In Defense of Traditional Human Rights

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Abstract: In considering human rights policies of a sovereign, a functional definition of *human rights* is necessary. The Uniform Declaration of Human Rights (UDHR) expansively defines human rights by employing a positive rights standard advocated by Jack Donnelly. This expansive definition allows for the infusion of philosophical and political principles not shared by all societies. The lack of consensus results in a decreased ability to react appropriately to per se human right violations, including genocide.

Traditional human rights, or negative rights, are *most* essential to the definition of human rights in limiting future atrocities. By defining human rights within the context of traditional negative rights, greater consensus is possible allowing efficient action and greater protections. This standard is an imperfect normative theory of global justice. However, the functionality of a traditional human rights approach far outweighs - in human life - the philosophical and political jousting of the global justice questions.

Keywords- Human Rights, Negative Rights and Positive Rights

1. Introduction

Contemporary global justice theory is commonly rooted in a normative approach whereby the theory is assumed to be beneficial to the common good. Though benefits

may exist, issues become evident when transitioning from this normative approach to analysis of the impacts of global justice theory on the human rights policies of a sovereign country. When considering global justice from this applied perspective, a more functional definition of *human rights* becomes necessary to allow for implementation. This functional definition is centered upon basic human rights principles to allow near universal application despite relative differences in the political systems of involved countries. By limiting the definition of human rights to these more fundamental principles, the ability to develop consensus among sovereign countries is greatly improved; thereby, improving the functionality and effectiveness of human rights policy's implementation.

Alternatively, a broader definition of human rights limits consensus and compels further investigation, inquiry and debate. Whether an event has violated human rights must be established prior to any form of intervention based on global justice grounds. Therefore, a recognized consensus on the definition of human rights allows for more immediate consideration of ethical implications of action or inaction as the triggering event is clearly identified as a violation per se. A recognized consensus of human rights allows for expedited determinations by and between sovereigns regarding the need for intervention and form of intervention (e.g. economic sanction, military response). Although, relative responsibility of sovereigns, such as the response of the United States versus the response of Ghana to international crisis, may require additional political determinations, the primacy of action is not lost.

In this paper, I will critique Jack Donnelly's emphasis on positive rights in formulating a comprehensive doctrine of human rights. This critique forms the thesis of traditional human rights, or negative rights, as *most* essential to the definition of human rights in limiting future genocides or atrocities assuming a pluralistic society. By defining human rights within the context of traditional negative rights, greater consensus is possible among and between sovereigns allowing prompt action and greater protection of human life. This quasi-*statist* position, which is characterized by strong bureaucratic tactics and rigid centralization between sovereigns, while remaining limited in scope only to remedy the most grievous human rights violations, will be defended employing supporting

philosophies of Thomas Hobbes, Maurice Cranston, John Rawls, Thomas Nagel, and Joshua Cohen.

2. Critique of Donnelly

When considering *rights*, a common philosophical distinction exists between *positive rights* and *negative rights*. There is a qualitative difference between these types of rights when viewed from the perspective of an individual. Positive rights commonly refer to the participatory rights of citizens. An example of an American positive right is the right to education. Other forms of positive rights, whose merits are commonly debated, include the right to food, healthcare, or housing. As evidenced by the recent establishment of universal healthcare in the United States by the Affordable Care Act and subsequent United States Supreme Court decision in the case of *National Federation of Independent Business v. Sebelius.*[1] These positive rights are often met with varied opinions and political and legal hostility. Positive rights require more than mere recognition and compliance by individual citizens, and at times businesses and other entities. Their active participation through tax policy becomes extremely important. Jack Donnelly holds these positive rights to be economic and social in nature, extending to even cultural rights.[2]
Ultimately, it is these positive rights that favour entitlements to socially provided goods, services, and opportunities.[3] For example, in the United States, the right to education and universal healthcare are both positive rights. These rights are also entitlements in the sense that those to whom these rights accrue cannot be deprived of the specific right (i.e. education, healthcare). In addition, those charged with providing the positive right (i.e. public schools, public healthcare providers) cannot deny the entitlement to the right-holder. More simply, as positive rights they cannot be removed once invoked. Continuing with the American education and healthcare example, as entitlements they survive even when the right-holder is lawfully imprisoned or incarcerated. Active support and

