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International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry

FERNANDO R. TESÓN*

INTRODUCTION

On April 2, 1990, agents of the United States government kidnapped Dr. Humberto Alvarez-Machain, a Mexican national, from Mexico.¹ He was accused of having participated in the torture and murder of an American agent of the United States Drug Enforcement Agency. Ignoring Mexican protests, the Drug Enforcement Agency flew the suspect to Texas to stand trial.² In a stunning opinion, the United States Supreme Court, reversing a lower court's decision, ruled that American courts had jurisdiction to try the case, even if the United States government had violated international law by abducting Alvarez-Machain in disregard of an extradition treaty with Mexico.³ The Supreme Court first found that the American courts did in fact have jurisdiction in the case.⁴ It then held that the executive branch, not the courts, should decide whether or not Alvarez-Machain should be returned to Mexico.⁵

Scholarly criticism has focused on the controversial legal arguments marshalled by the Court. In particular, the Court has been rightly criticized for its refusal to apply international customary law

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1. See Robert Pear, *Justice Department Scrambles to Explain Abduction Plot*, N.Y. TIMES, May 27, 1990, § 1, at 24.

2. *Id.*

3. *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

4. *Id.* at 2196-97.

5. *Id.* at 2196.

in deciding the jurisdictional question.⁶ Others have defended the Court's decision,⁷ but there is little disagreement that the abduction violated international law.⁸ Even the Supreme Court conceded that the abduction "may [have] be[en] in violation of general international law principles."⁹

In this paper I wish to explore the question raised in *Alvarez-Machain* from a different angle: what are the *moral* principles bearing on operations such as an international abduction?¹⁰ International abductions are part of a larger category of international acts referred to as "low-intensity" operations.¹¹ Can these acts be morally justified in time of peace? Can the Mexicans, for example, rightfully claim that abductions of persons like Alvarez-Machain, who are suspected of horrendous crimes,¹² violate Mexican sovereignty? Does the interest of the United States in bringing such persons to trial outweigh the Mexican sovereignty claim? If not, what interest of the United States could possibly justify the abduction? In any case, are abductions *ever* morally justifiable?¹³

The traditional view is that, absent conditions that would justify a state of war, low-intensity operations are barred because of the principle of state sovereignty. Following a famous dictum in the

6. See Michael J. Glennon, *State Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992). Professor Glennon points out that the Court does not quite deny that international abductions are prohibited by customary law. The Court simply believes that the Executive is free to disregard customary law when apprehending suspects abroad. See 112 S.Ct. at 2195-96.

7. See Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992); see also Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907 (1992) (criticizing the lower court's ruling that the illegality of the abduction deprived the courts of jurisdiction).

8. See Glennon, *supra* note 6, at 746-47.

9. 112 S.Ct. at 2196.

10. I am using the Alvarez-Machain abduction as an example of the kind of operation I have in mind. This paper is not solely about that incident, but rather is about the relationship between any such international coercion during peacetime and the sovereignty of affected states.

11. See *infra* part I.

12. Dr. Alvarez-Machain allegedly kept the torture victim alive so that the interrogation could continue. 112 S.Ct. at 2190.

13. In my view, the answer to the moral question is determinative of the answer to the legal question. See Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84, 84-89 (1990). Whatever one's views may be about the relationship between law and morality, surely at the very least a discussion of these moral questions can serve to illuminate the debate on the wisdom and desirability of low-intensity international coercion such as abductions and other forms of covert operations.

Lotus case, this approach maintains that no enforcement action can ever be taken in the territory of another sovereign state.¹⁴ According to this traditional positivist view, when one state sponsors an international abduction in the territory of *any* other state, it violates the sovereignty of the latter state, regardless of whether it is legitimate or illegitimate, friend or foe, democratic or tyrannical, aggressive or peaceful. The positivist view sanctions abandoning most principles of state sovereignty only when the circumstances that justify war prevail. When open war is justified, respect for state sovereignty is diminished enough to allow acts of intervention, such as low-intensity operations. When the reasons to wage open war *do not* apply, the argument goes, then acts of intervention short of war are prohibited out of respect for the sovereignty of the target state.

This traditional view assumes that respect for another state's sovereignty is an all-or-nothing concept. Ordinarily, a state should consider foreign territory inviolate; however, when the target state is on the wrong side of a just war, its claims to territorial sovereignty collapse, permitting its foes to employ the full range of military remedies, including, of course, low-intensity operations.¹⁵ This argument concludes that peacetime low-intensity operations, such as the Alvarez-Machain abduction, are morally prohibited on account of the sovereignty of the target state. Respect for a foreign state's sovereignty is thus said to be the moral principle underlying the well-established legal prohibition on state-sponsored international abductions and other low-intensity operations.

I believe that this traditional positivist proposition is too extreme. By presupposing an antiquated and rigid notion of sovereignty, the traditional positivist view fails to make crucial distinctions which are relevant for the moral justification of all international acts. More specifically, I reject the twin premises that state sovereignty is an *intrinsic* value, or a self-sustaining and autonomous moral principle, and that state sovereignty is an all-or-nothing concept, according to which all states are equally sovereign by virtue of their statehood. I suggest instead that state sovereignty is an *instrumental* value supported by moral principles linked to human rights and respect for individual autonomy.

14. "[T]he first and foremost restriction imposed by international law upon a State . . . [is] that . . . it may not exercise its power in any form in the territory of another State." S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

15. A just war is, for example, a war waged by a state in self-defense against an aggressor.

The moral reasons supporting an act of intervention should be weighed against the moral reasons that support state sovereignty, and the result of that contest cannot be determined in advance. Instead, a low-intensity operation such as the abduction of Alvarez-Machain is morally justified only when it meets the following conditions:

- The *ends* of the operation are morally justified. An international act of coercion, including war, is justified if, and only if, it is undertaken in the defense of the basic rights of persons and, derivatively, in the defense of just institutions.
- The government contemplating the operation is a legitimate government.
- Either the target state or the target government is illegitimate.
- The operation does not otherwise violate human rights.
- The operation is necessary and proportionate in terms of both the moral worth of the cause and of the harm done.
- The *modus operandi* is not such that would undermine the flourishing of civic and personal virtues that a liberal democracy must encourage.

The moral legitimacy of a low-intensity operation depends absolutely upon the justice of the cause it is intended to further, and relatively upon the legitimacy of the social contract in the target state. Only legitimate governments have moral standing to conduct these operations, but they may not proceed when the target state is also fully legitimate (in the sense explained below). Even when the target government or state is not legitimate, those performing the low-intensity operation must make every effort to respect the individual rights of the persons that reside in the state. The twin requirements of necessity and proportionality apply to the conduct of international coercion generally.

Finally, even if all the foregoing conditions are met, some *modi operandi* may be so odious that they should be avoided, since employing them would undermine the civic and individual virtues that a liberal democracy must cultivate. In other words, some operational methods may have a highly corrupting effect. Virtue theory thus provides an important supplement to the liberal theory upon which this paper primarily rests.

In light of these requirements, I suggest that the abduction of Alvarez-Machain by United States agents was unjustified because it punctured the sovereignty of a morally legitimate state, in violation

of the extradition procedures freely chosen by the two liberal, democratic states involved. My thesis does *not* entail the sweeping proposition discussed above, defended by traditional positivists, that *any* international abduction is prohibited, regardless of the legitimacy of the states or causes involved. Sovereignty is bound up with legitimacy, and legitimacy depends upon observance of human rights.¹⁶

I. A DEFINITION OF LOW-INTENSITY CONFLICT

Before tackling our substantive problem, I would like to narrow the kind of low-intensity operations that will be discussed in this paper. There is some confusion as to what kinds of intervention should fall under the heading of "low-intensity conflict." It is certainly agreed that it does not include "high-intensity conflict," or all-out war. Short of this extreme, however, there is no unanimity. Some writers have defined low-intensity conflict in a noticeably broad way, including everything short of total war.¹⁷ For example, some scholars have treated the 1986 U.S. bombing raid of Libya as an instance of low-intensity conflict because it was a limited operation short of total war.¹⁸ The problem with this broad definition is that limited uses of conventional military force are best analyzed as part

16. I have elsewhere defended this view of international legitimacy. See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 53-94, 111-23 (1988); Tesón, *supra* note 13, at 112-16; Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60-74 (1992).

17. For example, see the definition by the U.S. Joint Chiefs of Staff: Low-intensity conflict is a limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psycho-social pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographic area and is often characterized by constraints on the weaponry, tactics, and level of violence.

Joint Low-Intensity Conflict Project Final Report, Executive Summary (Fort Monroe, Virginia: U.S. Army Training and Doctrine Command, August 1986), quoted in Loren B. Thompson, *Low Intensity Conflict: An Overview*, in *LOW INTENSITY CONFLICT* 1, 3 (Loren B. Thompson ed., 1989). For a summary of criticisms to this definition, see Thompson, *supra*, at 3. See also Bernard F. McMahon, *Low-Intensity Conflict: The Pentagon's Foible*, *ORBIS*, Winter 1990, at 3, 4 (offering a long list of missions that fall under the heading of low-intensity conflict).

