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Citation: Blunt, G. D. (2017). Is There a Human Right to Resistance?. Human Rights Quarterly, 39(4), pp. 860-881. doi: 10.1353/hrq.2017.0052

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Link to published version: <https://doi.org/10.1353/hrq.2017.0052>

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Is There a Human Right to Resistance?

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Abstract

This article is premised on the idea that global poverty is the foreseeable and avoidable by-product of the international system. This position is held by many cosmopolitans, but rarely do they deal with the consequences of this claim. This paper will examine the idea of a right to resistance in the face of global poverty. It will argue that a right to resistance is a necessary component of the political conception of human rights. It will also be argued that it is latent in some major documents and declarations to the point that it can be considered an emerging practice.

I. Introduction

In the debate on global distributive justice, cosmopolitans have often claimed that the global poor are suffering a severe human rights violation. The foremost amongst them has been Thomas Pogge, who has made the powerful argument that global poverty is the foreseeable and avoidable product of the international system.¹ It is understandable that the focus of Pogge and other cosmopolitans has been to offer institutional reforms to ensure secure access to human rights and provide compensation to those who have suffered from human rights violations.² Yet, very little has changed in the decades in which cosmopolitans have been leveling this criticism and proposing alternatives. There are still hundreds of millions of severely poor people. Amongst the affluent there is little political will to move beyond schemes like the Millennium Development Goals and the Sustainable Development Goals (SDGs), which may improve the lot of some people, but does not provide secure access to the contents of their human rights. The SDGs place more focus on the importance of stakeholder consultation, but stakeholders are not the same as rights holders. It remains the prerogative of member states to determine the way in which

stakeholders participate.³

It is surprising that cosmopolitans have not been more willing to engage with the problem of intransigent ongoing human rights violations. Whether the global poor have a right to resist the institutions responsible for their immiseration is a question that has rarely been discussed.⁴ This article will argue that the political conception of human rights, which underpins several prominent theories of global distributive justice, requires a right to resistance in order to be a strong theory of rights rather than a discourse on important interests. Moreover, the way in which the right to resistance has been conceptualized often overlooks the types of resistance available to extremely oppressed agents. This silence on resistance is symptomatic of a deeper problem with the global justice literature. It does not treat the global poor as genuine moral agents. Cosmopolitans identify the global poor as hypothetical moral agents and rights-holders, but when they appear in the work of political philosophers they tend to be subjects awaiting justice to be delivered rather than agents acting to claim what they are owed. This is somewhat understandable. The literature on global poverty may be about the global poor, but it is not for the global poor. It is a discussion between academics that occasionally reaches out to the affluent citizens of developed states. This is a problem because it molds theory to the interests of the academic, who, as Charles Mills points out, tends to be an affluent white male.⁵ It is not surprising that, although cosmopolitans are concerned about the global, they tend not to focus on resistance as it may severely disrupt the social institutions in which academics prosper.

Yet, it is unfair to treat this as ideological blindness to the agency of the global poor. Pogge has written that he has no standing to speak for the global poor.⁶ This can be called the Spivakian reticence in cosmopolitanism. Gayatri Spivak's assertion that the "subaltern cannot speak" seems to be a hidden premise within much of cosmopolitanism.⁷ Any attempt to capture

the agency of the global poor is doomed to make them the mouthpiece for the interests of the affluent academic philosopher. They become fetishes rather than actual persons. Cosmopolitans seem to be caught in a pincer by their critics; either they treat the global poor as subjects, or they treat them as objects.

This article attempts to avoid treating the global poor as passive subjects or as a fetish for our moral commitments. Edward Said's critique of Michael Ignatieff springs to mind: we must "imagine the person whom you are discussing—in this case the person on whom the bombs will fall—reading in your presence."⁸ In the case of global poverty, we are not imagining people upon whom bombs are falling. Instead, they are victims of a slower, but no less devastating violation of their rights. This is why resistance must be on the cosmopolitan agenda. It is difficult to imagine that an extremely poor person would be content with phantasmagorical reforms of the international system found in the cosmopolitan literature. The intention here is not to speak for the global poor, but to disclose a space of resistance that the global poor can shape and is also intelligible to cosmopolitans and human rights theorists.

The article begins by examining the political conception of human rights that underpins several prominent theories of global distributive justice. It will then argue that a right of resistance is a necessary part of this theory, if it can be considered a theory of rights that produces obligations. It will then examine the structure of the right by examining transatlantic slavery. This clarifies the structure and content of the right to resistance by rooting it in practice.

II. The Political Conception of Human Rights

There are many competing theories of human rights and providing a comprehensive analysis is

simply beyond the reach of this article. However, the choice of the political conception of human rights is not random. The political conception of human rights, best articulated by Charles Beitz, has a strong connection with cosmopolitan arguments about global distributive justice. The political conception of human rights is compelling because it attempts to sidestep the perennial debate about the foundations of human rights by examining the function of human rights in the international system. This conception has been identified with John Rawls' use of human rights in *The Law of Peoples*. He identified them as "a special class of urgent rights" that play a distinct role in ideal theory by setting the minimal standard of decency, legitimacy, and the limits of pluralism.⁹ Rawls' use of human rights, however, was criticized for being arbitrary in its selection of what counts as a human right in order to avoid the appearance of parochialism.¹⁰ This, however, mistakes the purpose of human rights in Rawls' society of peoples. They are conceptualized as the minimum standard for a liberal or decent people to be a member in good standing of the international community. Their function is to produce a stable, peaceful, and minimally just international system and, in non-ideal circumstances, to justify international intervention. Yet, even with this justification in mind, the arbitrariness problem still lingers. It is not clear why freedom from torture satisfies the Rawlsian criterion, but the right to a basic income does not.

