Poor planning led to an insufficient number of military personnel and international civilian police being deployed for the purpose of ensuring public order and security (ibid:2314).

imposed in its aftermath. Prior to the Gulf War, Iraq had been a functioning state, regarded as an equal member of the international community (Barakat, 2005:573). However, the international regime of sanctions and reparations economically incapacitated Iraq (Dodge, 2005:709; Barakat, 2005:573-574). This caused many Iraqis to adopt the belief that there was an international conspiracy to weaken their state and led them to accept some central tenets of the ideology of the Ba'ath regime (Niblock, 2001:186-188). Thus, the moral authority of the international community in general, and that of the US in particular, was seriously undermined in the eyes of the people of Iraq (Barakat, 2005:574).

To conclude, the occupation of Iraq did not fare well under any of the conditions for permissibility. Moreover, it manifestly failed to meet the requirements of *right authority* and *reasonable hope* and did not intent to respect the right to collective self-determination of the Iraqi people, which rendered it impermissible.

Chapter VIII: Conclusion

This thesis has developed a rights-based theory of the permissibility of AHI, which argues that permissibility varies along a sliding scale: it declines in probability as one moves through the three forms of AHI – humanitarian assistance, military rescue, and transformative occupation. In my argument, I first demonstrated that AHI is not impermissible in principle by refuting the three main principled objections to it. Second, I showed that the permissibility of any AHI is determined by three factors: its implications for international peace and stability, its impact on the enjoyment of the right of political communities to collective self-determination, and its performance under the traditional *jus ad bellum* criteria of Just War. On the basis of these determinants, clear-cut conditions for permissibility were developed. Third, I demonstrated that it is possible to distinguish between three forms of AHI – humanitarian assistance, military rescue, and transformative occupation. Fourth, I showed that each of the three forms of AHI tends to fare differently under the conditions for permissibility, in fact, permissibility tends to become less probable as one moves through these three forms. Three case studies – Bosnia (1993), Libya (2011), and Iraq (2003) – were examined in order to illustrate how the theory is to be applied in practice.

This study has sought to address a glaring gap in the literature on the permissibility of AHI, namely, the lack of research into the different forms that AHI can take and the implications this has for permissibility. Thus, the main original contribution made by this thesis consists in the argument that the permissibility of AHI varies along a sliding scale. Other important contributions are the following: the development of a novel theory of permissibility which includes not only the traditional *just ad bellum* criteria of Just War but two other sets of conditions for permissibility; the construction of a comprehensive classification of the different forms of AHI; and the development of an account of what makes a genuine political community. Furthermore, the present study's reliance on a combination of deontological and consequentialism moral reasoning has

made a contribution to the moral argument that there is a need for complementarity between these two types of moral reasoning in the field of applied ethics.

This thesis has raised a number of important questions that require further research. Among these would be, what are the human rights that enable meaningful individual participation in the collective life, which in turn renders collective self-determination valuable from the perspective of individual self-determination and autonomy; where does the boundary lie between justified and unjustified paternalism in the context of AHI and socio-political transformation of the target state; by what yardstick should we measure the consent of a people to its state and government so as to determine the legitimacy of the latter; and, under what circumstances can acts of omission render an individual or a collective morally liable to attack?

The present study has raised one more important question, namely, what are the implications of normative theorizing for international law? A number of prominent scholars of international law argue that the legal rules governing AHI are deficient and ought to be reformed (Franck, 2003:216; Tesón, 2014:61-62). Buchanan (2003:131) points out that "there seems to be a widening consensus that there is an unacceptable gap between what international law allows and what morality requires". An inquiry into the prospects of reforming the international legal rules governing AHI would involve a careful examination of the potential benefits and dangers of legalization. For example, it ought to be considered what the implications of legalization would be for the problem of abuse. This study has discussed how abuse creates the perception of illegitimacy which could undermine the system of international law. From the perspective of the problem of abuse, legalization appears to be preferable to the current state of affairs where there is a lack of clarity regarding the precise legal status of AHI.

The vagueness surrounding the legality of AHI provides fertile ground for abuse of the language of humanitarianism and for unjust interventions. By contrast, formal legalization would draw a clear line between what is permissible and what is not permissible. It would outline precise legal criteria for permissibility and, thus, it could potentially help to tackle or at least to minimize the problem of abuse by increasing the visibility of abuse and enhancing the stigma attached to it. However, legal rules are also

not immune to manipulation. It would still be humans who would need to pass a judgment on whether a particular case would justify an AHI. Applbaum (2007:361) observes that "because rules are not always properly followed, the formulation of the best rules takes into account the consequences of mistaken or manipulative misuse of the rule".

Another question to consider with respect to reforming the law on AHI would be the appropriate method of legalization. Moral inquiries into the permissibility of AHI – such as the present study – entail a subsequent discussion of how to harmonize legal norms with the conclusions made on the basis of moral reasoning so as narrow the gap between the moral and the legal status of AHI. Some authors have suggested that illegal action ("illegal legal reform") may be the only way to achieve legal reform on AHI, as the current international legal system tends toward conservatism and thus restricts the possibility of enacting substantial reform by means of legal actions (Buchanan, 2003:133-134; Byers and Chesterman, 2003:198-199). Among the main alternatives for reform would be the creation of new treaty law within or outside the UN system or of a new rule of customary international law (Buchanan, 2003:138-140).

There are a number of problems with respect to the creation of a new customary rule of international law that would permit AHI. First, it would require substantial illegal action, which could produce destabilizing effects at the international level. Second, such a process of change would be difficult to govern and control. Thus, the outcome – a new rule of customary law – might be different in terms of its content than what was initially intended. By contrast, the legal rules created by means of formal codification in a treaty would be the result of careful deliberations and expert discussions. Nevertheless, it might be difficult to achieve the substantial consensus necessary for a treaty to be created. What is more, formal codification has its own challenges, such as striking a balance with respect to how specific the codified rules ought to be (Himes, 1994:98); some aspects of the moral theory of permissibility, such as the flexible relationship between the criteria for permissibility, may be difficult to codify. It is future research that ought to provide answers to all these questions.

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