18. See, e.g., William V. O'Brien, *Counterterror, Law, and Morality*, in *LOW INTENSITY CONFLICT*, *supra* note 17, at 187, 199-204.

of the conduct of war.¹⁹ Therefore, I treat limited military force merely as an instance of conventional warfare, much in the way customary international law treats it.²⁰ Since the justification for limited warfare does not differ from the justification for war generally, no additional moral analysis is needed. I will not, therefore, include instances of limited *conventional* war in my analysis.

The operations that pose distinct ethical problems, and those with which I am concerned here, are those that *do not* constitute overt conventional war, limited or unlimited. I define a low-intensity operation as *a limited coercive act, not involving the military, and therefore lacking the characteristics of even limited conventional war, performed by a government in a foreign state, without the consent of the targeted state's government.* In a low-intensity operation, a government exercises coercive power in territory in which, under ordinary circumstances, it has no jurisdiction to exercise such power. The Alvarez-Machain abduction thus qualifies as a low-intensity operation under this general definition.

Even this narrowed definition encompasses a vast range and variety of operations with very different ends and means, such as counterterrorism, suppression and support of insurgency, narcotics enforcement, and the targeting of individuals such as political leaders. All of these actions are performed in the territory of another sovereign state, and none involves the use of conventional military force, even in a limited fashion.

There has been very little scholarly discussion of the moral justification of low-intensity conflict using this limited definition. To be sure, throughout the history of philosophy, the morality of war itself has been the subject of intense concern and debate.²¹ The philosophers' preoccupation with war derives from the horror and finality of physical combat of nation against nation, army against army. In a very primal way, the frightening reality of war tests the limits of reason, and thus of civilization itself. It is no surprise,

19. Harry G. Summers, Jr. believes that such expressions as "low intensity conflict" and "police action" are niceties used to disguise war, especially by the United States. Col. Harry G. Summers, Jr., *A War Is a War Is a War Is a War*, in *LOW-INTENSITY CONFLICT*, *supra* note 17, at 27, 27.

20. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 101-02 (June 27) (distinguishing between "most grave" and "less grave" prohibited uses of force in customary international law).

21. For an influential modern reappraisal of the morality of war, see MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

therefore, that no less an eminent thinker than Immanuel Kant, the champion of rationalism, called war "the judgment of God," and was satisfied that the outcome "determines the side on which justice lies."²² The irrational quality of war has, I think, goaded philosophers to analyze and understand it with the tools of rational moral thinking—to domesticate war, as it were.²³

In contrast, the vast assortment of operations that have been designated low-intensity conflicts²⁴ have not been the subject of much philosophical literature. There are at least two reasons for this omission. First, low-intensity operations usually do not cause as much damage and suffering as all out war. Second, and more important, much of human society has often associated conventional war, but not low-intensity conflict, with courage, dignity, chivalry and decency. To many, having fought in a just war (e.g., with the Allies in World War II) is the mark of the virtuous citizen who is ready to defend his country (and, sometimes, other peoples' countries) against evil enemies.²⁵

Low-intensity operations have instead been thought of as secretive, sleazy, sneaky and not particularly demonstrative of courage or similar virtues.²⁶ One source of this perception is that low-intensity operations are the domain of specialists, spies, commando forces and hit squads. It is hard to associate such operatives with a general, grass-roots, patriotic effort to defend just institutions against an enemy who threatens them.²⁷ Another source of the ill-repute attaching to low-intensity operations is that they are often covert and without warning. Last but not least, they are often aimed at non-military targets. Low-intensity operations thus run contrary to traditional ideals of honor and fair fighting.

The result is that low-intensity operations have not been seen to be worth justifying morally. Many people dismiss them as at best a

22. Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* [1795], in *PERPETUAL PEACE AND OTHER ESSAYS* 107, 110 (Ted Humphrey transl., 1983) [hereinafter *Kant, Perpetual Peace*].

23. Contrast this view with Hegel's suggestion that war, far from being an intrinsic evil, is healthy for the state in that it restores its vitality. See J.N. FINDLAY, *HEGEL: A RE-EXAMINATION* 326-27 (1958).

24. See *supra* notes 17-21 and accompanying text.

25. Even having fought honorably in a conventional war on the wrong side is sometimes regarded as praiseworthy.

26. See, for example, Kant's condemnation of certain forms of low-intensity conflict in his Sixth Preliminary Article. Kant, *Perpetual Peace*, *supra* note 22, at 109-10.

27. Consider the common belief in the intrinsic immorality of the C.I.A., held even by people who regard the United States as a positive moral force on the whole.

necessary evil, strategically required sometimes, perhaps, but unjustifiable in terms of rational morality. This attitude explains why literature on the moral justification of low-intensity conflict is so scarce.²⁸ This dismissive approach to such an important phenomenon of international relations is, however, not satisfactory. One who believes all use of international coercion is always unjustifiable could easily enough condemn any low-intensity operation as an example of such coercion. Most of us, however, are not such extreme pacifists. We need, therefore, to develop a moral analysis to apply to operations which fall short of open warfare.

The difficulty in devising any moral framework applicable to low-intensity operations is the variety of morally relevant facts implicated in their execution. For example, consider the differences between aiding the Iraqi population to overthrow Saddam Hussein, and training death squads aimed at innocent civilians in El Salvador; or between abducting a suspected criminal in Mexico without waiting for the Mexican authorities to act, and sending a commando force to liberate hostages held in a foreign country by a group tolerated by the local government. Whether an action should be frowned upon as morally deficient will depend on the facts of the particular case.

II. THE ENDS OF LOW-INTENSITY CONFLICT

Low-intensity conflict is a form of international coercion. This coercion may involve varying degrees of violence.²⁹ At the very least, low-intensity operations involve violation of the sovereignty of another state. In other words, the low-intensity operation impinges on the monopoly on coercive power that pertains to a government in its territory, and is recognized by international law. In many other cases, low-intensity operations will involve actual violence to persons or damage to property. What aims can morally justify such actions? Can a government invoke the national interest, or national security, or self-defense, or expediency, or the need to punish criminals? Is something else required in the form of justification? Writers have differed on the answer to these questions.

28. The only article on this specific issue is that of William V. O'Brien, *supra* note 18, but it does not go beyond very general remarks about international law and just war doctrine.

29. See Sam C. Sarkesian, *The American Response to Low-Intensity Conflict: The Formative Period*, in *ARMIES IN LOW-INTENSITY CONFLICT: A COMPARATIVE ANALYSIS* 19, 21 (David A. Charters & Maurice Tugwell eds., 1989) (showing a continuum of coercion in different types of conflict).

A. *The Realist Answer*

Realists have long maintained that international behavior can be explained by postulating an overriding motivation, one that is the same for all international actors, especially nation-states: the national interest. The realist school sees the task of the science of international relations as the study of the interactions of distinct national interests, which produce international phenomena, both cooperative and confrontational.³⁰ Realism so defined attempts a *descriptive* explanation of international behavior. Whatever its merits as a thesis of political science (i.e. whether or not realism adequately describes and explains international behavior), there is nothing in it that logically entails a *moral justification* of international behavior. The realist can consistently claim that a state committed an action because it advanced its national interest, but that on independent moral grounds the act was unjustified. The realist need not claim that the national interest itself serves to justify international acts.

Many descriptive realists have, however, almost imperceptibly slipped into a *normative* realist approach. Normative realism is the view that national interest *justifies* international behavior.³¹ Two bases for normative realism have emerged. Some realists have adopted a *state-of-nature* approach to international relations, i.e. the Hobbesian position that nations are at (potential) war with each other.³² According to this view, all is fair in war, and the only rule applicable to the state is one of prudential rationality. In a phrase, the state *should* act only to advance its national interest. According to this view, there is no such thing as justice or morality across borders. Realists are thus skeptical regarding any claims of morality in international policy.³³ Under this theory, a government errs when

30. Seminal works in the realist tradition include HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (1959); KENNETH WALTZ, *MAN, THE STATE, AND WAR* (1959); and HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977). I realize, of course, that I am oversimplifying realism. The doctrine has many variations, yet I deal in the text with the central and, as far as I know, uniform methodology of national-interest analysis.

31. See, e.g., George F. Kennan, *Morality and Foreign Policy*, 64 *FOREIGN AFF.* 205, 205-08, 217 (1985-86).

32. 2 THOMAS HOBBS, ON DOMINION ch. 13, in *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY*, 63, 169 (Sir William Molesworth ed., 1841) ("For the state of commonwealths considered in themselves, is natural, that is to say, hostile."). See generally HOBBS: *WAR AMONG NATIONS* (Timo Airaksinen & Martin A. Bertman eds., 1989). For a modern version of this view, see TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983).

