
Review Essay

Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo

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Abstract

The essay reviews five recent works on humanitarian intervention which shed new light on central questions of the debate. The authors, mainly international lawyers but also scholars of international relations, philosophy and sociology, mainly agree that in positive international law, even after Kosovo, no right to unilateral humanitarian intervention has emerged. Several, however, regard this situation as morally unsatisfactory and offer important proposals for the future development of international law, although they remain vague on some crucial issues. Their moral argument rests on the assumption that an order based on individual rights, rather than state sovereignty, would endorse humanitarian intervention. But it is doubtful that individuals would favour such a right, given historical experiences, and it also seems more appropriate to locate the conflict between human rights and peace, rather than between human rights and state sovereignty, with strong moral arguments supporting each side. Moreover, most proponents of unilateral humanitarian intervention neglect the value of institutions; they conclude a unilateral legal right directly from the moral argument. However, in domestic liberal theory institutions have long played a crucial role, and they deserve a similar role on the international level, as some of the contributions emphasize. Such institutions would allow for accommodation of diverging conceptions of morality, and Western states should, both for reasons of history and political theory, seek such accommodation rather than use their current power to impose their morality on the rest of the world.

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*The conquest of the earth, which mostly means taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing if you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea; and an unselfish belief in the idea — something you can set up, and bow down before, and offer a sacrifice to.*¹

Few topics in international affairs have fascinated so many writers as the problem of humanitarian intervention, and indeed few are as dazzling as this. Discussions of the problem have always focused on fundamentals, and defenders of a right to intervene on humanitarian grounds have consistently laid claim to a higher morality than their opponents. Yet the history of humanitarian interventions is one of abuse, and the loss of blood incurred in its course draws into doubt this moral high ground. One need only recall how Alberico Gentili justified the Spanish conquest of the New World:

I approve . . . decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practised abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose. For such sins are contrary to human nature.²

Since these times, the discussion on the legality and desirability of interventions to counter atrocities has not diminished, and indeed it came again to the forefront of international attention during the Kosovo war in 1999. During and after the war, scholars of philosophy, of international relations and international law contributed to the public and academic debate in innumerable publications, five of which shall be reviewed in this essay. They all take different perspectives. Two of them, Simon Chesterman's *Just War or Just Peace?*³ and Christine Gray's *International Law and the Use of Force*,⁴ focus mainly on positive international law. But Gray's study, based to a large degree on the analysis of state practice, places the issue of humanitarian intervention into the broader framework of the law on the use of force which allows for insights into many parallels in other strands of this body of law. In contrast, Chesterman concentrates on humanitarian intervention as such (broadly defined), but often escapes the confines of state practice and offers broader reflections on the political impact and significance of legal developments. While both these works are quite critical towards humanitarian intervention, the others under review take a much more positive stance. Nikolaos Tsagourias, in *Jurisprudence of International Law*,⁵ approaches the issue from a jurisprudential angle. For most of his book he describes different strands of thought in international law and their approach to humanitarian intervention. He eventually opts for a 'discursive model of human dignity',

¹ Joseph Conrad, *Heart of Darkness*.

² A. Gentili, *De iure belli libri tres* (J.C. Rolfe trans., 1933) 122.

³ Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, New York: Oxford University Press, 2001) xxx and 295.

⁴ Christine Gray, *International Law and the Use of Force* (Oxford, New York: Oxford University Press, 2000) xii and 243.

⁵ Nikolaos K. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester: Manchester University Press, 2000) x and 137.

which is based on critical reflections on international law, but, in its emphasis on human dignity, often comes close to tendencies of the New Haven School. In contrast, Nicholas Wheeler, in *Saving Strangers*,⁶ bases his analysis on a solidarist theory of international relations, contrasting it with pluralism's less favourable view of humanitarian intervention. From the perspective of political science, his thorough account of state practice in eight cases since 1945 seeks to reveal a fundamental change in the discourse on international relations, with a pluralist attitude replaced by more solidarist views since the end of the Cold War. Finally, in *Der Kosovo-Krieg und das Völkerrecht* (The Kosovo War and International Law),⁷ 10 scholars of law, philosophy, political science and sociology at German universities present their views on the different layers of the discussion on humanitarian intervention, particularly with respect to the Kosovo war. Most of them argue on a very abstract, theoretical level — and most of them approve of humanitarian interventions in general, confining their criticism mainly to the way such interventions are conducted. In the framework of this essay, of course, I cannot do justice to all contributions to the volume, but will only mention some of their most characteristic arguments.

