

Preventing Military Humanitarian Intervention? John Rawls and Jürgen Habermas on a Just Global Order

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A. Introduction

We rarely witness wars between states anymore but this does not mean that there are fewer conflicts or less injustice worldwide. The contrary is true. More people than ever have become a victim of civil wars, other sub-state armed conflicts and genocide during recent years. The international community disagrees about how to react to gross human rights violations that occur in the course of these “new wars”¹: whereas some think this is a genuine task for the United Nations, others stress the argument of unrestrained national sovereignty as essential condition for international peace. Despite unceasing contestation, foreign interventions are nevertheless increasingly seen as an appropriate response to this kind of armed domestic conflicts -- at least under certain conditions. The latest testimony in this direction is the emergence of an intense international debate over the “responsibility to protect”, which seeks to justify military intervention in cases of a severe violation of individual negative rights of freedom.²

In my contribution to this Symposium, I will focus less on the formal arguments offered in defence of military intervention; instead, I am interested in the question of means, strategies and conceptual tools offered to deal with these kinds of new conflicts by current theories which aim at a conception of justice for an international order. In particular, I will focus on the following question: How does military humanitarian intervention fit into a conception of justice for international relations?

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¹ Mary Kaldor: NEW AND OLD WARS. ORGANIZED VIOLENCE IN A GLOBAL ERA (1999).

² ICISS 2001: THE RESPONSIBILITY TO PROTECT. REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Ottawa: 11. An argument for an extended notion of the “responsibility to protect” was made by Moon with regard to the refusal of the authoritarian regime in Burma to let humanitarian aid into the country after the cyclone catastrophe.

John Rawls and Jürgen Habermas seem to be adequate candidates for an analysis approaching this question. Both have developed theories of *just* international relations with roots in the Kantian tradition. Both are inspired by the Kantian project of creating an enduring peace among nations, and, finally, for both military humanitarian intervention is a political instrument to reestablish peace and justice. Their approval of the military intervention in Kosovo is thus not surprising. Nevertheless, it is worthwhile to test the limits of their theoretical agreement. I want to argue that they each endorse differing theories of legitimate humanitarian military intervention – an ideal theory and a non-ideal theory. According to Rawls, the well-ordered societies are on a higher level of legitimacy and because of this, they are entitled to wage a “just war” against criminal states. By contrast, Habermas, fears a development towards arbitrary world politics, dominated by a self-declared democratic super power, entitled to decide over war and peace. For Habermas the legitimacy of intervention depends on its justifiability on the basis of procedures that are grounded in international law. For both thinkers, thus, ‘outlaw states’ and despotic leaders constitute a formidable test of their different approaches. It is striking, in my view, that Rawls seems to exclusively want to resort to military humanitarian intervention when dealing with ‘outlaw states’. Habermas, on the other hand, is very much aware of the Kantian distinction between morality and law, which leads him to exclude ‘outlaw states’ from his vocabulary; instead, he speaks of despotic governments and legal criminals who, after gross human rights violations, may become the object of official military sanction by a global executive power.

Neither approach, however, allows for a change in perspective, which would seem necessary in order to adequately react to these new conflicts: it is the perspective that focuses on how to prevent humanitarian intervention rather than how to justify it. The thesis is that a just global political order offers institutional provisions for *preventing* humanitarian interventions. One important aspect of preventing humanitarian intervention, even though not the only one, is the reduction of worldwide poverty and the creation of institutional incentives to stabilize young democracies. Here again, Rawls and Habermas offer different proposals on how to eschew a comprehensive discussion of the material conditions for a just political order, but neither suggestions seems to go far enough. A conception of global justice needs to reflect, or so I argue, institutional measures to overcome gross injustice.

To make all this clearer, I will first review the role of peoples, states, and individuals before I discuss the conception of the legitimation of law in both theories (I). The comparison of these aspects will show how both approaches even though similar to some respect deal differently with ‘outlaw states’ (II). I will continue arguing that even though Habermas’ approach is more convincing in some respects, it neglects, like Rawls’, a perspective that beneath the threshold of military humanitarian intervention may work towards a *just* global order. In showing this, I will defend a conception of global institutional justice that addresses poverty thereby helping prevent humanitarian intervention in the first place (III).

B. Framework of reference: peoples, states, individuals

Foreign interventions have a long history in international relations, but interventions directly targeted at ending gross human rights violations committed by a government or a paramilitary guerilla group against its “own” people are a relatively new phenomenon. Accordingly, we have seen the development of a new set of justifications for interventions since the end of the Cold War. In a continuously unfolding new climate of multilateral relations, the Security Council became a central actor, with its role changed from a mere “bystander” in international relations to a global guardian of peace and security.³ A revitalized United Nations became a legitimate body authorized to decide on violations of sovereignty under article 2(7) of the Charter. And, moreover, it eventually assumed the charge of estimating whether there should be an orchestrated response of the international community on gross human rights violations. Viewed over time, however, the United Nations has not been very successful with classical military interventions authorized under Chapter VII of the U.N. Charter as has become clear in Somalia and in parts of the UNPROFOR mandate in the former Yugoslavia.⁴

This “new interventionism”⁵ differs from air strikes and “classical” ground troop engagement in at least three ways. First, the new interventionism does not aim at besieging an enemy but at foreclosing massive human rights violations. Secondly, it is conducted in a defensive manner and geared towards de-escalation, and, thirdly and perhaps most importantly, the new interventionism focuses not on another state but on the individual human life worthy of protection. Such an intervention differs significantly from attempts to free a population from a colonizing or otherwise repressive external power. It also differs from a counter-response to a third-party intervention in a civil war because the political aim is not to support one or the other party but to prevent massive human rights violations, and, subsequently, to create secure conditions for democratic politics.⁶ And finally, it is distinct from humanitarian aid in the way it has developed over the 20th century, because the instruments of a pro-human rights intervention are not usually restricted to humanitarian measures like economic support, technical assistance, or medical treatment, either for old or new interventionism.

³ Michael W. Doyle: *The new interventionism*, in: Pogge, Thomas W., GLOBAL JUSTICE (2001), 228.

