National Interest and Human Rights: Boxers in a Ring?

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The relationship between human rights and national interest is rarely analysed, but recurs as the theme underlying many stories on the everyday news. When we read of targeted killings in the Middle East, mass evictions in megacities in Asia and Africa, international cyber-spying, or barriers created in the richest nations to stop migrants and asylum-seekers, the issues at stake are implicitly or explicitly reduced to a simple question: should we pursue our national interest or protect human rights?

Usually, the relationship between the two concepts is indeed depicted as a conflictual, zero-sum game, where one is doomed to be submitted to the other. Some people (often branded as realists) believe that the national interest must prevail, while others (often labelled as idealists) reckon that human rights always come first.

The challenges are deep, and start from our definitions. While national interest is not defined beyond vague political sketches, human rights are clearly described in a host of international treaties. Indeed the two concepts belong to two different realms: politics, in the first case, and law in the second. Politics points to the spectrum of possible actions meant to benefit a collective, while law generally refers to the system of rules that prescribe which of those actions are legitimate. It is then natural that tensions should arise between the two. However, from a strictly legal point of view, the choice to be taken by governments should be simpler than it looks: all States at all times must abide by international law obligations, including those regarding human rights.

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Some will think that, in exceptional circumstances, or to balance competing interests, governments must be allowed to resort to extreme measures, stepping out of the human rights system. But the human rights system is more sophisticated than one would assume, and already embraces the tools for addressing exceptional circumstances and balancing conflicts of interest. In fact, most human rights treaties foresee the possibility for Member States to derogate from certain human rights obligations, though this can only be done in specific circumstances and under strict conditions[1]. The same conventions also indicate how to realize trade-offs between competing rights[2]. Any interests (call them "national" or otherwise) that may be at stake, and are important enough because they entail the possible infringement of someone else's human rights, should be duly considered and inform any relevant course of action. Stepping out from the human rights framework, to pursue an interest perceived as superior, should be neither lawful nor necessary.

From a political and ethical point of view, it is clear that the legal framework can be adjusted to pursue the realization of specific interests. If someone wants to redefine the rules of the game, however, they will only be able to do so through appropriate processes and in defined circumstances, since important principles of human rights law have become customary norms that cannot be retracted.

In a way, this means that the hands of governments are tied: if they think that killing a child, raping a woman, or sending a man back to a country where he risks being tortured may be instrumental to the achievement of what they consider their "national interest", there is no way they can do so lawfully.

Does this entail a reduction of State sovereignty? Yes, of course it does. But this is a limitation that in large part has been imposed by the States on themselves, through the development of constitutional principles that protect fundamental rights and form the basis of the international human rights system[3].

It is only thanks to this limitation on States' action – that puts individuals' fundamental interests on top of everything else – that we can challenge dictators for ordering the disappearance of political opponents, governments for repressing religious minorities, or States for letting the poor starve while local natural resources are devastated by big corporations. Some have indeed suggested that this limitation on State sovereignty reached its tipping point with the international reaction to South Africa's apartheid: that institutional setting was based on human rights violations of a magnitude to generate huge public outcry, but could only be challenged through the development and implementation of rules binding all States[4].

Today, it seems increasingly difficult to conceive of a "sovereign State" as a monolithic entity different from its own members, one with its own interests. Of course, the existence of a multitude of interests of a collective nature must be acknowledged, but those interests can be reduced, one way or another, to interests of the individuals who are part of that collective. And such interests have been identified – by national constitutions and international treaties – as human rights. Thus, I argue that the very existence of a State should be regarded as instrumental to the protection and fulfilment of those rights, and such protection and fulfilment will become the primary, and in fact the only, national interest.

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Despite the progress achieved in recent decades, a supposed "national interest" is still often cited by governments in an attempt to justify limitations of human rights within their own jurisdictions. The analysis of some cases can shed some light upon some key challenges to this practice.

In many situations, governments impose State secrecy provisions on information that could clarify whether any wrongdoing has taken place. One such example is provided by the Maltese government's refusal to disclose information regarding the intervention of its coast guard in the central Mediterranean following the SOS launched by a boat in distress on 11 October 2013. Strong evidence indicates that the Maltese authorities moved too late to coordinate the rescue and that this delay contributed to the deaths of about 200 people. However, the government claims that disclosing information on the rescue would go against its national interest, as it may jeopardize its relationship with Italy, also involved in the rescue[5]. Clearly, this may well be little more than an excuse to hide embarrassing truths. In this sense, this example goes to the core of the issue: how can we know that an alleged national interest is not in reality a mere cover-up? Allowing governments to by-pass fundamental freedoms to protect a purported national interest that they only know would result in a blank check for them to use any means to protect their own interests.