1 The Law Unchanged

These works, through their diversity in perspectives and results, add up to a highly interesting exchange on many of the most pertinent issues in the debate on humanitarian intervention. And, in their emphasis on theoretical issues, they take the debate beyond the restatement of international law by developing their thoughts on how to proceed in its future development. This step seems particularly important as the works reveal a far-reaching agreement on the current state of international law, at least if measured according to traditional standards of interpretation and state practice.

Already during the 1990s, authors such as Sean Murphy and Matthias Pape had provided conclusive evidence that the UN Charter did not embrace a right to unilateral humanitarian intervention and that state practice, even after the end of the Cold War, had not modified this account.⁸ This is widely confirmed by the works discussed here. Gray, Chesterman and Wheeler agree that neither the examples during the Cold War (especially India/Pakistan, Vietnam/Cambodia and Tanzania/Uganda) nor more recent cases such as the interventions in northern Iraq or in Kosovo reflect an

⁶ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, New York: Oxford University Press, 2000) xv and 336.

⁷ Merkel and Reinhard (eds), *Der Kosovo-Krieg und das Völkerrecht* (Frankfurt am Main: Suhrkamp Verlag, 2000) 245.

⁸ S.D. Murphy, *Humanitarian Intervention* (1996); M. Pape, *Humanitäre Intervention* (1996). For the opposite conclusion, however, see F.K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (1999).

acceptance of such a right by state practice.⁹ They rely not only on the objections to the legality of the actions by significant parts of the international community, but also on the justifications advanced by the acting states. These hardly included a right to unilateral humanitarian intervention at all; only the United Kingdom came to argue in favour of such a right in some instances. While in the earlier cases states referred primarily to self-defence in order to justify their use of force, in the 1990s the acting states emphasized a multitude of factors, prominent among them an ‘implied authorization’ by the UN Security Council. For a right to unilateral humanitarian intervention to emerge, however, its positive assertion by the actors as well as its acceptance by other states would be necessary. This has not yet occurred, and Gray (p. 18) and Chesterman (p. 85) argue convincingly against approaches that use earlier cases as precedents because of what they were ‘in essence’ rather than what the acting states proclaimed as justification at the time. And Gray is right to point out that attempts to weaken the requirements for state practice, e.g. by counting the Security Council’s failure to condemn a certain action as implicit approval, are likewise difficult to sustain (p. 17). Moreover, the mere fact that states are hesitant to rely on a right to humanitarian intervention reflects the persisting weakness of the claim to it, or at least its extremely controversial status. The international discourse has certainly moved towards more solidarist arguments, as Wheeler demonstrates impressively. Thomas Franck has recently presented a similar analysis, and he has concluded that the Charter rules on the use of force have thereby become slightly more flexible.¹⁰ However, caution seems indicated: any such modification would require more than ambiguous silence towards actions of limited precedential value, and, as Wheeler concedes to Gray and Chesterman, the open endorsement of a new rule has yet to occur.

2 Legitimacy: The Quest for Criteria

Given this state practice, arguments in favour of a unilateral right to humanitarian intervention on the ground of positive international law encounter severe difficulties. Accordingly, the attempts of several authors in the German volume (Merkel, Senghaas, Höffe) to defend such a right on the basis of collective self-defence for threatened individuals appear rather weak. Noting the emergence of individual rights in international law, they rely on the maxim ‘no right without remedy’, but overlook

⁹ For similar conclusions, see the ‘Fourth Report on Kosovo’ of the Foreign Affairs Select Committee of the UK House of Commons, <www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>, para. 132 (‘at the very least . . . tenuous basis in current international customary law’); and the report of the Dutch Advisory Committees on Issues of Public International Law and on International Affairs, <www.AIV-advice.nl>, 20 (‘current international law does not provide sufficient legal basis’). For a discussion of these reports, see Wheatley, ‘The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention’, 5 *Journal of Conflict and Security Law* (2000) 261–273; Dekker, ‘Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report’, 6 *Journal of Conflict and Security Law* (2001) 115–126.