Beitz developed the political conception of human rights by moving away from an ideal theory model to looking at the development of human rights as a political practice since the end of the Second World War. This move helps to diffuse the first-order theorizing problems that troubled Rawls in favor of looking at the function human rights play in the existing political system. These practices generate important reason-giving norms that have a global reach and are valuable insofar as they protect important human interests from threats we know to be real and

non-trivial.¹¹ This is not a simple sociological description of the contemporary human rights regime. Human rights provide reasons for actions because they are normatively compelling. The political conception examines how agents understand and act upon human rights claims.¹² Moreover, the practice of human rights in the international system is not a matter of sanctifying the status quo, but rather it discloses what can be done to develop the best practice by looking at the function of rights in the international system and whether current practices are suited to this function.¹³

Human rights practices, according to Beitz, have five distinct characteristics. The first is that they are expansive. Contrary to the idea that human rights protect a minimal set of interests, often thought of as those necessary to lead a bare, human life, human rights cover a wide array of important human interests. They include protection from socioeconomic threats, as well as participation in political and cultural life.¹⁴ Consequently, human rights have a certain sufficientarian quality that addresses the requirements for living a minimally decent life rather than a bare, human life.

The second characteristic is that human rights require heterogeneous strategies for implementation. Some human rights are realized through the design of political institutions, some with constitutional protections, while others can be realized through public policy. Pogge provides a helpful illustration of this when he claims a society that has a deeply entrenched custom of religious pluralism, but no formal constitutional protection, cannot be said to deprive people of their freedom of conscience as they enjoy secure access to the content of that right. The counter-intuitive conclusion is that a human right does not need to be recognized as a right in order to be realized.¹⁵

Third, human rights are not necessarily preemptory. This cuts across the notion that

human rights are trumps against other public policy goals, but there are instances where social and economic conditions may be legitimate obstacles to their realization.¹⁶ This is most prominently seen in "progressive realization" clauses found in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).¹⁷ Beitz also points to how the International Covenant on Civil and Political Rights (ICCPR) allows for the derogation of some rights in extraordinary conditions.¹⁸ However, it should be noted that progressive realization and derogation require that states or other agents act in good faith. A state that fails to provide access to education in order to enrich an oligarchic clique would not be satisfying progressive realization conditions. Likewise, a state that suspended the right to security of the person on the grounds of a largely fictitious terrorist threat would not be derogating in good faith. Human rights protect high priority interests, but they are not rigidly absolute.

The fourth characteristic of human rights is that they are not ahistorical rights that emerged fully formed alongside the first *homo sapien*. They are a response to the conditions of modern life.¹⁹ Human rights practices emerged in the aftermath of the Second World War and the Holocaust, both of which made the threat of the state to human interests viscerally evident. Human rights developed as an attempt to constrain the power of the state by generating some form of international accountability.

The historical nature of human rights also features in the fifth characteristic: human rights are not static concepts, but an emergent practice.²⁰ They are a dynamic practice that responds to emergent and neglected threats. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW), and the CRC have supplemented the core human rights documents that make up the "international bill of rights," namely the Universal Declaration of Human Rights (UDHR) and the two Covenants. These have developed the practices of human rights to respond to interests, which may have been underappreciated or unrecognized in the past. It also raises the prospect that human rights can adapt to emergent threats such as climate change and new institutional structures.

These five characteristics provide a general outline of contemporary human rights practices; to this can be added an account of enforcement. Beitz identifies accountability to international organizations, external inducements for realization, international assistance, domestic political contestation and engagement as the means by which human rights are realized.²¹ However, given the nature of this article, it is the use of compulsion that is of particular interest. He identifies a range of options from economic and diplomatic sanctions to military intervention in dire circumstances. Coercive intervention is only permissible *in extremis* where grave violations of human rights are occurring or are imminent. Intervention in these cases cannot be considered modal.²² Nevertheless, it is worth noting that human rights practices are underwritten by coercion in the last resort. In desperation, people can appeal to the international community for assistance. However, some human rights violations can have external causes, such as the policies of a neighboring state or multinational institution. In these cases, reform does not need to occur within the state, but is a matter of external adaptation.²³ These two modes of implementation are worth noting because of their silences. Beitz provides conditional support for external intervention, but does not mention whether resistance is also considered to be acceptable. External adaptation is also undeveloped. In circumstances where external agents or institutions cause human rights violations, but resist reform, is intervention or resistance

permissible? Beitz says nothing about whether external causes of human rights deficiencies are open to similar modes of enforcement, including compulsion.

