Legitimacy, Justice and Public International Law

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arrangement that would oblige them to intervene regardless of the current wishes of their citizens.

The conclusion to this line of thought is that interventions can only be made legitimate by the direct democratic authorisation of the citizen body. Such authorisation might be given in different ways – through a referendum, for example, or through more normal processes of democratic politics whereby governments submit themselves to popular vote if the policies they want to pursue provoke large-scale resistance. This would have the practical drawback that rapid intervention would be difficult unless it was clear that public opinion was strongly in favour, in which case governments could act first and win their mandate later. Whether an intervention would be authorised or not would also be less predictable, which might mean that rogue states, or ethnic groups within those states, were less deterred from embarking on courses of action that would justify the intervention (such as policies aimed at ethnic cleansing). Moreover this approach would not solve the multi-agent problem at international level: assuming that in any particular case, several states, or several different coalitions of states, could carry out an intervention successfully, their citizen bodies would find themselves in the position of bystanders at an accident, each hoping that somebody else will step in to help while being willing to shoulder the responsibility themselves as a last resort. So from the human rights point of view, it can only be regarded as a second best, given that neither the voluntary model nor the contractual model passes the test of feasibility. More fundamentally, we may wonder whether a democratic vote in favour of intervention necessarily solves the internal legitimacy problem. Can a majority vote in favour of some policy justify the imposition of substantial costs upon a minority of citizens who may have voted against the policy?

In general, the answer to this question must surely be 'yes'. The essence of democratic politics is that minorities are obliged to accept the outcome of a majority vote even if this is to their disadvantage. On the other hand, the legitimate authority of the majority is usually understood to be circumscribed in various ways. Minorities have rights too: their human rights cannot be infringed; they are owed various kinds of equal treatment, and so forth. The question, then, is whether decisions involving interventions to protect the human rights of non-citizens are to be seen simply as part of normal politics within those constraints, where majority votes can legitimately bind minorities, or whether they raise deeper questions, such that a more inclusive form of consent is needed to make them legitimate.

Allen Buchanan, in an illuminating discussion of the internal legitimacy of humanitarian intervention, has posed the problem in the following way.[6] Suppose we were to see the authority of the state as stemming from a hypothetical agreement among its members to create an association that serves their interests; then humanitarian intervention becomes problematic, except in the unlikely event that it receives unanimous support from the citizens. Since the purpose of the intervention is to protect the human rights of outsiders, it falls outside the scope of the hypothetical contract, and those opposed to the intervention who would have nevertheless to bear some of the costs are entitled to refuse to do so. Thus soldiers can be required to fight in national defence, or more widely in pursuit of national interests, but not merely to protect the human rights of outsiders – a view famously articulated by Samuel Huntington, who said, in relation to the US intervention in Somalia in 1992, 'it is morally unjustifiable and politically indefensible that members of the Armed Forces should be killed to prevent Somalis from killing one another'.[7] To get beyond this point, a more expansive conception of the state is needed, which Buchanan labels 'the state as an instrument for justice'. On this view, the state is seen as a mechanism which individuals can use to discharge the 'natural duty of justice' that they owe to foreigners as well as to compatriots. The natural duty of justice is the duty to help ensure that all persons have access to institutions for the protection of their basic rights, so long as this can be done without incurring excessive costs.

Because of the limitation contained in the last clause, Buchanan's understanding of the natural duty is consistent with the idea that citizens can justifiably display some degree of partiality for their compatriots – they do not have to weight the protection of non-citizens' rights equally with the protection of citizens' rights.[8] Suppose that most citizens interpret the natural duty in this way: they give priority to protecting the human rights of compatriots even while recognising some responsibility for the human rights of vulnerable foreigners. Even so, acts of humanitarian intervention would seem to be justifiable so long as the costs and

[6] A. Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', *Journal of Political Philosophy*, 7 (1999), 71–87.

[7] Cited in J. L. Holzgrefe, 'The Humanitarian Intervention Debate' in J. L. Holzgrefe and R. O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003), 30.

[8] I have defended such a position in 'Reasonable Partiality for Compatriots', *Ethical Theory and Moral Practice*, 8 (2005), 63–81.

the benefits were proportionate – if, for example, the number of lives saved or amount of suffering averted was considerably greater than the overall cost in death or injury to members of the intervening state. But the problem with this approach is that it treats the citizens as a homogeneous bloc and overlooks the possibly very unequal distribution of costs within that group. It does not, in other words, consider the position of the soldier or civilian worker who is killed or injured in the course of what, overall, may be a relatively low-cost intervention.

It may be said in reply to this that soldiers – and a similar argument might be made in the case of certain categories of civilians – when they join the armed forces undertake an open-ended contract to fight and risk their lives as and when necessary. They may join up primarily to serve their country, in the sense of defending its interests, but once they have enrolled, they have put themselves at the disposal of the state, and they are no longer entitled to judge for themselves when and for what purposes they are going to be deployed. If this is not clear to them already, it should be spelt out in their contracts of employment. Obviously this argument applies only to the case of volunteer or professional armies, not to conscripts, and we might therefore conclude immediately, with Michael Walzer, that only volunteers can be used in humanitarian interventions.[9] But does it apply even to them? For the argument from consent to go through, we would need to be convinced that those who join the military do so out of choice, not necessity, and with a reasonable grasp of the risks they are likely to incur. Perhaps they have been seduced by rosy advertisements of the life of adventure that today's soldier enjoys, or the high-tech equipment he or she will be operating, at a safe distance from the enemy. These advertisements may be justifiable on balance, because there is certainly a problem of finding enough people willing to join the armed forces in a society where military life no longer has the cachet it once had, but we need to ask whether the recruits' consent is firm enough to silence concern about the risks they may be exposed to in the course of humanitarian intervention.

