



Law and Intervention

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Abstract

The end of the Cold War led to a proliferation of military intervention in violation of the principles of political sovereignty and territorial integrity. As with all forms of human interaction, intervention comes in various forms, of varying degrees of legitimacy, and which are contested to a greater or lesser extent. This paper considers differing sets of legal justifications for going to war, or for refraining from so doing, including analysis of the tension between legality and legitimacy and between codified 'positive' international law and customary international law, as well as the ramifications of political ethics and ethical dilemmas in terms of humanitarian justifications for going to war. The findings are that a shift in the practice of states and interpretations by the leading publicists has led to a more permissive norm of intervention and therefore a disjuncture between customary and positive international law.

Keywords: Humanitarian intervention, just war, sovereignty, human rights, positive law, customary law.

INTRODUCTION

Humanitarian intervention is a crucial area of debate at the theoretical juncture of law, philosophy and international politics. The communications revolution has democratized and globalized the debate whenever and wherever evidence emerges of human need and suffering. Pressure on decision-making elites from internal and external constituencies has made the legal norm of non-intervention insupportable, and has lifted international politics from its amoral torpor. This paper assesses the validity of different sets of justifications with respect to international law and legitimizing norms. It further addresses the evolution of the international normative underpinnings of international law, questioning whether or not codified or positive international law is lagging behind customary practice and interpretations, and therefore in danger of becoming anachronistic or redundant.

As with all forms of human interaction, intervention comes in various forms, of varying degrees of legitimacy, and which are contested to a greater or lesser extent. Least controversial are those interventions that take place unopposed

(i.e. with the consent of the sovereign power – e.g. American anti-terrorist operations in the Philippines in 2002); where *de facto* sovereignty has ceased to exist (e.g. the American led Unified Task Force /Operation Restore Hope in Somalia 1992); or where the mission is purely to keep the peace, supply aid and succor, or to evacuate civilians, (e.g. UN missions in the Horn of Africa in the 1980s and Cambodia 1992-3, and the rescue of schoolchildren from the war-torn Ivory Coast by France and the United States in 2002).

Most controversial are opposed military interventions, in particular where there is little or no evidence of broad-based international support for the action (most clearly obtained through the UN Security Council or General Assembly endorsement) – what J. L. Holzgrefe defines as ‘the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.’¹ Action taken by the United States and its allies against Saddam Hussein’s Iraq took the latter form. However, the most controversial positions allow the greatest stress-testing of prevailing rules and norms, and thus is the area which will be examined most thoroughly in this paper.

The second section will address the codified legal position associated with the UN system – the extant positive position regarding the conditions under which it is permissible to wage war. Section three will address more permissive humanitarian legal traditions and their implications for the underlying normative conditions of positive law. Section four and section five will address two elements of customary international law (respectively the customs and usages of civilized states and the works of jurists and commentators) which, while generally being accepted as carrying equal weight to that of positive law, is often found to offer conflicting guidance on humanitarian intervention to that codified in treaties and the constitutive documents of international organizations.

LEGAL LIMITATIONS ON WAGING WAR

The 1928 Kellogg-Briand Pact essentially outlawed war as an instrument of national policy except (implicitly) when fought in self-defense or (as it only referred to national policy, and did not supersede the Covenant of the League of Nations) when authorized by the Council of the League of Nations. To a considerable extent, this legal position has been inherited by the current United Nations system.²

¹ J. L. Holzgrefe, Robert O. Keohane, *Humanitarian Intervention: Ethical, Legal and political Dilemmas* (Cambridge: Cambridge University Press 2003) p. 18.

² Hans Kochler has noted that the Covenant of the League of Nations represented a move from *bellum justum* towards *bellum legale* and was therefore only a partial success towards the goal of abolishing the *jus ad bellum* altogether with the major and decisive step only taken with UN Charter itself eventually implementing the basic provisions of the Briand-Kellogg Pact by *integrating* the ban of the use of force into a system of collective security. Hans Kochler (ed) *The Use of Force in International Relations International* (Vienna: Progress Organization Studies in International Relations XXIX 2006) pp. 13-14.

Article 2(4) of the UN Charter requires states to refrain from the threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent with the purposes of the United Nations. Pursuant to Article 51, states may only legally resort to force in the interest of individual or collective self-defense. Under Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, the prohibition in Article 2(4) of the Charter is part of *jus cogens* - a principle from which no derogation is permitted, and which is often reflected in the drafting of international treaties. For Lyal Sunga:

a plain reading of Article 2(4) does not support the notion of the legality of unilateral military intervention for humanitarian considerations. In case Article 2(4) is not sufficiently clear in itself, General Assembly resolutions 2625, 3314 and 44/22 reflect the international community's view that Article 2(4)'s prohibition of the use of force in international relations must be interpreted broadly and exceptions to this prohibition have to be read very narrowly.³

Essentially, the UN position is that the only military intervention that can be justified is one to resist or reverse an act of aggression. Under Chapter VII Article 39, the UN Security Council is responsible for determining threats to international peace, breaches of the peace or acts of aggression, and under Article 42 the Security Council – not individual Member States - is empowered to authorize a response.⁴ To assist them in their deliberations, the Security Council may draw upon the 1974 UN General Assembly definition of aggression as 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations' or Article 6 of the 1946 Charter of the Nuremberg Tribunal wherein states may be charged with the 'waging of a war of aggression or a war in violation of international treaties, agreements, or assurances.'

A further proviso limiting intervention by the international body, as well as other states, exists in Article 2(7), according to which: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." In effect, Article 2(7) allows for added deference to states for acts within their territorial borders, and reinforces the internal and external implications of state sovereignty.

Thus each state, according to international law, has a duty of non-intervention into the affairs of other states. At the basis of this duty lies the concept of state sovereignty. The prohibition against intervention was embodied in General Assembly Resolution 2625, as one of the "Principles of International Law Concerning Friendly Relations Among States." Further confirmation can be found in the rulings of the International Court of Justice. In the Corfu Channel Case, the ICJ denounced any pretend right to intervention in interna-

³ Lyal S. Sunga 'The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?' in Hans Kochler (ed) *The Use of Force in International Relations International* (Vienna: Progress Organization Studies in International Relations XXIX 2006) p. 58.