These characteristics of human rights practices and enforcement are used by Beitz in a two-level model of best practices. The object of human rights is to protect urgent human interests against standard threats found in the modern world comprised of states. This primarily produces obligations on the state to a) respect human rights, b) protect human rights, and c) aid individuals who are involuntarily deprived of their human rights.²⁴ Additionally, human rights generate a second level of norms for external states and non-state actors; however, these are not duties but *pro tanto* reasons for assisting states to realize their obligations and, in exceptional circumstances, to intervene when a state fails in its obligations.²⁵ These reasons are compelling, but they are not binding. A *pro tanto* reason can, in certain circumstances, be rebuffed on the grounds that its addressee has stronger obligations that preclude action.

III. A Political Conception of the Right to Resistance

The political conception of human rights needs the right to resistance for two reasons: to validate it as a theory of rights and to explicate the duties human rights generate in the international system. Beitz's theory of human rights has been criticized for not really being a theory of rights at all. John Tasoulis has argued that this conception of human rights does not clearly create duties that require governments to respect the rights of their citizens, but certainly seems only to generate reasons rather than obligations for the international community to protect human rights.²⁶ If human rights are, in fact, rights, then they have to generate a claim-based relationship between those making a claim and those to whom the claim is addressed. If a person's claim can

be set aside without remedy, then it is not really a right. It is a statement of interest, perhaps even vital interest; however, as it does not generate an obligation it cannot be a right. This is similar to the criticism of "manifesto rights" by Onora O'Neill. The content of these rights, usually socioeconomic, can be high priority interests for human beings, but they are problematic because they do not identify the specific duty-bearer.²⁷ Certainly, it is easy to see how Tasoulis reaches this conclusion. Beitz draws his political conception from human rights practices and it is evident that these practices do not create binding obligations to intervene in circumstances of human rights violations. This seems to be an accurate description of current human rights practices. Yet, the compromise of making this practice-based description is that human rights are reduced to compelling statements of interests rather than rights proper.

The right to resistance helps to put the "rights" back in human rights. Tony Honoré's justification of the right to revolution helps to explain why this is the case. Honoré recognizes that rights without remedies are not really rights at all. Indeed, this argument anticipates Tasoulis' criticism of Beitz. He argues that human rights as a concept are empty rhetoric without a right to revolution.²⁸ If an interest can be considered a right, then there must be a remedy available to the rights-holder; if this were not the case, then the rights-holder would be a "mere critic."²⁹ It might be said that Beitz does not have a problem with reducing human rights discourse to a language of criticism. Human rights may not be properly rights, but the moral discourse they generate is a particularly compelling form of criticism. If a state declines to intervene on behalf of those experiencing human rights violations, then the state needs to have legitimate reasons. Yet, the core of the criticism remains. If a state declines to intervene and does not have acceptable reasons for doing so, there is no remedy for those experiencing human rights violations. They might protest the indifference of the international community, but they have no

other recourse.

The right of resistance provides the means to set aside this complaint. If individuals have the right to resistance, then it strengthens the case that human rights are properly rights. This does not mean that the appeals they make to the international community are rights-based claims. Rather, it means that they have the right to resist the institutions responsible for the violation of their human rights. This is not alien to Beitz's understanding of rights. His argument is not that all human rights claims are simply *pro tanto* moral reasons, but rather that the state has human rights obligations to its citizens. If the state fails to realize these obligations, then the international community can be called upon for assistance that, in extreme circumstances, can take the form of armed intervention. What gets lost in this argument is the relationship between the institution with human rights obligations and the rights-holders. If these are to be rights, then individuals must have a remedy for their violation. The international community is not that remedy, but instead supplements the individual's right to resistance. If the international community is permitted to intervene in extreme cases of human rights violations, then it seems consistent to say that individuals have the right to resist by similar means. The right to resistance provides the bedrock for the political conception of human rights. In circumstances where the state fails in its responsibilities, citizens may legitimately enact their right to resistance by organizing to reform the state or to escape the worst consequences of human rights violations. If this were not the case, then human rights would ultimately be a compelling form of moral reasoning to all parties involved. It would provide *pro tanto* reasons for the state to respect them, but ultimately generate no obligation to do so. This is incompatible with the attempt to construct the best practice model of human rights, as the practice is supposed to provide a robust defense against predictable threats to basic human interests. It would reduce human rights to a paper

shield for the victim. This also addresses the concern that the right to resistance is a case of “rights inflation.” This is not an addition of something desirable but essential to a basic human life. It is necessary in order for the political conception of human rights to be a theory of rights.³⁰

The right to resistance may help to assuage the concerns that the political conception of human rights treats rights as merely discourse. However, there may still be a concern about human rights only providing *pro tanto* reasons to the international community. There is certainly something unsettling about a hypothetical scenario where a preventable genocide is occurring, but the neighboring states do not intervene, as each has legitimate competing obligations. This does not seem to capture the function of human rights practice, which emerged as a reaction to the excesses of Nazism. It might be argued in Beitz’s defense that, in instances of grave human rights violations, such as genocide, there would be very few reasons to reject the reasons given via human rights claims by the victims. Yet, this does not seem to be self-evidently true. In a scenario where one state is committing genocide and, in order to stop it, the international community would have to accept hundreds of thousands of deaths in an intervention, it does not seem absurd to think that at least some citizens would feel that this is a strong reason to set aside appeals for intervention. This is not a pleasant conclusion, but it is plausible.