¹⁰ T.M. Franck, *The Lauterpacht Lectures* (unpublished, 2000). An expanded version of these lectures will be published in 2002 by Cambridge University Press.

the fact that in international law many rights are lacking an appropriate remedy, and that only very few can be forcibly implemented.

In order to argue for a right of states to use force in humanitarian emergencies, one must therefore have recourse to arguments outside the positivist canons of interpretation. This is the aim of Tsagourias' introduction of human dignity as the benchmark of evaluation. In his view, concentration on human dignity allows one to grasp the 'essence' of the problem and to avoid a 'capricious legalistic logomachy' (pp. 64 and 96). To put it simplistically, Tsagourias tries to trump positive law by morality, or at least to intermingle both. A related moral argument — though without any legal claim — is provided by Wheeler, who argues that in a solidarist conception of international relations a right to humanitarian intervention would be recognized, while the refusal to do so by pluralist views reflected their 'moral bankruptcy' (p. 296).

Reading this, it seems — and much of the public debate on Kosovo focused on this issue¹¹ — that the main problem of humanitarian intervention consists in the divergence of law and morality: while considerations of justice and human rights demand the recognition of a right to intervention, international law prevents this by anachronistically relying on order and on state sovereignty. If so, then the perennial question of the relationship of law and morality comes to the fore, as in Tsagourias' work, but also the much-debated question whether it is politically desirable to accept humanitarian intervention as lawful. Proponents of humanitarian intervention on moral grounds have argued that the recognition of an exception to the prohibition on the use of force could open the door to abuse too wide and that it would be preferable for states to justify their action on the basis of political arguments — the intervention would then be unlawful, but it would be a 'venial sin'.¹² This view is supported by Chesterman (p. 231), but opposed by Wheeler. In the latter's view, such a split would excessively weaken the force of the general prohibition, since it would lead to the perception that the powerful states can disregard the legal rule whenever they wish; other states might then follow suit and treat these rules equally cavalierly in the future (p. 294). This latter position appears plausible, especially if one shares Wheeler's conviction that norms have a constraining effect on state behaviour primarily by excluding possibilities of justification — an indeterminate, purely moral exception to the prohibition on the use of force would leave open the range of potentially justified interventions. Law loses much of its weight if its deviation from moral standards is openly admitted and other ways of justification are recognized.

Whichever solution one chooses, one needs to define criteria for admissible humanitarian interventions. Here, most of the works under review are very cautious. Tsagourias dismisses any attempt at definition, as it would pre-empt the consideration of relevant factors in each case; for him, the discursive process is more important than

¹¹ See e.g. the conclusion of the Independent International Commission on Kosovo, *Kosovo Report* (2000) 186; and the evaluations in the UK report, *supra* note 9, at para. 138; and in the Dutch report, *supra* note 9, at 27.

¹² See, for different approaches, Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *AJIL* (1973) 304 *et seq*; O. Schachter, *International Law in Theory and Practice* (1991) 126; and Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 14.

rules (p. 112). In this approach, however, law loses any distinct function; it merges with both philosophy and politics. In contrast, Chesterman reflects carefully on the possible criteria before rejecting a definition on the ground that any such definition would assume the possibility of an ‘ideal’ humanitarian intervention which is unlikely to take place (p. 230). Wheeler takes a more optimistic approach and develops four core criteria: a ‘supreme humanitarian emergency’ must exist; the use of force must be the last resort; the limits of proportionality must be respected; and there must be a high probability of a positive humanitarian outcome (p. 34). Other criteria, such as the legality of the action and its non-selectivity, are considered as merely optional: their fulfilment strengthens the legitimacy of the intervention, but is not necessary to justify it in the first place.

In general, these criteria appear as plausible as those developed by other authors, although one would have expected a more extensive discussion of the limitations on the means to be employed in such an intervention — especially after the debate on Kosovo had revealed a strong connection between the *ius ad bellum* and the *ius in bello* in public opinion. In contrast, Merkel in his contribution to the German volume concludes that the inherent constraints on the conduct of a humanitarian intervention would render it in most practical cases unjustifiable.¹³ Moreover, Wheeler’s criterion of force as ‘last resort’ seems overly weak, as it only requires confidence on the part of politicians that peaceful avenues are exhausted.