33. For a convincing response to the realists' moral skepticism, see Marshall Cohen, *Moral Skepticism and International Relations*, 13 *PHIL. & PUB. AFF.* 299 (1984).

it does something it believes is in the national interest, but in reality is not; the leaders *should* have perceived the real national interest and acted on it, but failed to do so.

The second path to normative realism involves considerations of constitutional philosophy. Under liberal democratic theory, the government is the agent of the people. It is employed by the citizens of the state to serve *their* interests. A consequence of this agency relationship is that significant deviations from this purpose, such as when the government advances only its own interests, are grounds for criticism or, in the extreme, for declaring the illegitimacy of that government. Ultimately, betrayal of the democratic mandate may even justify overthrowing that government. These are the terms of the *vertical* social contract, the contract between people and government.³⁴ This contract essentially specifies that the agent, i.e. the government, is obliged to govern in the interest of the principal, i.e. the governed.

Under this view, the duty of a government to serve the interests of its subjects is the paramount rule in international relations.³⁵ A government does not owe any duty to foreigners, since they do not stand in any contractual relationship with it. As in the state-of-nature approach, prudence alone serves to limit foreign policy options. For example, a government seeking to advance its citizens' interests too aggressively may cause other states to retaliate, thereby *harming* those it sought to benefit.

This view is appealing because it relies on democratic government *within* states to validate amoral behavior *among* states. Since governments are agents that represent their citizens, each government should attempt to further the interests of its citizens in unbridled competition with other governments. Any state should determine how to act internationally by analyzing its interests and the available options, and rationally choosing the options expected to maximize those interests. There are no international principles of morality, unless morality itself is defined in terms of the rational choice just set forth.

From the realist standpoint, for example, American support for the ill-fated Bay of Pigs invasion was mistaken, not because it was morally wrong, as an instance of aggression or impermissible

34. See *infra* part III.

35. Professor Marshall Cohen attributes this view to Spinoza. Marshall Cohen, *Moral Skepticism and International Relations*, in INTERNATIONAL ETHICS 3, 4 (Charles R. Beitz et al. eds., 1985).

intervention, but because the United States government miscalculated the benefits that the invasion would bring to the United States. Had the invasion succeeded and brought about the planned consequences, it would have been unobjectionable. The realist may accuse a government of imprudence—an inability to foresee disaster—but not of immorality. Both the state-of-nature version of normative realism and this latter version, based on the agency relationship between government and citizenry, conclude that national interest is the sole measure of international acts.

B. *Extreme and Moderate Realism*

According to normative realism, international acts—including low-intensity operations—are justified if they serve the national interest. We must, however, make a further distinction between *extreme* realism and *moderate* realism.

According to extreme realism, acts are justified whenever they advance the national interest. Extreme realists thus regard the furthering of the national interest as a *sufficient* reason to carry out any operation. For example, the extreme realist would say that when the United States government was deciding whether to abduct Alvarez-Machain from Mexico,³⁶ it should have balanced the expected national benefits in bringing him to justice with the potential adverse consequences of the operation. Benefits could include punishing an offender and deterring criminals from seeking shelter in other countries. Possible harms could spring from hostile Mexican responses, such as severing diplomatic relations or taking the case to an international organization like the United Nations. If, on balance, the benefits to the national interest outweighed the risks, then the abduction would have been justified on realist grounds. That the operation might kill some innocent Mexicans or cause significant property damage in Mexico would not have weight except insofar as American interests would be affected thereby, since the extreme realist believes the U.S. government owes no duty to Mexicans.

Moderate realism, on the other hand, contends that maximizing the national interest is a *necessary*, but not a sufficient reason to

36. See *supra* notes 1-5 and accompanying text. For a similar factual scenario, see *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991), *vacated and remanded*, 112 S.Ct. 2986 (1992) (Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was apprehended in Mexico by several individuals who were either U.S. agents or Mexicans working for the U.S. Once in U.S. territory Verdugo-Urquidez was charged with various offenses).

justify an international act. International acts are justified when they further the national interest and *also* comply with moral principles and the requirements of necessity and proportionality applicable to all uses of force.³⁷ In our example, the moderate realist might assert that the abduction of Alvarez-Machain could be morally justified only after all other means to persuade the Mexican government to render the suspects had failed, and then only if no Mexican lives were lost, since the American interest in preventing criminals from seeking safe haven in other countries arguably supersedes property considerations, but not the loss of lives.

C. *Utilitarian and Communitarian Realism*

One preliminary question for the evaluation of realism is what counts as national interest. Realists have two very different answers to this question. The first one is that national interest is the aggregate of present and future individual interests. The second answer is that national interest is an enduring interest held by the state or the nation over and above the interests of the individuals (present and future) that populate the state.

It seems obvious that there are goals that, if accomplished, would benefit most people in a country. For example, if American industry becomes more competitive, most American citizens will benefit since there would be more wealth and more jobs in the country. Therefore, diplomatic actions by the U.S. government that attempt to make U.S. businesses more competitive, such as the establishment of conditions for fair international trade, serve the national interest because most people in the country materially benefit from such action.

This approach defines national interest simply as the aggregate maximization of interests, or preferences, of the citizens of the state over time. National interest is explicated by resorting to empirical laws and theories, and denotes *actual* preferences and interests of the people. While such an empirical calculation may be highly complicated, there is nothing conceptually wrong with this method of defining the national interest. The definition does not refer to anything more than the actual interests of individuals; in that sense, the national interest is real, concrete and measurable. I will call this definition, for want of a better name, the *utilitarian* conception of national interest. In its normative form, this thesis holds that the

37. For a discussion of necessity and proportionality, see *infra* part VI.

satisfaction of the net aggregate interests of present and future citizens of the state justifies international acts.

An important consequence of utilitarian realism is that the justification of international acts is sensitive to empirical claims about individual preferences. Some claims are simply empirically false, such as appeals to the national interest when the interest that is being served is that of a minority, to the detriment of the population at large. The validity of claims that foreign policy serves the national interest is thus determined by empirical tests.

In our example, the utilitarian realist must consider possible consequences to the interests of citizens of the state in order to decide whether or not the abduction of Alvarez-Machain is justified. A poll that showed popular support for the abduction of Alvarez-Machain would count in favor of the abduction. Likewise, an opinion poll showing opposition to the abduction would factor against executing the operation.³⁸ The morally justified decision by the government would be the one that advanced the interests of the citizens of the state, and one way to measure these interests is to calculate their actual preferences at any given moment. (Of course, utilitarian calculations are complicated because future citizens' interests must also be considered.)

Some realists, however, have a different conception of the national interest. For them, national interest is *not* reducible to the aggregate interests of the citizens of the state. They reject the utilitarian claim that the national interest should be determined with reference to the current and future preferences of the people. These realists advance instead a holistic definition of national interest. National interest is ascribed to the state or nation as a whole. The national interest is *held by the nation or the state as a moral being that endures over time*.³⁹ This interest survives the change of internal socio-political arrangements and of governments. Instead of emphasizing actual preferences or interests, this view stresses communal considerations such as national glory or tradition, and

38. If readers believe that using opinion polls as a way of determining serious political preferences is silly, I suggest they check how most political arguments are conducted these days.

39. I have called this idea "the Hegelian Myth." See FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION ch. 3 (1988).

ethnic or religious pride. I will call this version of realism, for want of a better name, *communitarian realism*.⁴⁰

Of course, if the majority of the present and future population feels strongly about national glory or ethnic pride, their preferences will be maximized by an international act in pursuit of those goals. In this case, utilitarian and communitarian realism will converge. The communitarian approach to national interest, however, is *not sensitive* to empirical falsification. Communitarians claim that communal values are to be found in the "intimations of the tradition" of a given society. If national interest is defined in this way, it will often be the case that the *actual* aggregate preferences of *present* citizens will not coincide with what is dictated by the "intimations of the tradition." On a communitarian justification of an international act, the fact that actual preferences do not coincide with the communitarian interest does not count against performing the act. This version of realism is *foundationalist*, in that an appeal to the foundational principles of *the community* trump actual popular preferences.