⁴ See, among others, GEORG MEGGLE, ETHICS OF HUMANITARIAN INTERVENTIONS (2001); J.L. HOLZGREFE AND ROBERT KEOHANE, HUMANITARIAN INTERVENTIONS: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (2003).

⁵ DOYLE (note 2).

⁶ MARY KALDOR, NEW AND OLD WARS (2000) 257.

This new type of foreign involvement has led to the creation of the new phrase “military humanitarian intervention.”⁷ It is obviously an oxymoron: it combines a humanitarian purpose with military facilities that may very well work against such “good” intentions and may cause new injustice. This ambivalence is surely one reason why there is an ongoing, polarizing debate about the pros and cons of military humanitarian intervention. However, I will address the questions that arise when one considers the ambivalence of military humanitarian intervention in theory and practice. In what follows, I will lay out to what extent in both theories the instruments to overcome conflicts are determined by the role that peoples, states and the individual play in the political arena. If peoples or states are the main actors in international relations, it seems that transnational interaction processes and cooperation are limited to the *international* level, the communication between states. This is different, however, when the world citizen is seen as the main actor. Then the interests of all people are recognized, including those of the so-called outlaw states. I will start with analyzing some consequences for dealing with new conflicts, which result from estimating the role of peoples, states, and individuals and the political process in these two approaches, which point, as we will see, into different directions.

1. The disappearance of the individual

In his 1999 treatise on *The Law of Peoples*, John Rawls applied his own theory to international politics and law, yet declaring that his proposal was a ‘realistic utopia’.⁸ In view of the enormous challenges international law has faced during the last ten years, reaching for the normative stars while not losing touch with political circumstances on the ground has become rather difficult. It is with the aim of increasing its “practicability” that Rawls develops his law of peoples on two levels. The level of “ideal theory” justifies the law of peoples, or more precisely, it justifies the moral principles that function as a pattern for the evaluation and interpretation of existing law, and for the creation of a new one. In the “non-ideal” part of this theory he focuses on how the ideal principles can be applied and fostered most appropriately amongst peoples who, for different reasons, are reluctant to respect the law of peoples.

The “ideal theory” proceeds in two stages. In a first step, *citizens* of liberal democratic societies justify the principles for a law of peoples. Here the “original position”, which formed the core element of Rawls’ *Theory of Justice* in 1971⁹, functions as a citizen’s

⁷ Deen K.Chatterjee and Don E.Scheid, *Introduction, in*, ETHICS AND FOREIGN INTERVENTION (Chatterjee/Scheid, 2003), 1-21.

⁸ JOHN RAWLS, *THE LAW OF PEOPLES*, (1999).

⁹ See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). The original position – briefly said - provides that citizens’ representatives preside over principles of fairness that determine the “basic structure” of society, and that they do this with an impartiality deriving from the fact that they possess only limited knowledge about prospective social position.

"device of representation" in the process of reaching agreement on principles on the national level. In a second step, the original position is applied to the international level. Here Rawls works the switches in two important ways. In contrast to the arrangement within a society, the subjects to the contract are representatives of *peoples*, not individuals. Moreover, the justification process does not take place amongst all the peoples in question right from the beginning. It starts with democratic liberal peoples who interpret and agree on a law of peoples. Only in a second session do non-liberal, or "decent hierarchical," peoples become integrated.

The outcome of the second session — the one among liberal and the decent societies — is that they also have to honor human rights, among which are the most basic and familiar ones, such as the right to life and liberty, the right to a "sufficient" measure of freedom of conscience, the right to property, and the right to formal equality.¹⁰ One immediately wonders why, instead of reasonable citizens, the transnational positions offer a similar ideal-typical construction as it is on domestic level but about *peoples*. The justification of the principles of a law of peoples has been delegated to peoples' representatives who only know what citizens share, such as a common language or history and a democratic political order. They are not expected to know that *citizens* have *different* conceptions of the good. So it seems that Rawls ignores the important social condition of "pluralism" that he had stressed in *Political Liberalism*. This comes as a surprise because by neglecting the "fact of pluralism," he seems to drop the rather "realistic" assumption of pluralism as a basis for justifying global principles.

Besides, there is a further problem with his arrangement: The legitimation of the principles of law would be much stronger if it were the individual citizens, or their representatives, who agreed on the law of peoples. In that case, the justification of the law of peoples would rest on one of the basic principles of democracies; namely the principle of *political self-determination*. According to this principle, citizens need only submit to rules over the establishment of which they had some procedural influence. It is not understandable why citizens of liberal democracies would choose to do otherwise. In any event, there must be a reason why Rawls thinks that they would prefer the minimal version on international level. In the earlier edition of *The Law of Peoples*, he offered a fairly clear answer: he fears an ethnocentric bias, should the individual be the main element in the construction of the original position. Surely, even though the first round only takes place among liberal democracies, the results could only occur with a view to a second round in which hierarchical societies join in.

But doubts remain. First of all, one may wonder whether, by overcoming the "western" bias, he nevertheless presupposes too much. Just think about the human rights that still protect individual freedoms and political participation. On the other hand, it is important

¹⁰ RAWLS (NOTE 8), 65.

to note that compared to the 1948 Universal Declaration of Human Rights, Rawls' list is considerably shorter as the "well-ordered societies" have agreed to a law of peoples that lags behind the rights one already finds in the UN Charter. The peoples agree on principles that should first and foremost ensure peoples' sovereignty, which actually comes close to state sovereignty.¹¹ Rawls does not at first specify which human rights the liberal peoples agree on, but later on he concretizes which human rights decent hierarchical peoples would uphold, and one can assume that they are identical with the human rights in the law of peoples. Among them are the most "basic" human rights, such as the rights to life and liberty, to a "sufficient" measure of freedom of conscience, to property and to formal equality.¹² A new principle on the list is a "duty to assist other peoples under unfavorable conditions" but neither are there social and cultural rights nor explicit political rights to self-determination.