⁴ See Kochler 2006 op cit. pp. 14-15.

tional law; whereas in *Nicaragua v. U.S.*, the Court held that “the principle of non-intervention is an integral part of customary international law.” Thus, for Luban:

[E]ach state, according to international law, has a duty of non-intervention into the affairs of other states: indeed, this includes not just military intervention, but, in Lauterpacht’s widely accepted definition, any “dictatorial interference in the sense of action amounting to the denial of the independence of the State.” At the basis of this duty lies the concept of state sovereignty, of which in fact the duty of non-intervention is considered a “corollary.”⁵

International law, however, does outline some conditions under which military intervention is permitted. Article 41 of the UN Charter allows the isolation of an aggressor state in economic, diplomatic and political terms and, (under Article 42), if such measures prove inadequate, military action to give effect to Security Council decisions.

Article 51, relating to the pre-emptive use of force as self-defense, states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The requisite standard, under Article 51, is that military self-defense is triggered only upon the fact that an “armed attack occurs” against a state.

Essentially then, international law under the UN system appears to prioritize order of justice, and the rights of states over those of individuals, only endorsing war in response to an act of aggression, and only then once formal identification of the act as being one of aggression has been carried out by the Security Council. However, other traditions in international law are more permissive of warfare for “just” reasons in general and humanitarian intervention in particular. These will form the basis of the next section.

HUMANITARIAN LEGAL JUSTIFICATIONS FOR WAR

In the aftermath of World War I, when the League of Nations transferred the colonies of the defeated powers to the control of the victors, the process was completed in accordance with what became known as the mandate system. Although the victorious powers were given control over these territories, they were answerable for their treatment of the inhabitants of these “mandates” to the League of Nations. Thus for the first time, individuals were granted appeal to a higher authority than that which formally controlled their day-to-day existence. This constituted a direct international legal challenge to the long established principles of state sovereignty. In addition, a series of League of Nations peace treaties guaranteed rights of minorities in East-Central Europe, the Bal-

⁵ David Luban, ‘Just War and Human Rights,’ Charles R. Beitz et. al. (eds.), *International Ethics* (New Jersey: Princeton University Press 1985) p. 199.

kans, and Scandinavia as the borders of Europe were redrawn in the aftermath of World War One.⁶

The Nuremberg trials also contributed to limiting state sovereignty – states could no longer do as they wished with their citizens, and the UN Charter Preamble reaffirms faith in fundamental human rights without discrimination. This is further reflected in the wording of Articles 1(3), 55 and 56. Other relevant examples include the 1948 Universal Declaration of Human Rights and the 1966 Covenants on Civil and Political Rights (along with its Optional Protocol) and Economic and Social Rights (collectively, the International Bill of Rights). Typical examples of human rights freedoms include torture, slavery, racial discrimination, and gender discrimination. Indeed international law has increasingly been seen to intercede between states and their citizens, and human rights have in some cases come to be seen as rights held *against* states.

188 states have now accepted limits imposed by the 1949 Geneva Conventions upon the waging of war. Thus the Conventions themselves, and the fundamental proposition they affirm (that even wars have limits), “have become the starting point for the recent efforts to identify the jurisdiction *ratione materiae* of institutions to enforce international humanitarian law.” Furthermore, the Convention on the Prevention and Punishment of the Crime of Genocide has been ratified by 120 countries and, according to the International Court of Justice, holds to generally accepted values which oblige all states, even those which have few links with the international community, to “punish and prevent genocide.”⁷ Indeed, not only does the Convention state that the authors and instigators of a genocide must be brought to trial, but also that “there is nothing to prevent a state which is party to the Convention, even if it is not directly affected itself, from calling for sanctions against violations committed in another signatory country.”

Article II of the Convention on the Prevention and Punishment of Genocide defines the crime as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting upon the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

⁶ Sunga 2006 op cit. pp. 49-50.

⁷ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260, U.N. GAOR, A (III), (entered into force on January 12, 1951).

International legal principles can also be seen as coming into conflict with regard to intervention in an ongoing civil conflict within a target state. On the one hand, the position of the UN as the embodiment of "the peoples" rather than the states of the world, and a principle of national self-determination dating back to Woodrow Wilson's 14 points and the Covenant of the League of Nations, has tended to be supportive of the democratic rights of peoples, even to the extent of justify armed intervention in the promotion of democracy and realization of statehood.

This argument holds that states may initiate use of force against another state for purposes of preserving, maintaining, or possibly, initiating democracy. UN Article 2(4) is the most commonly referred to source of international law relating to this position. Thus scholars such as William Reisman of Yale Law School argue that Article 2(4) must be used to increase opportunities for self-determination.⁸

However, many legal publicists hold the position, that far from permitting or even encouraging armed intervention in states to support secessionist movements, international law prohibits such actions as they could lead to the overthrow of weaker governments and the dismemberment of their territory by stronger aggressor governments.⁹ It is further argued that the individual governments have a universal right to self-determination, including over issues of democracy.¹⁰ Thus, the only permissible intervention in a civil conflict is that authorized by the recognized government of the target state – i.e. an intervention in support of government forces to suppress insurgents. This could be viewed as being in the tradition of fraternal support from one sovereign to another.

Historically such justifications have been abused for geopolitical gain by all major powers. The 1829 invasion of Ottoman Empire by Triple Entente powers of Russia, France, and Britain to protect Christians were followed by further invasions by Russia throughout century, but also by the Crimean War with Britain and France siding with the Ottoman Empire against the Russians.¹¹ Even Hitler claimed normative justifications for his expansionist foreign policies to "protect the minority rights of Germans" in neighbouring countries.¹² The dangers of such an interpretation become clear when one considers that the new borders in Europe had left millions of Germans in the new states of Poland and Czechoslovakia, and that during the League of Nations period there were Germans living as far East as the Volga.

In the Cold War both superpowers used both sides of the debate to attempt to give a legal veneer to their power-political machinations. The clearest mani-

⁸ See William Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4),' *American Journal of International Law*, 642, 643-45 (1984).

⁹ See Oscar Schachter, 'The Legality of Pro-Democratic Invasion,' *American Journal of International Law*, 645, 649-50 (1984).

¹⁰ *Ibid.*

¹¹ Sunga 2006 op cit. pp. 47-48.

