Gunther Hellmann (ed.)

Justice and Peace

Interdisciplinary Perspectives on a Contested Relationship

NORMATIVE ORDERS

campus

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Chapter 1
Introduction—Justice and/or Peace?

Gunther Hellmann

The original title of the conference on which this volume is based avoided a choice about how to relate the two concepts of justice and peace to one another.[1] They can, and often are, connected in a non-contrasting fashion ("and") and/or in terms of an alternative ("or"). Whether one or the other connection is used is suggestive in itself, but in both cases it still leaves a broader set of possibilities as to how one conceives of the underlying relationship. Two basic choices seem to stand out: One would be to relate "justice" and "peace" in terms of symmetry or asymmetry. The relationship would then be construed either in terms of normative equivalence or hierarchically—ie. one being more important from a normative point of view than the other. Alternatively one could connect them in terms of either conceptual interdependence or conceptual independence—ie. one might emphasize the "and" in the title and argue that justice and peace are mutually dependent or one could conceive of both concepts as being mutually exclusive—ie. that one has to choose between them in an either/or fashion.

The prominence and particular expression of any of these ways of connecting peace and justice in different academic disciplines depends as much on disciplinary focus and traditions as it depends on specific knowledge-constitutive interests when scholars work on a particular research problem. As a result both the conceptualization of "justice" and "peace" and the connection being made between them figure quite differently in this volume due to the

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1 The conference took place in November 2010. Many colleagues have helped in organizing it and in translating its results into this book. I am grateful in particular to Rainer Forst who, in addition to being co-speaker of the Cluster of Excellence "The Formation of Normative Orders", also served as co-coordinator with me for Research Area 3, "Transnational Justice, Democracy and Peace", during the first funding period. The conference itself would not have been possible without the professional support of the administrative office of the Cluster, especially its former head Peter Siller. Finally I am indebted to Daniel Jacobi, Florence Isabel Wild, Christian Weber and Ursula Stark Urrestarazu for editorial assistance and to Nils Wadt and Fabian Raimann for technical support.

fact that the Cluster of Excellence on "The Formation of Normative Orders" brings together a heterogeneous interdisciplinary group of political scientists, philosophers, historians, cultural anthropologists and international law scholars. It is against this background that we thought that the title "Justice and/or Peace" would be fitting for such an interdisciplinary exchange. After all it was intended to reflect the breadth of intellectual engagement with these two concepts among colleagues from different disciplines within the Cluster as well as between them and colleagues from other universities.

In chapter 2 *Michael Doyle* examines the roots of the "Responsibility to Protect" (RtoP) in international law and international ethics. RtoP, Doyle argues, is in tension with established Charter law on the use of force, but it may be beginning to change the law. From the perspective of Liberal international ethics the theme of humanitarian intervention is deeply familiar in both its communitarian and cosmopolitan variants. Even the Realist and Marxist traditions include commitments to human respect that make humanitarian concerns far from foreign. The norm of RtoP builds on but narrows the liberal tradition in ways that expand international legitimacy and address the concerns of many skeptics of humanitarian intervention. The chapter further explores how RtoP evolved out of the crisis in Kosovo in the 1990s and discusses its policy significance in the contemporary world in cases in which it has been invoked—ranging from Myanmar to Kenya, Guinea and Libya. Doyle concludes that RtoP as a policy doctrine is significant but likely to remain less than revolutionary. Straightforward as the provisions of the 2005 UN Outcome Document may appear, both their significance and the will to implement them are far from clear. By contributing to the increasing pluralism of the normative architecture of world politics RtoP has produced some confusion. However, this confusion may gradually recede as RtoP norms are accumulated in customary law and reshape the discourse of international ethics.

Harald Müller examines the relationship between justice and peace in chapter 3 from a different angle arguing that "good things do not always go together". He starts with the premise that our endorsement of justice is deeply embedded in Western thought. It found expression most recently in the shape of democracy promotion. Yet, while such efforts do sometimes yield moderately peaceful results (e.g. Bosnia-Herzegovina) they can also led to more doubtful (e.g. Congo) or even outright disastrous outcomes (e.g. Afghanistan). In terms of a conceptual history of justice and peace, Müller introduces both as distinct but mutually related states of social and political