Even if we can show that soldiers have freely consented to be exposed to risk of death or serious injury, moreover, it does not follow that the state that has received their consent is entitled to expose them to any risk, no matter how large. Although no longer civilians, they are still citizens, and are owed what, following Dworkin, we can call 'equal concern and respect'. It can perhaps expose them to a reasonable degree of risk, in

[9] M. Walzer, 'The Argument About Humanitarian Intervention' in D. Miller (ed.), *Thinking Politically* (New Haven: Yale University Press, 2007), 243.

pursuit of a sufficiently good purpose (which would include the protection of human rights). But what counts as a reasonable degree of risk? How many lives may one justifiably anticipate sacrificing in an intervention that if successful would save life on a large scale? There is, as far as I know, no clear answer to these questions to be found in the literature of moral and political philosophy. But if in place of this we look to the practice of democratic states, and to public opinion in those states, the implicit answer is that in the case of humanitarian interventions where no national interest is at stake, the anticipated risk must be quite low. Once a few hundred soldiers have been killed or seriously injured, opinion shifts rapidly against the intervention.[10] Huntington's position remains an extreme one, but popular opinion trails not very far behind it: it is not willing to accept that *many* Americans should be killed to prevent Somalis from killing one another.[11]

It may seem that popular opinion here is simply falling victim to an unthinking form of nationalism, perhaps even racism, that sets the value of (dark-skinned) foreigners at close to nothing. But before rushing to this conclusion, we should step back a bit to reflect. Return for a moment to the duty of rescue considered now as a responsibility of the individual – the duty to pull a drowning person out of the river, for instance. As this is usually expressed, it is a duty to rescue endangered persons when this can be done at little cost to oneself – in other words there is built into the duty a very considerable tilt in favour of the intervener, who has no obligation to incur a risk of the same magnitude as the risk to which the victim is now exposed. (This tilt is reflected in the law of those states with 'Bad Samaritan' laws that impose a legal duty of rescue. The duty applies only where the victim is facing a threat of death or serious injury; the rescuer is required to intervene only when he can do so without incurring significant risk; and often he is given a choice between carrying out the rescue himself and contacting the relevant authorities, for instance the police.[12])

[10] For some discussion of this point, with references to supporting empirical evidence, see J. Goldsmith, 'Liberal Democracy and Cosmopolitan Duty', *Stanford Law Review*, 55 (2002–3), 1667–96.

[11] In case this should be thought of as mere selfishness, remember that the issue is not what individual people may be willing to do themselves to save the lives of potential victims – we have enough evidence of heroic personal altruism to lay that question to rest – but how far they are prepared to require *others* – their fellow-citizens – to engage in risky humanitarian rescues.

[12] See, for example, J. M. Ratcliffe (ed.), *The Good Samaritan and the Law* (Garden City, NY: Anchor Books, 1966); M. A. Menlowe and A. M. Smith (eds.), *The Duty to Rescue: The Jurisprudence of Aid* (Aldershot: Dartmouth, 1993). For discussion of the arguments

Again what counts as a 'reasonable cost' in these circumstances is left undefined, but one helpful suggestion is that one should be willing to incur risks of the kind that one runs anyway in the course of daily life: crossing roads, driving cars and so forth.[13] Suppose we were to use this as our benchmark: it would still be possible for someone to refuse to intervene on grounds of risk, even though the risk involved was only a little higher than the risks he would be taking anyway as he went about his daily business. If this is the correct understanding of moral duty in cases where there is only one rescuer, and so responsibility rests entirely with that person, what should we say about cases in which there are several potential rescuers, and so the additional question of how to allocate responsibility arises – which is normally the position when large-scale violations of human rights are threatened?

There are, in fact, at least two variants on the multi-agent scenario. In the first, the rescue is best carried out by a single agent, and the problem is one of identifying that agent: if several rescuers leap into the water in an attempt to rescue the drowning person, they get in each other's way and make a successful rescue less likely. What is needed here is to pick out, for example, the strongest swimmer among those standing on the river bank. In the second, cooperation between the rescuers increases the chance of success and/or reduces the potential cost to each rescuer: if the water is fast-flowing but not too deep, a human chain could be formed reaching out to the victim. It is easier to escape responsibility in the first case than in the second, because each person may reasonably believe that some other bystander is better qualified than he to leap into the water, whereas once the chain begins to form, it will be hard to find good reasons not to join it. Which variant better represents the case of international intervention to protect human rights? At first sight, it seems that this is a case of scenario two: intervention will be more effective, and less costly to each political community, when undertaken by a multinational force. But in practice this may not always be so. First, an effective intervention is likely to involve only a small number of states, and so there is still the problem of how the list should be drawn up, with

for and against such legislation, see J. Feinberg, *The Moral Limits of the Criminal Law, Vol 1: Harm to Others* (New York: Oxford University Press, 1984), ch. 4; H. H. Malm, 'Bad Samaritan Laws: Harm, Help or Hype?', *Law and Philosophy*, 19 (2000), 707–50; A. Ripstein, 'Three Duties to Rescue: Moral, Civil, and Criminal', *Law and Philosophy*, 19 (2000), 751–79; C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Clarendon Press, 2006), ch. 2.

[13] For this suggestion, see Fabre, *Whose Body is it Anyway?*, ch. 2.

each state having an incentive to minimise its contribution, or better still not be involved at all.[14] Second, coordination may be difficult if different contributing states impose different cost limits on the intervention – for instance some states are only willing to accept a very low risk of their personnel being killed or injured. Under these circumstances there may be heated disputes about what form the intervention should take, leading to paralysis. For these reasons, the first scenario may better capture the problem of distributing responsibilities at international level.