¹² *Ibid.* p. 52.

festations of these policies were the Reagan and Brezhnev Doctrines. The Reagan Doctrine, named after the US President, originated from his speech on March 1, 1985 in which he proclaimed that "freedom movements" in Afghanistan, Angola, and Central America, were entitled to receive "help" from the U.S. in support of their human rights.¹³ A corollary to the Reagan Doctrine is the Brezhnev Doctrine, which claimed the right of one socialist state to assist another socialist state if socialism was threatened there by the forces of imperialism.¹⁴

Yet, in general, the legality of such military interventions has been severely criticized, as, even more so, have the humanitarian claims. For Joseph Boyle: 'Interventions are widely held to be similar to, if not instances of, the kind of aggressive war widely held to be impermissible, indeed criminal, insofar as it ordinarily involves border crossing and is not undertaken for the sake of legitimate self-defence.'¹⁵ Legal scholars and courts have therefore tended to adhere to a third interpretation, the principle of neutral non-intervention, whereby states must refrain from aiding either side in a civil war. An example of an application of this third position is demonstrated in *U.S. v. Nicaragua* (1984 I.C.J. 392), whereby the ICJ concluded that the principle of non-intervention is part of customary international law.¹⁶

Thus it appears that other than wars authorized by the Security Council as being necessary to counter threats to international peace and security, and those waged in self-defense or collective self-defense, only those that are fought to prevent egregious violations of human rights, perhaps amounting to genocide, would gain legal sanction. Legal positivists may even reject this more restrictive view of legal intervention and associated conventions and covenants, due to the fact that General Assembly Resolutions are only considered 'advisory' rather than 'binding' upon Members.

The positivist approach to international law focuses almost exclusively upon codified law - what is actually written. The reasoning behind this is that states are sovereign, and as such are above the law, except where they have consented to be bound by it. Thus, '[t]he essential characteristic of the positivist approach to international rules is its insistence that such rules are binding only if they are grounded in state consent.'¹⁷ Hence, 'Legal Positivists seek fundamentally to ascertain what the law is, rather than what it *ought* to be. They are also united in rejecting the Naturalist premise that law can be rationally derived

¹³ Louis Henkin, Richard Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials* (3RD ED. 1993) p. 938.

¹⁴ *Ibid.* p. 939.

¹⁵ Joseph Boyle, 'Traditional just War Theory and Humanitarian Intervention' in Terry Nardin (ed) *Humanitarian Intervention: NOMOS XLVII* (New York: New York University Press, 2006) p. 32.

¹⁶ See also, Declaration of International Law Friendly Relations and Cooperation among States, U.N.G.A. Res. 2625 (xxv), 25 U.S. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of the States, U.N.G.A. Res. 2131 (xx) (1966).

¹⁷ R.J. Beck, A.C.A. Arend & R.D. Vander Lugt, *International Rules: Approaches from International Law* (New York: Oxford University Press 1996) p. 56.

from some metaphysical source.'¹⁸ Thus an investigation into the legal position of humanitarian intervention by the British Government found that: 'The overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention' and, '...finally, on prudential grounds, the scope for abusing such a right [of humanitarian intervention] argues strongly against its creation.'¹⁹

In order to move beyond this positivist position, we must accept alternative sources of legal justification. This is possible through an examination of customary international law and generally established international norms and rules of behavior that may be considered enabling or binding even if not enshrined in a particular written document. The Paquete Habana Case established that 'where there is no treaty and no controlling executive or legislative act or judicial decision [i.e. codified or positive law], resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.' This ruling is reiterated in Article 38 of the Statute of the International Court of Justice, which refers to 'international custom, as evidence of a general practice accepted as law;' and 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

This means that there are in fact two additional sources of international law that we can consider with regard to humanitarian law and military intervention: international custom, as evidence of a general practice accepted as law by "civilized" states, and the works of commentators. These hold important implications for our analysis. If states generally act as if, and leading publicists recognize, that sovereignty is not inviolate, then indeed, an international legal justification of military action in violation of sovereignty is available. If sovereignty can be challenged, and there are certain things that states may not do to or with their citizens, then the normative value attached to non-intervention must be weighed against that attached to other commonly held values that are being violated in order to judge the legitimacy of intervention.

This implies a crucial theoretical shift from an interpretation of justification based purely upon codified international law (legality) towards one embracing wider principles of just war (legitimacy). Nick Wheeler has made an attempt to bring together the questions of legality and legitimacy in the context of international law. Concerning the dilemma of what to do about strangers who are subjected to appalling cruelty by their governments, he identifies a marked shift in the normative context of international relations. "As a result of the international legal obligations written into the United Nations system, clear limits were set on how governments could treat their citizens...[yet due to the weakness of legitimate enforcement mechanisms] Intervention by force might be the *only* means

¹⁸ *Ibid.*

¹⁹ Foreign Office Policy Document No.148 (1986) See Mark Littman QC, *Kosovo: Law & Diplomacy* (London: Centre for Policy Studies, 1999) p. vii.

of enforcing the global humanitarian norms that have evolved in the wake of the Holocaust."²⁰

Should the international community embark upon this route, they would fundamentally challenge the established principles of non-intervention and non-use of force, and thereby demonstrate a greater commitment to international societal considerations of justice than to international systemic considerations of sovereignty and law. Crucially, Wheeler's work 'investigates how far states have recognized humanitarian intervention as a legitimate exception to the rules of sovereignty, non-intervention, and non-use of force.'²¹

In this context, situations can arise where an alternative moral practice develops that secures approval but that breaks existing law. If this persists over time, there are two possible pathways that have been identified by Tom J. Farer: first, an explicit exception might be carved out of the existing law that permits the action under specified conditions provided that the actor invoking the new rule can demonstrate that his or her action satisfies these. The second approach is to deny exceptions that are formally enshrined in the law but to recognize a practice of mitigation based on successive cases where judges and jurors have imposed lesser sentences on the basis of a plea that the action should be treated leniently.²²

In the next section we will address whether states have acted, or are beginning to act, as if humanitarian intervention was legally justified. In the final section, we will address the writings of publicists on the topic of just war.

'THE CUSTOMS AND USAGES OF CIVILIZED NATIONS' (STATE PRACTICE)

In the aftermath of the 'first' Gulf War, the then Secretary General of the UN outlined in his Agenda for Peace, the central tenets of the New World Order: "The time of absolute and exclusive sovereignty... has passed.... It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world".²³ That is to say, no state could consider itself immune to the demands and rights of its internal and external constituencies, and that the UN as the embodiment of the international community would not tolerate the hindrance of its "great objectives" of peace and security, justice and human rights and "social progress and better standards of life in larger freedom."²⁴

²⁰ Nicholas J. Wheeler, *Saving Strangers* (Oxford: Oxford University Press 2000) p. 1.

²¹ *Ibid.* p. 2.

²² *Ibid.* p. 3.

²³ Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping* (Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992). p. 5.

²⁴ *Ibid.* p. 2.