affairs: Justice describes a state in which actors get what they are entitled to according to commonly agreed standards of distribution. Peace, in contrast, describes a state in which actors are not threatened by physical harm or even death by the willful acts of other actors wielding, or aspiring to, political power. Müller then shows how justice and peace can be at odds since heterogeneous claims to justice may act as a driver of political conflict. Noting that there can never be a truly universalistic account of justices as each actor always theorizes from within her own cultural context, he asks how we may escape this conundrum. His answer is twofold. Firstly he holds that we must identify justice conflicts without falling back into the trap of particularistic notions. He proposes a version of speech-act theory which employs the concept of justice only as a rhetorical structure devoid of any a priori meaning. Its task is to tease out different claims to justice, here understood as claims for an "entitlement". He substantiates the efficiency of such an approach empirically, nevertheless stressing the multiple and divergent understandings of justice that do become apparent. This leads to Müller's second answer—the idea that a universalistic account of justice can only emerge as the result of practical consent by the greatest possible number of actors. He concludes by proposing that such an "empirical universalism" can only emerge "from the busy, boring, controversial and inglorious and unsung reconstructive work of the diplomatic ants which populate the closed rooms of global negotiations, and their friendly non-governmental assistants which impact most of the time from the sidelines."

In contrast to Müller, *Rainer Forst's* chapter approaches the question of the relationship between justice and peace from the perspective of the actors who raise basic claims to live in a justifiable social order and are thus the agents of "orders of justification." He unfolds his main conceptual thesis that justice is a principle and a basic demand, while peace is a value qualified by justice and is in its core demanded by justice. Forst then identifies a major Western tradition of thinking of the relation between justice and peace within the framework of a normative order of priorities between the two. Within this tradition a major line of thought culminates in Kant's call for the establishment of a universal system of law as the precondition and foundation of perpetual and justifiable forms of peace. Taking this claim to the level of the international political system, Forst argues for the formula "peace by law" and for a legitimate system of legal justice on the level of international law as the proper connection between justice and peace. Yet, he adds, that while we can follow Kant's idea of a system of law that consists in a system of

publicly known principles of right and justice, at the same time, we need to reinterpret Kant's idea of the publicness of these norms in a democratic way once we start thinking beyond the state. Forst then cautions against the lurking danger of agents of democratic order becoming oppressors themselves. For the self-conscious spread of the assumed universal value of a "just order" could then not lead to peace but to war as a means to globally reinforce this idea. He thus argues against the usual foundations of such mistaken actions: putting peace before justice, the reversal of his main thesis. Forst reverts to Kant embracing the idea that justice must not be culturalized and hence subordinated to the idea of "peace first and by any means necessary." He locates the prerogative of justice in the fact that persons are the lone agents of justification and that this capacity is not grounded in some ethnocentristic concept of justice but in the basic human activity of demanding justification. Hence, while prefabricated standards of "justice" may be rejected, the very act of rejection itself is normative and rests on the basic right to demand justification. Justification itself becomes one central foundational element for a concept of justice. It thus explains the priority of justice over peace and the linkage between justice and democracy in the principle of publicity: it is the space of the processes of justification which presents peace as a situation of non-domination that overcomes threats, the exercise of violence and deems any counteractivity as flights from justice and thus peace. He concludes by showing the implications of this approach in the case of human rights.

Matthias Lutz-Bachmann examines peace and justice in the tradition of just war-theories in chapter 5. He begins by showing how Cicero was one the first thinkers to raise the moral question of whether or not war might be legitimate at all. Lutz-Bachmann illustrates how Cicero did not see war as a proper means or necessary condition for a "just political order". Instead his "theory of just war" can be seen as a first attempt to de-legitimize the "state of war" as an instrument to achieve peace and/or justice in a political community. It presents war only as exception to the general norm of peace and argues that it is only justifiable in two cases usually caused by lack of a binding legal order in international politics ("retribution" and "self-defense"). By introducing the thought of Thomas Aquinas, the author then shows how Cicero's attempts at justification where doubled and further refined, particularly via the former's three principles of legal government ("auctoritas principis"), just cause ("causa iusta") and "rightful intention" ("intentio recta"). Yet, these principles were mostly lost when a historical shift from a moral to a predominantly legal discourse took place, transforming the "ius ad bellum"

into a theory of legal rights and duties. A changing focus on states and legal bodies instead of individual rulers as well as the undecidable nature of "just causes" and "good intentions" only spared Augustine's first principle. The latter, however, was turned into a constitutive moment for the definition of the political powers in an "international" order of "sovereign states" while at the same time being cleansed of any normative impulses. It was only Kant who criticized the underlying works of Grotius and Pufendorf, among others, and reintegrated the normative imperative to act peacefully into a concept of justified laws by reverting to ideas of freedom, equality and reciprocity. However, Lutz-Bachmann finishes by showing how Kant's idea of a fragile yet ever expanding federation that prevents war has to be reconsidered today vis-à-vis the empirical facts of globalization and the ideal as well as material differentiation implied by it.