That said, the right of resistance shows how international human rights responsibilities are more demanding than Beitz acknowledges. There are two potentially conflicting elements in how he presents the international dimension. He argues that human rights only produce *pro tanto* reasons for international action. However, he also claims that human rights can be violated by external agents, such as neighboring states, and that states have an obligation to respect human rights. The general obligation to respect human rights is common in the literature. Henry Shue identified it as a basic human rights responsibility that is understood as a negative duty not to

violate human rights.³¹ It is reasonable to assume that Beitz thinks that the state's obligation to respect human rights has a global reach. This is supported by human rights practices. Pogge points to Article 28 of the UDHR as evidence of a negative duty to not harm the human rights of others. It states that all people have the right to live in an international system in which they can realize the content of their human rights.³² This is further supported by the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social, and Cultural Rights. It is argued that states have the extraterritorial responsibility to respect, protect, and fulfill human rights.³³ This is compatible with the notion that positive action is context dependent and that there is still a negative duty to not violate the human rights of non-citizens. It also matches the historical narrative underpinning Rawls' and Beitz's conception of human rights. For example, the human rights regime is to constrain the state internally, but also externally. It is the idea that a state that respects human rights at home will not be an aggressive neighbor. A human rights regime that allows some states to violate human rights abroad because it has compelling reasons to do so is not reconcilable with the best practice of human rights.

The right of resistance throws into relief the importance of the negative responsibility to respect human rights. If a human rights violation is being caused by external agents failing in their responsibilities, then the victims are not presenting *pro tanto* moral reasons; rather, they are making rights-based claims. If circumstances of intransigent non-compliance occur, then it seems reasonable that the victims could legitimately resist. The scope of the right to resistance is often kept at the state level, but there is no intrinsic reason for this. It is true that human rights developed as a reaction to state power, but since human rights practices are dynamic there is no reason to assume that they cannot extend to external agents and institutions. If human rights are designed to protect basic human interests from predictable threats, and such agents and

organizations are predictable threats, then *mutatis mutandis* they can be subject to human rights obligations including resistance. It is the means by which human rights violators can be held accountable. The argument about moral reasons instead of obligations is posited in the context where external states have upheld their responsibility to respect human rights. The victims of human rights violations in a distant land may appeal to outsiders for assistance; yet, if these outsiders have no responsibility for the crisis, then this cannot be an obligation. However, if the foreign policy of a neighboring state did precipitate the violation, the victims may demand assistance as compensation.

The right to resist institutions and agents that foreseeably and avoidably violate human rights extends to the international community. This shows that the reduction of human rights to non-binding moral appeals is limited to circumstances where states have upheld their negative duty of respect. Indeed, if one follows cosmopolitans like Pogge, then these circumstances simply do not exist in the current international system. The institutions of the global economy violate the responsibility to protect human rights by imposing unfair terms of economic cooperation that undermine the ability of poorer states to satisfy the rights of their citizens.³⁴ Moreover, the proliferation of the state system across the globe means that individuals do not have a feasible alternative to life under the power of states and the privileges granted by the international system. This undermines secure access to human rights by incentivizing *coups d'état* within fragile democracies; the wealth derived from the international privileges allows oligarchic cliques to govern through patronage networks without protecting human rights.³⁵ If this claim is taken seriously, then it is difficult to see how any state can be said to be in compliance with their obligation to respect human rights. One does not have to accept Pogge's analysis to accept the general point. If states have a negative duty to respect human rights and

states can cause human rights violations abroad, then they can be subjected to human rights claims by non-citizens that are not *pro tanto* appeals. If these claims are ignored, then resistance against external violations of human rights is legitimate.

A. Universal Declaration of Human Rights and the Right to Resistance

The right to resistance keeps the rights in the political conception of human rights by acting as the final remedy for their violation and helps to show that there are significant international human rights obligations. However, the political conception of human rights is based on an analysis of practice. One might argue that resistance and revolution do not form a part of international human rights practice. The right to resistance is not an enumerated right in any of the major human rights documents. The idea that one has a legal right to revolt has a mixed history. Honoré points to Clause 61 of the Magna Carta, which authorized the barons of England to seize royal castles should the charter be violated. He also points to the American Declaration of Independence and the state constitutions of New Hampshire, Delaware, and Pennsylvania as referencing a right to revolt. The constitution of the Federal Republic of Germany grants the right of resistance (*widerstandsrecht*) to its citizens in circumstances where democracy is undermined.³⁶ To this list, we might add the French Declaration of the Rights of Man and Citizen, which recognized the right to resist oppression to be as fundamental as rights to liberty, property, and personal security.³⁷ Yet, even Honoré recognizes this is a muddy issue. The right to resistance is not generally acknowledged in constitutional documents. The American Declaration of Independence may make bold claims about the right of a people to alter or abolish their government, but the US constitution does not specifically enumerate it in the Bill of Rights.