[1] (2012) 132 S.Ct. 2566
[2] Donnelly, Jack, *International Human Rights, Third Edition* (Westview Press, 2007) at 25
[3] *Ibid*

assistance remains a constant in this positive rights schema. Hence, a violation of a positive right involves "only failing to provide assistance, a (presumably lesser) sin of omission".[4]

Conversely, negative rights commonly refer to freedoms from encroachment by the government or others. They prohibit intrusion on individuals. Essentially, these negative rights are certain liberties that afford redress or sanction, if unfairly encroached. In American constitutional theory, negative rights are found in many protections afforded by the Bill of Rights. These include First Amendment freedoms such as speech and free exercise of religion. "Negative rights require only the forbearance of others to be realized".[5] Thereby, violation of a negative right "involves actively causing harm, a sin of commission".[6]

In *International Human Rights*, Jack Donnelly offers a modernity argument for the development of human rights citing massive development post-World War I with the Jewish Holocaust serving as the catalyst. Donnelly also refutes the qualitative difference between negative and positive rights.[7] Donnelly maintains that negative rights are essentially civil and political rights, whereas positive rights are economic and social rights.[8] Donnelly argues that all human rights "require both positive action and restraint by the state if they are to be effectively implemented".[9] Therefore, he holds that all rights require endeavoring and forbearance. Donnelly cites examples of the right to vote, due process of law, and trial by jury as common civil and political, or negative, rights. Furthermore, "some rights, of course, are relatively positive. Others are relatively negative. But this distinction does not correspond to the division between civil and political rights and economic and social rights."[10] Donnelly's analysis attempts to destroy fundamental distinctions between positive and negative rights by analyzing the role of government in enforcing these rights. This perspective, however, is government-centric

[4] *Ibid*
[5] Donnelly, Jack, *International Human Rights, Third Edition* (Westview Press, 2007) at 26
[6] *Ibid*
[7] *Ibid*
[8] *Ibid*
[9] *Ibid*
[10] *Ibid*

and western. A right to democratically elected representation is assumed as standard in western legal procedure. Most notably, Donnelly employs an expansive definition of negative rights which limits distinction from positive rights. The analysis is based on government action or inaction, not the subject. It is the action or restraint of government which determines the qualitative character of the right as opposed to the impact on the subject. This treatment of government as separate from the citizenry contradicts the basis of governmental legitimacy. The basis of legitimacy, from a western perspective, entails development of laws by the citizenry themselves, or someone charged with their care, and the promotion of the common good.[11]

By emphasizing the citizenry and limited rights, the distinction between positive and negative right is better applied to the study of international human rights. As the welfare of the citizen, as opposed to the welfare of a regime, is the priority in human rights analysis, they must remain the central to discussion. It is the impact upon the subject, or citizen, which is the core of human rights and related violations. Whatever the philosophical perspective regarding the origin of human rights, religious or secular, the impact upon the individual, or collection of individuals, is the catalyst for action by sovereigns. These actions potentially include humanitarian assistance or military intervention depending on the circumstance. Further, emphasis on the citizenry coupled with a limited-rights perspective allows for more consistency in determining common rights across borders. In limiting the purview of international human rights to essential negative rights agreed upon by most liberal societies (e.g. the prohibition against the killing of innocents), a more apolitical standard for human rights enforcement is possible. When these fundamental negative rights, or liberties, are violated by a government or citizenry, the world community is able to react in a timely manner. In considering the post-World War I context given by Donnelly, the Armenian, Jewish, Yugoslavian, Rwandan, and Sudanese genocides share the common characteristic of a grossly negligent response time by the international community. Historically, the international community is prone to confer and dither as human life is systemically destroyed.

[11] Aquinas, ST II-i, Q 90, a.3

Donnelly then proceeds to draw moral equivalence between violations of positive and negative rights. Does it really make a moral difference if one kills someone through neglect or by positive action?[12] Contrary to Donnelly's assertion, the answer is yes. Neglect generally requires a more expansive definition of duty, as opposed to a positive act or commission, in order for the failure to act to constitute a harm. In order to be responsible for the death of someone based on neglect, an affirmative duty to avoid the dire outcome must exist. The affirmative duty is usually based on a special relationship or other agreement. This relates to the concept of voluntariness, which is firmly rooted in western justice theory.[13] Voluntariness in this context creates a hierarchy of injustice ranging from a mishap, where the harm is unforeseeable, to the unjust man, who acts with premeditation and deliberation to create the harm.[14] A failure to act (i.e. an omission) is more commonly considered negligent and deemed a mishap or mistake barring an affirmative duty. This may be reasonably deemed a lesser injustice. Whereas an act (i.e. a commission) is more commonly deemed an unjust act or indicative of an unjust man. This, in turn, may be deemed a greater injustice.