Let me now attempt to draw the threads of the argument together. I began from the premise that we all share in a general responsibility to protect human rights that crosses national borders. As human beings we cannot simply sit back and watch as others are deprived of their rights to life, subsistence, bodily integrity and so forth. But for this responsibility to become effective, it has to be assigned to particular agents, who are then given the duty to protect the rights of specific groups of people. The primary assignment is to states, whose claim to sovereignty rests in part on their ability to protect the human rights of their own citizens. But where this breaks down, either through state incapacity or because the state adopts policies that violate the rights of its own people, a further assignment of remedial responsibility to outside bodies has to be made. The issue then is how this should be done, particularly in light of the fact that the costs agents are asked to bear in the course of their intervention must be reasonable ones. I then looked at two possible solutions to the problem. The first was the voluntary model, where each person is left to decide for themselves what contribution they will make towards protecting human rights, either directly, by say volunteering to become an aid worker, or indirectly by offering financial support to aid organisations. This, I suggested, was likely only to work in a subset of cases, where the costs of intervention were not high, and intervention did not require a direct confrontation with a state that was itself responsible for violating human rights. The second was the contractual model, where citizens commit themselves in advance to discharge the responsibility to protect, preferably via a binding international agreement that would require states to intervene when asked to do so either on their own or as part

[14] As an illustration, consider the difficulties involved in putting together a 15,000-strong force for peacekeeping duties in South Lebanon in the summer of 2006: even among those countries who declared themselves willing to participate, the numbers offered were remarkably low, France leading the way with an initial promise of 200 troops, later increased after considerable pressure to 2,000.

of a multinational force. I argued that citizens would be unlikely to agree to this, and this would be reasonable in light of the prospective costs – it would be like binding oneself to rescue drowning swimmers regardless of how many of them there were, and how fast the river was flowing. One can accept the duty of rescue, but justifiably retain the right to decide when the costs of a rescue are too high, at least within certain limits.

Since neither of these two models seems likely to deliver what it promises, what we are left with is this: the responsibility to protect human rights is primarily a responsibility of states, which must however retain the right to decide when they will undertake an intervention in defence of these rights. Where states can join forces and work together to offer protection, that is all to the good. But they cannot bind themselves to enter such coalitions in advance, not least because the intervention must be justified internally, to their own citizens, in light of the fact that the costs are going to fall upon those citizens, and often very unequally upon different sub-groups. It is important that those who face the greatest risks should do so willingly, but I argued that one should not take the fact that the army, say, is recruited on a voluntary basis as justification for requiring soldiers to take part in an intervention regardless of the likely cost. The upshot is that in some situations there is likely to be what we might call a protection gap: there are people who can legitimately demand protection, because their rights are being violated by forces that they are unable to resist, whether forces of nature or human agents, but those who might protect them can legitimately refuse, because the costs they are being asked to bear are too great, either absolutely or in relation to those being borne by others. I won't try to judge which real cases – Rwanda, Darfur etc. – might fit this description.[15]

I want to end by drawing out two general corollaries of the position I have been defending. First, as I noted earlier, most discussion of humanitarian intervention, in the specific sense of *military* humanitarian

[15] This idea of a protection gap has been challenged on the grounds that all (genuine) rights must have corresponding duties, so in cases where it turns out that no agent has an obligation to intervene (on grounds of risk, say) it follows that no right has been infringed. Putting the same point another way, all rights, including human rights, have inbuilt limitations that mirror the limited obligations of potential rights-protectors – so my right to life does not extend to the right to be rescued from a fast-flowing river if no suitably powerful rescuer is present. I reject this view. It is true that rights are subject to feasibility constraints, so that, for example, one has no right to a life-preserving resource that it is beyond human power to provide, but more mundane cases of scarcity reveal that the mere absence of an agent with a corresponding duty does not invalidate a right. I have developed this point in Miller, *National Responsibility and Global Justice*, ch. 7, sect. V.

intervention, has been preoccupied with the question of legitimacy: who has the *right* to intervene in any particular case. Reading this literature, one can get the impression that there are too many states eager to intervene who have to be kept in check by some principle of due authorisation. However the gist of my argument has been that, if we are looking at cases that are simply humanitarian and do not have significant geo-political aspects, then the likelihood is that we shall have too few rather than too many willing interveners – that states will be playing games with each other to minimise the risk to themselves in contributing to the relief of what is clearly a humanitarian disaster. From this perspective I share Michael Walzer's view that we should not try to lay down in advance conditions for who may intervene, but rather be guided by the simple maxim 'who can, should'.[16] I speculate here that the reason most authors want to impose legitimacy conditions on humanitarian intervention is that they are thinking about the issue of intervention *in general*, and quite properly want to lay down restrictions on that. In other words, one may think that states should not interfere in one another's internal affairs even for good purposes, such as promoting or safeguarding democracy, and therefore support general principles of non-intervention, but want to make a clear exception for cases of the kind I identified at the beginning of the chapter, where basic human rights are being violated on a significant scale. The solution, therefore, is to worry less about the question 'who has the right to intervene?' and more about the question 'when are human rights being violated on such a scale that anybody who can has the right to intervene? What is the threshold beyond which we are clearly facing a humanitarian disaster?'.

My second corollary concerns the role of international law in protecting human rights. To what extent can the responsibility to protect human rights be turned into a legal obligation? It follows from what I have argued that there could not be a general legal obligation of this kind – there could not be an obligation to engage in humanitarian intervention that would parallel the 'Bad Samaritan' laws that in some states impose a duty of rescue on individuals. This does not mean that international law has no role to play in protecting human rights. Its main role, however, is surely to restrain potential violators of these rights. Since most states have now signed up to the original UN Declaration and the subsequent charters of human rights, one can say that there is at least the basis for a legal obligation to respect these rights. The problem, as we all know, is

[16] Walzer, 'The Argument About Humanitarian Intervention', 241.

how to make international law effective in the absence of a powerful enforcing body, which does not exist now and is unlikely to exist in the foreseeable future. But perhaps international law might first be given normative force, in the form of *rulings* about acceptable and unacceptable human rights practices, even though such rulings could not in the immediate future be enforced. As bodies such as the International Criminal Court become better established, the effect would be to serve notice on the rulers of rights-violating states that they might in the future find themselves liable to prosecution. In this way international law could play some part in preventing human rights disasters that fall under headings c), d) and e) on my original list.