Ignatieff claims that the right to resistance may be a part of liberal constitutionalism, but this is not the case with the human rights lexicon. Indeed, Ignatieff thinks that the right to resistance is alien to human rights.³⁸ This is true insofar as there is no single enumerated right. However, the absence of an enumerated right is not necessarily a problem. Honoré, Beitz, and Pogge claim that a right does not need to be formally codified in order to be recognized. The question of whether the right to resistance forms a part of human rights practice, therefore, does not hinge on its formal codification of major documents, but whether it can be found in the broad practice of human rights. There are two particular instances where the right to resistance is recognized as legitimate: the UDHR and the declarations and resolutions addressing racist minority regimes in southern Africa.

The preamble of the UDHR states, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."³⁹ Ignatieff analyzes this as a caution against violating human rights; states that do so are vulnerable to revolts and revolutions. It is not an endorsement of political action, nor is it an acknowledgment of a right. This, however, is weak reasoning. Human rights are rights held against the state. A state that systematically abuses them is subject to external pressure to desist. If this fails, Honoré asserts that the UDHR states that people are compelled to revolt. This compulsion is not an excuse, but a justification of the right to resistance. As Honoré says, it makes little sense to deny a person the right to do what she is compelled to do to protect urgent interests.⁴⁰ We can return to Beitz's argument, that human rights practices produce strong *pro tanto* reasons for coercive intervention against states that perpetrate severe human rights violations. If this is true, then it seems reasonable that there are at least *pro tanto* reasons to revolt or resist. If the interests of victims are urgent enough to generate

rights against the state, then it seems reasonable to say that they have a right to protect themselves.

B. Decolonization and the Right of Resistance

The second instance where the international community has made the link between human rights and resistance are the documents related to the racist minority regimes in southern Africa during the 1960s and 1970s. These are most commonly addressed to the apartheid regime in South Africa, but others extend to the illegal and racist minority regimes in Rhodesia, Namibia, and the Portuguese colonies in southern Africa. Both Honoré and Ignatieff acknowledge these documents, yet they are interpreted in different ways. Ignatieff points to General Resolutions 1514 and 2909, which claim that "alien subjugation, domination and exploitation" is a denial of human rights and that it may be resisted "by all necessary means." Honoré locates this argument in the Declaration on the Principles of International Law (1970), which also affirms that anti-colonial struggle is legal.⁴¹ However, Ignatieff argues that these resolutions can only be read in the context of national self-determination; they do not support the notion there is a general right to resistance.⁴² Nonetheless, a survey of the documents related to decolonization in Southern Africa reveals that Ignatieff's interpretation cannot be correct; resistance against colonialism and apartheid was grounded in human rights.

In the 1960s, South Africa, Rhodesia, and Portugal formed what Yassin El-Ayouty called a "solid wall of defiance" against decolonization, racial equality, and democracy.⁴³ In response, Afro-Asian states began using the United Nations and the language of human rights to legitimize the struggle against this entente. This discourse began with UN Resolution 1514 in 1960, which

affirmed the Declaration on the Granting of Independence to Colonial Countries and Peoples. This declaration states that the "alien subjugation, domination and exploitation constitutes a denial of fundamental human rights" and that "immediate steps" should be taken to end colonialism.⁴⁴ The intransigent non-compliance by the entente led to a series of declarations and resolutions, which recognized the liberation struggles in southern Africa as legitimate and calling for captured freedom fighters to be granted the protections of the Geneva Conventions.⁴⁵ These struggles were justified by appeals to national self-determination, but also to individual human rights. Apartheid was condemned as a crime against humanity and for "its gross denials of human rights."⁴⁶ The legitimacy of the struggle against it was derived from its aim of realizing "all human rights, and in particular political rights and fundamental freedoms of all the people of South Africa irrespective of race, colour or creed."⁴⁷ Portugal was condemned for violating the economic and political rights of indigenous Africans by pursuing a policy of arbitrary removal of these people from their land and then granting it to immigrants.⁴⁸ Rhodesia was condemned for depriving the people of Zimbabwe of their legitimate rights by instituting apartheid policies.⁴⁹ Moreover, the condemnation of apartheid and colonialism was not confined to the actions of these states. The international community was called on to provide moral, political, and material assistance to resistance movements. It was also called on to end any support of these regimes, especially in the case of the unrecognized regime in Rhodesia. The condemnation of colonialism and apartheid and recognition of the resistance movement in southern Africa also included obligations to not support these regimes and presented strong reasons for the international community to support resistance.

It becomes evident that, while national self-determination played an important part of this discourse, it was not to the exclusion of human rights discourse. This supports the idea that, if

resistance to foreign human rights abuses is legitimate, then, *mutatis mutandis*, so to must resistance against domestic oppression. The interests of the victims are what drive human rights practices, not the nature of the abuser. Apartheid, in particular, was condemned as a crime against humanity. If it is legitimate to resist one crime against humanity, then it should be legitimate to resist against others.” So, while the right to resistance is not specifically enumerated in major human rights doctrines, the combination of the UDHR’s preamble and the various resolutions and declarations associated with colonialism and apartheid show that it is far from alien to the discourse of human rights. Instead, it underpins human rights practices, but only becomes evident in instances of radical injustice.