Communitarian realism has the virtue of rejecting the pure utilitarian approach to national interest described above. It recognizes that there may be higher principles that are not honored or appreciated by the majority of members of the community at a given historical moment. By refusing to base foreign policy on whatever the citizens of the state happen to prefer at a given time, or on their self-interest, communitarian realism can be seen as an attempt to instill morality into international relations. In many instances the analysis will be intuitively appealing. For example, an argument against the C.I.A.'s involvement in the overthrow of Chilean president Salvador Allende is that such action was incompatible with the principles embedded in the American tradition. For the United States to engage in that operation was inconsistent with the American tradition of respect for human rights and the will of the people. Since this tradition in turn defines national interest in foreign policy, it prevails over the possible

40. Communitarians have confined themselves to domestic political philosophy. For representative communitarian views, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982), and Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6 (1990). To my knowledge, no one has applied communitarian philosophy to international law and relations. Walzer is a curious case. Even though he is usually seen as a communitarian philosopher, his views on war are predominantly liberal. Liberal writers have their own critiques of communitarianism. See Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL. & PUB. AFF.* 308 (1985); Carlos Nino, *The Communitarian Challenge to Liberal Rights*, 8 *L. & PHIL.* 37 (1989).

short-term advantage of overthrowing a government perceived as unfriendly to the United States.⁴¹

The communitarian realist has two possible arguments to support the abduction of Alvarez-Machain. He can claim that the punishment of crimes, such as torture, that deeply offend American moral sensibilities, justifies the abduction—especially since the crime was perpetrated against an American government official. Alternatively, the communitarian realist could simply contend that the abduction of Alvarez-Machain is justified as a way to advance the national interest of fighting the flow of illegal drugs into this country. These positions are not affected by either the public's support for, or its opposition to, the operation.

On the other hand, it is possible to supply a communitarian argument *against* the abduction. If the communitarian believes that respect for the international rule of law, embodied in commitments like treaties, serves important national interests and provides an incentive for other states to honor their legal commitments, then he may conclude that the abduction is unjustified. Here again, national interest is not coextensive with the mere short-term advancement of collective preferences.

It is worth noting, in passing, that for communitarians, too, there are good and bad communitarian arguments, just as there are good and bad utilitarian arguments—not all appeals to tradition will suffice. The debate over the morality of foreign policy is, for the communitarian realist, always a debate about the correct interpretation of the national tradition.

D. *A Critique of Realism*

Much of the literature on low-intensity conflict exhibits a normative realist orientation by focusing on what strategies would best serve the national interest.⁴² But is normative realism a morally sound principle? I submit that it is not; advancing the national interest is neither a sufficient nor a necessary condition to justify international acts, including low-intensity operations.

I will start with utilitarian realism. This version of realism, as suggested above, has considerable appeal because it is based on democratic principles. What could be more attractive than the

41. For a defense of this view, see Kennan, *supra* note 31, at 214.

42. Any of the essays in *LOW-INTENSITY CONFLICT*, *supra* note 17, may serve to illustrate this point.

suggestion that a government that we institute to defend our interests should do just that? Yet utilitarianism as a general moral theory has well-known fatal flaws. In the philosophical literature, the most devastating critique of utilitarianism comes from a foundationalist perspective.⁴³ International acts may serve the national interest in a utilitarian sense, yet may be immoral. Just as an individual is expected to refrain from immoral acts even when they advance his self-interest, so in international relations governments must refrain from immoral acts even when they serve the national interest. The foundationalist critique disagrees with the often unstated premise of realism that there is no international morality.

This flaw of utilitarian realism can be clearly seen in a well-known problem of utilitarianism generally: its failure to take into account human rights. Surely someone committed to liberal principles would not accept the proposition that a government may blatantly violate the rights of persons in other countries, provided only that in doing so it advances the interests of its own citizens. For example, a government cannot justify killing or oppressing people in other countries, simply in order to improve the economic condition of its citizens.

The objection to utilitarian realism is that its premise is fatally incomplete. A government's job description is not simply to maximize the interests of the citizens who hire it, but rather to maximize these interests *consistently with respect for human rights*. A morally justified democracy is a rights-constrained democracy, not a pure democracy where the majority does as it pleases.⁴⁴

Assuming human rights are international and universal,⁴⁵ while our government may have a *primary* duty to uphold *our* rights and *our* just institutions, it also has a duty to respect the rights of *all* people. Just as the majority of a state's people may not oppress domestic minorities, internationally it may not direct its own

43. The seminal work in this regard is JOHN RAWLS, A THEORY OF JUSTICE (1971).

44. See Kant, *Perpetual Peace*, *supra* note 22, at 114; see also Tesón, *The Kantian Theory of International Law*, *supra* note 16, at 60-62.

45. The concept of the universality of human rights has been persistently challenged over the years (especially by governments who wish to violate them), but I believe that such universality holds both as a matter of morality and as a matter of positive international law. See generally Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985) (rejecting relativism as applied to international human rights). Most recently, the otherwise quite deficient Vienna Declaration has reaffirmed the principle of universality. See Vienna Declaration and Programme of Action, 25 June 1993 (copy furnished to the author by the U.S. Department of State), pt. II, para. 1 ("The universal nature of [human] rights is beyond question.").

government to ignore the rights of individuals in other states. Therefore a government's duty to maximize the preferences of its citizens cannot be a paramount and exclusive international duty.

Utilitarian realism does, however, have a role to play. When a government performs an international act, such as a low-intensity operation, that seriously *harms* the national interest, even if the behavior serves worthy purposes, the citizens of the government's state have a claim against it for not doing its job properly.⁴⁶

Communitarian realism, unlike utilitarian realism, shares with the human rights approach its foundationalist quality in that certain principles trump actual interests and preferences. Yet despite its anti-utilitarian, foundationalist approach, communitarian realism is also untenable since, like utilitarian realism, it is indifferent to human rights.

Under communitarian realism, an international act is justified when it is consonant with the tradition and the communal values of the state performing the act. Communitarian realism does not take into account the resulting harms, including human rights violations, suffered by non-members of that state.

By postulating some national interest over and above the actual preferences of citizens, communitarian realism is far more dangerous than utilitarian realism, in spite of its current vogue; it is too closely akin to the spurious and destructive themes of nationalism. Perhaps for that reason, communitarianism is also hopelessly relativistic. There is no internal principle to prevent the doctrine from being used to justify appalling régimes of oppression and frightful foreign policies, so long as those practices spring from the tradition of the society in question. In addition, communitarians lack the moral tools to come to the defense of *dissenters* from the tradition. For example, communitarians are bereft of arguments to defend the victims of the Tiananmen Square massacre, since arguably despotism has traditionally been part of the "intimation" of Chinese tradition. They also lack the moral tools to oppose the claim by the religious community⁴⁷ of Islamic fundamentalists to forcibly convert infidel nations, if that is part of the Islamic tradition. Communitarianism is incompatible with

46. When an agent, such as a lawyer, fails to serve the interests of his client, the client has a claim against the lawyer, even though the lawyer be motivated by the noblest of concerns.

47. While community may often be seen as defined by national borders, community may or may not coincide with nations—witness religious communities, or the moral community of Europe defined by the European Convention on Human Rights, *reprinted in* ENCYCLOPEDIA OF HUMAN RIGHTS 499-505 (Edward Lawson ed., 1991).

international human rights since the very premise of the theory rejects the notion of transboundary justice or morality.

Unlike utilitarianism, communitarianism does not depend on principles of democratic representation. Communitarians have no reason to prefer a democratically elected government that may not pursue the "intimations of the tradition" to an enlightened, but democratic government. Indeed, this has been precisely the view of the most illustrious communitarians.⁴⁸

In the earlier example regarding the critique of the C.I.A.'s involvement in overthrowing Chilean president Salvador Allende,⁴⁹ an appeal to community seemed acceptable because *the tradition it was based on was morally worthy on grounds other than the simple fact that it was a tradition*—it was a liberal tradition. In such a case, the communitarian realist arrives at a morally desirable outcome, but for the wrong reasons. One can of course argue that the C.I.A.'s help in ousting Allende was immoral because it was inconsistent with the American tradition of respect for human rights and the popular will. But what about the people most directly affected? It seems to me that the operation must be condemned for the effects it had on *Chileans*, not for the self-regarding reason that it was inconsistent with the tradition of the United States.⁵⁰

A just tradition must be defended because it is just, not because it is a tradition; conversely, unjust traditions deserve no respect. A communitarian may reply that the relevant community should be defined as the *international* community. Since that community has agreed to an international law of human rights, international human rights are now part of the "intimations of the tradition" that determine the community interest.⁵¹ This position, however, amounts to unconditional surrender, since it makes communitarian realism true, but trivial. If human rights are universal, then communitarianism is tantamount to liberalism. The communitarian can no longer identify

48. See PLATO, THE REPUBLIC bk. VII. Elsewhere Plato writes: "The wise shall lead and rule, and the ignorant should follow." PLATO, THE LAWS, *690b. As Karl Popper has shown, the "Socrates" of the Republic is the embodiment of unmitigated authoritarianism. 1 KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 131 (2d ed. 1966).

49. See *supra* note 49 and accompanying text.

50. The coup opened the door to years of oppressive military government.

51. I take this to be the thrust of the New Haven school, with its emphasis on clarification of global community policies. See Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS 191 (Myres S. McDougal & W. Michael Reisman eds., 1981). For my critique, see TESÓN, HUMANITARIAN INTERVENTION, *supra* note 16, at 17.

a relevant community as legitimately denying human rights since that community would also be part of the international community, and therefore governed by the imperative to honor human rights.