International law could not, however, resolve the problem of how to allocate responsibility for protection in cases where the human rights disaster is already occurring. Unless a scheme of voluntary cooperation between states arises – again unlikely in the short run – the best hope seems to be the emergence of norms that would pick out particular states, or groups of states, as bearing special responsibility for each individual case. The problem, as I have argued elsewhere, is that the norms we might find plausible do not, unfortunately, all point in the same direction.[17] In the international case we might think, for example, of geographical proximity – states, or groups of states, should have a special responsibility for protecting human rights in their own region; cultural similarity – Islamic states, say, should have a special responsibility for rights violations in other Islamic states; historic connection – states should have a special responsibility towards countries they have interacted with over time, for example their ex-colonies; and special capacity – states that have a particular kind of expertise or resources should assume responsibility when that expertise or those resources are needed. We can observe cases where each of these norms has come into play. But clearly their reach is going to be patchy, they will point in different directions in some cases, and following them would distribute the burden of intervention in arbitrary ways – some states being called on to intervene more often and at much greater cost than others.[18]

[17] See my paper 'Distributing Responsibilities', *Journal of Political Philosophy*, 9 (2001), 453–71.

[18] Unequal distribution of costs may not be arbitrary where it can be shown that the intervening state bears some historic responsibility for the human rights violations that are now occurring – for example if it is an ex-colonial power that has previously supported one faction in a state that is now experiencing civil war.

For the time being, therefore, the best we can hope for is something like the following: first, there should be a clearer international understanding of what counts as a human rights disaster, such that the general norm of non-intervention can be set aside. The states directly involved are of course likely to resist being labelled in this way, since they will have their own political agendas to pursue which may well be contributing to the disaster, but that does not matter so long as there is wide international agreement, in the UN and elsewhere, that the scale of human rights violation has crossed the threshold.[19] Then there should be communication between states with the capacity to intervene with the aim of applying norms such as those listed in the last paragraph to pick out one or more states as responsible agents. Perhaps in the longer term it might be possible to work out a system of burden sharing so that the costs of intervention can be more evenly spread – though this will undoubtedly be difficult. (Even in what might appear to be the much simpler case of distributing the burden of admitting refugees – simpler because this can be characterised crudely just as a matter of the numbers to be admitted – coming up with a generally acceptable scheme has proved problematic.[20]) One reason for this is that the present capacity of states to contribute to human rights interventions, particularly interventions that involve the use of force, is heavily influenced by the past policies of these states, in building up their military capability, or choosing not to do so. These policies in turn will reflect different conceptions of national identity, and can be defended by appeal to national self-determination. What, for example, should we say about a country like Switzerland which for historic-cum-cultural reasons has developed a system of national defence that is precisely that and nothing more, and whose contribution

[19] At present such agreement exists in the case of genocide – even those developing countries that are generally reluctant to accept any breaches of the sovereignty norm are willing, in principle, to allow intervention to prevent an impending genocide (they may object to the particular agents who undertake the intervention). Clearly the threshold is here being set very high; there are many large-scale human rights disasters that do not take the form of genocide – for instance ideologically driven policies that lead to mass starvation. I am grateful to Carolyn Haggis for information on the evolving attitude of African states in particular to interventions aimed at stopping genocide.

[20] I have discussed this question briefly in 'Immigration: the Case for Limits' in A. Cohen and K. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005). I refer there to proposals discussed in J. C. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 115–211 and P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243–97.

to peacekeeping efforts overseas is therefore unavoidably minimal? Or of countries such as Germany and Japan whose constitutions place narrow limits on military activities? Could they be brought into a burden-sharing scheme by being asked to make larger contributions in other areas, such as reconstruction in the aftermath of an intervention?

In the absence of such a scheme, and given that the UN can only encourage and not require member states to take action even in cases where it has resolved that intervention is justified, there is not much to rely on apart from diplomacy and the moral imperative to protect human rights, made more pressing by media reports of the unfolding disasters. Under these circumstances it seems inevitable that what I have called the protection gap will persist: hundreds of thousands of people will continue to have their rights infringed because the responsibility to protect them remains undistributed.

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9

The threat of violence and of new military force as a challenge to international public law

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The foundation of a new international public law

After the dark experiences of two destructive world wars in the twentieth century it has been the constitution of the United Nations Organization by which the foundation stone was laid for a positive change in international relations. But even if we have to admit that the UN couldn't meet all political expectations one can recognise a lasting reform of international public law by the UN Charter. It inserted new directions into the framework of international law. The prohibition of a threat or use of military force in international relations – as constituted by UN Charter, article 2, 4 for all member states of the UN[1] – has a deep impact on the legitimate character of the activities and the role of states as well as on the former concept of state sovereignty. While the traditional order of '*ius gentium*' after the Westphalian Peace Treaty in 1648 did include the legal option for all sovereign states to enter into war against the other members of the international community of states, the UN Charter excludes that right in general, limits the 'inherent right' of self-defence of a member state of the UN to the temporal condition 'until' the Security Council of the UN has decided on appropriate measures,[2] and transfers the legal questions concerning peace and war to the system of 'collective security', represented by the political body of the United Nations itself.

These directions have initially changed the conceptual frame of international public law in a fundamental respect. From a philosophical perspective one could say that the prevailing legal international order meets the normative imperative for legitimacy which was defined by Immanuel Kant at the end of the eighteenth century. In his famous essay

[1] See *Charter of the UNO*, Chapter I, art. 2, 4. [2] *Ibid*., Chapter VII, art. 51.