The main players in Rawls' international theory are democratic peoples and non-democratic states; individuals disappear when it comes to legitimation, as does the assumption of pluralistic forms of life and a convincing conception of political self-determination. Through the double legitimation process, among the well ordered, and again, among well-ordered and hierarchical peoples, the high normative standard of legitimacy is diluted and adjusted to the non-democratic societies. One of the consequences is the sacrifice of a critical standpoint from which to evaluate international rules. By this, however, Rawls makes an important point. He focuses on the hierarchy in the legitimacy of government forms. Democracies are the most legitimate entities, like in Kant's theory, too. This, in turn, is linked to certain rights and obligations that distinguish democracies from all other societies. It is because of the normative superiority of democracies that they appear to be obliged to exert pressure towards defect societies to become democratic. Consequently, because democracies are what they are, they have more rights than non-democratic societies. This, we will see after having discussed Habermas's approach, allows them to conduct "just wars" against outlaw states.

II. A dual reference in global domestic politics

Jürgen Habermas proceeds from the same starting point as Rawls insofar as he also aims to offer a contemporary reading of Kant's *Perpetual Peace* (1795). Like Rawls', Habermas' work has long been dedicated to laying the foundations of a democratic constitutional state. In Habermas' *deliberative* understanding of democracy, the constitution is an ongoing project in which the constitutional basic rights are interpreted and implemented over time by legislative institutions that, in turn, offers deliberative procedures for the participation of all those affected by these institutions. Habermas has become interested

¹¹ RAWLS (NOTE 8), 37.

¹² RAWLS (NOTE 8), 65.

in the key question about how the comprehensive proposal he developed in his 1992 treatise *Between Facts and Norms*¹³ can be applied to political relations above the level of the nation state already in the mid-nineties.

Unlike Rawls, however, he explicitly has in view the promotion of „cosmopolitan conditions“ (*weltbürgerlicher Zustand*) although he shies away from the utopian idea of a world republic. This would be, and here he agrees with Kant, not only an unrealistic proposal but would also be in the danger of potentially turning the domestic democracies as the transnational order into a “graveyard of freedom” (to use Kant’s metaphor). Stressing the assumption that we currently live in a functionally differentiated world society, he argues for a “constitutionalization” of international law that is realized in a multileveled system. Through this he finds a path between the vision of a world republic and Kant’s second best solution of a treaty between states (*Völkerbund* – League of Nations) from which the parties could voluntarily withdraw.¹⁴ By doing this he departs from Rawls, which becomes very obvious when we turn to his revisions of the Kantian approach. These aspects of the Habermasian version of Kant’s project – of which I will only mention the two most important ones --- are of interest here as they are the key for understanding his approach of how to deal with the different actors in the new conflicts.

One element of note is that Habermas introduces two historical notions of constitution that on international level complement one another.¹⁵ For Kant, it is the sovereignty of the people that controls the political power with the means of law. For Habermas this *republican* tradition with its tight connection between the state and the constitution has been a successful concept on the domestic level, but arguably cannot be upheld on international level.¹⁶ Political self-determination and constitutional setting are split up and are uncoupled from the state. According to Habermas, this does not mean that the republican notion of constitution is irrelevant on international level but it cannot persist the way known domestically. For a constitution to be meaningful at the international level, it might be useful to seriously consider the liberal version of constitution – Kant obviously did not have this mind. The liberal interpretation of a constitution must be understood as a means for *restricting* powers and strengthening the rule of law. It is not linked to state functions as the “rule of law” arches over existing power relations and directs political

¹³ JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992), engl. transl. by William Rehg, BETWEEN FACTS AND NORMS (1996).

¹⁴ Jürgen Habermas, Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren, in: DIE EINBEZIEHUNG DES ANDEREN, (1996).

¹⁵ Jürgen Habermas, Eine politische Verfassung für die pluralistische Weltgesellschaft? in, ZWISCHEN NATURALISMUS UND RELIGION, (2005), 331.

¹⁶ HABERMAS (note 15), 328.

power into a process of juridification.¹⁷ The normative ideal of a congruence of the rulers and the ruled is authorized to restrict the power of those entities or rule systems have been established largely without any democratic backing.¹⁸ On the global level, however, both legal traditions meet, hence the power of states and at the same time allow states as well as world citizens to remain subjects in the global political.

Secondly, Kant was convinced that the sovereignty of people was indivisible. In Habermas' view the democratic will-formation in a federalist organized multi-level system is branched out and works parallel in different legitimation channels on the community, nation state, regional, transnational, and supranational level. He assumes that world domestic policy will not reach a high normative standard of democratic legitimacy; that is, we will not soon see global suffrage, or an elected assembly that includes special advocates for those who live under repressive regimes.¹⁹ But in contrast to Rawls, Habermas does not want to dilute the normative procedural assumptions for the transnational and supranational level completely. There is some evidence that Habermas adheres to democratic standards for the global level – even though they have to be realized in new ways as the domestic institutions cannot just be transferred onto the international and supranational level.

The next step in Habermas's inquiry is to find out how the Kantian idea of a republican state of world citizens can be liberated from the frightening aspect of a single, globally coercive state authority. The transition from an *international* to a *cosmopolitan* political order can, according to him, best be conceived in procedural terms rather than in social contract terms. Habermas's deliberative conception of reason is tied to public procedures that need to be open for the viewpoints and experiences of others and the willingness to reach agreements on principles that guide social interaction.²⁰ He offers two criteria for legitimate international law setting processes. First, there needs to be a transparent and accessible deliberative process the structure of which provides the condition for an expectation of rational results.²¹ Furthermore, no longer will the concrete embodiment of the sovereign through voters be decisive, but rather the procedural assumptions that are implemented in communication and decision processes.

Habermas explores the realm of possibilities between an individualistic legal order of a federal world republic and a global society that reserves institutions and procedures of

¹⁷ HABERMAS (note 15), 328.

¹⁸ HABERMAS, THE KANTIAN PROJECT AND THE DIVIDED WEST, 139. HABERMAS (note 15), 328.

¹⁹ This was Habermas' suggestion in HABERMAS (NOTE 13), *supra* note 12 at 218.

²⁰ See also the very good introduction of Ciaran Cronin HABERMAS (note 18), Editor's Preface, vii-xxi at ix.