Normative realism, then, fails to supply a *sufficient* justification for international acts. Moreover, the pursuit of national interest, in either the utilitarian or communitarian versions, does not seem to be a *necessary* condition to justify international acts either. If we conclude that there is a duty to assist people in distress, or that there is a duty to transfer wealth to the needy under appropriate principles of distributive justice, international morality may mandate international aid by governments even when those acts do not advance the national interest of the government taking the action.

In conclusion, normative realism is unappealing in any of its versions because of its indifference to universal principles of justice, human rights in particular. Utilitarian realists are correct in seeking a liberal democratic foundation of national interest, but a constraint on action based squarely on human rights is needed. Communitarian realists, on the other hand, are right to seek a foundational approach, thereby rejecting the utilitarian determination of the national interest; however, they choose a faulty foundational principle—appeal to tradition. Both communitarian and utilitarian principles are insensitive to human rights.

E. *The Human Rights Approach*

The task then is to provide a theoretical basis for international morality, one that avoids the pitfalls of realism. I contend that *an international act is in principle immoral when it violates human rights*. Should we accept this suggestion, then we can clearly see why the national interest cannot possibly justify low-intensity operations that violate the rights of individuals in the target state. The reason is simply that *universal* human rights trump the pursuit of interest. It follows that a morally acceptable description of the international role of the government is that *a government is entrusted by the citizens of the state with the conduct of foreign affairs so that the interests of the citizens will be served, provided that global human rights are respected*. The human-rights based theory of international law is thus compatible with the pursuit of the national interest in the utilitarian sense, with human rights operating as a side-constraint to that pursuit.

The first and foremost interest of citizens in a democracy is to uphold and defend their just institutions; the government, therefore, has a duty to defend the state's just institutions. In a sense, this

interest may seem to correspond to that offered by communitarian realists, since the morality of defending just institutions does not depend on citizens actually wanting to defend them at any particular time. A government having the foresight to defend just institutions against the popular will would be morally justified.⁵² As suggested above, the human-rights theory of international relations is distinct from communitarian realism, even though they may at times prescribe the same course of action. In those cases where an appeal to tradition is desirable, such as when the American tradition of defense of freedom and democracy is invoked, the communitarian interest is simply coincidentally in accord with the defense of just institutions. The liberal, human-rights based view, however, will *already* have decided, on independent grounds, that freedom is worth defending. In short, the government of a just state has a duty to defend its just institutions because they are *just* institutions, not because they are *its* institutions.

The second duty of a democratic government is to uphold and promote human rights and democracy *globally*. This tenet is supported by two reasons, first suggested by Immanuel Kant.⁵³ The first reason is simply that human rights are universal, as indicated above. Human rights accrue to every human being, regardless of history, culture or geographical circumstance. Every person has an equal claim to be treated with dignity and respect: this is the ethical foundation of international human rights. The second reason why governments must uphold human rights and democracy globally is that this is the only way to secure peace.⁵⁴ By encouraging the creation and preservation of democratic societies abroad, the democratic government is building the liberal alliance, which alone can serve as the basis for a stable international community. Liberal democracies are far less prone to make war than illiberal régimes.⁵⁵ The coexistence of democratic and undemocratic régimes is the main cause of global conflict, because those two radically different political systems do not easily coexist.

We can now summarize the normative basis of foreign policy. A democratic government has a three-fold international duty: (1) to defend its own just institutions; (2) to respect the rights of all

52. An example of this is the refusal of the French government to accept the surrender of the French people to the Nazi occupiers during World War II.

53. I have developed the following arguments in Tesón, *The Kantian Theory of International Law*, *supra* note 16.

54. *Id.* at 74-81.

55. *Id.*

persons at home and abroad; and (3) to promote the preservation and expansion of human rights and democracy globally. These three ways of upholding human rights differ, however. The first duty of a government is to defend *its* just institutions; this duty is perhaps the only *absolute* duty that governments have. The second duty of a democratic government is to respect human rights, including protection of the rights of foreign persons when it conducts otherwise permissible low-intensity operations. This duty is very strong, although perhaps not always absolute.⁵⁶ The third duty of a democratic government, which is related to the second, is to defend and promote respect for human rights *by foreign governments*. This duty is strong, yet constrained by moral and prudential considerations that relate to the rights of innocent people in the target state, as well as to the capabilities of the acting state, its resources, and the safety of its citizens.⁵⁷

The corollary of the foregoing considerations is that *a low-intensity operation will be justified if, and only if, it is consistent with respect for global human rights*. A government may pursue the national interest, either in the utilitarian sense (defined as the satisfaction of the aggregate preferences or interests of the citizens of the state), or in the (putative) communitarian sense of defending just institutions, provided that in doing so it respects the rights of everybody. *This* version of moderate realism, therefore, is acceptable because the pursuit of human rights and the defense of just institutions operate as a moral constraint on the pursuit of national interest.

The human rights approach helps us analyze one kind of low-intensity operation: insurgency and counter-insurgency. The human rights approach includes a theory of just war; it is the war waged in defense of human rights.⁵⁸ In most wars, international or civil, there is a side that is morally right. That side may be waging a war to defend itself from an aggressor, or to overthrow a tyrannical

56. There are a number of reasons to support the view that states legitimately have lesser duties vis-à-vis foreigners. These are analogous to the reasons that individuals have a greater duty toward their family members than to others. Yet even these subordinate duties are absolute within their proper compass: the fact that we normally do more things for the people that are close to us does not mean that we can violate the rights of others.

57. Notice that I am talking here about duties, not rights. I take for granted, at this stage of development of international law, that democratic governments have a *right* to demand human rights compliance from other governments and, in some extreme cases, even to intervene by force to help victims of serious oppression. See generally TESÓN, HUMANITARIAN INTERVENTION, *supra* note 16, at 112-14.

58. See TESÓN, HUMANITARIAN INTERVENTION, *supra* note 16, at 113; see also David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 60 (1980).

government (at home or abroad), or justly to secede from a parent state.⁵⁹ Insurgency operations by a democratic state designed to assist just revolutionaries are justified, provided that the help is welcome by the insurgents themselves. For example, a response to a request for assistance by Iraqi revolutionaries aimed at overthrowing Saddam Hussein would be morally justified. Similarly, counter-insurgency operations to assist legitimate, rights-respecting governments against illiberal uprisings are morally justified, provided that the government welcomes the assistance.⁶⁰

Assistance to illegitimate governments, or illiberal groups in civil wars, on the grounds that they are friends of the legitimate government carrying out the operation, is forbidden in principle. A very important corollary of the human-rights theory of international law and relations is that, normally, only legitimate governments may be supported.⁶¹ The *liberal alliance* envisioned by Kant, and hopefully taking shape in the post-Cold-War international society, is the only plausible foundation of international law, and illegitimate governments are excluded from its benefits.⁶² This point sharply brings out the contrast between the human-rights approach and realism. Many realists have maintained that, in foreign policy, we should support our “friends,” even if they are despicable dictators.⁶³ Leaving aside for the moment the very plausible claim that *in*

59. See generally ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* (1991) (advocating various arguments as moral grounds for the right to secede).

60. This proviso derives from considerations of autonomy, which apply to acts in defense of others. See Judith J. Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 305-306 (1991). But self-defense of the state is always, in effect, defense of others. In repelling an aggressor, the government assists citizens who are being victimized by aggression, and individuals fight in defense of fellow citizens. It follows that, as I have tried to show elsewhere, the rationale for self-defense does not differ in substance from the rationale for humanitarian intervention. See TESÓN, *HUMANITARIAN INTERVENTION*, *supra* note 16, 113-14; see also Tesón, *International Obligation and the Theory of Hypothetical Consent*, *supra* note 13, at 117.

61. I say “in principle” and “normally” because one can imagine a situation where the only way to avoid a moral catastrophe is to temporarily support an illegitimate government. An interesting such case arises when two tyrants are fighting each other. Here the liberal democracy must refrain from helping either, except in very extreme situations, such as when one tyrant, if victorious, will drop a nuclear bomb or cause a similar catastrophe. But it is never morally right to support a tyrant against a democracy, or a tyrant against democratic forces resisting him, or illiberal rebels against a democratic government.

62. See Tesón, *The Kantian Theory of International Law*, *supra* note 16, at 89-93.

63. Even in the midst of the current global democratic revolution, we can see the endurance of this ruthless approach: Western governments befriend the Syrian dictator Hafez al-Assad and the current Chinese leadership, on account of spurious “national interest.”

realism's own terms such a policy is disastrous in the long run, the human-rights theory condemns this view as profoundly immoral.⁶⁴

The human-rights based justification of international acts is still very general, and at first blush many will find it unsatisfactory. One possible objection is based on principles of state sovereignty. A low-intensity operation may be conducted in such a surgical way that no one's rights are violated, yet the sovereignty of the target state would still have been punctured. That violation of sovereignty, it is argued, suffices to bar the legitimacy of low-intensity operations, such as the abduction of Alvarez-Machain. In order to assess this objection, one must examine the ethical foundations of state sovereignty.