In chapter 6 *Luise Schorn-Schütte* takes a look at confessional peace as a political and legal problem in the Early Modern Period. She starts from the assumption that justice and peace have been regarded as desirable goals in all historical epochs, but that both terms denoted particular goals at different times. Departing from an early modern concept of "justice" and "peace" which also subsumed religious clashes under the juridification of conflicts, her argument proceeds to sketch the framework of legal norms that provided the basis for what can be called the distinction of fundamental rights. The framework was developed in a series of individual religious settlements, including the Peace of Westphalia, which affected the internal structure of legal matters and thus order. Schorn-Schütte illustrates how, beginning with the Reformation, politics and religion became ever more intertwined as all attempts at unifying religion failed and (religious) peace had to be achieved in a political way. Questions of faith and religious truth were thus reformulated as legal questions. Hence, the new religious peace was not identical to religious tolerance in the 16th and 17th century since then nobody legally accepted religious plurality in itself and thus a conflict of norms or values. Solutions were rather always intended to be temporary. While this may seem like a paradox, Schorn-Schütte declares, it is of fundamental importance: religious peace worked by "freezing" religious conflict—not perpetually but only until a "true" religious solution was found. The recourse to legal traditions thus created broader options for religious policies everywhere. She then analyses the peace of 1648 in closer detail and demonstrates how the character of religious settlements changed the political order and organization—albeit not in a way many modern scholars see it. She holds that while

"Westphalia" was aimed at parity, this idea of internal balance must not be unduly extended to notions of external balance. She thus counters accounts of 1648 as the watershed moment for the genesis of the international system of politics and thus states. Quite to the contrary, Schorn-Schütte argues that it was mostly structures such as personal networks, patronage and friendship that also formed the contours of external relations. Consequently, one may rather speak of a slow process of 'state-development' even after 1648.

Chapter 7 by *Brendan Simms* confronts us with "democratic geopolitics" and what the author interprets as the rise and fall of a transatlantic normative order in the contemporary age. Simms focuses on the political implementation of the idea that democracy promotion enhances security. He locates the origins of this new doctrine in the Jackson-Vanik amendment and the Helsinki Final act in the mid 1970s. Stipulating particular human rights in international treaties marked a normative revolution in relations between states and proved to be a powerful solvent of the Soviet Bloc. The ensuing shift to a unipolar constellation dominated by the US amounted to a normative change. During the 1990s, the goals of promoting human rights and expanding democracy became cornerstones of American and European security strategies. Democratic geopolitics was first practiced in Central and Eastern Europe leading to the enlargement of NATO and the European Union. All candidate countries had to demonstrate that they had a functioning democratic political system based on a market economy. The new strategy of democratic enlargement prevailed over the old norms of non-intervention with the Kosovo war and the independence of East Timor against the will of the Indonesian government. These events seemed to presage a new era for democracy and human rights. The remaining dictatorships looked isolated and appeared to be swimming against the tide. After September 11, the Bush administration also practiced democratic geopolitics in the Middle East, the only region that had remained exempted in the original conception. Whether the experiences in Iraq, however, and the contested transformations of the Middle East after 2011 have put an end to the US-European project of democratic enlargement remains to be seen.

In her chapter "Popular Casuistry and the Problem of Peace/Justice in Christian Ethics" *Cecelia Lynch* focuses on the relationship between tensions in Christian ethics and tensions in normative orders while engaging the ubiquitous question of whether peace and justice are symbiotically related, antithetical to political "order", or problematic but necessary to achieve in some combination. To provide an answer she delves into the tensions in

Christian political theology and practice surrounding goals of justice and peace among particular thinkers, activists, and politics leaders. She argues that contemporary debates about religion, normativity and politics that take for granted assumptions about the relationship between Christianity and secular modernity should instead expose and analyze the symbiotic tensions that characterize Christian ethics of justice and/or peace. In order to "clear an analytical space" she develops the concept of "popular casuistry" connecting it to how religious actors view the "common good." She then expands her argument by examining ethical tensions on issues of peace and/or justice that remained unresolved in three periods of the twentieth century: the pacifist/Just War debates of the 1930s and 40s, the debates about oppression and violence from Liberation Theology in the 1970s and 80s, and the post-Cold War debates about human rights and humanitarianism from the 1990s to the present. The resulting new analytical space shows that any given "religion" (taking account of Max Weber's initial caution about defining this term) needs to be viewed as part and parcel of historical (both material and ideational) struggles. Finally, she draws out preliminary lessons for the conundrum of peace and/or justice. Christian ethics demonstrate the difficulty of articulating as well as achieving normative orders that ensure both peace and justice. The choice of which to prioritize—peace or justice—leans in each of the above periods towards justice but the interpretations of what constitutes justice are vastly different within each period as well as between them. Moreover, each of these tensions has important parallels in the allegedly "secular" world. Perhaps the similarities are more than parallels, however—perhaps they are indications of how both the religious and the secular work through ethical judgments about peace and justice in symbiotic fashion. If this is so, Lynch concludes, the nature of the Christian-religious/secular divide as well as the nature of the peace/justice divide might well be equally symbiotic, and equally without ultimate resolution.