Further, reasonable persons often determine their individual duties based on their relationships. Consider the relative duties owed to one's own parents and children as opposed to parents and children of others. Therefore, such determinations are, in one respect, political in nature. Also, reasonable persons often determine duty based on their understanding of the self. In this context, consider the relative duties owed to one's own parents and children by a person seeking to be a "good" child or parent, as opposed to the relative duties owed by one not seeking to be a "good" child or parent. These determinations of duty may also be influenced by theological perspective or personal philosophy. However, even when assuming a common theology or religion, the understanding of duty therein may differ. The understanding of duty varies widely within segments of the major religions (i.e. Judaism, Islam, and Christianity). The secularist, humanist, agnostic and atheist are similar in their varying determinations of duty.

[12] Donnelly, Jack, *International Human Rights, Third Edition* (Westview Press, 2007) at 27
[13] Aristotle, *Nicomachean Ethics* V.8 (1135b11-26)
[14] *Ibid*

Ultimately, this lack of consensus in determining duty becomes only more pronounced in a pluralist society. An expansive definition of duty or a more varied interpretation of duty, then results in less likelihood of consensus regarding something actually constituting a duty across borders.

Alternatively, limiting the human rights question to one of response to a positive action or commission serves to more clearly define duty. Actions recognized by and between countries as prohibited (e.g. the killing of innocents) are more easily recognized and addressed. Therefore, political determinations by sovereigns regarding whether a duty exists, which requires time and deliberation, are also limited. As gross violations of human rights occur concurrently with this deliberation, the expedited response results in more efficient action to redress the human rights issue. The economic and social model of positive rights advanced by Donnelly is the opposite. As opposed to this reductionist approach, Donnelly conflates positive and negative rights which then promotes a lack of consensus. Therefore, consensus must be established prior to action. As the human rights violations are concurrent with the development of consensus, the cost of expansive definition resulting in the delay of action may reasonably result in additional loss of life. Given the state of contemporary politics and demonstrated inability to prevent genocide since the drafting of the Universal Declaration of Human Rights (UDHR), a traditional negative rights model, which limits definitions and increases consensus, is more reasonable and appropriate to limit human rights violations.

3. Traditional Negative Rights as Most Essential

The critique of Jack Donnelly serves as the basis for a limited definition of human rights whereby traditional negative rights are found to be the *most* essential. As a normative theory, placing limits on what constitutes human rights does not prohibit future growth or breadth of the definition. In considering how human rights should or ought to be defined, we tailor definition based on realities of history and contemporary politics. The potential for development toward a more liberal, progressive, or Marxist ideal is not impossible. This determination is for future analysis. Instead, the foundation is established to

preserve the most fundamental human rights by recognizing the continued inability to respond effectively to genocide and other human rights violations.

3.1. Hobbesian Assumption

In considering international reaction to human rights issues, I will assume a Hobbesian influenced position that international relations are a state of nature, something that requires a realist political theory.[15] This position serves as the most powerful argument for international skepticism regarding international relations.[16] Nonetheless, Hobbes philosophy of the state of nature being a state of war is particularly prescient given the current wars in Iraq, Afghanistan, Sudan, the continued Middle East conflict, and military posturing of a resurgent Russia. This state of nature argument allows for a right of nature as well.[17] This is the right to self-sufficient being with the ability to protect oneself. Hobbes holds that states are autonomous because people are autonomous and therefore a sovereign is necessary to establish justice.[18] Hobbes extends this analysis to the international scene. He states that internationally, a state of nature exists because there is no sovereign to establish justice.