The political conception of human rights needs the right to resistance. If it does not, then its supporters must concede that they are not rights in any strict sense, but merely a moral discourse within the international system. This may be perfectly acceptable to some, but it seems at odds with the justification of human rights practices. They were established to protect individuals from the excesses of state power and to allow them to appeal to the international community for assistance. If there is no right to resistance, then the claims one has against the state are not really rights, but are similar to a moral appeal to the international community. They are merely statements of interest, appeals to what the state should do rather than claims about what the state must do. The right to resistance also helps to clarify the limits of *pro tanto* moral appeals in the political conception of human rights. In human rights practices, there is an obligation to support an international system in which individuals can enjoy their human rights. If states or other institutions fail to uphold this obligation, then the right to resistance may be enacted at a global level.

IV. The Right to Resistance: Content and Structure

Now that the general argument for the right to resistance has been made, this section will construct a more robust understanding of the content and structure of this right. As previously noted, the right to resistance has been generally neglected, but there have been several interesting attempts to revive it in contemporary political theory. What these attempts have in common is their methodology, which understandably begins with abstract questions about the structure of the right and often adopts a Hohfeldian approach as to whether resistance or revolution is a liberty-right, a claim-right, or a combination of both. However, it will not be the starting point of this analysis. Instead, the focus will be on the practice that we are examining. This is, in part, inspired by Beitz's emphasis on the importance of assessing practice for political conceptions of human rights, as well as the need to take the actions of oppressed groups seriously. By starting at the abstract level, we run the risk of theorizing resistance for privileged groups.⁵⁰ The practice of resistance will be examined using the test case of transatlantic slavery. The choice of slavery has three justifications. The first is that slavery is an uncontroversial moral wrong that is explicitly condemned by major human rights documents.⁵¹ Second, slavery is a case where resistance seems intuitively justified, the burden of proof falling on the person saying that they should stay in bondage.⁵² Finally, the historiography of slavery has shifted over the past forty years from viewing slaves as completely dominated to a more nuanced understanding of agency in circumstances of injustice, which points the way to taking the agency of persons suffering human rights violations seriously.⁵³ This will not be an exhaustive account of resistance, but it will show that the practice of resistance is more multifaceted than many rights-based accounts acknowledge by examining three vignettes of slave resistance. Once these are presented, the matter of structure and scope will be considered.

A. The Haitian Revolution

The Haitian Revolution is the only slave-led revolution that succeeded in creating a new state. In 1791, the French colony of Saint-Domingue experienced a widespread uprising led by slaves and free persons of color.⁵⁴ Adopting the rhetoric of the French Revolution, the rebel armies led by Toussaint Louverture and Jean-Jacques Dessalines helped compel the French Republic into abolishing slavery in 1793.⁵⁵ Then, in 1801, Louverture's constitution reconfirmed that slavery was forever abolished in Saint-Domingue. Napoleon dispatched the Leclerc Expedition under the mandate to restore the rule of law in the colony. It initially enjoyed some success by co-opting powerful leaders like Dessalines and arresting Louverture.⁵⁶ However, the peace was short-lived and violence returned with the restoration of the slave trade in 1802.⁵⁷ Over the next two years, a new slave insurrection supported by a British naval blockade and the relentless scythe of tropical disease led to the defeat of the French. On New Year's Day in 1804, Dessalines declared that Saint-Domingue was no more and that the Republic of Haiti was a free state. It took more than a dozen years, but slavery would never return to Haiti. The cost was terribly high. A third of the population perished or fled between 1789 and 1804.⁵⁸ In the immediate aftermath of independence, Dessalines engaged in the ethnic cleansing of the remaining French.⁵⁹ The economy was in a shambles from years of war and the dislocation caused by emancipation. The republic was an international pariah and only received marginal acceptance by agreeing to pay reparations to the French for daring to overthrow slavery.⁶⁰ However, the people of Haiti were free.

B. Fugitive Slaves

On 3 September 1838, a young man left Baltimore bound for New York City. For most people, this would be a rather tedious journey, but the man in question was Frederick Douglass and he was a fugitive slave.⁶¹ Unlike many slaves, Douglass' escape was not physically arduous, but psychologically more demanding. He was assisted in his escape by his fiancé and by fraudulent papers supplied by a retired black seaman. These papers allowed him to travel by train and ferry. At several times, he was almost identified by persons whom he knew. Indeed, he believed that one German blacksmith did recognize him, but decided not to turn him into the authorities. He arrived in New York City, far from home and with little means, but would go on to become one of the greatest citizens of the United States.⁶² Like some tens of thousands of slaves, he found slavery irreconcilable with the life he wished to lead and so he fled.⁶³ It is hard to overstate the risk of escaping slavery in the antebellum South. If caught, the most common punishment was to be lashed, but slaves often found themselves imprisoned, chained, deprived of water, and in certain cases mutilated, such as having their ears cut off.⁶⁴ Moses Roper, for example, received 500 lashes on his third attempt at escape.⁶⁵ It could have possibly meant being sold to a plantation in the Deep South, where escape was nearly impossible and the conditions even more brutal.⁶⁶ It may have even meant being tortured and murdered, as such things were not unheard of.⁶⁷ Even in success, it meant leaving behind his entire life and, even in freedom, the threat of re-enslavement must have hung over every fugitive slave that decided to stay in the United States rather than travelling on to the security of British North America. These risks, however, were not sufficient to dissuade Douglass and those like him to attempt to reach liberty, often with the assistance of Underground Railroad. It should also be noted that fugitive slaves were viewed as a potential precursor to a general slave uprising, as gangs of fugitives occasionally formed raiding parties.⁶⁸