More problematic, however, is that these criteria — as do those in other recent proposals¹⁴ — beg two major questions. First, what is a ‘supreme humanitarian emergency’? Wheeler can give no definition, but says that some claims will be more persuasive than others — then, however, the criterion is futile as it gives no guidance but relegates the problem of definition to the consideration of each single case. Wheeler himself concedes the ideological biases involved in each further concretization (p. 308). Secondly, who is to decide on whether the conditions are fulfilled or not? On this question, Wheeler is surprisingly silent, although in another publication he regrets that this fundamental procedural question has as yet not been seriously tackled in the literature.¹⁵ Various solutions are possible: a determination of a threat to the peace by the Security Council could be regarded as sufficient, but, as Chesterman notes (p. 229), it is unlikely that Council members opposed to intervention would be more willing to make such a determination than to authorize an intervention as such.¹⁶ One could also revive the ‘Uniting for Peace’ resolution and require a

¹³ Merkel, ‘Das Elend der Beschützten. Rechtsethische Grundlagen und Grenzen der sog. humanitären Intervention und die Verwerflichkeit der NATO-Aktion im Kosovo-Krieg’, in Merkel and Reinhard, *supra* note 7, 66–98, at 92.

¹⁴ See e.g. those of the Danish Institute of International Affairs or of the Independent Commission on Kosovo; cf. the latter’s *Kosovo Report*, *supra* note 11, at 192–198; those contained in the Dutch report, *supra* note 9, at 28–32; or those referred to in the UK report, *supra* note 9, at paras 140–141.

¹⁵ Wheeler, ‘Review Article: Humanitarian Intervention After Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy?’, 77 *International Affairs* (2001) 113, at 121.

¹⁶ For discussion, see also Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council’, 3 *Max Planck UNYB* (1999) at 92–94.

two-thirds majority in the General Assembly;¹⁷ one could make use of the future International Criminal Court;¹⁸ or one could devise a body of wise persons etc. In any case, however, what would happen if such a body failed to determine a supreme humanitarian emergency although in the view of some states it existed? In an argument based on moral grounds, this would probably count as little as the fact that the Security Council had not authorized the intervention under Chapter VII of the Charter; the mere 'dimension of the evil'¹⁹ would trump every consideration of right process. Indeed, in the case of Kosovo, NATO member states refrained from seeking a General Assembly resolution, apparently for fear of failing to achieve the necessary number of votes; but this did not prevent them from intervening. But, at least for those who regard morality (or law) as a discursive project, substance and procedure could be closely intertwined, as they are, for example, in the work of Jürgen Habermas. The institutions involved would then allow for an inclusive process, enabling equal participation in the definition of the threshold for intervention and in the application of the criteria to the particular case.²⁰ Tsagourias' discursive project, however, favours a more critical approach, with himself alone participating in the discourse.

3 Morality Versus Legality?

The considerations above were based on the assumption that morality demands a right to unilateral humanitarian intervention, as claimed by Tsagourias and Wheeler. But does morality indeed warrant such a clear answer? According to the usual claim, the problem of humanitarian intervention highlights the tension between human rights and state sovereignty, and, while human rights are based on moral grounds, state sovereignty is not or only to a small degree. This claim, though, faces two obstacles.

First, Wheeler's solidarist conception, supposedly unlike its pluralist opponent, argues that states should satisfy certain basic requirements of decency before they qualify for the protection which sovereignty and the principle of non-intervention provide (p. 28). This resembles the earlier arguments of Michael Reisman and Fernando Tesón who construe international law as based on individual rights and popular sovereignty and for whom states that disregard these are susceptible of forcible intervention by other states;²¹ in the German volume, Reinhard Merkel and

¹⁷ Nolte, 'Kosovo und Konstitutionalisierung: Zur Humanitären Intervention der NATO-Staaten', 59 *ZaöRV* (1999) 958; and White, 'The Legality of Bombing in the Name of Humanity', 5 *Journal of Conflict and Security Law* (2000) at 38 *et seq.* Similar proposals are made in the UK report, *supra* note 9, at para. 128, and in the Dutch report, *supra* note 9, at 26.