As a result, the response to any international humanitarian crisis requires a political determination by sovereigns to ensure any relief does not adversely impact their self-sufficiency financially or otherwise. Despite the crisis, the state of nature still exists. Therefore, to preserve the most basic liberties (e.g. protection of innocents) one must attempt to limit the Hobbesian argument in order to persuade a sovereign to secure human rights beyond its own border. If this is not done, the country is unlikely to sustain the economic loss and potential loss of life, inherent in securing human rights. The state of nature assumption is best limited by reducing application. This is accomplished by limiting the need for determination of relief through a narrow understanding of when relief is appropriate. A definition of human rights as traditional negative rights serves this narrowing function, limiting the impact of Hobbes assumption, which may reinforce

[15] Beitz, Charles, *Political Theory and International Relations* (Princeton University Press, 1970) at 28
[16] *Ibid*
[17] Hobbes, Thomas and Gaskin, J.C.A., *Leviathan* (Oxford University Press, 1998)
[18] *Ibid*

a reluctance to intervene. Maurice Cranston, the British philosopher and economist, provides support for this position.

3.2. Cranston and Authentic Human Rights

As Maurice Cranston argues in *Political Theory and Rights of Man*, "a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category".[19] Contrary to Donnelly's emphasis of positive rights, Cranston maintains that the "traditional human rights are political and civil rights such as the right to life, liberty, and a fair trial".[20] These rights are contemporary negative rights requiring forbearance of intrusion. Donnelly, and other modern human rights scholars, offer the expansive definition of human rights based on positive right theory including economic and social rights. Cranston responds to this redefinition of human rights with both philosophical and political objections.[21] The philosophical objection is that the new theory of human rights is illogical.[22] The political objection is that the new theory confuses human rights and hinders protection of more actual human rights.[23]

Cranston, writing in 1967, recognizes the then recent evolution of human rights agreed upon by Donnelly. Cranston notes that "the reason for the revival is perhaps to be sought in history, first, in the great twentieth century evils such as nazism, fascism, total war, and racialism, which have all presented a fierce challenge to human rights; and secondly, in an increased belief in, or demand for, equality of men."[24] Cranston analyzes the historical growth of rights in keeping with the positivist right approach now advocated by Donnelly. This includes the positivist approach followed by Human Rights Commission of the United Nations Economic and Social Council in 1946. This positivist approach is characterized by deference to social construction and evidenced by the inclusion of many

[19] Hayden, Patrick, *The Philosophy of Human Rights: Paragon Issues in Philosophy* (Paragon House, 2001) at 164
[20] *Ibid*
[21] *Ibid*
[22] *Ibid*
[23] *Ibid*
[24] *Ibid*

provisions that are relatively positive in character. These include provisions culminating in the UDHR relating to compensation requirements (Articles 23 and 25) and right to education (Article 26). This positivist approach resulted in objection by some countries, including the United States.

In 1948 the UDHR was drafted to include thirty articles. Cranston correctly recognizes the first twenty articles as traditional negative rights, commonly held to be natural rights or rights of man. However, it is the remaining ten articles that Donnelly's argument would emphasize upon. These remaining ten rights are positive rights, economic and social, including a right to education and "periodic holidays with pay" in Article 24 of the UDHR.[25] Cranston maintains such economic and social rights are not human rights as they cannot be translated into political and legal action. More simply, such rights are virtually unenforceable.

In response to this expansive definition of human rights, Cranston bifurcates rights into the categories of legal right and moral right.[26] It is the specific category of "moral rights of all people in all situations" which he holds to be true human rights.[27] Universality begs these rights be "few" and "highly generalized".[28] A limited, generalized understanding allows for greater agreement and reduces the politics of relationship between involved countries. As foreign policy is complex in nature and multi-dimensional, relationships between countries on matters seemingly unrelated to an imminent human rights abuse, such as environmental policy or trade policy, may frustrate the ability of countries to act in concert and efficiently. When considered from a classical perspective, the distributive justice requirement of geometric or arithmetic proportionality, in recognition not response, is effectively removed. The question of merit or worthiness relating to geometric proportion doesn't warrants any consideration as the more limited definition of human rights allows for recognition of the violation without regard to the countries involved. Also, the question of equilibrium or harm is also irrelevant as the human right is narrowly defined so the infringement on the right is more discernible. The station or

[25] *Ibid* at 165
[26] *Ibid* at 167
[27] *Ibid* at 168
[28] *Ibid*

situation of the country impacted, as well countries determining whether to assist, need not be exhaustively considered. In turn, the political differences of conferring sovereigns are effectively removed as recognition is apparent.