'On Perpetual Peace'[3] Kant stated the necessity for a new constitution of international law which should overcome the traditional legal and moral doctrines on a just warfare not only by the implementation of a strict and unconditioned prohibition for all states to go to war against each other but also by the constitution of a 'league of peace', which means a federation of peacekeeping states giving up the original right to carry out their political agenda by the means of warfare.[4] But while Kant presupposed in his arguments that only republics with a basically democratic order were allowed to join the suggested international league of peacekeeping states, the Charter of the UN does not set up such a criterion like a republican or democratic order of a state as an admittance and membership requirement. On the one hand, the decision not to require an inner democratic order was the basic condition for the political success and the factual possibility to constitute the UN among the allies of the Second World War and to form the special admission to the permanent membership in the Security Council. On the other hand, exactly that decision did imply unintended consequences, some of which I would like to address in the following section.

Challenges to international public law

Challenges to international law 'from within'

In early modern times the traditional order of international law was conceived as a '*ius gentium*' or a law among peoples regulating the external relations between sovereign states based on customary law as well as on contract law. Prepared by the previous legal as well as philosophical traditions,[5] the classical doctrine of the '*ius gentium positivum*' became effective with the Westphalian Peace Treaty and applied since then for several centuries, mainly to the external relations of the European states. That legal order reflected juridically the prevailing political structure of power between the modern European states. That function of international public law didn't change in the gradual process of

[3] I. Kant, 'On Perpetual Peace', first edition 1795, in *Kants Werke, Akademie Textausgabe* VIII (Berlin/New York: De Gruyter Verlag, 1968), 354–7.

[4] See the famous book of C. von Clausewitz, *Vom Kriege*, first edition 1832–4 (Stuttgart: Reclam, 1994).

[5] See, for example, M. Lutz-Bachmann, A. Fidora and A. Wagner (eds.), *Lex und Ius. Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Neuzeit* (Stuttgart: Frommann Holzboog Verlag, in press (2009)).

democratic inner reforms or even revolutions within the single states. Beyond the principle of 'indivisible sovereignty' of each single state the legal order of the old '*ius gentium*' contained neither a further legal nor a normative principle or rule in order to protect a state from being attacked by another state. We can therefore conclude that the juridical order of that international public law was never endangered nor challenged *as such* by the conduct of war or the threat of violence in international relations since warfare and the use of force was permitted within its regulations if conducted according to well-specified formal procedures, even if it is true that the emergence and development of 'Humanitarian International Law' in the nineteenth and twentieth centuries achieved success in restricting the legal reasons for nation-states and the legitimate ways to conduct war mutually.[6]

That situation changed fundamentally after the Second World War and the dramatic experiences of a warfare of 'total destruction', including the atomic bomb. The introduction of a new paradigm of international public law succeeding the foundation of the United Nations aimed at the goal of establishing a new international political order based on a few general and fundamental normative ideas which all human beings can and for good reasons should acknowledge as legally binding principles in international politics independent of their political, cultural, religious or non-religious identity: the unconditioned commitment to keep peace, not to dominate other states or political communities and to observe the basic human rights. The intentional threat of violence and the use of military force are therefore, if they happen to occur, not only challenges to the given order of power and of states but additionally challenges to the prevailing order of international public law. Accordingly the 'lawful use of force' in self-defence which is permitted by article 51 of the UN Charter is not only temporally limited but above all restricted to the conditions of a system of 'collective security'.

Like other severe violations of legal orders the evident act of an illegal use of military force in international relations in the case of a military aggression of a member state of the UN could be prosecuted as a criminal act on trial.[7] But the tentative idea of legal jurisdiction suffers not only

[6] See e.g. the Conventions of Geneva (1864), Den Haag (1899) or the Brian-Kellogg-Pact (1928).

[7] See the resolution of the UN General Assembly of 1974: it affirmed that 'aggressions' of states could be called 'crimes' in a proper sense, but that is juridically not the case for all violations of art. 2,4.

from the lack of appropriate international procedures of law enforcement in international legal affairs and from the often disputed unsatisfactory implementation of global political structures, but also from the substantive disagreements among the states over the question how crimes of aggression are exactly to be defined in the international arena. Only new political agreements, improved legal commitments as well as advanced implementations of structures for peaceful and effective political interventions would hopefully prevent the international escalation of aggression and intervene early enough before military acts are carried out by states, either against foreign countries or even against parts of their own population like in the former Yugoslavia, Somalia, the Congo or Sudan today. What might happen in recent times in cases of hot international conflicts, upcoming crises and already ongoing military conflicts, wars and the severe violation of human rights if one (or even more) standing members of the UN Security Council vetoed appropriate measures? Often nothing! As we know, exactly that occurred too often in the past sixty years and it will continuously happen in the future due to the insufficient structure of UN legislation and of jurisdiction within the legal order of international law. I call that the *first challenge* to international law 'from within' the prevailing legal order.

The often documented incapacity of the UN to protect peace in international crises has become even more problematic in recent years. Due to the legal developments within international law like the general assertion of states to the character of '*ius cogens*' for basic principles in international law or to the 'erga omnes'-obligations according to the 'Vienna Treaty on the Law of International Treaties'[8] single actors like states or state-based organisations may much more often feel obligated to intervene in cases of severe violations of human rights than happened before. These legal developments within international public law helped to improve discussions in Western democracies not only on the justification of 'humanitarian interventions' but also on the 'justified use of military force' in international relations. Some political philosophers claimed for themselves and their political systems high moral standards, political legitimacy and argued for a 'moral foundation' for international law.[9] But we have learned that these legal developments increased the

[8] See *The Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969.