²¹ See especially *The Postnational Constellation and the Future of Democracy*, in THE POSTNATIONAL CONSTELLATION. POLITICAL ESSAYS, (2001) 110-111. [█](#)

global governance for states only and argues for a two-track legitimation of international law that is mirrored in the institutional structure. One approach begins with the world citizen and then proceeds to the member states with full-fledge citizenship rights before realizing – on the *supranational* level - an international community. On the supranational level, justice is materialized through the peace and human rights politics of the world organization. The other approach sees the citizen first as part of her respective nation state, its representatives and the regional regimes and then of the *transnational* bargaining systems. On this “middle level” between nation state and the supranational UN organization “real politics” take place. This is the realm of highly contested topics like the global economy and finance, ecology, and social welfare.²²

It is one aim of Habermas to overcome a normative theory that confronted with the criticism that it might be interesting for the theory but not useful for the practice. In real politics, Habermas argues, legitimation is already partly realized at any rate by a “derivative legitimation”, a legitimation status that depends on “advances” of the legitimation from democratic constitutional states. The European Union remains a “role-model” for this, even though a cosmopolitan, multi-layered system cannot reproduce the civic solidarity or welfare-state policies of the European Union.²³ That is why the “entire normative framework” of the cosmopolitan alternative Habermas sketches should consist of the protection of human rights. This holds for the UN Charta that is already realized with reference to the Universal Declaration of Human Rights, and it is even the case for the institutions on the transnational level; the WTO and other global economic organizations have at last begun considering basic human rights.²⁴ Albeit, this weak form of a non-state constitutions remains dependent on continuous “indirect backing”, which can be most promisingly be fulfilled through a supportive global public sphere.²⁵

The always fragile interrelation between the rule of law and democracy would be further eroded if supranational constitutions were no longer supported (“backed”) through democratically legitimate institutions within the constitutional state. But what is significant in this context is no longer the *concrete* embodiment of the sovereign through voters, but rather the *procedural* assumptions that are implemented in communication and decision-making processes. Therefore, normative procedural assumptions are still required but they now appear in a somewhat different form. Where Habermas emphasizes political self-determination and the place of the individual citizen in the process of legitimation, he

²² HABERMAS (note 18), 136.

²³ HABERMAS (note 15), 338.

²⁴ Patrizia Nanz and Jens Steffek, *Global Governance, Participation, and the Public Sphere*, in GOVERNMENT AND OPPOSITION, (2004), 314–335.

²⁵ Hauke Brunkhorst, *Globalizing without a state*, 31 MILLENNIUM, JOURNAL OF INTERNATIONAL STUDIES 3, 675, (2004).

recognizes the power of the world population. In an ongoing struggle between political elites and the citizens, it is the latter that can trigger the learning processes and, in the long run, put pressure on governments. The referendum processes within some of the EU member states as well as naming and shaming campaigns in the context of human rights compliance are only two examples that stand for the power of the population. Habermas' proposal can probably be best described as "constitutionalization in the making", the theoretical reflection of which includes the analysis of constitutionalization processes, its legitimation deficits – measured against a normative standard – as well as a description of developments that can be interpreted as meeting democratic governance on transnational and supranational level halfway.

Like Rawls, Habermas proposes a leveled notion of legitimacy, but contrary to him, it is not the legitimacy of states that leads to a stratification of a just world order with a well-ordered state at the top of the "rating". Instead, it is the legitimacy of the law-setting processes that is leveled according to its normative standards. For Rawls the principles of justice steer political processes, for Habermas, the legitimate juridification leads to a just world order. It is the different role attributed by each to morality and politics that partly explains the difference between them with regard to military humanitarian intervention.

C. Dealing with the "outlaw": The institutional settings

Against this background, how are we to picture the relationship between democratic and non-democratic, especially so-called "outlaw" societies? What is the institutional context in which both authors place the "outlaws"? Finally, what political instruments do they suggest for dealing with them? Rawls' and Habermas' answers to these questions turn out to be very different, depending on their conception of legitimate transnational law setting and the role of political processes discussed above. Whereas Rawls gives a military based answer, Habermas stresses the political inclusion of 'outlaw' states.

1. The military response

In Rawls' ideal theory a peoples is an internally well-ordered society and an externally well-behaved state that respects the law of peoples.²⁶ But in reality, not all societies are peoples or well-ordered states. So we have to enter the realm of 'non-ideal theory', where Rawls offers strategies for reaching the long-term goal of integrating into the "Society of Well-ordered Peoples"²⁷ those societies that fall short of the justice ideal. There are three

²⁶ RAWLS (NOTE 8), 35.

²⁷ RAWLS (NOTE 8), 106.

categories of “defective” societies.²⁸ A society characterized by “benevolent absolutism” (consider Khartoum, the U.A.E, or Jordan) does respect the mentioned human rights, and is not aggressive to the outside, has the material and technical means for development but does not give its citizens any meaningful role in political self-determination, which seems to be its main difference from decent hierarchical societies.²⁹ More interesting for our purpose are “burdened societies”, which are not expansive or aggressive, but may lack the political and cultural traditions, the human capital and the know-how, as well as the material and technological resources internally to become well-ordered, despite their aspirations.³⁰ We may think here of Angola, Tanzania, Vietnam, and maybe Russia. These societies stand, one could say, first in line to cross the threshold to the “Society of Well-ordered People.” The third category, “outlaw states,” in contrast to burdened societies, do violate human rights internally and do not want to comply with a reasonable Law of Peoples externally. Here Rawls seems to distinguish, even though not explicitly, between two types of ‘outlaws’: those that are internally repressive but externally non-expansionist, and those that are equally internally repressive and externally expansionist.³¹

With this taxonomy in mind, the first thing that stands out is that the concept of “peoples” is obviously reserved to liberal and decent societies in the realm of the ideal theory³², whereas burdened societies and the benevolent absolutism encompass neither peoples nor states but ‘societies’, in non-ideal theory. Usually, ‘peoples’ is employed to embrace culturally defined collectives without a government, which are not integrated by a state. Often enough ‘peoples’ reach out for their own state: this is the case, for example, of the Kurdish people who no longer want to be dispersed on the territory of three different countries. In contrast, Rawls uses the term ‘peoples’ as a characteristic trait of a state that

²⁸ As far as I know, it was Guillermo O’Donnell who first introduced the notion of “defective democracy”. He, however, uses this adjective when addressing societies with fair and free political competition but with weak or intermittent horizontal accountability. See O’Donnell 1993, *On the State, Democratization and Some Conceptual Problems. A Latin American View with Glance at Some Post-Communist Countries*, 21 WORLD DEVELOPMENT, 1355 (1993).

