

Reform Intervention and Low-Intensity Conflict

Commentary on Fernando R. Teson's "Low Intensity Conflict and State Sovereignty: A Philosophical Analysis"

by
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Fernando Teson argues in his paper for strict moral limits on low-intensity operations, on the grounds that it is just as important to respect human rights in these activities as in conventional warfare. He is right to insist on such limits, but there are problems with the way he goes about making his case.

Specifically, I want to argue that in trying to derive these limits from a philosophical theory of legitimacy, Teson gets bogged down in academic abstractions. A philosophical theory of legitimacy and sovereignty is one thing, moral principles of international conduct another. Furthermore, insofar as it does have policy implications, the legitimacy theory he offers is far too permissive. Instead of relying on an abstract and elastic theory of legitimacy for moral guidance, we should be paying more attention to the traditional constraints of international law, and to making sure that these constraints are reflected in U.S. law and military practice.

International law—not only the law of the Charter, but also customary international law—frowns on armed intervention. Many moralists take a more permissive view of intervention, however. Some pay no attention to international law at all, basing their judgments directly on whatever set of moral ideas seems most compelling, from natural law and human rights to the national interest and American values. Others claim to take international law seriously by agreeing that the sole lawful ground for the unilateral use of armed force by a State is self-defense, but then interpret self-defense so expansively as to effectively undercut the legal constraints. Almost all seem willing to agree that international law should be respected—provided nothing really important is at stake. In Professor Teson's version of the story, international law is morally defensible as a system of rules regulating the relations of legitimate States, but there is no moral basis for paying attention to whatever protection it may offer illegitimate States.

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Before considering Professor Teson's argument, I want to express some concern about his handling of the concepts of sovereignty and legitimacy.

For Teson, the concepts are linked: sovereignty is "popular sovereignty," a kind of legitimacy. The version of his paper presented at the Newport symposium defines "sovereignty" as "the monopoly of coercion" granted to a government "by the citizens that reside in it, and recognized by international law." This is not a good definition of sovereignty, however, not only because it loosely combines discrepant factual and normative criteria, but because it attempts to settle by definition what is actually the substantive point at issue in the debate over the moral limits on low-intensity conflict: whether sovereignty (and its corollary, territorial integrity) constitutes a principled obstacle to low-intensity operations.

The core meaning of the word "sovereignty" in the context of international relations is "statehood," a status in international society that is defined by international law. A sovereign State is an independent State, but not necessarily a democratic one. So understood, sovereignty is a presupposition of international society, not a moral principle. "Legitimacy," in contrast, pertains to the moral claim a nation may have to being a State or, alternatively, to the claim a government may have to govern the State. It is plain that, on these definitions, "sovereignty" and "legitimacy" are different concepts, and that the definitions are by no means eccentric ones. We can talk of States whose title to statehood or whose government fails somebody's test of moral legitimacy. If we tie sovereignty to legitimacy, then the concept of sovereignty becomes superfluous.

International law exists because of the uncertainty and disagreement surrounding moral judgments of State conduct. And the concept of sovereignty continues to have a place in international discourse because there is so much uncertainty and disagreement surrounding judgments of legitimacy. By making legitimacy the criterion of sovereignty, as Teson and many other moralists do, we substitute an obscure and contested criterion for a clearer and more objective legal standard. It is true that international law suffers from uncertainty and disagreement, but the remedy for that is to strengthen the consensual basis of international legal norms, not to abandon those norms for an even more uncertain philosophical formula.

Professor Teson presents his views on the moral significance of legitimacy as an alternative to what he calls "realism," the view that the ethical standing of military actions (including low-intensity operations) depends on their consequences for the national interest and that such actions are justified when they advance that interest. Teson's own view is that military and low-intensity operations are justified when they serve to promote democratic government and human rights. I want to suggest that the difference between the realism he rejects and the human rights theory he defends is not as big as he thinks it is.

It may help to sort things out to provide a more elaborate typology of moral views, one that identifies a wider range of moral views than Teson's dichotomy between political realism and the human rights perspective he advocates.

In particular, I want to suggest that it helps to classify moral views along not one but two dimensions. The first allows us to distinguish between consequence-oriented and constraint-oriented viewpoints. A consequence-oriented ethic is one that makes consequences or *outcomes* the criterion of right and wrong, whereas in a constraint-oriented ethic right and wrong are determined on the basis of antecedently-authoritative *principles*. Realism, as Teson understands it, is an example of an outcome-oriented perspective, whereas his own human rights theory is (mostly) a principled or constraint-oriented perspective.

But there is a second dimension of difference in ethical theory that cuts across this outcomes-principles dimension. Ethical theories can also be either universal or particular. That is, the outcomes or constraints they emphasize can be those of mankind as a whole, or they can be those of some particular portion of mankind, a particular community. If we make the simplifying assumption that these two dimensions can be dichotomized, we can generate a simple 2x2 table of possibilities (see Figure 1).

FIGURE 1

	Universal	Particular
Consequence-Oriented	Utilitarianism	Political Realism
Constraint-Oriented	Common-sense Morality Natural Law Human Rights	Communal Principles

Although this typology reveals the relationship between two significant dimensions of ethical controversy, it remains a pretty crude interpretive tool. Its categories may seem clear and distinct, but actual moralities are a messy affair. They resemble each other in various, sometimes disturbing ways, and often overlap. In fact, moralities are in some ways best understood as vocabularies for moral judgment and debate, and any given vocabulary can be used to express a wide range of substantive positions.