[9] See, for example, A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford University Press, 2004).

inherent tensions of international public law, especially with regard to the prohibition of the use of military force beyond the UN system of collective security in the name of a self-authorised obligation of states. There can be no doubt that these developments have led to many even more complicated international crises in recent years. I call these tendencies the *second challenge* to international public law 'from within'.

Finally I would like to address the decisions made by the unanimous vote of the UN Security Council itself, like the decision on the 'War on Terrorism' after the events of 9/11. One can doubt to what extent terrorist organisations like Al-Qaida are subject to international law but it seems to be obvious that the declaration of a 'war' against private actors implies an introduction of new elements in the system of international law, represented by the definitions of the UN Charter and previous UN legislation. The rationale of legitimate war of states against dangerous but private actors in the name of the UN Security Council as the representative of the system of collective security not only adds further conceptual uncertainties into the order of international law, it also helps to develop and to legitimate political concepts like the 'preventive' or even 'pre-emptive use of military force' since it seems to be impossible to fight 'a legal war' against an almost totally invisible enemy without legalising to a certain degree even 'pre-emptive' military strikes. I call that slippery road from a legal war on terrorism to the pre-emptive use of military force in the name of legitimate self-defence which was opened by the decisions of UN itself the *third challenge* to international public law 'from within'.

Challenges to international law 'from outside'

In addition to these three challenges to international law resulting partly from its interior constitution and partly from its legal evolution I refer now to three different challenges arising from recent developments 'outside' the sphere of law. I do so in focusing first on the emergence of a cultural dimension of conflicts among states and populations in the age of globalisation, second on the fact of an ongoing proliferation of nuclear weapons and additional weapons of mass destruction which will very likely increase in the next few years, and third on the problem of how to deal with aggressive political regimes in the world in accordance with the normative ideals and the legal order of the prevailing international public law.

One of the – perhaps unintended – consequences of the political agenda of the UN itself has been the emergence of a 'cultural dimension'

within many international conflicts. One might prove whether or not it has something to do with the politics of cultural identity which had been supported by the UN in the time of the anti-colonialist and anti-apartheid decisions. But in contrast to these former political issues the cultural impact on conflicts today goes far beyond a local or regional relevance. Cultural and especially religious (or at least seemingly religious) identities play a growing role in international conflicts and sometimes they produce the willingness of actors not only to use violence in the name of their highest moral good but also to sacrifice their own lives. As we know it is hard to see how the traditional instruments of legal coercion like a rightful punishment by a criminal court could ever be effective against persons who are determined to carry out suicide attacks against others. I call this the *fourth challenge* to the order of international law emerging from 'outside' the legal sphere today.

The proliferation of nuclear weapons and other weapons of mass destruction and their spread to tyrannical regimes as well as to international private organisations, which both might be willing to use these weapons, is probably the most significant and threatening challenge to the order of the international legal system we are confronted with worldwide today. It seems to be obvious that the international 'Treaty on the Nonproliferation of Nuclear Weapons' (NPT)[10] and the 'International Atomic Energy Agency' (IAEA) are not able in the long run to prevent the proliferation of these weapons to unlawful regimes or to private organisations like terrorists, warlords or even ordinary criminals. If that is going to happen one can easily predict that the global public, as well as the international legal order, might be taken as hostages of illegal persons. And even more dramatically we might experience outbreaks of nuclear warfare among states and among private actors which could destroy the basic principles of international public law and its institutional global structures. Insofar as these considerations are rational I would like to call this possible future scenario the *fifth challenge* to prevailing international law since it already preoccupies the political agenda of global diplomacy if we refer to the examples of India and Pakistan, North Korea or Iran.

Finally, regarding the international political interaction of states and powers we are confronted with the problem of whether or not the legal

[10] See *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, 1 July 1968; Review Conference 2–27 May 2005, New York.

order is able to really integrate the relevant actors. Due to the fact that there are quite a few states which lack an inner reform towards republican structures and democracy like Kant asked for in his political philosophy one may have severe doubts regarding the reliability of these actors. In accordance with the theory of Kant who required first an inner reform and a democratic constitution for a state in order to become a member in the 'league of nations', one might call these states 'unjust legal orders'[11] or even 'outlaw regimes',[12] like John Rawls did. Even if these states belong formally to the UN as full members we have good reason to suspect that their governments do not respect the normative implications of international public law nor fully recognise its goals, namely a reliable global order of peace, prohibition of warfare and protection of human rights. One may therefore conclude that at least some of those regimes are willing to violate the legal international order if they think that in a given situation they may gain strategic benefits in doing so. If the analysis of the inferences between a lack of inner democracy and a lack of obedience to international law is true one may count even permanent members of the Security Council among these states like China or Russia. I call this problem of reliability the *sixth challenge* to international public law.

Two proposals from political philosophy: Michael Walzer's and Allen Buchanan's arguments for the use of military force in international affairs

The threat of violence and of new military force in international relations has set off various debates within political philosophy on the question of how to react rationally to these challenges. Among the different contributions one can identify new interest in the idea of finding solutions from a *legal* discourse to, at least for many jurists, an unexpected *moral* argument. The recent revival of the just war theory is only one indicator for this development. In this paragraph I refer very briefly to the position of two influential political philosophers, namely to Michael Walzer and Allen Buchanan. They both advocate different versions of this general shift to an ethical legitimation of a

[11] See Kant, 'On Perpetual Peace' and cf. additionally I. Kant, 'On the Proverb: That May be True in Theory, but Is of No Practical Use', in Kant, *Akademie Textausgabe* VIII, 307–13.

[12] J. Rawls, 'The Law of Peoples', in S. Shute and S. Hurley (eds.), *On Human Rights* (New York: HarperCollins, 1993), 72ff.