Cranston argues for a three-part test to determine authenticity of a human right: *practicability*; *genuine universality*; and *paramount importance*.[29] Practicability relates to both rights and duties. The individual cannot be charged with the impossible, nor can they be guaranteed the impossible. Genuine universality entails the application of the right to everyone and not specific classes, groups, or demographics. Finally, paramount importance relies on the "utilitarian philosophy that analyses moral goodness in terms of the greatest happiness for the greatest number".[30] Cranston notes common sense affords an understanding of the essential services (i.e. ambulance) as opposed to non-essential (i.e. fairs and camps).[31]

Maurice Cranston ultimately limits the definition of human rights to those traditional negative rights recognized by most countries, including freedom of movement, right to life, right to liberty, and right to fair trial. It is these rights whose violations serve as an "affront to justice".[32] These traditional negative rights also allow for consensus among divergent societies. This overlapping consensus regarding human rights is supported by John Rawls understanding of public reason and related legal theory.

3.3. Rawls' Law of Peoples and Legal Theory Lexicon

The Law of Peoples by John Rawls analyzes justice by construction of the original position where actors choose principles of justice.[33] Rawls then extends these individual principles of justice to nations and international law. It may be reasonably argued that Rawls philosophy supports the thesis of negative rights as most essential to human rights. The international law envisioned by Rawls appears more limited than those proffered by Seyla Benhabib and Jurgen Habermas as a positive right to democracy is not guaranteed.

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[29] *Ibid* at 169
[30] *Ibid* at 171
[31] *Ibid*
[32] *Ibid*
[33] Rawls, John, *The Law of Peoples* (Harvard University Press, 1999)

Moral powers, including a capacity for justice and idea of the good, are deemed necessary for society.[34] Although Rawls assumes a pluralistic society, he argues that liberal societies with different comprehensive doctrines, such as Judaism, Islam, and Christianity, may find a political element or overlapping consensus. This overlapping consensus then forms a public reason.[35] This public reason will be limited which leans more favorably to a limited negative rights definition of human rights. The positive rights emphasis of Donnelly will fail to establish public reason whereas negative rights foster greater universality. Rawls clearly states the law of peoples requires "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide".[36] Violations of these traditional negative rights are "equally condemned by both reasonable liberal peoples and decent hierarchical people". Therefore, the limited definition affords public reason or consensus; consensus then allows prompt determination of action or inaction.

It is the principle of toleration which serves as Rawls underlying philosophy regarding global justice.[37] Toleration affords a more limited approach to intervention as opposed to a cosmopolitan position. The cosmopolitanism assumes an overarching shared morality and community, toleration does not. By not assuming a shared community or amalgamated identity, toleration defers to the distinctive characteristics of the relevant sovereigns. Whereas, the cosmopolitan position may require greater duty to intervene based on shared community or identity, toleration is more limited. More simply, as the relationship between the sovereigns differ in these distinct contexts, the relative duties also differ. Rawls holds that intervention is not permitted among and between liberal societies. Therefore, failure to secure positive rights, social or economic, does not allow intervention. In fact, Rawls precludes an interventionist approach in the international sphere that assumes basic human rights, a system of law, and decent hierarchical system of justice exists. It is to be noted that Rawls conception of rights is once again basic and

[34] *Ibid* at 45
[35] *Ibid* at 18
[36] *Ibid* at 79
[37] *Ibid* at 79

not expansive. These basic rights and system of law are similar to a traditional negative rights approach in coordination with Hobbes and Cranston, as they rely on minimum standards to allow for consensus. Action of a sovereign is warranted on a limited basis, contrary to the cosmopolitan approach, wherein a country failing to adhere to democratic principles may be subject to sanction.

This understanding of limited, or basic, human rights and limited intervention is further supported by Rawls' legal theory lexicon. In *A Theory of Justice,* Rawls maintains his premise of justice as fairness as being applicable to international law[38]. This theory evolves from the same Hobbesian presumption regarding social contract theory, namely state of nature as a state of war. Rawls recognizes that distinct principles and approaches, such as the toleration principal, must be purposefully administered in order to achieve *just law* between nations. These just laws do not naturally evolve. Once again, the Rawlsian evolution derives from construction of the original position and veil of ignorance. The result being two specific principles of distributive justice: the *equal liberty principle* and the *difference principle*.[39]