Mamadou Diawara examines notions of justice with regard to the domestication of copyright in Sub-Saharan Africa in chapter 9. Taking the protest of artists in Mali against lax and inefficient copyright regulations by the state as a starting point, the chapter explores the field of copyrights in Sub-Saharan Africa. It outlines the types of relations that exist between the state, those wanting to protect these rights, and producing artists in order to show how international legal frameworks for the protection of copyrights are interpreted and adapted in specific local contexts. First, the web of complex relationships that make up the artists' environment is analyzed. Griots for

example, locally embedded professional musicians in charge of praising the glory of their patrons in the Mande world, receive their revenue from well-to-do patrons at high-profile public performances. They often prefer to leave their work unprotected and broadcasted by radio stations because it furthers their publicity. In contrast, internationally recognized artists with ties to the global music scene look out more rigidly for their copyrights since it constitutes the greatest part of their income, but they still try to remain present in local television and radio programs. Thus, there are some locally specific limitations to the strict application of copyright laws. The greatest danger for the artists emanates from the pirating of music. In Mali, production centers had to be closed due to the lack of protection of the national market and the influx of fraudulent products from foreign countries. For some countries, such as Nigeria, piracy has become an integral part of the formal economy, contributing to the decay of the Malian musical landscape. Artists are pressing the state to protect their rights more effectively but shy away from attacking local media that are crucial for their popularity. State institutions encounter legal and practical difficulties in determining the guilt of traffickers. They also shrink back from prosecuting radio and television stations for illegal broadcasting because they fear criticism by journalists who consider themselves watchdogs of democracy. As a consequence of this complex constellation, young musicians in Mali and Sub-Saharan Africa and are developing a new mode of music management in which lucrative performances play the central role and CDs and cassettes, often produced in home studios, are only there as support.

The final two chapters examine the relationship between peace and justice in international law. *Andreas Paulus'* chapter "Between Constitutionalization and Fragmentation—Concepts and Reality of International Law in the 21st Century" discusses the prospects of the constitutionalist vision to establish a unified global legal system. After a brief description of the origins of global constitutionalism, in particular in German international law theory, he sets forth the opposite thesis, namely that we are faced with a fragmented global order that reflects a dismemberment of any unified conception of a single legal order into a world of several and distinct actors that self-order their own legal realm without much need for a coherent overarching legal system. Besides the establishment of the World Trade Organization and the International Criminal Court, the past two decades have also seen the revival and then the erosion of the collective security system of the United Nations, and it is far from obvious that the rise of the Asian and Latin American powers

Brazil, India, and, in particular, China will lead to a renewed international constitutionalism. Confronting the constitutionalist arguments with an unruly and diverse international environment makes clear that the attempt to bring the whole of society under the single control of one legal system is failing. Courts and tribunals proliferate, but most of the new bodies adjudicate only one single issue area in a specialized legal régime that recognizes diverse legal actors. The result is not a single coherent legal order, but a panopoly of legal orders serving eventually conflicting interests and considerations. This tendency does not necessarily mean, however, that constitutionalization as a principle of legal ordering has lost its appeal and its usefulness altogether.

In the final chapter "International order as an Idea" *Stefan Kadelbach* argues that the relationship between justice and peace must be considered in a normative way if one chooses the perspective of international law. The chapter thus raises the question if justice and peace are conflicting notions or if they can be harmonized in a plausible concept of international order. The first part deals with interventions by one or more states with the aim of changing or stabilizing the internal order of another state in cases of domestic injustice and unrest. In post-war orders after the cessation of international conflict, an equilibrium has to be found between the interest in securing societal peace and demands for transitional justice. Collisions are possible between the international criminal courts' duty to prosecute and the objective of reaching a peace agreement. The second part refers to conflicts between the purposes of justice and peace within the international legal order, thus assuming that global governance is not only a matter of states but also of genuinely international actors and regimes. In the contemporary institutional landscape, republican ideas of former centuries, though in a reduced version, have reached international law itself. However, contradictions between the objective of peace and notions of justice still pervade the international order and pose challenges to its legitimacy. The present architecture of international organizations reflects power asymmetries and in some cases fixes inequalities in treaty law. These apparent injustices are explained with the claim that sticking to old rules helps to avoid conflicts and that legitimate interests are subordinated to peace. Still, a legal order whose justice is disputed cannot guarantee peaceful coexistence. In the final analysis, only a procedural model may provide the basis for balancing conflicts between the two ideals.