Similar sentiments can be found in the Millennium report penned by the successor to Boutros-Ghali, Kofi Annan. He also adds that the central task faced by states is to "ensure that globalization becomes a positive force for all the world's people."²⁵ This Report formed the basis of the Millennium Declaration adopted by Heads of State and Government at the Millennium Summit, held at UN Headquarters in September 2000.²⁶

In the High-Level Plenary Meeting for the 2005 World Summit (14-16 September) the world's leaders agreed on a "responsibility to protect" which included a "clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."²⁷ This declaration included a specific endorsement of humanitarian intervention by expressing willingness "to take timely and decisive collective action for this purpose, through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to do it."²⁸

The Responsibility to Protect even includes a section (6.28 – 6.40) on what can be done 'When the Security Council Fails to Act.' According to Sunga the Commission Report then gave the impression it had accorded scant regard for the basic principles of state sovereignty and non-intervention as it 'proceeded to classify and characterize various sorts of deployment of armed force, and then, rather surprisingly, dwelt on a range of operational considerations, logistical questions and issues of military tactics.'²⁹

Historically, the customs of "civilized" states have not reflected such willingness, but in recent years states have engaged in normative war-fighting even when codified international law would appear to disqualify them from acting. In particular, Rwanda can be seen of something of a watershed with regard to humanitarian intervention.³⁰ At first states were reluctant to get involved due to considerations of national interest, but ultimately they were compelled to do so because of pressure from international and domestic public opinion fuelled by information from NGOs and the media. Furthermore, the aftermath of Rwanda was crucial in determining the future behaviour of states.

²⁵ New Century, new challenges, SG report millennium, www.un.org/millennium/sg/report/ch0.htm

²⁶ Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000). The Millennium Declaration is a UN resolution, adopted at the 8th plenary meeting on September 2005 with nine major development goals. <http://www.un.org/millennium/declaration/ares552e.htm>

²⁷ The Responsibility to Protect consists of three parts: the responsibility to prevent, to react, and to rebuild. *Principles for Military Intervention* in the Responsibility to Protect institutionalize traditional criteria of Just War Theory. See, *The Responsibility to Protect*, International Commission on Intervention and State Sovereignty (December 2001).

²⁸ *Ibid.*

²⁹ Sunga op cit 2006. p. 77.

³⁰ See generally, Brendan Howe, 'The Rwandan Crisis: A Watershed for Humanitarian Intervention,' *International Studies Review*, 41-61 (Vol. 5 No. 2 October 2004) p. 5.

The failure to act in this instance increased international normative pressure for action in the next case of "practices that shock the conscience of humankind," Kosovo. As Fergal Keane noted at the time of the Kosovo intervention, in many ways it was "an exercise in assuaging guilt, the guilt felt over Bosnia and Rwanda."³¹ Madeleine Albright, US Ambassador to the UN during Rwanda and Secretary of State during Kosovo, is the best example of the transformation as a result of inaction guilt. Although generally seen as pro-humanitarian intervention, and regardless of her personal preferences, in her bureaucratic role, she was instrumental in putting ever more barriers in the way of US intervention in Rwanda. Not only did the US fail to intervene, they also took the lead in restraining the international community. Albright informed the Security Council that Washington was opposed to the reinforcement of UNAMIR under any circumstances, and that the US position was that all peacekeepers should be withdrawn.³²

Yet, post-Rwanda Albright became such a fierce advocate of the humanitarian use of military interventionary force, that Kosovo has been termed by many 'Madeleine's War.' Clinton noted in 1998 that "She pushed, and she pushed, and she pushed. She was always out there, and that made a big difference to me."³³ In an interview with this author Albright confirmed that the previous cases where the US and the international community had 'waited too long to go in' had 'played a huge role' in determining policy over Kosovo.³⁴

Likewise President Clinton expressed this guilt during a visit to Rwanda in March, 1998 and acknowledged the impact it would have upon future decision-making. He first admitted that genocide had taken place, that the killings were neither spontaneous, accidental, nor the result of ancient tribal struggles, and that people everywhere had the capacity to slip into pure evil. Furthermore, he stated that "we cannot abolish that capacity, but we must never accept it. And we know it can be overcome."³⁵ He conceded that the world had not acted quickly enough and accepted the collective guilt, stating:

"The international community, together with nations in Africa, must bear its share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become a safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide."³⁶

³¹ Fergal Keane, 'Rwanda and Kosovo: the same beneath the skin,' *Sunday Telegraph*, Apr. 11, 1999.

³² Elizabeth Neuffer, 'The Key to my Neighbour's House: Seeking Justice in Bosnia and Rwanda (London: Bloomsbury 2002). p. 119

³³ 'Madeleine Albright: the spiritual patron of the disaster in Kosovo,' *Ariana Online*, at <http://www.arianaonline.com> (September 20, 2005).

³⁴ Interview with Madeleine Albright at Graduate School of International Studies, Ewha University, Seoul, Korea (Nov. 12, 2002).

³⁵ 'President Clinton apologizes: Text of President Clinton's address to genocide survivors at the airport in Kigali, Rwanda' *Associated Press*, Mar. 25, 1998.

³⁶ See *Ibid.*

Clinton went on to acknowledge how this guilt would impinge upon future deliberations. He noted that although we cannot change the past, we can and must do everything in our power to help build a future without fear, and full of hope:

"We owe to those who died and to those who survived who loved them, our every effort to increase our vigilance and strengthen our stand against those who would commit such atrocities in the future – here or elsewhere. Indeed, we owe to all the peoples of the world who are at risk – because each bloodletting hastens the next as the value of human life is degraded and violence becomes tolerated, the unimaginable becomes more conceivable – we owe to all the people in the world our best efforts to organize ourselves so that we can maximize the chances of preventing these events. And where they cannot be prevented, we can move quickly to minimize the horror."³⁷

Clinton further revealed that he was instructing his administration to improve its systems for spotlighting countries in danger of genocidal violence, and outlined the necessity for the international community to have the ability to act when genocide threatens.³⁸ A combination of guilt over inaction in Rwanda and similar inaction in Bosnia meant that the Clinton administration was not going to sit idly by when a case that seemed to contain elements of both those tragedies next appeared.