²⁹ RAWLS (NOTE 8), 92, note 2.

³⁰ RAWLS (NOTE 8) , 106, note 2.

³¹ RAWLS (NOTE 8), 90, note 1, and 93, note 6.

³² For a better understanding of how Rawls deals with the “outlaw” states, it is helpful to recall the characteristics of liberal and decent hierarchical peoples. To put it briefly, liberal peoples are internally united through a constitutional government, a shared cultural elements like language, historical consciousness and political culture. To the outside they act “reasonably,” which means that they “offer fair terms of cooperation” to other peoples (See RAWLS (note 7), 25) - presuming that they are committed to those principles themselves. “Decent hierarchical” societies differ from liberal peoples in that governmental institutions may be influenced by “comprehensive doctrines,” such as religious faiths and political equality only exists in a formal sense: it does not apply to individuals, but rather to groups or castes that should be represented in the political and legal systems (See RAWLS (note 7), 64). To the outside decent hierarchical societies are non-aggressive, which is a major difference from the ‘outlaw regimes’ (which I will describe in a moment).

has the shape of a well-ordered society and is either liberal or decent. The category 'state', however, is used to characterize the 'outlaw state' which have their own territory and government but miss all substantial characteristics of a legitimate state such as a meaningful constitution that meets basic human rights, the realization of "rule of law" and minimal democratic requirements as well as a cooperative foreign policy. So we can say that for Rawls peoples are states but not all states are peoples.³³ And, similarly, all peoples are societies but neither all societies are peoples, nor are all states societies.

What does all this mean for the relations that Rawls conceives of for international politics? Given the variety of defective societies, it is striking that with regard to dealings with 'outlaw states' by liberal societies, Rawls envisages only a restricted number of options. Peaceful cooperative relations can occur with other well-ordered societies. Societies, however, can be supported on their way to become "well-ordered" with a little help from already established peoples, while, for burdened societies, there is only economic and technological assistance. Now surprisingly enough, for well-ordered societies, war is a ready and only means for enforcing its rational interests.³⁴ Even more striking, the proposal seems to leave mainly military intervention for outlaw regimes. It is the democratic societies that are in charge to conduct this "just war" against the "outlaws".³⁵

To be fair, Rawls suggests a "confederative center" that may represent the "common opinion and policy" of well-ordered societies towards non-well-ordered societies in public. The center also exposes the human rights violations of oppressive regimes – a kind of *naming and shaming* in the name of the "Society of the Well-ordered".³⁶ At the same time, he suggests neither institutional arrangements nor additional ways of communication. Assuming that for Rawls Iraq would have to qualify as an 'outlaw state', the only option left for democracies is military conflict. This seems to be true regardless whether the state in question is expansionist or non-expansionist.

Reducing the scope of *interaction* to conflict is all the more surprising as Rawls admits, as mentioned before, that there are 'outlaw states', which violate human rights internally but "are not aggressive and do not harbor plans to attack their neighbors".³⁷ Rawls illustrates

³³ See the helpful taxonomy in Rawls' theory. Please see for this Henry Shue, *Rawls and the Outlaws*, 1(3) POLITICS, PHILOSOPHY&ECONOMICS, 307, 308 (2002).

RAWLS (note 7): Peoples: 23-7. A. liberal (23-5); B. Decent (4,59-60, 63-7); Societies (neither Peoples nor States): A. Burdened (5,63,90,106);B. Benevolent Absolutism (63,92); States, usually 'outlaw states': A. Expansionist as well as internally repressive (90); B. Non-expansionist but internally repressive (90 note 1, 93-4 note 6)

³⁴ RAWLS (NOTE 7), 90, footnote 2.

³⁵ For this diagnosis also SHUE (note 31).

³⁶ RAWLS (NOTE 8), 93, note 2.

³⁷ RAWLS (NOTE 8), 90, note 2.

this point by referring to a society akin to the Aztecs that suppresses parts of its own people but without, however, being aggressive to the outside. Rawls suggests that “they must be made to realize that without honoring human rights, their participation in a system of social cooperation is simply impossible”.³⁸ Military intervention “might be called for” if human rights violations become egregious and other, unspecified in the text, sanctions were not successful.

At the same time, one can ask whether we have good reasons to assume that *decent* hierarchical societies are not aggressive.³⁹ They do not fulfill the important criterion of being democratic, which, according to the *democratic peace thesis*, would actually qualify them to be a peaceful member of world society. The same may be asked regarding burdened societies, though perhaps we need not worry about their potential for aggression since they lack the resources for conflicts. But surely we must question the presumed guarantee of peace from states of benevolent absolutism, which lack any democratic internal structure.

The line between well-ordered and “defective” regimes, it turns out, is anything but clear-cut, and the use of the “outlaw state” category seems to be confined to military humanitarian intervention in cases where the legitimacy lies in the hand of the well-ordered societies. Further concerns subsist, as we will see later, as regards Rawls’ use of the notion of justice. But before entering into this discussion, I would like to draw attention to Habermas’ treatment of military humanitarian intervention.

II. Dealing with the “outlaw”: Political inclusion

The discussion of Habermas’ constitutionalization of the international relations, gives us a sense for why in political theory, “outlaw states” remain in the background. Military humanitarian intervention, ideally, should be a police action that regularly is conducted by a global executive power in response to criminal offenses of a despotic government against its own population. This police action is considerate legitimate if it was unanimously approved by the UN Security Council.⁴⁰ As the individual – almost at eye-level with the state – is an important actor in international relations from a normative point of view, whose rights need to be protected, it is not all that surprising that national sovereignty is not an unshakable variable. A military humanitarian intervention, therefore, is not first and foremost directed against the whole “state,” but rather at its government, and will bring individual perpetrators to the International Criminal Court.

³⁸ RAWLS (NOTE 8), 93, note 6.