III. THE JUSTIFICATION OF STATE SOVEREIGNTY

Low-intensity operations violate the sovereignty of the target state. In some cases, as discussed above, there are moral reasons to make war. The overriding aim of a just war is the protection of human rights. A government's war to defend the rights of its citizens, when they are being violated by a foreign aggressor, is called self-defense. A government's war to defend the citizens of the target state from human rights violations by their own government is called humanitarian intervention.

The twin principles of state sovereignty and nonintervention are among the best established principles of international law. A liberal conception of politics is one for which the justified civil society protects and recognizes basic human rights, of the type named in modern constitutions and pertinent international instruments.⁶⁵ A liberal conception of state sovereignty has to be congruent with the justification it offers for the legitimacy of the state generally. I suggest that a state is *internationally* legitimate when it is *internally* legitimate.⁶⁶

The best way to approach the question of the legitimacy of the state is to distinguish between the horizontal social contract and the

64. We do not even need a very deep theory of morality to condemn the realist's advocacy of help to "friendly" dictators. Whether one relies on the universality of human rights (as I do), or on an American or Western communitarian tradition, or on pure compassion, the result is the same.

65. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3 U.N. GAOR (Resolutions, pt. 1) at 71, U.N. Doc. A/810 (1948).

66. I made this point in TESÓN, *HUMANITARIAN INTERVENTION*, *supra* note 16, at 55-57, 77-94, 112-14. See also CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

vertical social contract.⁶⁷ Citizens of the state are bound to one another by the principles of justice that underlie a just constitution—this is the *horizontal* social contract. Meaningful social cooperation requires the creation of government, i.e. of institutions and offices to which political power is attached. These offices are occupied by persons who are democratically chosen by the citizens of the state. These persons enter, therefore, into an *agency* relationship with the people who have elected them. This agency relationship is the *vertical* social contract. In a democracy, the government is accountable to the people and has to remain faithful to the terms of the vertical contract.

From this, it follows that illegitimacy may take place in two ways. First, the vertical contract may be breached, in which case the *government* is illegitimate. This occurs when the government is unrepresentative or, even if it was originally representative, it engages in serious and disrespectful human-rights violations. The government has lost its standing since it no longer represents the citizens. Second, the horizontal social contract may break down, so that the *state* is illegitimate. This situation could result in anarchy, as in Somalia, or in a fragmentation of the parent state into several independent states, as happened to the Soviet Union.

Sovereignty is the external aspect of legitimacy. A government is legitimate when it genuinely represents the people and generally respects human rights. Such a government must be respected by foreigners, in particular foreign governments. A state is legitimate, and must be respected, when it is the result of a genuine horizontal social contract. In turn, a legitimate social contract, for instance a legitimate constitution, is one that, at the very least, protects the basic human rights of its citizens. Such a state must likewise be respected by foreigners, in particular foreign governments.

A group of people residing in a territory, bound by a legitimate horizontal contract, may rescind the vertical contract as a result of a breach by their government. This may occur violently, as by revolution, or peacefully. The government in power becomes illegitimate; in other words, the vertical contract has collapsed. In these cases, citizens have not lost their rights. They have not forfeited their human rights or their civil society, which is the result of the social contract that protects such rights. The horizontal social

67. The distinction between the two kinds of social contracts was suggested by HANNAH ARENDT, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 49, 85-87 (1969). I elaborate the idea here in more detail.

contract, I emphasize, is derivative from individual rights. They have given up neither their individual rights nor their life in common, their commitment to social cooperation.

The illegitimate *government*, however, is not morally protected. Foreigners, therefore, have a duty to respect human rights and a life in common in the state, but do not owe a similar duty to the illegitimate government, because that government does not legitimately represent the state and its people anymore. In addition, an illegitimate government is not entitled to respect⁶⁸ because by hypothesis, if international law offered protection to this government, it could remain in power and oppress its people without fear of political pressure from the international community.⁶⁹

It is possible, however, that the horizontal contract itself may collapse, causing civil society to disintegrate. There may be an illegitimate, spurious social contract—one that does not provide for respect for basic human rights. In these cases, the *state* is illegitimate. Of course, a fortiori the government will be illegitimate, since the vertical contract exists at the sufferance of the horizontal contract. In this case also, as in the case of collapse of the vertical contract, the former citizens—now stateless people, persons in the state of nature—maintain their individual rights.⁷⁰ Foreigners, and in particular foreign governments, must respect the human rights of the individuals that reside in that putative state, notwithstanding the collapse of the horizontal social contract. If the horizontal contract collapses, citizens do not have a claim to life in common anymore. Foreigners, therefore, are not under as stringent a duty to respect that “society” as in the case of collapse of the vertical contract. They must respect individual human rights, but there is no longer a social contract to respect. A group of individuals, not a state or a society, is all that is left.

In summary, a state is entitled to the complete protection of state sovereignty afforded by international law when it is founded upon a legitimate horizontal contract *and* a legitimate vertical

68. I realize that this is not the thrust of international law, which tends to protect any government that has succeeded in subduing the population. See TESÓN, HUMANITARIAN INTERVENTION, *supra* note 16, 53-94.

69. This is not to say that foreigners may do *anything* with regard to an illegitimate government. In particular, they may not overthrow it without the consent of the citizens of the state. *Id.* at 119-23.

70. Imagine that in an unexplored area of the globe we discover individuals who do not have any political or social organization, who just wander in the region. Human rights, I believe, would pertain to them, although I will not attempt to prove this point.

contract. A state is entitled to less protection of its sovereignty when the *vertical* contract has collapsed. While human rights and the right to a life in common ought to be respected, the illegitimate government and its instrumentalities are not entitled to protection. Finally, when both the horizontal and vertical contract have collapsed, there is no sovereignty whatsoever, but the individuals that reside within the boundaries of the defunct state retain their human rights, which must be respected by foreigners as well as by others in the commons.

We turn now to the application of the principles that support state sovereignty and how they can trump the pursuit of low-intensity operations by foreign governments. I shall start with the somewhat easier question of the moral standing to undertake a low-intensity operation.

IV. WHO CAN UNDERTAKE A LOW INTENSITY OPERATION

The first consequence of the foregoing considerations is that only a legitimate government has moral standing to carry out a legitimate low-intensity operation *as a government*. Dictators may not validly perform low-intensity operations. The reason is straightforward. The vertical contract is invalid and the agency relationship is spurious; consequently, the government cannot validly act on behalf of the citizens of the state. Its international acts, and in particular its coercive acts, such as war and low-intensity operations, are invalid *qua* acts of the state.

At first blush, this conclusion seems counter-intuitive. Why can't the illegitimate government of state A send a group of people to train and advise the combatants led by the legitimate government of state B in *its* fight against illiberal insurgents? Surely B will use all the help it can get. This, however, will not do—the government of A cannot validly order *citizens of A* to fight and perhaps risk their lives in another state, even for a just cause! Because A's is an illegitimate government, it lacks the moral standing to command. The citizens of A are not legitimately subordinate to the government, and do not have a duty to obey. Of course, any individual has a right to join in a just war, fought in another state, when invited by the just warriors.⁷¹ If people in A decide voluntarily, and are not deployed

71. I believe that people have a *duty* to assist, to the extent possible, their fellow citizens (i.e. citizens of the same state) against an unjust aggression; this is the only possible justification of conscription enforced by legitimate governments. I will not, however, attempt to demonstrate this difficult point here.

by A, to join the just counter-insurgency in B, they could do so in their private capacity. The illegitimate government may not engage the people and the collective resources of the state in any war, low-intensity conflict, or other coercive action.

The position defended here presents a sharp contrast with realism. Realists, especially communitarians, claim that every state has a national interest that is as legitimate and important as any other state's national interest against which it competes in the international arena. Realists do not seriously consider the possibility that a government carrying out an operation may simply be unrepresentative. There are many ways in which the realist bypasses this inconvenient fact. For example, a realist might argue that there are political or sociological reasons why the tyrant remains in power, or that tyranny is a natural phenomenon.⁷² They might, more plausibly, distinguish between the dictator's domestic illegitimacy and his international standing to pursue the national interest. This justification ignores the fact that the international act performed by the dictator purports to engage the collective responsibility of the citizenry. Typically, the act may put the population at grave risk. Other governments may then legitimately challenge the authority of the dictator so to act, and this can be done only by resorting to some notion of domestic legitimacy.