'justified warfare', conducted by democratic states and allegedly legitimate in an act of self-empowerment by an *ultima ratio* reflection. Walzer says that this kind of use of military force by single democratic states acts 'beyond humanitarian intervention' in a global society and Buchanan speaks about a 'preventive' use of military force. Of course, both represent quite different traditions in political philosophy but they have in common a moral reading of the core content of human rights which seems to be the normative starting point of their argument in favour of a self-legitimation of single states to use military power in international affairs.

In his Minerva Lecture, held in 2004 at the University of Tel Aviv with the title 'Beyond Humanitarian Intervention: Human Rights in Global Society', Walzer addresses some of the obvious deficiencies of the international order which I cited above as 'challenges to international public law', and in doing so he focuses his arguments especially on three problems: the first problem is marked by the question of which rational status 'human rights' might claim in the international arena – beyond the sphere of the so-called 'decent states'. The second problem is indicated by the question of who might be responsible for the fulfilment of the universal validity claims of these 'human rights' in the sphere of international political relations, and the third problem is raised by the question of what should be done for the enforcement of 'human rights' in the realm of international politics.

In answering these questions Walzer starts with what he calls a 'minimal conception' of human rights. In his view human rights primarily refer to the right to life and liberty, including the basic normative statement 'that mass murder, ethnic cleansing, and the establishment of slave camps are not just barbarous and inhuman acts but violations of human rights'.[13] Walzer favours what he calls 'a short list' of human rights, and he states that there is no public addressee responsible for the enforcement of human rights in the international arena. In his view that marks the decisive difference to the protection of human rights within the legal order of 'decent states' governed under the rule of law. It is evident that Walzer is following here the line of the political philosophy of Montesquieu and Hegel in rejecting the idea that the given international political order might represent a perhaps incomplete but already existing and binding public *legal order*, including basic human rights

[13] Michael Walzer, *Beyond Humanitarian Intervention*, 1; I quote Walzer's text from the version of his manuscript.

today. Walzer argues that a political discourse on rights without a corresponding structure of an implementation of these rights in effective social and political structures is not only incomplete but even fallacious. He therefore gives up the idea of an internationally binding *legal* order and concludes a '*moral postulate*' which functions as a substitute for the supposed lack of effective or reliable basic rights in the international sphere. That postulate claims the *moral* commitment that all those democratic states which are able to intervene in cases of severe human rights violations in the international arena 'should intervene, militarily if all else fails',[14] since 'all people at risk of massacre or enslavement have a right to be rescued'.[15] That postulate addresses the democratic states and contains a moral legitimation for the self-empowerment and self-entitlement of single states to act militarily.

Referring to Hannah Arendt's famous statement that the idea of human rights stands for the claim of human persons 'to have rights' within the given legal order of a single state, Walzer postulates additionally not only something like an original '*moral right*' for all people to live in a 'decent state' but also the more far-reaching '*moral obligation*' for states in the international order to foster state building everywhere in the world in the name of a coercive protection of human rights since a protection of human rights is for Walzer only effective within the legal order of a nation-state. Accordingly, the attempt to protect human rights in the international arena seems to him to be futile.

Allen Buchanan presents another kind of answer to the new threats and challenges which endanger the given international legal order today. He basically shares Walzer's reading of human rights beyond the scope of the *legal* order of single 'decent states' as a source for a *moral* commitment which claims a normative validity 'independently of whether they are enshrined in legal rules or not'.[16] According to Allen Buchanan human rights claim a universal validity since they express and define certain general and necessary conditions without which humans are not able to conduct a good or decent life. The commonly shared '*interests*' of all humans in the protection of those general conditions is for Buchanan the final moral reason for the universal validity of human rights. One may doubt whether or not that argument is able to explain the normative content of the moral and legal claim of validity of human rights sufficiently. But nevertheless, according to Buchanan it is necessary to specify

[14] *Ibid.*, 7. [15] *Ibid.*, 8.
[16] Buchanan, *Justice, Legitimacy, and Self-Determination*, 119.

the reference to these 'general conditions' in order to be able to apply human rights to the very different individual social and political situations humans live in: 'Even if the existence and basic character of human rights can be determined by moral reasoning without reference to the particular features of any legal system, institutionalised efforts to monitor and improve compliance with these rights are needed to specify their content, if they are to provide practical guidance, and these must be context specific.'[17]

The practical impact of human rights as binding rules or norms is primarily a negative one. For Buchanan human rights are *moral norms* 'expressing basic moral values that place constraints on institutional arrangements rather than … prescriptions for institutional design'.[18] Nevertheless, the primarily negative function of human rights does include at least some positive requirements like the affirmative right of all humans to live under conditions of a 'democratic governance'. In regarding that right as a basic norm which belongs to the 'core' of international law Buchanan obviously goes far beyond the concept of Michael Walzer. According to Buchanan the postulate of 'democratic governance' doesn't just apply to the legal order of the single states[19] but additionally to the sphere of legitimacy of the international legal order as a whole.

The condition of a 'minimal democracy' is, according to Buchanan, a postulate which addresses the single states and their active role within the international arena. His argumentation corresponds to the idea of a normative primacy of the validity of human rights over the sovereignty principle claimed by the single states. For that reason Allen Buchanan postulates a clear commitment for the democratic states to employ, if possible, 'preventive military force' in international affairs in cases of an imminent severe violation of human rights. That moral postulate does not only express the legitimate possibility for the use of preventive military actions in opposition to the prevailing international public law but also an obligation to act accordingly. Buchanan suggests a number of legally ordered procedures including some '*ex ante*'- and '*ex post*'-evaluations which have the task of guaranteeing an 'impartial proof' for the justification of the use of 'preventive military force' by single states. In his article 'The Preventive Use of Force: A Cosmopolitan International

[17] *Ibid.* [18] *Ibid.*, 127.

[19] See *ibid.*, 143: 'All persons have the same fundamental status, as equal participants, in the most important political decisions made in their societies.'