³⁹ Darrell Moellendorf, *COSMOPOLITAN JUSTICE*, 15 (2004).

⁴⁰ For this argument HABERMAS (NOTE 13), 219; and with reference to Klaus Günther, HABERMAS (NOTE 13), 235. See also Giovanna Borradori, *Dialogue with Jürgen Habermas*, in *PHILOSOPHY IN A TIME OF TERROR*, 39 (2003).

At this point it becomes clear that Rawls and Habermas endorse two different approaches towards military humanitarian intervention. Like John Stuart Mill, Rawls presumes a right to self-determination of the sovereign that – even in case of war with another state or in case of civil war -- should not be violated by any third party – except for some clearly defined cases. In Rawls' scenario severe domestic human rights violations can be reason for such an exception. The prerogative to decide over such exceptions resides with democratic societies, because of their superiority of legitimation they have a *right to intervene*. Here Rawls obviously adapts the dominant interpretation that came up after the end of the Cold War and according to which gross human rights violations and the threat of worldwide peace give grounds to such an exception to the principle of non-violation of state sovereignty. Whether or not the community of the well-ordered societies chooses to “exercise” their right to intervene, and how they conceptualize the corresponding duties, depends on different factors, including the political power constellation and political criteria like urgency, prospect of success, costs involved, the pressure of the public, and so on.

For Habermas, these issues present themselves differently. The individual right holder demands the realization of human rights in a situation of urgency by addressing this moral claim in absence of a reliable government for the world community. The crucial point is this: Habermas does not suggest a right to intervene but a *right to be saved from a tyrannical regime*. This reminds us of the Arendtian right to have human rights whose realization is postponed until the enforcement of human rights creates the conditions of exercising them. The focus on the individual may be *one* reason why Habermas, surprisingly, defended the NATO attacks on Yugoslavia arguing that this could have stopped the crimes against humanity committed by the Milosevic regime. In Habermas' view, NATO's actions were legitimized through the tacit authorization of the society of a world citizen's community, and, in his remarkable formulation, in “anticipation of the cosmopolitan order to come.”⁴¹ Even though legitimate, the intervention was not “perfectly” legal; the Security Council was deadlocked and it was NATO that acted. However, Habermas stresses that a moral claim, even if it is fully justified, can never offer a sufficient reason for humanitarian military intervention. There must be a juridical backing in order to avoid the risk of arbitrary international politics. In the Kosovo case, the intervention at least appealed to the *erga omnes* obligation that binds all states to provide emergency assistance in case of an impending genocide.⁴²

In Rawls' theory, political and, more generally speaking, communicative processes mainly confirm the value-based hierarchies among the different societies (not individuals), which are the result of the contractual agreements in the original positions. This also shapes the

⁴¹ HABERMAS (NOTE 18), 35.

⁴² HABERMAS (NOTE 18), 86.

function of military humanitarian intervention as a means of the democratic societies to restore peace among states and secures human rights. In contrast, Habermas' stresses the claim of the individual towards the world community that protects citizens from tyrannical regimes. Justice is based on moral reasons but justice cannot be realized domestically and beyond the nation state without a juridical procedures. Political processes that aim at political inclusion alone cannot overcome distrust, misunderstandings and incompatible interests among political actors but in the "deliberative approach" there is a range of other, institutional measures for cooperation between democratic and non-democratic societies beneath military humanitarian intervention.

D. The Site Where Justice Lives

Both approaches are based on different concepts of military humanitarian intervention. Nevertheless it is a solid component in their international theories. Finally, I would like to explore the question in how far both theories offer suggestions about how to prevent military humanitarian intervention in the first place. The argument is that institutional incentives that help to prevent poverty also lead to a society that is more just, and will not ask for humanitarian intervention.

What is required is a change in perspective, from *reacting* on severe human rights violations to *acting* in anticipation of future violations. Of course, one can imagine a variety of measures to prevent intervention, among them diplomacy and economic sanctions. I will concentrate here on severe poverty, which according to the Secretary General is one important aspect that prepares the ground for civil war and other forms of severe aggression against a population. The Secretary General's Report on the reform of the United Nations Organizations⁴³ unifies peace and justice under the hat of an "extended notion of *security*," where poverty, widespread diseases, and ecological catastrophes are defined as serious threats to international security. Any measures taken against these problems are defined as being in the genuine interest of the developed world.⁴⁴ Besides this, worldwide poverty is a great crisis in itself: 18 million people die painfully each year an easily preventable death. So I would like to analyze what Rawls and Habermas offer to overcome severe poverty and by this, contribute to preventing military intervention. Let us, again, first look at Rawls.

⁴³ Report of the Secretary-General's High-level Panel on Threats, CHALLENGES AND CHANGE (TCC), 2004, A More Secure World: Our Shared Responsibility, United Nations, <http://www.un.org/secureworld/>

⁴⁴ The High-level Panel, however, mentions also a tight link between poverty and civil wars, *Id.*, 15.

I. Justice as Assistance

John Rawls integrated a “duty to assist other people” into the “basic charter of the Law of Peoples”.⁴⁵ This was an important step towards promoting global justice, and it demonstrated that Rawls became aware of global poverty and the fact that a certain living standard is a necessary, although insufficient precondition for peace. The nature and objects of the assistance are precisely described⁴⁶: those societies should be assisted that do not pursue an aggressive foreign policy and that lack the material and technological means as well as the political culture to become members of the community of well-ordered societies. The aim of the material and technical assistance should be to install just and democratic institutions, which might include educational programs as well as a population control policy. Rawls is not talking about a principle of distributive justice along the lines of the difference principle. The assistance will end as soon as a more or less stable order has been established, and the assistance will probably also dry up if it turns out that “democratization” remains out of reach.