V. STATE SOVEREIGNTY AND LOW-INTENSITY CONFLICT

The question as to whether or not a low-intensity operation, such as the U.S.-sponsored abduction of Alvarez-Machain, violates the target state's sovereignty is answered by applying the principles suggested in the foregoing discussion. Three cases are possible. First, the target state is fully legitimate, meaning that both the state and the government are legitimate. Second, the target state rests on a valid horizontal contract, but the vertical contract is invalid, with the consequence that the government is illegitimate. Finally, the target "state" does not have a valid horizontal social contract—both the state and the government are illegitimate.

72. Cf. Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, in *INTERNATIONAL ETHICS*, *supra* note 35, at 217, 229.

A. *Low-Intensity Operations Against a Fully Legitimate State*

Assuming the justice of the cause and conformity to the other moral constraints (i.e., proportionality and *modus operandi*), a low-intensity operation will violate the sovereignty of its target state when that sovereignty is fully legitimate, in other words, when both the horizontal and the vertical contracts are legitimate.

The single exception, more apparent than real, to this principle arises when the legitimate government of the target state *authorizes* the operation, as is often the case with justified counter-insurgency. For example, whether U.S. efforts to help the government of El Salvador are barred by sovereignty considerations, other things being equal, depends on whether that government is legitimate. If the government is illegitimate, aid to that government is morally prohibited, come what may, because even express authorization by an illegitimate government is invalid. If the government is legitimate, the morality of the operation does not depend on sovereignty considerations, because of the authorization. Recall, however, that other requirements, particularly that requirement of a just cause, must still be fulfilled for the operation to be legitimate. A legitimate government may not always espouse a just cause, so the operation may be illegitimate on those grounds. In addition, the envisaged operation may be banned for being disproportionate, or intrinsically odious, or otherwise violative of human rights.

The Eichmann case may illustrate this point.⁷³ In 1960, Israeli agents located the infamous Nazi war criminal, Adolf Eichmann, living under a false name in Argentina. They abducted him in Argentina and took him to Israel, where he was tried, convicted, sentenced to death, and hanged. At the time, both the Israeli and the Argentine governments were legitimate.⁷⁴ Was the operation morally justified? This is a particularly instructive case, because punishing a war criminal is a worthy aim, especially for those, such as myself, who sympathize with retributivism. I believe, nevertheless, that the Israeli government was *not* justified in kidnapping Eichmann, as was recognized by the United Nations Security Council and the Israelis themselves, who apologized to Argentina.

First, it is necessary to examine the underlying aim of the low-intensity operation. I have indicated that the main justification of

73. Attorney-General of the Gov't of Isr. v. Eichmann, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961), reprinted in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 266-74 (4th ed. 1990).

74. This was one of the brief periods of civilian government in Argentina.

international acts, and international coercion in particular, is the defense of human rights. The punishment of a war criminal, even one as evil as Eichmann, is a less compelling aim than a *direct* defense of human rights. The Israelis had two possible justifications for punishing Eichmann: retributive justice and deterrence. Retributive justice is an abstract idea of just desert that cannot easily be linked to the defense of human rights, even if one otherwise accepts the retributivist justification of punishment.⁷⁵ Deterrence is only *indirectly* linked to the defense of human rights. A deterrence argument would justify punishment of Eichmann in order to show potential war criminals and mass murderers that they will suffer should they violate human rights. Since the fear of punishment will prevent some war crimes, so the argument goes, the probability of rights violations will decrease.

Under either deterrence or retributivism, the goals pursued by the Israeli government, while morally worthy, are insufficient to outweigh a legitimate state's sovereignty. The Israelis should have requested authorization from the Argentine government before they abducted Eichmann. Even if the Argentines refused to help the Israeli cause, and there is no evidence that they would have, I believe that the moral foundations that support the sovereignty of a fully legitimate state defeat legitimate retributive interests. Of course, given the horrific nature of Eichmann's crimes, the Argentine government would have acted immorally had it refused to surrender or, in the alternative, prosecute Eichmann. Even then, Israel could not justifiably seek a remedy that violated a legitimate state's sovereignty. Members of the liberal alliance have a duty to resort to rational methods of solving disputes. Low-intensity operations such as abduction have no place *within* the alliance, no matter how noble the cause or how vile the target of the operation.⁷⁶

Assuming the most favorable facts for the United States government, i.e., that Alvarez-Machain was in fact guilty of complicity in acts of torture, the Alvarez-Machain case is morally

75. See Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, CRIMINAL JUSTICE ETHICS, Winter-Spring 1985, at 3. Kant's reason for rejecting deterrence and adopting retribution is unsatisfactory—even creepy. See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 99-106 (John Ladd trans., 1965) (criminals must be punished because if we don't, we share in their blood guilt).

76. Of course, the situation changes radically when we change the dateline. Suppose Eichmann is residing in Buenos Aires in 1978, sheltered by the fascist military régime. The considerations against abducting him do not apply here, and Israel would have had a strong moral case for conducting the operation. The requirement that the operation be as surgical as possible (discussed in part VII *infra*) still applies.

indistinguishable from the Eichmann case. Mexico is a legitimate state, and the Mexican government a legitimate government. Mexico is a full member of the liberal alliance; therefore, her sovereignty must be respected. The United States has no right to intervene in Mexico; moreover, it had a solemn duty to resort to the agreed-upon methods of dealing with criminal fugitives, such as the extradition treaty in force between the two nations.⁷⁷ Had Mexico refused to extradite Alvarez-Machain, the United States would not have been justified in using coercion. Only diplomatic and judicial remedies, such as a case in the World Court, are available among liberal republics. It is unfortunate that the United States Supreme Court refused to give even the slightest consideration to this central question of international morality.

B. Low-Intensity Operations Against an Illegitimate Government

The second situation, in which the targeted state is legitimate, but its government is not, is more complex. In such cases, assuming all other necessary conditions are met, low-intensity operations are *legitimate only if they are directed against the government itself and its instrumentalities*. This means that the operations may not violate the human rights of the citizens, nor disrupt their life in common.

The example of Iraq may serve to illustrate this point. I already indicated that a legitimate government's assistance to an insurgency of Iraqi citizens aimed at ousting the Iraqi dictator would be morally justified.⁷⁸ Suppose that the United States contemplates an operation to destroy the arsenal of Iraq, in particular all those facilities and matériel that may increase its nuclear capabilities. State sovereignty does not preclude this operation, since it is directed against the government and its instrumentalities, not against the citizens of Iraq.⁷⁹

In such cases, it is important to recall that the citizens have not waived their human rights or their right to have a state, or a life in common. Therefore, the operation must respect these rights and the local institutions that represent their freely chosen life in common. It must be tailored as narrowly as possible as an action against the government, not the people. Some cases are relatively clear, such as where action is taken to aid just revolutionaries against an illegitimate

77. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

78. See *supra* text accompanying note 60.

79. Recall that the other conditions must obtain. In this case, the aim—prevention of aggression by a tyrannical government—is justified.

government, or to protect imminent victims of a tyrant's repression, or to rescue nationals in danger.

Even in these clear cases, the citizens of the target state have not given up their state. The operation must respect the local institutions reflective of their life in common. One hypothetical example may help clarify this principle. Suppose the United States government has detected in Cuba a notorious drug lord suspected of very serious crimes in the United States. Is the United States morally justified in abducting this person from Cuba? The Cuban government, we shall assume, is illegitimate, but the Cuban *state* is not. In other words, Cubans have a right as against foreigners that their life in common be respected. This may include institutions such as the judicial system. The answer to our question will depend on whether the courts in Cuba are independent or subservient to the Castro regime. If the former, the United States may not act and must instead utilize diplomatic channels, such as a request for extradition. If the latter, the courts are not an institution to administer justice to the Cuban people, but rather a mere instrumentality of the illegitimate regime. In this case, I suggest that the United States may act, provided the operation satisfies the other requirements. Action is justifiable because the United States would be doing no more than capturing a suspected criminal from his hideout among a gang of outlaws of the international community. After all, illegitimate governments are no more than gangs of outlaws, usurpers.