¹⁸ G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (1999) 381. In the 2000 edition, however, this proposal is modified in favour of a general reference to a 'legal process' (*ibid.*, at 444).

¹⁹ See *ibid.*, at 444.

²⁰ See J. Habermas, *Faktizität und Geltung* (1992) 109–291.

²¹ Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990) 866; F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed., 1997) 55 *et seq.*

Wolfgang Kersting take this view.²² As far as this claim seeks to reflect current international law, it is quite dubious — state practice has not recognized such a substantial limitation on sovereignty. There are certainly trends in some areas of international law to question the legitimacy of undemocratic or oppressive governments, and these are not confined to Europe or the Americas, but have reached African and Asian members of the Commonwealth as well. But, although such governments may not be allowed to participate in international fora, this development does not amount to denying the respective states the protection of the non-intervention principle, as Brad Roth has convincingly shown in a recent study.²³ Chesterman shares this conclusion (pp. 91 *et seq.*).

However, the current status of international law is not decisive for the primarily moral argument Wheeler makes; instead, further inquiry into the foundations of sovereignty would be needed to confirm or refute it. Unfortunately, Wheeler confines himself to pointing to some of the pluralists' objections to weakening the principle of non-intervention, but he refrains from discussing them in greater depth (pp. 27 *et seq.*). His view, as he notes, comes close to that of Michael Walzer who, while stressing the protection that sovereignty affords a people's self-determination, recognizes that in some egregious cases of human rights violation this protection should be denied.²⁴ In *Der Kosovo-Krieg*, Kersting takes the argument a step further. In an approach similar to that of Tesòn or, e.g., Charles Beitz,²⁵ he rejects much of Walzer's emphasis on self-determination and sovereignty and seeks to ground the international order in individual rights — at least in such basal, 'transcendental' rights as the right to life. Habermas, in his contribution to the same volume, outlines a comparable conception of cosmopolitan law, and equally concludes the general admissibility of forcible countermeasures against violations of these rights.²⁶

But, even if one accepts the premise of this argument — that the international order should be construed as based on individuals rather than on states — its conclusions give rise to doubt. Indeed, as Hedley Bull has emphasized, the well-being of all individuals might, in general, be better served by rejecting a right to unilateral humanitarian intervention, because states, in using such a right, would most probably act on the basis of their own moral principles and jeopardize a peaceful and just international order.²⁷ Bull's concern appears to be all the more justified on the background of historical examples of restricting the protection of the non-intervention principle to 'decent' states or peoples. Already Gentili held that war could be waged against men who violate the laws of nature as against brutes; and this served to justify the conquest of the Americas.²⁸ Samuel Pufendorf, in a refutation of a similar

²² Merkel, *supra* note 13; Kersting, 'Bewaffnete Intervention als Menschenrechtsschutz?', in Merkel and Reinhard, *supra* note 7, at 187–231.

²³ B.R. Roth, *Governmental Illegitimacy in International Law* (1999).

²⁴ M. Walzer, *Just and Unjust Wars* (2nd ed., 1992) 106 *et seq.*

²⁵ C.R. Beitz, *Political Theory and International Relations* (2nd ed., 1999).

²⁶ Habermas, 'Bestialität und Humanität: Ein Krieg an der Grenze zwischen Recht und Moral', in Merkel and Reinhard, *supra* note 7, at 51–65.

²⁷ H. Bull (ed.), *Intervention in World Politics* (1984) 193.

²⁸ See Gentili, *supra* note 1.

argument by Francis Bacon, emphasized that only those who were themselves injured by a violation of the laws of nature were entitled to use force²⁹ — Pufendorf had experienced the horrors of the Thirty Years War in Germany and had realized the devastating consequences of more permissive doctrines of the just war.³⁰ But still 200 years later, James Lorimer could distinguish between civilized humanity, which was subject to regulation and protection by international law, and barbarous and savage humanity, which enjoyed this protection only partially or not at all.³¹ This obviously served to justify the colonial enterprises of the nineteenth century, and it is plausible that more recent attempts to relativize the equal protection of sovereignty arouse fears among many nations of a recurrence of such phenomena in the name of human rights.