The equal liberty principle holds individuals have equal claim to a scheme of basic human rights and liberties. This schedule of basic human rights and liberties is compatible with the same schedule for all other individuals. In this scheme, only the equal political liberties are to be guaranteed their value. This equal liberty principle serves to secure basic rights for those without power or wealth in the society by ensuring minimum essential rights for all. Therefore, only fundamental rights are guaranteed. The difference principle relates to social and economic inequalities. The difference principle then attempts to distribute wealth to place those without power or wealth in the best position possible in the circumstance. The equal liberty principle is superior to the difference principle in cases of conflict.[40] Therefore, to protect the interest of the worst off, everyone's basic human rights, including traditional negative rights and liberties, that

[38] *Ibid* at 4
[39] Rawls, John, *A Theory of Justice* (Harvard University Press, 2009)
[40] *Ibid*

includes free speech and due process, must first be protected. It is the equal liberty principle which ensures these basic rights.

Practically speaking, Rawls lexicon prioritizes the establishment of basic human rights. Once these basic human rights are satisfied, questions regarding social and economic inequality may be considered so long as the first principle is not sacrificed. This is analogous to the relationship of negative rights to positive rights. Negative rights, similar to the equal liberty principle, are most essential. Once the negative rights are established more complex questions relating to positive rights may be treated. For instance, once the right of life is established as a prohibition against genocide or ethnic cleansing, the positive right of a housing, food, or healthcare may be considered. This lexicon survives Thomas Nagel's distinction between justice and humanitarian duty.

3.4. Nagel and Humanitarian Duty

In considering the potential for a global justice theory, Thomas Nagel differentiates between justice and humanitarian duty.[41] This distinction advances the thesis of negative rights as most essential by transforming Rawls' philosophy of global justice into a moral position. A principle of humanitarian duty, not global justice, is possible according to Nagel, the humanitarian duty being more limited than a comprehensive justice theory.

Nagel makes a distinction between negative rights and associative rights. The former relate to the international and the latter to national sovereignty. Nagel lists among negative rights "those that are supposedly not dependent on a specific form of membership in a specific political society. These include freedom of expression, freedom of religion and pre-political limits to the legitimate use of power, independent of special forms of association. Presumably these rights are not to be associated with socio-economic justice and can be realized voluntarily. However, the same cannot be said for the rights of association. These rights emerge only because a political society is brought together under a strong, coercive form of centralized control. Here Nagel wants to include a right to democracy, the right to equal citizenship, the right to non-

[41] Nagel, Thomas, *The Problem of Global Justice* (Blackwell Publishing, 2005) at 119

discrimination, the right to equality of opportunity and the right to be treated fairly in the distribution of socio-economic goods."[42]

By bifurcating global justice into distinct concepts of justice and humanitarian duty, negative rights appear more aligned with humanitarian duty than justice. Associative rights are based on the Rawlsian approach to justice as fairness. These are essentially social rights. Although, Nagel categorizes actions relating to human rights as humanitarian duty, the result is no different than Cranston or Rawls. The consideration is one of the moral minimum, something that is well grounded in a limited definition of human rights. In considering the most traditional negative rights of life, liberty, and security, Nagel holds that "the normative force of the most basic human rights against violence, enslavement and coercion, and of the most basic humanitarian duties of rescue from immediate danger, depends on our capacity to put ourselves in other people's shoes."[43] This relates to both Cranston's genuine universality and Rawls' equal liberty principle. Nagel continues, "the interests protected by such moral requirements are so fundamental, and the burdens they impose, considered statistically, so much slighter, that a criterion of universalizability of the Kantian type clearly supports them."[44] In short, Nagel's humanitarian duty bares the same earmarks as negative rights as both are fundamental and limited. Being fundamental, both allow for more expeditiously determinations of consensus among sovereigns. Being limited, both impose a slighter burden on sovereigns requiring only forbearance to avoid violation.

Therefore, intervention by a state or institution, such as the United Nations, is arguably not a matter of global justice but humanitarian duty. The role of the state or institution is not to develop a comprehensive global justice policy for imposition. Instead, their proper role is the redressal of more grievous human rights violations based on a humanitarian duty that is not restricted by borders. However, as the participation of states in this humanitarian duty is voluntary, it will also be based on a limited conception of negative

[42] Rasmussen, David, *The Possibility of Global Justice: Kant, Rawls, and the Critique of Cosmopolitanism* (Transaction Publishers, 2009) at 5
[43] Nagel, Thomas, *The Problem of Global Justice* (Blackwell Publishing, 2005) at 131
[44] *Ibid*

rights or moral minimum. A similar approach is considered by Joshua Cohen in his development of global public reason to be explored further in the next section.