C. Mundane Resistance

The first two vignettes show resistance as a dramatic attempt to break slavery, or at least to break away from slavery. However, the majority of slaves in the Americas did not attempt to slit their master's throat or make the long walk to freedom. They remained on the plantations and worked in the fields and workshops of their masters. This gives the impression of being reconciled to their lives as human chattel; or, as some pro-slavery advocates held, it was better to be a slave in the South than a factory worker in the North.⁶⁹ The truth is more complex. Slaves found ways to resist the demands of their masters and to etch out small spaces of autonomy in an institution that was relentlessly dominating. These were acts of mundane resistance and, because they were carried out anonymously, one cannot give the name of a Toussaint Louverture or Frederick Douglass. These involved acts like theft of livestock, feigning illness, working at a slow pace, or damaging crops and machinery.⁷⁰ It also included etching out spaces where one could practice versions of Christianity with liberationist readings of scripture and incorporated Creole practices.⁷¹ These acts may seem inconsequential, but they are important. These acts of resistance, taken on their own, did little to alter the master-slave relationships; but, multiplied into their millions, it had a corrosive effect. It allowed the slaves to assert a modicum of autonomy. It confronted the masters with dissidence and disobedience. It caused cracks in the romantic image of the genteel slave-owner in the antebellum South.

These three vignettes of resistance are not a complete history of slave resistance, but they demonstrate how variable resistance can be from organized armed insurrection to decentralized covert dissent. The content of the right of the resistance is accordingly extremely broad. The literature on resistance and revolution tends to look at examples of armed insurrection, such as the Haitian Revolution or Nat Turner's Rebellion as examples of resistance. This is in line with

what Frank Lovett has called the contrast between resistance and ordinary political action.⁷²

Ordinary political action maintains adherence to the law, while resistance does not. The former encompasses running for office, writing to a member of parliament, or signing a petition.

Resistance breaks the law, but is qualified with an overt political agenda. It would include acts like armed insurrection or an unsanctioned political protest.⁷³ It also matches Rawls' distinction between civil disobedience and militant action. The former may break the law, but it maintains loyalty to the law insofar as those engaging in civil disobedience recognize the authority of the state to punish them. Militants, however, deny the legitimacy of the state and seek to overturn it.⁷⁴ Fidelity to the law is what divides them, but what joins these forms of political action is an overt agenda.

This does not capture all the ways in which slaves resisted their masters. It captures the type of resistance in the first vignette, but not in the other two. In the case of runaway slaves, there is no overt action. A slave could loudly declare that she disapproved of slavery and decided to go for a walk to British North America. It would require a good deal of planning and subterfuge to carry out. The political condition is also missing in many fugitive slave cases. Douglass' escape to the north was motivated by his belief that slavery was immoral, but many other slaves escaped for less overtly political reasons, such as attempting to reunite with family.⁷⁵ In the case of mundane resistance, it was also covert and lacked a political agenda beyond making life better for the slaves and less comfortable for the masters. This leaves a choice: either discount the second and third vignettes as examples of resistance, or adopt a conception of resistance that includes them. James C. Scott's notion of the *infrapolitical* provides such a conception. This term denotes acts of resistance by people who cannot risk open and organized resistance while expecting incredibly harsh reprisals. E.P. Thompson's analysis of threatening

anonymous letters in the eighteenth century is a good example of infrapolitical resistance. These letters expressed the anger of the poor at indolent aristocrats and avaricious gentry, but it was rage that could only be expressed anonymously for fear of the powerful.⁷⁶ This was not the product of organized resistance to the political system, but a form of everyday resistance.⁷⁷ It is the type of dissidence that occurs under the cover of anonymity and is not overtly political, but places stress on the privileged. If our definition of the political is limited to what may be "command performances of consent" and revolutionary acts of dissent, then we are dealing with a very narrow segment of human life, especially in instances where extreme domination prevails.⁷⁸ The addition of infrapolitical actions to our perceived spectrum of politics is extremely useful; it raises awareness that revolutionary moments often describe instances where privileged agents bring their power to bear outside the bounds of normal politics. The infrapolitical allows us to see the desperately oppressed as human beings capable of dissent and resistance in circumstances where overt political action is unreasonable.

The vignettes also show that resistance may have different ends. In the case of the Haitian Revolution, the end was, in part, the abolition of slavery. It sought to reform the political system to remove an inconvertible injustice; when it became evident that this could not be achieved under colonialism, abolitionism and independence became conjoined. In the case of fugitive slaves and mundane resistance, there does not appear to be a drive towards institutional reform. Instead, these actions seek to escape from circumstances of injustice or, at least, mitigate their worst effects. We can make a distinction between justice-seeking resistance and injustice-evading resistance. Revolutionary moments tend to be the former as they seek to alter the social institutions in which they live. Infrapolitical resistance tends to be the latter, as deeply oppressed agents cannot risk open resistance, but rather seek to escape or mitigate the injustice they are

experiencing. This is not a trivial observation, but has an impact on the analytic structure of the right of resistance.