The Rwandan crisis added two new considerations to the heritage of the post-Gulf War New World Order: an awareness that mass-media could be used not only by governments to manipulate perceptions of internal constituencies to support military forays, but also could mobilise internal constituencies to put pressure on decision-makers to enter into campaigns, and that revulsion or compassion could exercise as much influence of the public as appeals to their rationality; and an awareness that guilt, or the shadow of history acts as a further set of criteria constraining decisions.³⁹

Kosovo was to be the first explicitly humanitarian intervention in the post-Cold War world. The eagerness to get involved in Kosovo contrasts vividly with reluctance over Rwanda and Bosnia, as does the relative absence of considerations of material national interest compared with the Gulf. At the time much was made in the press and in public debate of the idea that liberal politicians were the new hawks, whereas conservative or realist commentators were comparatively non-interventionist. In Clinton's first public statement on the issue in March 1998, prior to discussions with the UN Secretary-General Kofi Annan, human rights featured more strongly than security or other considerations of national interest that might have been emphasized at other times in other cir-

³⁷ *See id.*

³⁸ *Clinton speaks out on Rwandan Genocide*, BBC, Mar. 25, 1998, at <http://news.bbc.co.uk>.

³⁹ Lyal Sunga notes that 'often a government has to maintain public support by arguing the legitimacy of its actions on the basis of law and politics. It was in this connection that the term "humanitarian intervention" gained currency in the 19th century.' 2006 Op cit. p. 46.

cumstances: "We do not want the Balkans to have more pictures like we've seen in the last few days, so reminiscent of what Bosnia endured. And I want to make it very clear that to me it's a very serious issue.... We believe that no option should be ruled in or out now."⁴⁰

Here it is interesting to note that not only does Clinton emphasize the human rights implications of what was happening, but also the impact of media pictures, the lessons of failing to intervene in previous cases of human rights abuse, and the fact that a military intervention to counter human rights abuses would not be ruled out. The emphasis on human rights and the attempts at coalition building continued in the public statements leading up to the intervention and during the conflict itself.

In a joint statement on the situation in Kosovo with the Russian President in September 1998, Clinton deplored the heavy suffering inflicted on innocent civilians, and announced that the "threat of humanitarian catastrophe is becoming ever more real."⁴¹ In October Clinton told reporters:

"I think the most important thing now is for us to save lives, return people to their homes, get them the humanitarian aid they need, and to remove completely and irrevocably the threat of aggression by the Serb military and other forces in Kosovo now."⁴²

In his radio address of February 13, 1999 Clinton explicitly linked US national interest with the protection of human rights and made a case for a proportional intervention in anticipation of further suffering if action were not taken.⁴³ And in March, in preparation for military action, he again reminded the public of the horrors been perpetrated by the Serbian regime:

"We should remember the thousands of people facing hunger in the hills of Kosovo last fall... We should remember what happened in the village of Racak back in January – innocent men, women, and children taken from their homes to a gully, forced to kneel in the dirt, sprayed with gunfire, not because of anything they had done but because of who they were."⁴⁴

Kosovo, then, may be seen as the first modern war fought for considerations of human rights and international norms. Kosovo demonstrated that even codified international law was not going to stand in the way of normative war fight-

⁴⁰ William J. Clinton *Public Papers Book I: January 1-June 30, 1998* (Washington DC National Archives) March 11, 1998 pp. 355-366.

⁴¹ William J. Clinton *Public Paper Book II: July 1-December 31, 1998* (Washington DC National Archives). September 2, 1998 p. 1501.

⁴² *Ibid.* p. 1794.

⁴³ William J. Clinton *Public Papers Book I: January 1-June 30, 1999* (Washington DC National Archives). February 13, 1999 p. 190.

⁴⁴ *Ibid.* p. 409.

ing. NATO's actions would appear to have violated the UN Charter and broader tenets of international law as it was not an action of individual or collective self-defence, had not been sanctioned by the UN Security Council, and, however distasteful we might have found the actions of the Belgrade regime, Serbian forces were not technically waging a war of aggression despite allied attempts to portray it as such. An act of aggression requires the crossing of state boundaries, and this didn't happen in the Kosovan conflict until NATO intervened.

Allied claims regarding the dangers of escalation were an exaggeration of the threat posed to international security by the situation in Kosovo, besides which, Article 39 of the UN Charter clearly states that it is up to the Security Council to decide upon such definitions. From an international legal standpoint, the Belgrade authorities had exercised *de facto* and *de jure* control over the province for an extended period of time. Thus any intervention in the pre-conflict was an intervention in the internal civil affairs of what by that time was the rump Yugoslav state.

A better claim, relied upon in most NATO propaganda regarding the conflict, was that NATO acted to prevent horrific practices. At the height of the NATO campaign in Kosovo, statesmen from US President Bill Clinton, to the UK's Secretary of State, Robin Cook, spoke of the death toll among the Kosovar Albanian population as threatening to reach 100,000. For more than a decade a systematic pattern of human rights violations against the majority ethnic Albanian population had occurred in Kosovo province. These entered a new phase in February 1998, when the armed conflict gave rise to rapidly escalating levels of violations, in particular forced displacement, extrajudicial executions and other unlawful killings.⁴⁵

According to the statements of leaders in the US, the UK and other allied countries, with Serbia on the rampage, military action was legally justified on the grounds of humanitarian intervention. Thus, although not apparent in all cases, it is clear that at least on occasion it is the custom of "civilized" states to engage in normative war-fighting. We will turn now to the writings of the publicists of just war theory.

'THE WORKS OF JURISTS AND COMMENTATORS' (JUST WAR THEORY)

Just war theory concerns both the legitimacy of the decision to go to war (the *jus ad bellum*) and the legitimacy of the war as it is waged (the *jus in bello*). In the absence of any specific UN Security Council resolution giving legal endorsement to military action an intervening state is forced to rely on these more vague principles of "legitimacy." The essential canons of this tradition with regard to the *jus ad bellum* advocate:

1. Just Cause – usually perceived as resistance to aggression, or the prevention of horrific practices. The cause is only just if it prevents such an ongoing situation, not if it is merely punishment for past transgressions.

⁴⁵ Amnesty International, *Kosovo: The Evidence*, (London 1998) pp. 6-18.

2. Right Intention – wars for revenge, wars to satisfy bloodlust or imperial ambition, are not justifiable under the tradition’s criterion of “right intention.”

3. Competent Authority – in the modern international political arena this means the support of the international community, most clearly achieved through UN endorsement.

4. Reasonable Chance of Success – The suffering likely to be caused by any military intervention can only be justified if the legitimate goals of the intervention are achieved.

5. Proportionality of ends – certainly “war is hell,” and a fair degree of suffering is to be anticipated, but in assessing the proportionality of ends leaders must consider not just the likely effects of intervention, but also those of non-intervention. As pointed out by Jean Bethke Elshtain: ‘Every civilian death is a tragedy, but not every civilian death is a crime.’⁴⁶

6. Last Resort – all reasonable efforts at a non-military solution having been tried and having failed, bearing in mind the continued costs in terms of human suffering caused by any further delay.