Because the citizens in the target state retain their individual rights, low-intensity operations are complicated by the very difficult, and virtually unavoidable problem that some innocent people may be injured or killed during an otherwise justified operation. The most prominent doctrine to justify accidental and incidental killing of innocent people in a just military action is the doctrine of double effect, which is in part recognized by modern international law.⁸⁰ According to this doctrine, incidental loss of lives in war is not prohibited if the *intent* of the just warrior is to obtain a military

80. See Protocol Additional to the Geneva Convention, Aug. 12, 1949, art. 51, 16 I.L.M. 1391 (1977). (Indiscriminate attacks prohibited, but only "disproportionate" loss of incidental lives prohibited). It is interesting to note that for the moral version of the doctrine, just cause is essential, so that *every* death inflicted by the unjust warriors is unjustified. For international law, however, just cause is irrelevant. The army on the wrong side of a war may also cause incidental loss of lives under the doctrine of double effect.

advantage, not to victimize innocents, even if he can *foresee* the deaths of innocent people.⁸¹

The doctrine of double effect, however, has been recently challenged by Judith J. Thomson. Her critique is skeptical of the moral relevance of the doctrine's crucial distinction between specific intent to kill bystanders and mere foresight that bystanders will die. In her view, if there is any justification for the incidental loss of lives of bystanders in a war, it must depend on the justice of the cause—on the larger purpose of the operation.⁸²

Professor Thomson, however, bypasses this question as too complicated, *et pour cause*: justifying the loss of innocent lives is perhaps the major challenge faced by any non-utilitarian theory of just war.⁸³ Providing a fully satisfactory reply to critics of the doctrine of double effect is beyond the scope of this discussion. I will, however, make three observations. First, unless *some* justification is supplied for the incidental killing of innocent people, no war or revolution could ever be justified. I am aware, of course, that this begs the larger question of the justification of war: maybe pacifists are right, and no violence is ever justified; or maybe utilitarians are right, and the only plausible thing to do is to weigh costs and benefits of war. But *if* one rejects utilitarianism, and *if* one accepts as a point of departure that sometimes fighting in a war or a revolution is the morally right thing to do, then we must come up with some rights-based justification for the incidental killing of bystanders. Second, the justification for the incidental loss of innocent lives in a low-intensity operation does not differ from the justification given for such loss in conventional war. Whether one chooses the doctrine of double effect or the "larger cause" doctrine⁸⁴ to justify incidental loss of innocent lives in a just war, the same rationale is available for justified low-intensity operations. Recall that the other constraints,

81. A recent version of the doctrine is offered in Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 334-36 (1989).

82. See Judith J. Thomson, *supra* note 60, at 292-96.

83. In HUMANITARIAN INTERVENTION, I adopted Daniel Montaldi's suggestion that incidental loss of lives in an otherwise justified war can sometimes be justified by reference to the nature of the evil that the just warriors are attempting to suppress. I suggested that the suppression of serious and disrespectful human rights violations was an interest compelling enough to outweigh, sometimes, the bystanders' right to life. TESÓN, HUMANITARIAN INTERVENTION, *supra* note 16, 96-102. Although I think I was on the right track, this view (which is consistent with Thomson's "larger cause" suggestion) needs to be elaborated further.

84. See *supra* note 82 and accompanying text.

such as proportionality and *modus operandi*, always apply. Finally, there is at least a clear difference in blameworthiness between the warrior fighting for a just cause who diligently tries to protect innocents, and the just warrior who chooses to terrorize and victimize them in his pursuit of the just end. A low-intensity operation against an illegitimate government, then, must not be *aimed* at innocent people, even if that is conducive to the demise of the tyrant. Moreover, the agents conducting the low-intensity operation must design it with the protection of bystanders in mind.

D. *Low-Intensity Operations Against an Illegitimate State*

When the target state is illegitimate, the social contract has collapsed, and sovereignty considerations no longer apply. In some instances where the horizontal contract has disintegrated, anarchy reigns and different groups may control different parts of the territory.⁸⁵ The aim of the low-intensity operation has to be justified under just-war theory, and, as always, the individual rights of the residents ought to be respected. All the considerations regarding innocent bystanders discussed in the previous section apply here as well.

It is crucial that the people be allowed to rebuild a legitimate state if they wish to do so. Humanitarian intervention must be accompanied by measures facilitating the political reorganization of local forces on the basis of free elections and respect for human rights. People who traditionally have lived in a region must be permitted freely to enter into a social contract.⁸⁶ These are not easy questions to answer, and the solutions will vary considerably depending on the facts.

VI. NECESSITY AND PROPORTIONALITY

The main purpose of this paper has been to suggest principles with which to evaluate low-intensity operations in the light of state sovereignty. Two other conditions, however, further restrict the legitimacy of these operations.

The first is the customary requirement of *necessity* and *proportionality*. Low-intensity operations satisfy the requirement of

85. Lebanon until recently and Somalia and Yugoslavia today may be examples of this situation.

86. By "freely," I refer to *individual freedom*.

necessity only if no less intrusive means are available to accomplish the same goal. Proportionality involves calculations of the costs and benefits of the low intensity operation in a way that is not solely dependent upon the national interest, however measured. The general rule is that the coercion used in the operation and the consequent harm done by it have to be proportionate to the importance of the interest that is being served, both in terms of the intrinsic moral weight of the goal, and in terms of the extent to which that goal is served.

VII. THE REQUIREMENT THAT THE OPERATION COMPLY WITH MINIMAL NOTIONS OF DECENCY

The second of these final conditions for a morally defensible low-intensity operation is that the operation must not be so odious in its *modus operandi* as to be corruptive of the virtues that people must exhibit in a liberal democracy. The operation should not be morally self-defeating.⁸⁷ This requirement rests upon an important moral insight: there are things we cannot do to others because of what *they* are (i.e., they hold rights), and there are things we cannot do to others because of what *we* are.⁸⁸ What are we? As individuals having inherent dignity and value, and as members of a just civil society—a liberal democracy—we must act in such a way as to cultivate our civic virtues and best character traits. This applies, a fortiori, to actions by the government, which is supposed to act for the *polis*. In part, the insistence on governmental virtue in the conduct of foreign policy derives from self-interest; we cannot expect our government to behave honorably by *us* if it goes around the globe sending hit squads to assassinate and torture people, even for just causes.⁸⁹

An example may help illustrate this proposition. Is it morally permissible to assassinate Saddam Hussein? I would think not. The proper course of action is to help the Iraqis overthrow him, capture

87. Virtue theory is usually traced back to Aristotle. See generally NANCY SHERMAN, *THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE* (1989). For a contemporary account, see ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984). The effect of adding virtue considerations to rights considerations is that the scope of morality is enlarged. In that sense, virtue theory provides important insights and supplements to liberal rights theory. However, contrary to virtue theorists, I regard civic virtues as parasitic on the values that underlie a liberal democracy, not the other way round.

88. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 400-02 (1981).

89. See generally Thomas Nagel, *Ruthlessness in Public Life*, in *PUBLIC AND PRIVATE MORALITY* 75, 78-79 (Stuart Hampshire ed., 1978) (discussing whether public morality can be derived from public morality).

him, and bring him to trial before Iraqi courts or an international criminal court in accordance with internationally accepted norms of fair trial. Assassination is banned, not because the punishment is necessarily inappropriate in light of Hussein's crimes, but rather because agents of a liberal democracy must conduct themselves in a way that honors the civic virtues for which they stand. Criminal punishment can only be imposed through the mechanisms allowed by liberal society. The same reasoning applies to other intrinsically contemptible modes of action, such as torture and terrorism, regardless of sovereignty considerations, just cause, or national interest.⁹⁰

CONCLUSION

I have argued in this paper that low-intensity operations, such as the abduction of Alvarez-Machain may be justified only when all of the following circumstances prevail: the contemplated actions further a just cause; they do not infringe the target state's sovereignty—which is itself a function of internal legitimacy; they otherwise respect human rights; they are necessary and proportionate; they comply with minimal norms of decency as to their mode of implementation.

In the Alvarez-Machain situation, the target state and government were both legitimate. Therefore, the United States could not justifiably ignore the extradition procedures provided by treaty. The moral analysis supports a *per se* legal rule that intervention is not allowed *against fully legitimate states*. State-sponsored abductions against fully legitimate states are therefore prohibited. Low-intensity operations may sometimes be justified against illegitimate states or governments.

My account of the moral legitimacy of low-intensity operations sets aside the morally bankrupt obsession with national interest, and substitutes instead the defense of human rights and just institutions. As the world moves toward the liberal alliance that was predicted by Immanuel Kant two hundred years ago, low-intensity operations will gradually become less important, for the same reasons that overt conflict will decrease.⁹¹ Members of the alliance will rely upon

90. Of course, Saddam Hussein may die at the hands of agents sent to arrest him if he chooses to resist, and the action will not thereby become illegitimate.

91. See Michael Doyle, KANT, LIBERAL LEGACIES, AND FOREIGN AFFAIRS (PART I), 12 PHIL. & PUB. AFF. 205, 225-232 (1983); Tesón, *The Kantian Theory of International Law*, *supra* note 16, at 74-81.

their mutual commitment to democracy, human rights, and the rule of law; international disputes will gradually be entrusted to international institutions. There is a crucial proviso: tyrants have no place in this scenario. *The international state system will not achieve peace and stability as long as international law continues to protect dictators under the guise of state sovereignty.* The main cause of war, and the main reason why democracies feel the need to carry out low-intensity operations, is the existence of such enemies of freedom, in and out of government. Only a truly universal movement toward democracy will render low-intensity operations obsolete.