The analytic structure of the right to resistance has been the subject of some debate over whether it is a liberty-right, a claim-right, or both. The practice-oriented helps to clarify the matter. It is evident that it is a molecular right that has a liberty-right component and a claim-right component. The liberty-right model of the right to resistance has, perhaps, the most established pedigree in the history of political thought. This is in the vein of John Locke's conception of the right to resistance. In certain political circumstances, where the state fails in its obligations to protect natural rights, individuals are free to resist the state. There is no obligation to obey the law and one has a duty not to interfere with someone resisting.⁷⁹ However, this does not seem to be able to capture the ends of some resistance. Some resistance makes a claim: a demand for redress against injustice. It is more than a liberty-right to be weighed against other liberty-rights.⁸⁰ Simon Caney defines the claim element as a claim against interference.⁸¹ However, it seems more complex than this. Christopher Finlay claims that the right to resistance is a claim-right against institutions to be protected from oppression, which understands as persistent domination, harm, discrimination, and injustice.⁸² He argues that the state has a role in protecting people from predictable threats to their basic interests. If the state fails to do so, then the right devolves back to the citizen.⁸³ So individuals have a claim against oppression, which we can conceive of as human rights violations for simplicity's sake. Individuals have the power, in the Hohfeldian sense, to transfer this to the state or other social institutions. Yet, this does not mean the right is fully alienated, but rather given as a trust. If the conditions of the trust are violated, then the right reverts back to the individual. This joins the liberty and claim-right models to a fiduciary model of the state.⁸⁴

It would seem that resistance to slavery adds little to this discussion. It certainly does not add a hitherto undiscovered element in the molecular structure of the right of resistance. However, what it does do is show that there is an imbalance in how resistance is discussed. In his compelling analysis of the right to resistance, Caney claims the right to resistance is the right to violate the law in order to "change certain practices, policies, or political systems" so that individuals may better enjoy that which they are entitled.⁸⁵ This certainly is the case in some forms of slave resistance. The Haitian Revolution's pursuit of abolition and independence certainly conforms to this model. However, fugitive slaves and mundane acts of resistance do not seem to. They do not have the same aim of overturning a political system, but rather they violate the law with the aim of escaping or mitigating the worst effects of unjust social institutions. The focus on institutional reform that drives the accounts of Caney and Finlay misses the importance of resistance by heavily dominated agents, those for whom open and organized resistance carries too high a price. This allows us to separate the liberty-right and claim-right elements of resistance. The two are often run together, but this is not necessary in every instance of resistance. There is no duty to comply with radically unjust laws or norms. The fugitive slave breaks the law, but it is a law she is not bound to follow. However, this does not mean that she is compelled to pursue institutional reform. This does not invalidate Finlay and Caney's argument for institutionally oriented resistance. They have a shared aim: to enable individuals to enjoy securely the content of their rights. What it makes clear is that, in certain circumstances, this means that individuals flee the site of injustice. So, while the general argument that the right to resistance works, it is important not to allow the claim-right element to be our singular focus, otherwise the resistance of subaltern agents will remain overlooked.

V. Conclusion

The right to resistance is an integral part of the political conception of human rights. If this were not the case, then those defending this conception would be compelled to admit that human rights are not really rights. Instead, the term human rights refers to an international normative discourse about vital human interests that states have reason to respect, but ultimately no obligation to do so. If the political conception of human rights is attempting to construct a notion of best practice, then the right to resistance is a necessary component because it creates a final remedy for abuses. Moreover, it is a right that is not alien to human rights practices. The UDHR and the various resolutions and declarations regarding minority rule in southern Africa endorse the notion of legitimate resistance to protect human rights. The content of the right of resistance is more capacious than is normally thought. The example of slave resistance shows that resistance can be covert and decentralized as well as overt and organized. Those writing about resistance need to broaden their scope to better appreciate the agency of extremely oppressed persons. This can be done by considering the liberty-right element of resistance to be as important as the claim-right element, or, to put it another way, by treating injustice-evading resistance as seriously as justice-seeking resistance. What remains to be addressed are the circumstances in which this right can be acted upon. Intuitively it seems that extreme injustices such as crimes against humanity or genocide would merit resistance. Yet, this intuition does not tell us about what the minimal triggering condition would be. However, this question falls outside the scope of this article.

The human right to resistance creates a space in the literature on global justice for oppressed persons to be treated as active agents. It, for example, provides a very different interpretation of the current refugee crisis in Europe. Popular discourse tends to cleave refugees

from mere economic migrants. However, if we accept the cosmopolitan reading of global poverty as an intransigent injustice, then it becomes hard to distinguish the economic migrant from the runaway slave. In both cases, we are looking at persons fleeing from an injustice by illegal means. They are acts that rest at the frontier of the infrapolitical. Perhaps this is why so many people have been made uncomfortable by the mass influx of migrants from the global South.

Endnotes

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Research funding for this article was provided by the *Leverhulme Trust* through an Early Career Fellowship [ECF-2014-661]. I would also like to thank *Human Rights Quarterly*'s editors and anonymous reviewers for their assistance.

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