More recent considerations that could perhaps apply to the *jus ad bellum* include the idea that the situation *post-bellum* should be inherently more peaceful than that existing prior to any humanitarian intervention. Thus, although not one of the classical justifications, a seventh criterion may be added:

7. The Goal of Peace

A further restriction could be placed on potential war-fighters, the idea that they must also be intimately concerned with the wider normative environment *post-bellum* in the state targeted for intervention. They should act to ensure that the violations of human rights that were used to justify intervention in the first place should not continue in the same or different form, that they are not replaced by a different abusive regime, and that every effort is made to ensure an operating environment *post-bellum* as supportive as possible of the norms used to justify intervention. Thus an eighth criterion could be:

8. Post-Bellum Operating Environment

Finally, in recent years just war theory has moved on from the state-centric focus of *jus ad bellum* to a position where greater emphasis is placed on *jus in bello* – i.e., the ends no longer necessarily justify the means, but rather how the war is to be fought must now form an integral part of the analysis of the legitimacy of going to war.

9. *Jus in Bello*

However, this is still an extremely controversial element of the *jus ad bellum*. It could conceivably, for instance, lead us to conclude that the Second World War, fought against Nazism, Fascism and Japanese Militarism, despite its *prima*

⁴⁶ Jean Bethke Elshtain, *Just War against Terror: the Burden of American Power in a Violent World* (New York: Basic Books 2003) p.4.

facie legitimacy was in fact rendered unjust by methods used (such as mass-bombing of civilian targets, fire-bombing, and of course nuclear bombing). Thus it is perhaps more conventional to treat the elements of *jus in bello* as a second set of justifying criteria, or rather normative constraints upon decision-makers. The binding principles related to this tradition include:

a. The proportionality of means doctrine – this is a vital component which dictates that no more military force is used than is necessary in order to achieve morally legitimate political and military objectives.

b. Discrimination – that every effort be made to preserve civilian life, even in the face of increased costs on behalf of the belligerents.

c. The concept of limited war – a more recent addition to the just war tradition that restricts the targets of belligerent states to those that will directly contribute to the reversal of the wrong that legitimized the intervention in the first place. I.e., targets that help perpetuate the wrong are legitimate up to the point where the wrong has been reversed. After that time, there are no legitimate targets, and during that period, it is unjust to develop alternative agendas and authorize military action to achieve goals other than those sanctioned by the original mandate.

Michael Walzer rejects the notion that just war theory is more permissive of intervention than the codified elements of international law. For him the most appropriate unit for normative analysis is the political community that underlies the state.⁴⁷ Thus: "Aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for... The rights in question are summed up in the law books as territorial integrity and political sovereignty. The two belong to states, but they derive ultimately from the rights of individuals, and from them they take their force."⁴⁸

He claims that the political community is based on shared experiences and co-operative activity, a "common life" that has a right to be protected, and the legitimacy of a state depends on the closeness of its match to the community of shared values.⁴⁹ "If no common life exists, its own defence may have no moral justification. But most states do stand guard over the community of their citizens, at least to some degree: that is why we assume the justice of defensive wars."⁵⁰

It is this 'presumption of legitimacy' that precludes external intervention.⁵¹ Thus Walzer rejects attempts to come up with neutral, value free or universal theories of justice as at best impossible and at worst counterproductive. There are human

⁴⁷ Michael Walzer, 'The Moral Standing of States: A Response to Four Critics' Charles R. Beitz et al (eds.) in *International Ethics* (New Jersey: Princeton University Press 1985). p. 218

⁴⁸ Extracted from "Just and Unjust Wars" in 'The Rights of Political Communities' in *International Ethics* 165-194 (Charles R. Beitz et al eds., 1985) p. 167.

⁴⁹ *Ibid.* p. 168.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* p. 220.

rights, but they are best defended by the political community defined as a state to which they belong, rather than uninformed external interference, due to the problem of the particularism of history, culture, and membership.⁵²

The political community (*qua* state) is probably the closest we can come to a world of common meanings as it is where language, history, and culture come most closely together to produce a collective consciousness.⁵³ Thus he considers community to itself be a good, and that membership cannot be handed out by some external agency; its value depending upon an internal decision. "The only plausible alternative to the political community is humanity itself, the society of nations, the entire globe. But were we to take the globe as our setting, we would have to imagine what does not yet exist: a community that included all men and women everywhere."⁵⁴

Walzer does acknowledge that in reality, "countries are likely to take shape as closed territories dominated, perhaps, by particular nations (clubs of families), but always including aliens of one sort or another," but considers that the only right such minorities have is not to be expelled. If the minority is large enough to constitute a separate political community and it is irredeemably alienated from the political whole, then he does also acknowledge the desirability of setting up a separate nation state for each community when boundaries are drawn.⁵⁵ However, within an established community, Walzer even advocates coercion in the pursuit of conformity.⁵⁶ Furthermore he claims that: 'Coercion is only necessary in practice because some minority of actual people doesn't understand, or don't consistently understand, their real interests.'⁵⁷

From such principles Walzer has drawn together his justification of the international norm of non-intervention, and the community rights of territorial integrity and national sovereignty. "All the groups that achieve statehood and all the practices that they permit... are tolerated by the society of states. Toleration is an essential feature of sovereignty and an important reason for its desirability."⁵⁸ It is not for us to judge other societies, but rather, if by their own values they are unjust; it is up to the members of those societies to reform themselves. Statesmen do deal with 'intolerable' states, and recognize them as sovereign members of international society.⁵⁹ Aggression, or forcibly intervening in another state's affairs, is the only crime in international relations.⁶⁰

However, while Walzer talks of pluralistic principles of justice and distribution based on historically and culturally generated divergent understandings of social goods, what he fails to acknowledge is that these understandings of social goods may have been historically and culturally generated in the interests of

⁵² Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (New York: Basic Books 1983). p5

⁵³ *Ibid.* p. 28.

⁵⁴ *Ibid.* p. 29.

⁵⁵ *Ibid.* p. 62.

⁵⁶ *Ibid.* p. 68.

⁵⁷ *Ibid.* p. 81.

⁵⁸ Michael Walzer, *On Toleration* (New Haven: Yale University Press 1997). p. 19

⁵⁹ *Ibid.* p. 20.