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Consider political realism and common-sense morality, which the typology puts at opposite ends of both dimensions. The picture of realism Teson offers is historically inaccurate and philosophically incomplete. The kind of realism we encounter in foreign affairs, when we get above the level of a vulgar, unthinking “my country right or wrong,” is one that does not entirely dismiss principled constraints, whether these come from one’s own tradition (for example, the American ethos or the ethic of military honor) or from some putatively more universal source (natural law, human rights, “reason,” etc.). The realism of Treitschke, Niebuhr, Butterfield, Morgenthau, and Kennan recognizes not only the prudential considerations of necessity and proportionality, but also the principled constraints of morality and law.

The ethical question, as the realist frames it, is “When should moral and legal constraints be set aside for the sake of the national interest (that is, to preserve national security or the public safety)?” Realist theories can be usefully classified according to whether and under what circumstances they permit prudential considerations to override principled ones. An extreme or pure realist might say “always,” but more moderate versions of realism would introduce progressively stricter constraints: “only in foreign affairs,” “only in war,” or “only in national emergencies.” In other words, the kind of sophisticated realism that is rooted in the idea of reason of State, and that has long been prominent in diplomatic thought and practice, is not a purely consequentialist ethic of the national interest. It is an ethic of principles that is willing to override its principles when the stakes are high enough, and only when the stakes are high enough. The strictest version of such an ethic would be one that insisted on fidelity to law or moral principle except in situations of extremity.

Now a constraint-oriented ethic that allows moral principles to be set aside in extremity is not so different from the kind of political realism that is willing to respect moral principles if the costs are not too high. There is not a big difference between a moral theory that says “respect the principles of justice and human rights except in extremity, if violating these principles is necessary to preserve the community and its laws,” and a realist theory that says that “in extremity one may (if necessary) override justice and rights.” The realist and human rights theories reach this common point of agreement from different directions, but there *is* a point of agreement. The only way to really distinguish common-sense morality from consequentialist realism is to insist that moral or legal principles must be observed regardless of consequences. *Fiat justitia, ruat coelum* (Let justice be done though the heavens fall). But despite all his insistence on human rights, Teson seems not to want to take this last step, and therefore (I would argue) he remains closer to realism than he perhaps realizes.

Now let’s take a closer look at Professor Teson’s ethic of legitimacy and his application of it to low-intensity conflict. Teson gets himself into needless difficulty by making too much depend on the idea of legitimacy. His basic

principle is, I have already suggested, unacceptable: that a State is internationally legitimate when it is internally legitimate. The concept of “legitimacy” is not one that can be used simply in making moral judgments, much less policy decisions. Not only are there other ways of justifying sovereignty, but it is by no means clear when either a State or a government is or is not legitimate.

The viewpoints we label “realism”, “common-sense morality,” and the like are little more than names for theories abstracted from far richer and more complex ethical systems—actual, living moralities that are embedded in practice and used (and misused) by those who would probably be unable to give any very coherent account of the principles underlying their own decisions. The philosopher can identify and dissect these moral traditions, and he can articulate the principles that underlie the judgments in which the traditions are used and through which they are continually reconstituted. The worst thing the philosopher can do is to fool himself into thinking that his constructs are an improved version of, and a practical substitute for, the moral traditions they interpret, and to offer these constructs as a guide to practice. But of course this is precisely what philosophers and other moralists are always doing, and I think Teson falls into this trap as well.

In the philosopher’s abstract approach to concrete ethical issues, all too often a merely explanatory scheme is used to criticize or defend conduct. But you can’t get very far by simply “applying” abstract moral categories and principles. It would be better to rely on our laws and our moral traditions, criticizing them internally on the basis of self-contradiction (holding a tradition to its own principles, so to speak), rather than to make some rational scheme the archimedean point of reference. In considering the propriety of low-intensity operations, we need to pay particular attention to U.S. and international law. Morally defensible military policies must respect non-consequentialist moral and legal constraints, and those responsible for them must be wary of overriding these constraints on grounds of “necessity.”

In my judgment, Professor Teson’s analysis is conceptually confused but it is not, in the end, entirely unsound. Teson relies on a philosophical argument to rediscover the common-sense moral idea that when the U.S. engages in low-intensity operations, it ought not only to give weight to considerations of necessity and proportionality, but also to respect those principles that protect individual and collective human rights. In other words, ethically speaking, low-intensity operations (like other kinds of military action) are constrained by moral considerations as well as prudential ones.

Professor Teson proposes a theory to guide policy that is less nuanced than common-sense morality and therefore hardly an improvement on it. As often happens when a philosopher turns to moralizing, this theory turns out to be an abstract restatement of a complex moral tradition or traditions. In Professor Teson’s theory, the traditions that are restated are those of natural law and Western liberalism. It is, of course, possible to pull a lot of different rabbits out

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of this particular hat, and in seeing human rights and justice as constraints on the pursuit of interest, Teson has at least got the right rabbit.

There is, however, a more practical and less dangerous way of seeking to secure respect for the principles of justice and human rights embedded in common-sense morality, and this is to insist that U.S. low-intensity operations respect both U.S. and international law. This does not mean that the relevant laws are uncontroversial, or that they are beyond criticism and the need for reform. But nothing is more important than improving and respecting our public standards for conducting foreign and military policy. And in interpreting the law, one must keep firmly in mind the basic idea of legality or the rule of law, and resolutely reject higher-law and instrumentalist interpretations that seek to get around constraints on the pursuit of moral goals or national interests.

Finally, we must not forget that there is much to be learned from earlier debates about the morality of war and intervention. Because the principles at stake are those that have long shaped international relations, the current debate regarding the scope and limits of permissible low-intensity operations, especially in relation to the norms of sovereignty, is very much a continuation of the old debate about armed intervention.

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