In other instances, governments have sought to exclude specific groups from the enjoyment of certain rights. Examples range from the exclusion of girls from schools in Taliban-ruled Afghanistan, to the discrimination in access to adequate housing for Roma in Italy. Actions of this kind have frequently been justified in terms of "national interest". This has been the case, for example, in the exclusion of non-nationals from the provision of non-emergency health care in countries like the UK, where such a policy even led to the exclusion of failed asylum-seekers from access to treatment for HIV[6]. And it is also the case of the Dominicans of Haitian origin in the Dominican Republic, who have been stripped of their citizenship and of relevant rights[7]. Cases like these beg

the question: whose interest is the "national" interest? And indeed they show the real nature, in practice, of the division at stake: one among the powerful, who are able to describe their own interest as "national", and the vulnerable, who often end up being disregarded.

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By putting the individual human being – rather than the State – at the centre of international law, the development of the human rights movement has challenged the principle of sovereignty not only on its domestic dimension, but also in the international arena.

In political discourse, particularly in developed countries, human rights are often referred to as a "foreign affairs" issue rather than a domestic matter. But in using foreign policy to advance human rights abroad, many governments tend do the opposite, employing human rights to achieve quite different foreign policy objectives[8]. This leads to significant distortions. If we downgrade human rights to a mere tool to pursue other objectives, we will end up accepting direct foreign intervention that sacrifices human rights overseas, in exchange for a different action perceived as beneficial at home. Here we reach a core question: is it acceptable, in order to protect a national interest of State X, to sacrifice human rights in State Y?

Among political theorists, it is still common to argue that "a state's foreign policy always ought to be determined exclusively by the national interest "(Obligatory Exclusivity Thesis) or, at least, that "it is always permissible for a state's foreign policy to be determined exclusively by the national interest" (Permissible Exclusivity Thesis)[9]. Both of these views fail to engage with the universality entrenched in the DNA itself of the human rights system. It is true that international treaties have generally attributed on each State Party the responsibility to protect the rights of people "within its territory and subject to its jurisdiction"[10]. However, jurisprudence has over time adjusted the concept of jurisdiction in relation to responsibility for human rights violations, accepting instances of "extraterritorial jurisdiction" when the exercise of "control and authority over an individual" can be proven[11]. This process of enhancing State responsibility to protect people in other countries from human rights abuses seems destined to go ahead in multiple forms[12].

Above I have suggested that, at the end of the day, the content of the "national interest" of a State is the respect, protection and fulfilment of the human rights of those living in that State. Here, as we are balancing the situation of individuals who live in different countries, the universal nature of the human rights system reveals itself: human rights are worth the same – no more and no less – across borders. Any attempt to justify different behaviour, and the infringement of human rights, depending on the place where the action is carried out, should be rejected. The balancing exercise mentioned above will still need to be put in place, but it will be based on the nature of the interests at stake, rather than on the nationality of those paying its consequences. Following this approach, the interests of the most vulnerable will in most cases prevail.

It must be noted that even single acts of defiance to the human rights system, no matter how far away they may be from the territory of the country responsible for such action, endanger the system itself across the board. As a result, everyone, overseas or at home, risks losing protection against abuses. In the long term, the negative effects of such actions may well overcome the perceived short-term gains. And the stronger the attempt to justify the human rights violation through propaganda amplifying the reach of "worst-case projections", the stronger the backlash on the entire system. The misuse of the "ticking-bomb" argument to justify torture and other cruel, degrading and inhuman treatment in the so-called "war on terror", offers a clear example. Such wrongdoing has not only shown its uselessness[13] but also undermined

the rule of law[14] and the perceived strength of the international prohibition of torture – despite its clear conventional and customary definition. Unsurprisingly, the use of torture across the world does not appear to have diminished in the past decade[15]. A similar dynamic takes place when governments, applying a somewhat "flexible" approach to human rights, advocate for human rights vocally when dealing with weaker or unfriendly counterparts, but then shut up when addressing stronger ones or allies[16].

I would argue that the protection of human rights, which brings a direct benefit to the human being, should always be regarded as an objective, rather than a tool, no matter what the postcode of the beneficiary. Things should be looked at in a holistic way, and in the long term. We should also acknowledge that the human rights system allows us – through the ordered realization of trade-offs between competing interests – to address and resolve conflicts, rather than fuelling them or resolving them only temporarily through an imposed solution. In this sense, we should remind ourselves that the Universal Declaration of Human Rights not only indicates which rights must be granted and protected within each country, but also states that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Art.28). This principle, and with it the entire international human rights system, was born not only out of generosity, but also out of self-interest and to preserve peace between nations[17].