These concerns take us to the second objection to the claim that morality demands the recognition of humanitarian interventions as legitimate. As has been said, it is commonly assumed that the primary tension with respect to humanitarian intervention is that of human rights and sovereignty. Since sovereignty is not regarded as having strong foundations in justice, the conclusion is drawn that human rights should, in a moral perspective, prevail. But it is far from certain that the dichotomy between human rights and sovereignty is pertinent in this regard: if this tension were the primary concern, it would be quite surprising that there is far less opposition to the recognition of a right to humanitarian intervention by the United Nations than there is to a such a right of individual states. The fact that the power of the Security Council to intervene in humanitarian emergencies has found broad acceptance in the 1990s³² indicates that sovereignty is not the main concern: any intervention, regardless of the actor, interferes with sovereignty.

If the dichotomy between human rights and sovereignty is therefore misplaced, it seems more appropriate to posit humanitarian intervention between human rights and peace.³³ By insisting on Security Council authorization, opponents of a unilateral right seek to prevent arbitrary interventions from flourishing and thereby seek to preserve international peace; as Chesterman notes, the restrictive regulation of the use of force in the UN Charter is likewise predicated on the primacy of peace (p. 222). In this framework, though, the moral question is harder to answer: peace seems to have stronger roots in considerations of justice than state sovereignty. Political theorists since Hobbes have found the legitimacy of state authority based precisely on the need to achieve domestic peace, and, in the international arena, the UN General Assembly has even asserted a right of peoples to national and international peace and

²⁹ S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* (C.H. and W.A. Oldfather, trans., 1934) 1307.

³⁰ See R. Tuck, *The Rights of War and Peace* (1999) 160.

³¹ J. Lorimer, *The Institutes of the Law of Nations*, vol. 1 (1883) 101. For a recent account of such tendencies in the nineteenth century, see Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1–80.

³² See Frowein and Krisch, 'Article 39', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (2nd ed., forthcoming). Chesterman's account of this practice is more cautious: see Chesterman, *supra* note 3, at 151.

³³ In this vein, see also the speech of the UN Secretary-General before the General Assembly, UN Press Release SG/SM/7136, 20 September 1999.

security.³⁴ Thus it is doubtful whether human rights trump peace; instead it is arguable that the protection of peace is more precious to individuals than the preservation of their human rights in all circumstances and that, if asked, they would reject a unilateral right to humanitarian intervention. In this perspective, the UN Charter's emphasis on the maintenance of peace 'to save succeeding generations from the scourge of war' relies on a strong moral argument. And it becomes more difficult to claim that international law and morality diverge to such a degree that positive law should be set aside by moral considerations.

4 Desirable or Indispensable? The Role of Institutions

Conspicuously absent from most arguments in favour of humanitarian intervention is a closer look at the role and value of institutions and procedures. This has been noted above with respect to the definition of criteria, and it becomes most obvious in the way relevant cases are presented and discussed. Thus in the structure of their works, neither Wheeler nor Tsagourias distinguish between interventions with and without an authorization of the UN Security Council.³⁵ Tsagourias merely dismisses the role of the Council because of its unsatisfactory design (p. 93) while Wheeler sees UN authorization as dispensable though, if forthcoming, enhancing the legitimacy of a specific intervention (pp. 40 *et seq.*). In contrast, critics of a unilateral right to humanitarian intervention strictly separate these cases; both Gray and Chesterman have included chapters dealing specifically with the use of force under UN auspices. And one of Chesterman's central claims is that 'unilateral enforcement is not a substitute for but the opposite of collective action' (p. 236). Unfortunately, though, this eloquent claim — like others in his book — is not matched by a similarly striking argumentative basis.

The weak regard for institutions is not restricted to proponents of a unilateral right to humanitarian intervention but is shared much more generally by theorists of a liberal international order, of an international law based rather on individuals than on states, such as Fernando Tesòn or Anne-Marie Slaughter.³⁶ And it can be observed in even greater clarity among philosophers; for example, neither Michael Walzer nor John Rawls discuss international institutions in any meaningful way. Walzer dismisses institutional concerns as merely legalist; in his view, waiting for the United Nations would equal waiting for the messiah.³⁷ In the German volume under review, Merkel and Kersting adopt less pointed, though eventually similar views. This bias against institutions might be explicable by the general weakness of existing international institutions, but it might also be caused by the specifically moral standpoint taken. Moral norms, in most conceptions, apply as between individuals,

³⁴ Declaration on the Rights of Peoples to Peace, General Assembly Resolution 39/11, 12 November 1984.