⁶⁰ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2d ed. 1992). p. 51.

only a small and distinct section of the community. Firstly, he explicitly assumes that the disadvantaged have the means to conduct social revision. Secondly, he implicitly assumes that what the majority want is correct for that community, and that the rights of minorities may be sacrificed on the altar of conformity through the instrument of state coercion. His third assumption is that a majority will be able to form a revisionist ideology and movement if the distributions of social goods are contrary to their interest.

This may not happen for a number of reasons. A person or group of individuals may lack the physical and/or political resources to overthrow the unjustified monopolies to which Walzer refers. Even if there is access to political resources, some groups may be so handicapped in their ability to utilise those resources, that not only are they ultimately ineffective, but also they never even get to the stage of making their demands heard.

The morality of Walzer's argument has been most extensively criticised concerning whether it goes far enough in sanctioning war. There is something of a consensus against the fifth principle of Walzer's "legalist paradigm," that nothing but aggression can justify war. For Luban, "if the rights of states are derived from the rights of humans, and are thus in a sense one kind of human rights, it will be important to consider their possible conflict with other human rights."⁶¹ He notes the logical inconsistency of an illegitimate state deriving sovereign rights against aggression from the rights of its own oppressed citizens, when it is itself denying them those same rights,⁶² and that in the communitarian justification "somehow oppression of domestic vintage carries a prima facie claim to legitimacy which is not there in the case of foreign conquest."⁶³

Luban claims that the majority of states have forfeited their rights, which in truth are only *privileges*, granted them in trust. Thus although not every infringement is a *casus belli* (the doctrine of proportionality still applies), he implies not only that any state can, but that every state has a duty to intervene in any other as long as it has a better human rights record. Unless we say that morality is conditional upon the nationality of the aggressor, we have a duty to defend the victims of internal as well of those of external aggression.

Luban's position raises serious questions of its own. If we are to give the right of intervention to those states who are morally superior, who decides which states qualify and on what criteria? Furthermore, what constitutes a human right, and when do we decide that it is being infringed? Chris Brown is concerned about the generalisations bandied about by Walzer's critics. "Shue may put security and subsistence above all other rights... But what of those who would put the right to worship God in their own way above either? Or the right to honour their ancestors?"⁶⁴ A common concern is that those values purported to be universal are in fact merely an extension of the world dominance of West-

⁶¹ David Luban, 'Just War and Human Rights,' in *International Ethics* (Charles R. Beitz et al, 1985). p. 201

⁶² *Ibid.* p. 204.

⁶³ *Ibid.* p. 214.

⁶⁴ Chris Brown, 'Cosmopolitan Confusions: A Reply to Hoffman,' *Paradigms* (1988-9). p. 102.

ern culture, and if used as a justification for war could lead to "crusaderism." Perhaps a truly just international society would follow George Bernard Shaw's maxim: "Do not unto others as you would that they should do unto you. Their tastes may not be the same."

Furthermore, such intervention could provoke international anarchy as all restraints are cast aside in the name of superior moral causes. The doctrine of human rights based intervention could become a justification of the moral imperialism of the powerful if not a cloak for naked aggression. Therefore we might still side with Walzer's firm stance on non-intervention on the basis of his belief that international society is unlike domestic society "in that every conflict threatens the structure as a whole with collapse. Aggression challenges it directly and is much more dangerous than domestic crime, because there are no policemen."⁶⁵ Without the primacy of state rights there would be no international society, only permanent war. As noted by C. A. J. Coady:

"the case against violent intervention cannot be dismissed merely by noting that sovereignty is not absolute. Warfare destroys lives, property, infrastructure, and environment in ways--and to an extent--that economic and diplomatic pressures do not. The case against military intervention has to be seen in this light and against the background of just war thinking."⁶⁶

However, this is where we uncover a major contradiction in Walzer's work. He talks of "shared values" for a community of a certain size, but rejects them for smaller (sub-state) communities, or the larger international community.⁶⁷ Yet if society has a taste for genocide (for instance), then in that case the plurality of cultures is probably not worth preserving. In fact, it could be argued that there is something approaching a global normative consensus against some of the more extreme abuses of human rights. Roger Spegele places pluralism somewhere between communitarianism and universalism as an alternative to the relativist position that my views are right for me and your views are right for you, as well as to the absolutist position that only one of us can be right.⁶⁸ There may be no absolute, universal, conception of the good, but this does not necessarily preclude us from recognising a universal conception of the "bad."

Different parties to the disagreement may be focusing on different independently significant values, and since there is no decision procedure for balancing these values any attempt by one party to claim priority over the other will simply beg the question. But it is important to see that this

⁶⁵ Walzer op. cit. 1992, p. 59.

⁶⁶ C. A. J. Coady 'The Ethics of Armed Humanitarian Intervention' *Peaceworks* No. 45 (United States Institute of Peace August 2002).

⁶⁷ Walzer op cit 1983, p. 30.

⁶⁸ R.D. Spegele, Political Realism and the Remembrance of Relativism, *Review of International Studies* 224-225 (1995). p. 21.

does not imply that there are no wrong answers. Pluralism does not commit one, as subjectivism does, to "anything goes" in morality.⁶⁹

For Donnelly there is a "remarkable international normative consensus on the list of rights" found in the Universal Declaration of Human Rights, and according to Dunne and Wheeler: "What further strengthens Donnelly's claim that there is a normative consensus underlying the human rights regime is the fact that in the daily round of diplomacy, state leaders justify their human rights policies in terms of these standards."⁷⁰ Even Walzer concedes something along these lines, stating that "sovereignty also has its limits, which are fixed most clearly by the legal doctrine of humanitarian intervention. Acts or practices that 'shock the conscience of humankind' are, in principle, not tolerated."⁷¹ Is not the "conscience of humankind" a case of shared global values? Walzer still attempts to differentiate between domestic and international regimes:

Given the weak regime of international society, all that this means in practice is that any member state is entitled to use force to stop what is going on if what is going on is awful enough... But no one is obligated to use force; the regime has no agents whose function it is to repress intolerable practices. Even in the face of obvious and extensive brutality, humanitarian intervention is entirely voluntary.⁷²

However, this concession further weakens his argument. Firstly, it is dubious to distinguish between two forms of political community purely on the basis of voluntary or compulsory defence of norms (and on what grounds does he make this distinction?) Secondly, critics would claim that this is precisely what is wrong with Walzer's argument, that he doesn't acknowledge a moral imperative to defend human rights in all their forms. Thirdly, by acknowledging that in certain cases any member state is entitled to use force to stop what is going on if what is going on is bad enough, he is hoist with his own petard – who decides what is "bad enough?" He ends up in the same position as his critics, but without the support of a value neutral set of criteria for just intervention.