If this principle of assistance were realized, it would require from the affluent states an increase in their development aid as well as the creation of food and educational programs. In the long run, this would lead to an improvement in the living situation of a huge number of people. But due to the narrowly defined assistance targets, only some of the needy peoples would benefit. In societies aspiring to liberalism and democracy, the “right to assistance” would indeed lead to the institutionalized guarantee of a fair number of political rights, equality of opportunity and a difference principle. The effect would be different, however, for burdened societies that only aim at developing a decent hierarchical social structure and not at becoming a full-fledged democracy. The institutionalization of a decent standard of living for all citizens is a necessary condition for democracy but—at least according to Rawls—is not intrinsic to hierarchical societies, and hence is not the goal of the targeted assistance. So the duty to assist would improve the living standard of peoples to very different extents. That would not be a problem in itself, but it becomes a problem since one can imagine that the support would probably not be sufficient to satisfy the needs of the citizens. This would be especially true for the population of “outlaw” regimes who, in the Rawlsian conception, are excluded from any support since their leading elite is not interested in establishing a fair or decent social structure. This kind of restriction seems to be either unfair—since citizens under a dictatorial regime are typically too exhausted or oppressed to change their conditions—or cynical, if in fact it is hoped that suffering of the population will lead to deteriorating conditions that will prompt governmental change.

⁴⁵ RAWLS (NOTE 7), 37.

⁴⁶ RAWLS (NOTE 7), 106.

I do not have space here to delve further into Rawls's reasons for rejecting the principle of global distributive justice as a means for rectifying economic and social injustice among peoples. Rather I would like to argue that a just international order indeed calls for more than a fair distribution of resources. Before that, however, I will turn to Habermas' approach on this topic.

II. A Realistic Utopian Approach to Global Justice?

Habermas' proposal for a "global domestic politics" offers an ambiguous notion of supranational justice. It has one foot in a *minimalist* "realist" approach where "global domestic politics" prioritizes peacekeeping above all else and the notion of justice is limited to the prevention of war and securing human rights.⁴⁷ The proposal's other foot is in a more "utopian" or *ambitious* approach, proposing a global governing organization that will *guide* global domestic politics according to principles of global justice embodied in the world organization and its Charter.⁴⁸ In the first reading, negative duties of a universalistic morality of justice – the duty not to engage in wars of aggression and not to commit crimes against humanity -- form the basis for the international courts and the political decisions of the United Nations.⁴⁹ There is no place for poverty reduction on the supranational level⁵⁰; rather it seems to be part of the transnational arena. As said above, a line is drawn between defined tasks of ensuring justice in this supranational arena (i.e. peacekeeping) and other transnational tasks of a "political nature" like designing economic regulations, environmental standards, promoting the arts, including setting social welfare which are all subject to political bargaining.

In the second interpretation, the United Nations provides the normative framework for the world politics at large, including political processes on the transnational level. The division of competence between the two levels is recommended with view to the functional requirements that need to be addressed by organizations like the WTO and the WHO. Fighting the causes of unbearable conditions asks for a non-functional engagement on the global level like dealing with AIDS worldwide for example. But the normative point of view remains an ambitious notion of justice, which includes social and cultural human rights.

⁴⁷ HABERMAS (NOTE 17), 140-143.

⁴⁸ Jürgen Habermas, *Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik*, in, ANARCHIE DER KOMMUNIKATIVEN FREIHEIT. JÜRGEN HABERMAS UND DIE THEORIE DER INTERNATIONALEN POLITIK, 406, (2007, Peter Niesen/Benjamin Herborth Hg.).

⁴⁹ HABERMAS (note 18), 143.

⁵⁰ For the differentiation between national, transnational and supranational in Habermas's theory see page 7 of this article.

Even though there are good reasons for the non-enforceability of these rights, according to Habermas, it should be a crucial aim of the United Nations to promote them.⁵¹

I cannot conceal that I am very sympathetic with the second reading. At a minimum, I think, poverty reduction should be considered a human rights issue and therefore a genuine issue of global justice, which is only possible in the “ambitious” approach. I would like to support this assumption by three arguments. First, from a consequentialist point of view, we can see more people die each year from preventable, poverty-related diseases and other forms of deprivation than are killed in war.⁵² That alone is reason enough to catapult this issue in the supranational arena. Secondly, world poverty is neither self-inflicted nor the responsibility of the victims; rather, we have to find out whose responsibility it is. Given the interconnectedness of politics, economics, and finance, it seems simplistic not to give greater and more systematic emphasis on the rules regulating international financial and cultural exchange, trade, and working conditions. Trade and financial relations, international law, and political agreements all *affect* the social, political, and economic situations of individual citizens, and sometimes to such an extent that it even requires some of them to live in poverty.⁵³ Global institutions make decisions about international investments as well as financial and economic requirements, provide loans and offer military and development aid, and thereby have a direct influence on the lives of people in poor countries. When parties to a contract can be forced to approve agreements that obviously run counter to the interests of the citizens in question, institutions are not just.

Thirdly, I think we need to question the normative reasons for supporting a “slimmed-down notion of justice,” meaning a *negative* notion of justice based on the idea of avoidance of arbitrariness. A slimmed-down notion of justice is unable to lend support to a critique of international and national rule systems that hinder people from accessing the resources needed to exercise basic principles of justice, such as human rights. For example, there might exist a political order where people are not explicitly prevented from accessing clean water but where the rules do not facilitate access either. There may be no incentives for firms to build adequate infrastructure, or perhaps the laws allow private firms to charge prices that are too high for most residents. A negative notion of justice, as

⁵¹ HABERMAS (note 15), 335.

⁵² THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS*, (2002).

⁵³ See on this thesis Onora O’Neill, *Transnational economic justice*, in O’Neill, *BOUNDS OF JUSTICE*, 115 (2000); see Thomas Pogge, *WORLD POVERTY AND HUMAN RIGHTS*, (2002).

This “institutional approach” appears also in the High-level-Report on TCC, when the authors remind “leaders” having “agreed that poverty alleviation is undermined by continuing inequality in the global trading system.” [...] In 2001, the WTO Doha Declaration explicitly committed signatories to put the needs and interests of developing countries at the heart of negotiations over a new trade round. WTO member should strive to conclude the Doha development round at the latest in 2006”. See, *supra* note 39, 28.

suggested by Habermas, goes hand in hand with the assumption that only a clear-cut negative notion of duties can hope to create a thin but stable basis by which to judge and guide the agenda of the state community.⁵⁴ As Henry Shue showed already some years ago, accomplishing negative duties inevitably requires positive actions.⁵⁵ There is rarely a simple one-to-one relation between rights and duties as there are many ways to serve or disserve a given interest. For example, the interest in physical inviolability imposes upon governments a duty not to torture and is important enough to generate for governments the duty to prevent paramilitary or other guerrilla groups from torturing. However, this duty may also generate related duties, for example, vigilance against the potential for torture, mass education about the wrongness of torture, and intervention in situations where torture is likely to occur.⁵⁶ If we agree with this reasoning, we can put the arguments that, first, social and economic human rights are not universalizable and, second, that they cannot be the basis of institutions because only vague and non-universal, “positive” duties correspond to them, to rest. This opens up the path by which social and economic human rights can enter the realm of global justice.