3.5. Cohen and the Global Public Reason

In *The Egalitarian Conscience*, Joshua Cohen offers a political argument as opposed to a normative theory for global justice. In the vain of Hobbes, Cranston, Rawls, and Nagel, a limited approach to human rights is offered. The cosmopolitan approach calling for expansive positive rights, including a right to democracy, is not advanced. Nagel recognizes the practical difficulty in establishing a comprehensive global justice theory of the cosmopolitan variety. He offers a theory rooted in determinations of universality, political morality, and urgency.

Cohen offers an argument in line with Rawls overlapping consensus and public reason. "A conception of human rights is part of an ideal of global public reason: a shared basis for political argument that expresses a *common reason* that adherents of conflicting religious, philosophical, and ethical traditions can reasonably be expected to share."[45] The definition of human rights must be limited to allowing this sharing. It cannot be formulated by reference to particular religious or secular morality.[46]

Cohen argues for this same notion of universality cited above coupled with the appeal to morality of Nagel. Cohen maintains human rights have three features. First, they are "universal in being owed by every political society, and owed to all individuals".[47] As they are owed to all individuals, Cohen maintains human rights as entitlements. These entitlements of human rights then serve to ensure the qualification for membership.[48] Furthermore, human rights may command universal assent "only as a decidedly thin theory of what is right, a definition of the minimal conditions for any life at all."[49] Second, human rights are "requirements of political morality whose force as such does

[45] Cohen, Joshua, *The Egalitarian Conscience: Essays in Honour of G.A. Cohen,* (Oxford University Press, 2006) at 226
[46] *Ibid* at 237
[47] *Ibid* at 229
[48] *Ibid* at 226
[49] *Ibid* at 230

not depend on their expression in enforceable law."[50] Third, they are "especially urgent requirements of political morality".[51] These requirements allow for a minimalist definition when considering application.

Cohen also recognizes specific traditional negative rights, including life and security, as associated with demands of basic humanity regardless of membership in an organized political society.[52] These threshold rights, as recognized by Cranston, Rawls, and Nagel, must first be achieved. Cohen argues that the protection of human rights are a less demanding standard than assuring justice and the related positive rights, entailing democracy as well[53]. Cohen continues with this thought and states that although the task is less demanding, we should not forget that the world would be unimaginably different and many hundreds of millions of lives would immeasurably better if this less demanding but exacting standard were ever achieved.[54]

3.6. Foundations in Natural Law and Rights Theories

After considering Donnelly, Hobbes, Cranston, Rawls, and Cohen, we are left with an argument for a negative rights approach as essential to a functional international human rights policy. Whether the justification resides in Cranston's three-part authenticity test, Rawls' international law and justice, Nagel's deontological argument, or Cohen's public reason, the basis for a limited, functional definition of human rights is supported. This begs exploration into how best to define the specific human rights requiring protection as negative rights.

The relationship of natural law and rights with moral rights theories assist in identifying these basic human rights requiring protection as negative rights. The rights to freedom and life inherent in natural law theory are recognized by Jacques Maritain, E.B.F. Midgley, H.L.A. Hart and others as fundamental rights. These examples also support the moral right recognized by Maurice Cranston. Ultimately, it is the understanding of a

[50] *Ibid*
[51] *Ibid*
[52] *Ibid* at 238
[53] *Ibid* at 246
[54] *Ibid*

natural right, which flows from the natural law, which then requires recognition of, and adherence to, a moral right.

Therefore, it is from natural law theory where natural rights, and moral rights, develop. It is the natural law which also "recognizes human rights, rights that inhere in man simply because he is a human person."[55] Aristotelian and Thomistic understandings of the natural law and rights are now more often challenged as there exists greater acceptance of laws and rights as conferred.[56] Nonetheless, it has long been held that "the philosophical foundation of the Rights of man is Natural Law."[57] Jacques Maritain holds "the philosophy of the rights of the human person is based upon the true idea of natural law".[58] Maritain recognizes two distinct elements of natural law which are necessary for development of natural right theory; the ontological element and the gnoseological element.[59] It is the ontological element of natural law which is central to recognition of any natural right. Maritain describes this ontological element of natural law as that "to which every human person is gifted with intelligence and is capable of pursuing ends in a way for which he is or she is answerable."[60] He holds that it is this nature law which serves as a basis for determination of normal functioning of man, specifically "what man should be and do".[61] As a result, this ontological element regarding man's nature is a moral law which is both given and ideal.[62] The second element – gnoseological – is simply man's ability to grasp the first ontological element.[63] Therefore, by applying Maritain, we find the grounding of human rights is based firmly in the natural law.[64]