³⁵ For an earlier striking example, see Abiew, *supra* note 8.

³⁶ Tesòn, *supra* note 21; Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503 *et seq.*

³⁷ See Walzer, *supra* note 24, at 107; J. Rawls, *The Law of Peoples* (1999) 36 and 70. For a similar neglect, see e.g. Beitz, *supra* note 25, at 67–92. But see also S. Hoffmann, *The Ethics and Politics of Humanitarian Intervention* (1996) at 12–37.

and they apply directly, i.e. without prior validation by a certain procedure. In purely moral terms, therefore, it is quite difficult to conceive of a meaningful role for institutions; when institutions come into play, one leaves the sphere of morality and enters the spheres of law and political theory.

Yet moral and political theory are not so neatly separated as it might seem, and many moral philosophers have accorded great importance to institutional settings, long before Jürgen Habermas' mutual stabilization of law and morality. One need only recall that Immanuel Kant, the philosopher probably most often referred to by liberal internationalists, insisted that, in order to avoid the discord arising from the unclear delimitation between morally defined rights, everyone was under an obligation to leave the pre-social state and to subject themselves to an external power. Of course, Kant himself did not draw the same conclusion for the international sphere, but at least he advocated a federation among states to prevent war from occurring.³⁸ But, if domestic liberal principles are transferred to the international arena, should not elements of domestic political theory follow them? This would, by necessity, move the focus of consideration from rights and duties of individual states to such rights and duties of and against central institutions — one would have to aspire not merely to a cosmopolitan order, but to a 'fully institutionalized cosmopolitan order', as Habermas puts it in his contribution to *Der Kosovo-Krieg*. In a similar vein, Otfried Höffe, Professor of Philosophy at Tübingen, refers to Kant and urges the establishment of global public authorities, capable of providing security to both states and individuals worldwide.³⁹

This focus on political institutions would clarify that the need for action in a humanitarian emergency does not permit the conclusion that there is a corresponding right of any other state, but perhaps that there is a duty of the world organization. In this perspective, the failure of the organization to correctly address a certain case might to some degree be tolerable — any institutional system produces shortcomings. Certainly the Security Council, with its veto rights and lack of transparency and accountability, might be especially prone to such shortcomings (Höffe calls them the Council's 'birth defects'), and these deficiencies need to be remedied. But the Council has in general come to operate reasonably well since the end of the Cold War, and in recent years the failure to react to humanitarian emergencies stemmed more often from a lack of readiness of individual states than from a blockade of the Security Council. As Wheeler notes, 'governments are notoriously unreliable as rescuers' (p. 310), and Rwanda is only the most evident case. If we, in spite of this, still defend the legitimacy of domestic governments, we will have difficulties in arguing that the international equivalent, the Security Council, has lost all its legitimacy and can be circumvented whenever this seems desirable.

³⁸ I. Kant, *Die Metaphysik der Sitten* (1777) at 430, §44; and 467, §54.

³⁹ Habermas, *supra* note 26, at 25; and Höffe, 'Humanitäre Intervention? Rechtsethische Überlegungen', in Merkel and Reinhard, *supra* note 7, 167–186, at 178–181. Both Habermas and Höffe, however, eventually recognize a right to unilateral humanitarian intervention because of the deficits of existing international institutions.

5 Unilateral and Collective Action: A Blurred Distinction in Practice?

As important as the distinction between unilateral and collective action might be in theory, some observers see it fading in practice. As Chesterman argues, the Security Council's decision to authorize instead of to conduct military operations has helped to blur the line between action by individual states and action by the international community as a whole (chapter 5). Indeed, since 1990, the Council has often chosen to empower certain states or groups of states to use force, and it has rarely used UN forces for operations under Chapter VII of the Charter, mostly because of the lack of troops at its disposal. And, in some of these cases, notably in the 1991 Gulf War, the authorization by the Council was regarded as merely an additional basis of legitimacy, without significantly changing the character of the Allies' action.