Even though I have here argued for making poverty reduction an issue in the realm of global justice, I do not agree with another interpretation defended by Cristina Lafont.⁵⁷ She shows that the question of what belongs into the realm of justice and what can remain in the hands of political bargaining processes with uncertain outcomes is an issue that needs to “follow the internal logic of moral discourse”⁵⁸ and does not lend itself to compromise. According to Lafont, issues of justice are not “political” and the “function of human rights should be ‘depoliticized’ if it is to remain legitimate”.⁵⁹ What is potentially troublesome with this assumption is that justice and morality begin to commingle, but I would say justice is political in the following sense. Principles of global justice are the basis of a “global basic structure” (to modify a Rawlsian term) that is institutionalised in concrete national, regional, transnational or global contexts. Principles of justice are defined not only by a principle of avoiding arbitrariness but, moreover, by an expanded conception of human rights that includes access to resources for subsistence and a substantial notion of political participation. This raises the issue of how human rights become legitimized. Rights

⁵⁴ HABERMAS (NOTE 18), 143.

⁵⁵ SHUE, HENRY, *BASIC RIGHTS*, (1980).

⁵⁶ WALDRON, JEREMY, *LIBERAL RIGHTS*, 212 (1993).

⁵⁷ Cristina Lafont, *Alternative Visions of a New Global Order. What should Cosmopolitans Hope for?*, In *SOZIALE WELT*, (2008). See also my comment on this paper: *Why a minimalist notion of justice is not enough: Comment on Cristina Lafont’s paper “Alternative Visions of a New Global Order: What should Cosmopolitans hope for?”*, in *SOZIALE WELT* (2008).

⁵⁸ LAFONT (note 57), 22.

⁵⁹ LAFONT (note 57), 21.

are justified and established through a “public use of reason” (as Lafont mentions) but this does not mean they are *derived* from moral principles. International rules are typically preceded by moral arguments for principles of justice, which are the result of public discourse. But even though these rules should not contradict principles that result from “the public use of reason”, spelling them out in concrete contexts is a political, and ideally, a democratic matter that may lead to context-specific results.⁶⁰ But why is the legitimation of human rights connected to democracy?

Human rights, even if legitimized through public discourse, are structurally different from moral principles. Rights generally demand realization in an institutional order. Once established, they do not prescribe motives for compliance, because they allow enforcement they are inseparably linked to the idea of self-determination. Enforced submission under a political order is only legitimized if those subjected by law are also its authors.⁶¹ This “principle of affectedness” is well accepted for domestic laws but is often watered-down at the international level. I cannot comment on this in detail here except to note there is no normative reason for not applying this moral principle with equal force in the international context. Nor do I think that real-world politics prevents us from establishing democratic mechanisms that allow citizens expanded participation, and moreover, keep in check administrative forces, and prepare international courts to become more independent.⁶² Global justice and democracy are interdependent – even at the transnational level.

In sum, neither a humanitarian duty to assist the not yet democratic societies nor the narrow interpretation of Habermas’ approach of supranational justice turned out to be convincing. Rather, global justice should be based on an institutional approach that addresses the justice of a global political order. Whether international rules are just depends on whether they have harmful effects on people’s lives. Preventing unjustified harm must include global rules that address the problem of severe poverty. This consequentialist point of view reveals *reasons* that allow certain rules to be rejected as unjust because they may unjustifiably harm people. Harmful effects are legitimate reasons within a reasonable discourse on international rules. This bridges the “harm-principle” with the discourse on setting up a legitimate rule system. Therefore, secondly, international rules are just if they enable all those affected by them to participate in the process of establishing those rules. This allows people to move the existing global political order towards a more just one. Political participation is in itself a necessary condition for a just

⁶⁰ RAINER FORST, DAS RECHT AUF RECHTFERTIGUNG, (2007).

⁶¹ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, (1996).

⁶² Hauke Brunkhorst, Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung. Europas zweite Chance – Im Kampf ums Europäische Parlament?, in: Niesen, Peter/Herborth, Benjamin (Hg.), ANARCHIE DER KOMMUNIKATIVEN FREIHEIT. JÜRGEN HABERMAS UND DIE THEORIE DER INTERNATIONALEN POLITIK, 321 (2007).

political order. For its realization it should be embedded in a process of juridifying international relations. Norm compliance, however, will probably best be reached by creating contexts of juridification that aim at taming the more powerful international actors in a global economy.

E. Conclusion

Discussing Rawls' and Habermas' theories on just international relations and military humanitarian intervention has generated (I hope) two suggestions for preempting military intervention.

First, there should be an ongoing effort to integrate even those states that tend to be aggressive into a plurality of legal and moral institutional networks, even if the legal ones are not "just" in a normative demanding way. This may to a certain extent put public pressure on them and, furthermore, might generate a strategic improvement over the unilateralism, which the United States has demonstrated.

Secondly, poverty reduction as strategy to prevent military humanitarian intervention social justice in the form of assistance for not yet democratic societies is not enough for relieving poverty, neither should poverty be left to transnational bargaining processes. Rather we have good moral reasons to make poverty reduction and social human rights a solid element of UN politics. International institutions must take into considerations the effects on domestic wealth and international relations. Ideally they should offer incentives for the establishment and of democracy and raise the costs for all forces that aim to overthrow them and install a despotic regime.

Even if realized, this surely will not make military humanitarian intervention superfluous, but it would bridge ideal and non-ideal theory. Through this it will raise the threshold for costly and military non-humanitarian interventions.