Yet a fusion between the competing paradigms is possible. Although Luban and Walzer reach their final positions from opposing theoretical starting points, their practical differences are little more than a matter of degree. Walzer is correct to point out the possible destabilising effects and the subsequent cumulative harm that might accrue across the board should the norm of humanitarian intervention come to supersede the norm of non-intervention. Thus attributing near unconditional sovereignty to states might play a huge role in producing a stable international order and so has a rule-utilitarian justification, even though

⁶⁹ *Ibid.* p. 224-225.

⁷⁰ Tim Dunne and Nick Wheeler (eds.) *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999). p. 77.

⁷¹ Walzer op cit 1997, p. 21.

⁷² *Ibid.* p. 21.

in specific circumstances intervention might be justified in strict utilitarian terms. Likewise, Luban is correct to point out that such specific circumstances may in fact occur with more frequency than Walzer allows.

At the very least, every case necessitates a debate concerning the morality of each side's position as '[n]o description of just war is likely to address all of the difficult cases adequately – and there is no realm of human affairs in which difficult cases are more common. Seat-of-the-pants practical judgement is a necessary supplement to one's principles in such matters.'⁷³ We acknowledge individual human rights, shared values within communities that constitute state rights, and a certain degree of global consensus or shared norms. What is needed is a way to reflect these three competing demands.

Perhaps John Rawls has come closest to providing an answer. Starting with a value neutral liberal approach to the rights of individuals, he takes on board much of Walzer's criticism. He accepts that we are historically situated, but that we have become historically situated in liberal individualism. Thus most contemporary societies (those not rejected by as pariah regimes) give a high priority to the freedom to choose. His theory of 'overlapping consensus' in political societies is as applicable to the international community of nation states as to multi-cultural pluralistic domestic communities.

This approach places less emphasis on value-free universalism, but remains resistant to the notion of values embedded in the political community, precisely because *no* political community reflects an absolute consensus view of its citizens regarding conceptions of the good, and any attempt to create such conformity will rely on coercion. Community embedded values are not ruled out in spheres other than the political.⁷⁴ However, Rawls identifies his overlapping consensus as the only community shared political value likely to endure without coercion – an institutionalised guarantee of tolerance of diversity *within* communities as opposed to mere toleration of diversity between communities.⁷⁵ Like Walzer he is concerned with majoritarian popular support for regimes, but is convinced that in order to get a majority of citizens freely to give their support, a political doctrine is needed 'that a diversity of comprehensive religions, philosophical, and moral doctrines can endorse, each from its own point of view.'⁷⁶

Any state which does not practise this degree of toleration of diversity leaves itself open to condemnation from the international community. Any state which does not practise this degree of toleration *and* conducts itself in a manner towards its own citizens that any rational being would find abhorrent *is* guilty under international law according to the shared norms of international society, the works of eminent publicists, the practice of states and the intents

⁷³ Luban op cit. 1985a, p. 216.

⁷⁴ In Stephen Mulhall & Adam Swift, *Liberals and Communitarians* (Oxford: Blackwell, 1992). pp. 199-200

⁷⁵ *Ibid.* p. 198.

⁷⁶ John Rawls, 'The Domain of the Political and Overlapping Consensus,' David Copp, et al (eds.) in *The Idea of Democracy* (1993). p. 250.

and purposes of the UN. Should the abuses be sufficient to outweigh the possible harm that would be done by external intervention, then every state of superior moral standing not only has the right, but also the duty, to intervene.

In an interview with William Shawcross UN Secretary General Kofi Annan appeared to endorse this world-view:

"The UN through its work and standards, and given the awareness developing around the world, has set standards and benchmarks as to the rights of people and as to how leaders should behave.... states exist to protect citizens and not vice versa, and they can no longer use sovereignty as a shield to hide behind....The charter is written in the name of "We the peoples". It's a document that is humane and centred on individuals....The fact that we cannot protect everyone does not mean we cannot help where we can."⁷⁷

Wheeler refers to these developments as a radical or "solidarist" challenge to the older "pluralist" paradigm. "Rather than see order and justice locked in a perennial tension, solidarism looks to the possibility of overcoming this conflict by developing practices that recognize the mutual interdependence between the two claims.... [T]he defining character of a solidarist society of states is one in which states accept not only a moral responsibility to protect the security of their own citizens, but also the wider one of 'guardianship of human rights everywhere'."⁷⁸

It is nevertheless difficult for the 'solidarist' to overcome the following objections to its enshrinement as a rule of international society. Firstly, in that humanitarian claims might cloak the pursuit of national self-interest, legalizing a right of humanitarian intervention would lead to states abusing it, "a doctrine of humanitarian intervention therefore becomes a weapon that the strong will use against the weak." Secondly, unless vital interests are at stake, states will not intervene if this risks soldiers' lives or incurs significant economic cost, "thus, the best we can hope for is a happy coincidence where the promotion of national security also defends human rights." Thirdly, the problem of selectivity, that the "selective way humanitarian intervention has been applied in the past is a guide to how a legal right would be applied in the future." Finally, we have the normative realist – "states have no business risking their soldiers' lives or those of their non-military personnel to save strangers."⁷⁹

CONCLUSION

The justifications for military action generally accepted under codified or "positive" international law, in accordance with the actions of states, or as propagated by legal scholars and practitioners amount to the following:

⁷⁷ Kofi Annan, 'We the Peoples: The Role of the United Nations in the 21st Century' in William Shawcross, 'Africa, The Black Man's Burden, *Sunday Times*, April 9, 2000.

⁷⁸ Wheeler op cit 2000, pp. 11-12.

⁷⁹ *Ibid.* pp. 29-31.

1. Security Council Authorized Action with regard to a threat to international peace and security.
2. Individual and Collective Self-Defense
3. Human Rights (although there remains much debate as to what degree of human rights violations justifies intervention, and who decides enough is enough).
4. Genocide

Many elements of just war theory have come to become enshrined in codified international law. However, this is an ongoing and incomplete process. The customary elements of international law appear to contradict positive law at times with both state practice and the writings of eminent publicists appearing on the whole to be more permissive of a right or even a duty of humanitarian intervention. States and statesmen appear to pay increasingly more attention to the canons of just war theory than any restrictions placed upon them by international law, thus the latter should be amended to take into account the former lest the entire structure be discredited as anachronistic.