Proposal', published together with Robert O. Keohane,[20] Buchanan additionally proposes an institutional framework which should aim to protect 'vulnerable countries against unjustified interventions without creating unacceptable risks of the costs of inaction'.[21] That proposal is designed as an international contract or even as a global treaty which has the task of implementing prevailing UN law with new legal procedures. They should help the democratic states in cases of imminent or already ongoing severe human rights violations to examine by themselves their specific moral duties if the UN Security Council fails to decide or to act for whatever reason. The proposed list of '*ex ante*'- and '*ex post*'-evaluations contains some more or less precise criteria for democratic governments in order to judge themselves on the question not only *if* but also *how* they should fulfil their alleged 'moral commitment' concerning the human rights of endangered foreign people. These criteria are something like the normative core for a reform of international rules which aims at a new international 'system of accountability'.

Towards a global public law: an argument for a reform of the UN

For our discussion on the meaning and relevance of the challenges to the international public order it seems to be of the highest importance that Michael Walzer and Allen Buchanan argue – like others in political philosophy – within the conceptual framework not of legal duties but of moral obligations, and in doing so they support a moral reading of the validity claims of human rights. As a result of their arguments they suggest the idea of a legitimate self-empowerment of single democratic states in order to use military force for the sake of endangered human rights in international affairs. Before I present my own considerations I would like to address some problems in the argumentation of both Michael Walzer and Allen Buchanan.

Concerning Walzer's contribution it seems obvious that he is ignoring the fact that there has been an evolution of international public law in the last sixty years which has led to a legal sphere of reliable international law even if its mechanisms aren't effective enough. Against that background it seems to be counter-intuitive to reject any juridical content of the

[20] See A. Buchanan and R. O. Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', *Ethics and International Affairs*, 18 (2004), 1–22.
[21] *Ibid.*, 1.

meaning of 'human rights' in the international realm of politics as well as in the global public as he does. His rejection of a reliable legal importance of human rights 'beyond' the order of single democratic states seems to have much more in common with the prejudices of the so-called 'realists' in the theory of international relations than Walzer might agree with. But even if we would accept Walzer's analysis it would remain unclear what a 'moral obligation' of a democratic state to act militarily in the international arena could mean precisely. A self-empowerment of a single democratic state is by no means a contribution in favour of a reliable legal order since it necessarily would not only produce massive tensions among states but also between legal orders, international treaties and organisations. I fear Walzer's proposal would lead to a new and even more dangerous 'anarchy of states'.

It seems to be obvious that Michael Walzer is avoiding appropriate arguments for his understanding of 'human rights' as a source of moral obligations of juridical entities like nation-states. In his arguments he fails to distinguish between 'moral obligations' and 'legal duties', that means between 'obligations' which address moral subjects like individual actors and 'duties' which bind collective actors like states or international organisations constituted by legal and coercive frameworks. Additionally we can see that Walzer ignores other important distinctions like the difference between a conditioned and an unconditioned obligation or between a duty to act and a duty to refrain from acting and so on. But above all: the plea of Walzer for a moral obligation of single democratic states for the use of military force 'beyond humanitarian interventions' doesn't only endanger the prevailing international public law, it also contains a new version of the just war theory which would lead to many counter-intuitive consequences. I therefore cannot see that his suggestion might be helpful in order to develop solutions for the challenges to the international order which emerge from the threat of violence and of new military force today and tomorrow.

It is quite obvious that Allen Buchanan presents a different proposal. But in his case too I cannot see how his reference to human rights might constitute an 'obligation' at all since the normative core of human rights is constituted in his reading by nothing other than an alleged 'interest' of people. Even if it is true that Buchanan wants to argue in favour of human rights as moral norms, I cannot see how one might infer something like a 'moral norm' from a given 'interest' of somebody. What I am missing in Buchanan's arguments is the proof of the normative and universal character of the human rights as moral entitlements as well

as legal claims with an unconditioned obligation for all other actors, whether individuals or states. In my view that normative core of the human rights speech remains unrecognised and unwarranted in Buchanan's reconstruction. Additionally Buchanan seems to neglect the difference among moral obligations and legal obligations for collective actors like states. I see similar problems in the argumentation of Buchanan's proposal as in Walzer's. But whereas Walzer's contribution would politically and legally lead to something like a new and, compared to the world of the nineteenth century, even more dangerous 'anarchy of states' which falls far behind the legal and political order of the UN Charter and its international organisations, treaties and mechanisms, Buchanan's arguments for a new 'system of accountability' are designed in order to support and to complete the prevailing order of international public law. That marks a big difference among both authors. But even if this prospect sounds much more plausible for me, the question remains of whether or not the basic idea of Buchanan's is suitable and convincing, namely his idea of a legitimation of a 'preventive use' of military force by single democratic states in order to protect human rights.

I fear that his proposal would, if realised, not reach its goal, namely to support the universal human rights in international affairs in the long run since the suggested self-empowerment of single states would lead necessarily to unintended results and would help to increase extremely dangerous scenarios of warfare, terrorism and anti-terror activities. The mechanism of self-entitlement of states Buchanan suggests would open the door to a new constellation of 'justified warfare' scenarios with inflationary effects and incentives to an increased use of military force in international conflicts since each state might claim its moral legitimacy and refer to supposed justified reasons for its actions. This leads me to the conclusion that the return to the supposed 'morally' legitimate practice of military intervention and the self-entitlement of states to military action is wrong. On the contrary, what we need is an impartial political authority or even better fair legal public procedures by which the international community of states itself can decide whether or not an international humanitarian intervention or even a preventive use of force might be necessary, reasonable and prudent in order to protect international peace. That presupposes not only global public debates among political representatives but also the implementation of new global democratic structures for decision-making in the international arena on questions of peace and war. Consequently I argue in favour of a reform of the prevailing international political order and for a further