

## International Law

## Humanitarian violations

by Hubert Filser



Under fire from Assad's army: Residential areas in Homs.

Source: AFP/Getty Images

Christian Walter, Professor of Law at LMU Munich, explores the limits of state sovereignty. Do the provisions of international law provide a basis for the legitimate removal of despots like Bashar al-Assad?

The flow of refugees streaming out of Syria into Turkey, Lebanon and Jordan shows no sign of abating. Early this year the Assad regime began to lay landmines along routes between the areas most affected by the conflict and the border. Death and displacement have become routine in large parts of the country. No longer confined to the centers of the initial uprising, such as Homs, the violence has reached the capital, Damascus. Reports of torture and the massacre of civilians are on the increase. The UN High Commissioner for Refugees in Geneva estimated that, by March of this year, 230,000 Syrians had been displaced as a result of the conflict. And with every passing day, the opposing parties become more radicalized.

#### Can, and should, the international community intervene directly?

Must the rest of the world continue to tolerate these horrors? Can, and should, the international community intervene directly? Many observers see outside intervention as a humanitarian imperative, but others point to the issue of state sovereignty. The answer thus depends not only on where one draws the line, but on what line one has in mind. In this context, specialists in international law like Professor Christian Walter of LMU must tread warily. Defining the point at

which the principle of state sovereignty is overridden by broader humanitarian concerns is akin to negotiating a minefield.

Walter has published commentaries on legal problems raised by conflicts like those now raging in the Arab world. His latest contribution, which will appear shortly, is entitled *Intervention in the Name of Human Rights – the Libyan Conflict and International Law*. He also co-edits a series of monographs on the internationalization of law. However, within his broad field of expertise, he is especially interested in situations where two bodies of law – human rights and the principle of state sovereignty – collide, as in Libya and Syria.

Even in cases like these, where dictators terrorize and oppress their own citizens, the legal position is fraught with difficulty. There is no universally acknowledged authority that can define a level of brutality that would justify intervention by the international community. "That must be decided in each particular case," Walter says. Political interests and norms that are open to interpretation always pose obstacles to clear-cut and rapid decisions. The UN Security Council endorsed military intervention in Libya, but only after protracted discussions. In Syria such a development remains unlikely but, as

Walter says: "The burden of responsibility is the same in the two cases."

Not so long ago, the positions were less ambiguous. During the Cold War, military interventions were rarely authorized by the UN because each side could use its power of veto in the Security Council to block such initiatives. Non-intervention was the preferred option. "The basic consideration was that military interventions tend to cause more problems than they solve," says Walter. The legal basis for the primacy of non-intervention was provided by Article 2 of the UN Charter, which enshrines the principle of the equality of all sovereign states, and forbids interference by any state in the internal affairs of another.

The international community was forced to rethink the implications of this principle by the genocide in Ruanda and the wars in Bosnia and Kosovo. "These were certainly key events," Walter remarks. "The atrocities committed in these two regions led to the change." Speaking of the genocide in Ruanda, the former UN Secretary-General Kofi Annan, who is currently acting as a mediator in the Syrian conflict, stated: "The international community committed sins of omission." If it had acted "promptly and with determination, it could have stopped most of the killing," he added.



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Annan was among those who proposed a new principle of international law, the 'responsibility to protect,' which is centered on the international community's responsibility to the individual – a fundamental change. "The protection of human rights now has greater weight in international law," says Walter. The new concept, which has meanwhile been enshrined in law, has far-reaching implications for the idea of state sovereignty. "Protection of human rights no longer stands in opposition to sovereignty; instead, it becomes a component of sovereignty," says Walter. "A state is only sovereign if it can guarantee a minimum of personal security and basic human rights for its population."

### 'Responsibility to protect'

This definition means that a state can forfeit its sovereignty under certain circumstances. Genocide, war crimes, crimes against humanity, ethnic cleansing – grave breaches of international law now make outside intervention not only possible but legitimate. The conditions that must be met before the international community may legally disregard a state's sovereignty are, however, quite stringent. Prior to the United Nations World Summit in 2005, no such case had arisen – with the possible exception of Kosovo, but the legality of NATO's intervention there remains controversial.

The change also affects the legal interpretation of norms, including the prohibition on the use of force formulated in the UN Charter and the definition of peace derived from it. "This passage has not always been interpreted in the same way," says Walter. When the United Nations were founded, the prevailing interpretation was based on a negative definition of the term 'peace' as the absence of military conflict between states.



Victims of the shelling of Homs often receive only rudimentary medical care.

Source: Alessio Romenzi/Corbis

Since the end of the Cold War, the Security Council has steadily broadened the application of the term.

The consequences are momentous. Previously, the Security Council could authorize intervention only in cases of armed conflict between independent states. The new definition of peace allows it to act at a much earlier stage, and to pass binding resolutions to regulate relations between the rival parties. Civil wars like those in Syria and Libya are now of direct concern to the international community as a whole. "Today nobody denies that the Security Council is empowered to become actively involved," says Walter. "Whether it actually does so in any given case is then a political decision."