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[55] Fay, Thomas, *Maritain on Rights and Natural Law*, St. John's University at 442

[56] "[Alasdair] MacIntyre would underscore that the individual who is the supposed carrier of rights simply does not exist. Natural right theory imagines human being as monads prior to any interpersonal relations, lodged in no particular culture of tradition. Sincere there are no such individuals, if natural rights require such individuals, natural rights are indeed chimeric." McInerny, Ralph, *Natural Law and Human Rights,* The American Journal of Jurisprudence (1991) at 3

[57] *Ibid* at 3; See also Maritain, Jacques, *Man and the State* (The Catholic University of America Press, 1951), Page 80

[58] Maritain, Jacques, *Man and the State*, at 84

[59] McInerny, Ralph, *Natural Law and Human Rights,* The American Journal of Jurisprudence (1991) at 5; See also Fay, Thomas, *Maritain on Rights and Natural Law*, St. John's University at 439

[60] *Ibid*

[61] *Ibid*

[62] *Ibid*

[63] *Ibid*

[64] Fay, Thomas, *Maritain on Rights and Natural Law*, St. John's University at 439

Maritain's contention is also advanced by E.B.F. Midgley in his *Natural Law and Fundamental Rights* where he concludes, "fundamental human rights can be adequately upheld only by reference to man's natural inclinations, to the natural law and, ultimately, to the eternal law itself."[65] Furthermore, H.L.A. Hart in is his essay *Are There Any Natural Rights?* states that "the assertion of general rights directly invokes the principle that all men equally have the right to be free."[66] Hart holds this right to be free as a moral and natural right.[67] The basis of Hart's assumption of freedom as the natural right is the understanding that freedom is chosen by all men and is inherent, not based on relationship, nor conferred.[68]

Maritain, Midgley, and Hart contend that human nature and natural law reveals the truth regarding the person. It is this truth which must be recognized in order for an intellectual basis for human rights to be argued.[69] It is this intellectual basis which allows for the preservation of life within a human rights philosophy. Without this acceptance of a value of life, there remains little charge to establish or enforce human rights. As detailed in the analysis of negative right, it is the politicizing of the definition of human rights which commonly results in lack of consensus and ultimately inaction. In a positive rights model, the individual is afforded more economic and social rights. This rights ethic stands in contrast to a negative rights approach tending to define rights more narrowly. In applying Maritain, Midgley and Hart, we find natural law providing a philosophic basis for a more balanced understanding of rights.[70]

4. Conclusion

In conclusion, the UDHR states that human rights are "a common standard of achievement for all peoples and all nations".[71] Unfortunately, the UDHR then expansively defines human rights by employing a positive rights standard advocated by

[65] Midgley, E.B.F., *Natural Law and Fundamental Rights*, The American Journal of Jurisprudence at 144
[66] Hart, H.L.A., *Are There Any Natural Rights?,* University College, Oxford at 188
[67] *Ibid* at 175
[68] *Ibid*
[69] *Ibid*
[70] Fay, Thomas, *Maritain on Rights and Natural Law*, St. John's University at 439
[71] *Ibid* at 230

Jack Donnelly. This expansive definition allows for the infusion of philosophical and political principles relating to justice not shared by all countries and societies. This creates a lack of consensus amongst and between countries. This lack of consensus results in a decreased ability to react swiftly and appropriately to per se human right violations, including genocide and ethnic cleansing.

A more narrowly tailored understanding of human rights allows for a recognized consensus. Given the millions of lives lost in various countries through institutionalized murder since the development of the Universal Declaration of Human Rights, a realist perspective regarding human rights is appropriate. A limited definition of human rights based on a traditional negative rights approach is necessary to ensure recognized consensus and limit future atrocity. This standard may not serve as a perfect normative theory of global justice. However, the functionality of a traditional human rights approach far outweighs, in human life, the philosophical and political jousting of the global justice questions.