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To sum up, we should not forget that in the past "national interest" was the reason behind any sort of atrocity committed by one group on another – from genocide to torture, from extrajudicial killings to apartheid. It is precisely in reaction to such atrocities that an international consensus emerged during the 20th century to outlaw such practices in all cases, with no possible excuse or justification. Such prohibition became part of international law, so that countries like South Africa, Chile and Argentina in the 1970s could not escape to the "haven" of national interest – whatever their official reasons for doing so might have been[18]. If we were to agree that such human rights norms could be derogated whenever a supposed "national interest" suggested to us to do so, then not only would we accept the annihilation of the human rights system, but we would also, in fact, open the door to the reinstatement of regimes of that kind.

Clearly, this process is not without scars, particularly as it entails a limitation of State sovereignty. Nor is it finished. Hampering its further progress is the idea, often underlying public discourse, that we should choose between national interest and human rights. This is often a false choice, though, and we must try to shift the paradigm and treat the two concepts in different ways, not as competing boxers in a ring but rather as lovers who share similar dreams but speak different languages and have – let's admit it – fairly complicated characters. Protecting human rights IS in our own best interest, as citizens of a State and as citizens of the world[19].

This process is not concluded. But, despite small setbacks – and the downturns dictated by the moods of the time – it will go ahead.

NOTE:

[1] See, e.g., International Covenant on Civil and Political Rights (ICCPR), Art.4.

[2] See, e.g., ICCPR, Arts.19 and 20, providing an interesting example of how to balance competing interests in relation to freedom of expression.

[3] Louis Henkin, *Human rights and state "sovereignty"*, 25 Ga. J. Int'l & Comp. L. 31 (1995-1996), in particular pp.38-39.

[4] *Ibidem.*

[5] *Army refusal to release chronology of Lampedusa rescue delay, upheld*, MaltaToday, 10 December 2014, http://www.maltatoday.com.mt/news/national/47272/ar

my_refusal_to_release_chronology_of_lampedusa_rescue_delay_upheld#.VIrqiCusXu3

[6] Phillip Cole, "Human rights and the national interest: migrants, healthcare and social justice", in *Journal of Medical Ethics*, Vol. 33, No. 5 (May, 2007), pp. 269-272.

[7] "¿Soberanía nacional vs. derechos humanos?", in *Hoy*, 5 November 2014, http://hoy.com.do/soberania-nacional-vs-derechos-humanos/

[8] See, e.g., references to human rights violations to justify the overthrowing of Saddam Hussein in A Decade of Deception and Defiance, White House Background Paper on Iraq, 12 September 2002, http://2001-2009.state.gov/p/nea/rls/13456.htm

[9] Allen Buchanan, *In the national interest*, in *The political philosophy of cosmopolitanism*, ed. by G. Brock and H. Brighouse, Cambridge University Press, 2005.

[10] ICCPR, Art.2.

[11] European Court of Human Rights, Case of Hirsi Jamaa and others v. Italy, Judgment, 23 February 2012, paras.70-82.

[12] See, as the most recent step in this direction, the entry into force of the Arms Trade Treaty on 24 December 2014. *UN officials hail entry into force of landmark global arms trade treaty*, http://www.un.org/apps/news/story.asp?NewsID=49668#.VKfLu9KG87k

[13] US Senate Select Comittee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, particularly finding 1, at http://www.intelligence.senate.gov/study2014/sscistudy1.pdf

[14] Ibidem, finding 20. See also the final pages of John Mearsheimer, America Unhinged, The National Interest, Jan/Feb 2014, pp. 9-30, at http://nationalinterest.org/files/digital-edition/1388435556/129%20Digital%20Edition.pdf

[15] See http://www.amnesty.org/en/stoptorture

[16] Mark P. Lagon, *Promoting human rights: is U.S. consistency desirable or possible?*, October 2011, http://www.cfr.org/human-rights/promoting-human-rights-us-consistency-desirable-possible/p26228

[17] Daniel R. Mahanty, *Realists, Too, Can Stand for Human Rights*, The National Interest, 9 October 2013, http://nationalinterest.org/commentary/realists-too-can-stand-human-rights-9208

[18] Louis Henkin, note 4, p.39.

[19] William F. Schulz, *In our own best interest: How Defending Human Rights Benefits Us All*, Beacon Press, 2001.