The concept of a 'responsibility to protect' allows the international community to step in when civilian lives are at risk. Thus, in UN Resolution 1970, adopted in February 2011, the Security Council condemned "gross and systematic violation of human rights" by the Libyan government. A month later, with the passage of Resolution 1973, it authorized military intervention by member states in Libya.

In the Libyan case a second strategy was also used to justify encroachments on state sovereignty in a crisis. This targets

dictatorial rulers like Bashar al-Assad and Muammar Gaddafi personally. Prior to this, as heads of state, they were immune to prosecution under international law.

However, in February 2011, the International Criminal Court in the Hague issued a warrant for Gaddafi's arrest. This was only the second instance of such a decision in the history of international law. "The basis for this move is set out in the Rome Statute which established the International Criminal Court," explains Walter. "However, as a contractual obligation in an international treaty, the provision is legally binding only on signatories of the Statute, and Libya and Syria are not among them. Thus, as in the case of the Sudanese President Omar Al-Bashir in 2009, a decision by the Security Council was necessary in order to turn the matter over to the ICC's Chief Prosecutor, Luis Moreno Ocampo. Following the ensuing investigation, the court issued warrants for the arrest of Gaddafi, his son Saif al-Islam and the head of the Libyan secret police al-Senussi. "This was a very significant step," Walter says.

The measure initially met with skepticism, because it seemed unlikely that anyone in Libya would enforce the decision, just as no one has arrested the Sudanese dictator. "As the situation in Libya prior to the



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capture and death of Muammar Gaddafi would show, the decision was not quite as naive as it appeared at first," says Walter. "The new regime could not ignore the arrest warrant, and its very existence sharply reduced the choice of possible havens for Gaddafi himself." It was no longer possible for him simply to leave the country. "From a legal standpoint, it would have been interesting to see how the case might have ended had Gaddafi been able to escape from Libya," says Walter. "Would neighboring states such as Niger have been willing to extradite him? And, if so, would they have sent him back to Tripoli or turned him over to the ICC in the Hague? Could one be confident that he would have received a fair trial in Libya?"

Such hypothetical constructions are of interest to jurists like Walter. They must think all possible scenarios through and consider their legal implications. For the law must be applicable to every conceivable situation. So Walter is not troubled by the fact that many trials, such as that against the Yugoslav leader Slobodan Milosevic, go on for years. What is important is the message they convey: crime does not pay! The workings of the law take longer than policymakers and those directly affected would prefer. "Nonetheless, the signals that these legal proceedings convey have a major impact," says Walter.

However, many would contest this assertion. In the case of Syria, they would contend that delaying action, in Syria for instance, makes the situation worse. Meanwhile, states like Russia and China take the view that less blood will ultimately be shed if the Syrians are left to solve their problems on their own. Russia in particular is unwilling to support military intervention to protect civilians, because it fears that this will lead to a change of government in Syria – and

argues that this is not a matter for the international community. This attitude explains why the Security Council has so far passed only a Presidential Declaration, rather a formal resolution, calling on the Syrian government and the opposition to end the violence.

Such appeals do not impress Syrians directly affected by the fighting. With little hope that a political solution will emerge any time soon, they demand arms with which to defend themselves. As a jurist, how does Walter answer this argument? "Arms deliveries to rebels constitute a clear violation of the principle of sovereignty," says Walter. Under what circumstances might such a step be justified? "This brings us back to the problem of whether or not sovereignty is reduced when human rights are being infringed." But, given that arms deliveries would contribute to an escalation of the conflict, this approach can probably be ruled out from the point of view of international law, he says. "I personally would regard such as a move as highly problematic. It's like giving a knife or a pistol to someone who is at risk of being attacked, instead of sending the police to deter any assault."

The inability of its permanent members to agree on a course of action severely limits the Security Council's options. "Without a mandate from the Security

Council, the necessary legal basis for action is lacking," says Walter. This enforced impotence, and the fact that the permanent members of the Council no longer reflect the distribution of power in the world, since states like India, Brazil and South Africa are not among them, underlines the need for reform.

However, Walter sees other ways of defusing regional conflicts – with the aid of the Arab League in Syria, for instance. Many political crises can be more effectively managed and resolved at a local level, using methods that are culturally acceptable to those involved, he says, citing the Truth Commission in South Africa as an example. The Commission investigated politically motivated crimes perpetrated during the apartheid era, and helped to initiate a dialogue between guilty parties and their victims. South Africans themselves chose this mechanism of conflict resolution in preference to classical criminal proceedings. The object of the exercise, which would appear ill-conceived by Western criteria, was not confrontation but reconciliation. A similar model is under consideration in Iraq. "There is a need for such alternatives in international law," says Walter. Indeed, unconventional approaches may be the only means of ensuring long-term stability in Libya and, someday perhaps, in Syria.

*Translation: Paul Hardy*



Prof. Dr. Christian Walter was appointed to the Chair of Public and International Law at LMU Munich in 2011. Born in 1966, Walter obtained his doctorate in 1995 and completed his *Habilitation* at Heidelberg University. Before moving to LMU, he was, inter alia, research assistant at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and worked for Paul Kirchhof and Udo Di Fabio at the German Constitutional Court. Walter has also represented clients before the European Court of Human Rights and the German Constitutional Court.