However, Chesterman's further claim that this development finally culminated in the use of force outside the framework of the UN, as in the enforcement of the no-fly zones over Iraq and in the case of Kosovo (p. 165), seems overstated. It is certainly true that it was in part the activism of the Council since the end of the Cold War that gave rise to the public expectation that 'something had to be done' and that something indeed could be done in those cases. The frequent use of force in those years has again made it a venerable instrument of foreign policy; at least in Western states, the feeling of impotence when faced with crises is gone. But it is rather the strength than the weakness of the collective security system that led to its circumvention by Western states at the end of the 1990s. Had the system been as mouldable as it was immediately after the Cold War, those states would not have felt the same need to disregard the institutional framework; they could have sought the Security Council's *imprimatur* of their wishes far more easily. The fact that China and Russia have become less willing to simply endorse Western policy shows that the institution has acquired teeth, and that it places restrictions on the pursuit of this policy. Western states are currently hesitant to accept these restrictions. Given their military and political power, they often regard multilateral institutions as one among other tools at their disposal, and if this tool does not work, they replace it with unilateral action.

In a more general way, Western states are less willing to accept the constraints of international law on the use of force. As Gray shows, the prohibition on the use of force is beyond dispute for most states (though not beyond violation), but some Western states, in particular the United States, urge a narrowing down in several respects; responses to terrorism, the protection of nationals abroad and anticipatory self-defence add to the example of humanitarian intervention under consideration here (pp. 23 and 119). Gray traces this back to the reduced fear by those states that the broadened rules will be used against them. This seems convincing: the power of international rules often stems from the interest of states in their reciprocal application, and dominant or even hegemonic states can ensure their interests by other means as well. However, at present there are countervailing forces: not only the tendency of other states to unite against predominance and to reach some balance of power, but also the power of public opinion which, at least in Europe, values

international rules and institutions highly, as could be observed in the discussions on Kosovo, though less in those on Afghanistan.

6 Humility and Caution

The protection of human rights is, of course, of primordial importance, and this is increasingly reflected in international law. To state this does not, however, mean to embrace the use of any means to further this protection. As has been argued, even within liberal thought there are enough ambiguities to induce doubts as to whether the unilateral use of force is appropriate: state sovereignty is not so devoid of roots in justice as it might seem; international peace might be of even greater importance for the individual than the protection of human rights in all circumstances; and achieving peace will necessitate restrictions on the use of force and on institutions whose decisions, though objectionable in some cases, possess binding force. Therefore, humanitarian intervention is not simply, as its proponents often claim, the moral alternative to an arbitrary, unjust, international legal order — one can also argue that the establishment of an institutional system to preserve peace and to delimit the rights of its subjects (even if still deficient) outweighs the need for a right to humanitarian intervention, even on moral grounds.

This calls for some humility and it should warn us not to engage in crusades prematurely, but to take account of dissenting voices as well. Both of the cases that seem best to represent unilateral humanitarian interventions at the end of the 1990s (the enforcement of no-fly zones in Iraq and the case of Kosovo) met with strong opposition by many states — not only by Russia and China but also by the majority of other nations, notably the Non-Aligned Movement, which now includes 115 states. Their positions tend to be neglected in both political and legal discussions, but they should remind us that the conviction of the acting states — however enlightened these might be — provided a weak basis for their claim to act ‘on behalf of humanity’. There is still considerable disagreement on the proper conception of morality, and such disagreement will best be overcome by discussions within global institutions, not by the sword. Several times already, Western states needed to realize that they had been wrong about what was good and right for the rest of the world.

Recent cases of humanitarian intervention certainly have become possible only because of the current distribution of power in international affairs, and probably they reflect indeed, as Ulrich Beck puts it in the German volume, ‘a mixture of humanitarian selflessness and the logics of imperial power’.⁴⁰ However, once Western predominance ends, other actors might use a right to humanitarian intervention to enforce their conceptions of morality as Western states do now. These conceptions might not be worse, only different. And perhaps it was awareness of this possibility that made NATO states refrain from the temptation to claim a right to unilateral intervention more openly — not only out of caution, but maybe also out of wisdom.

⁴⁰ Beck, ‘Über den postnationalen Krieg’, in Merkel and Reinhard, *supra* note 7, 232–241, at 240.