PREFACE

§ 1 The Purpose of This Book

Once you accept that democracy and human rights are universally desirable and that they should be implemented and respected everywhere,[1] the question remains how you can promote this universal respect. It is not because you accept universality that everyone accepts it. How can you turn the norm into a fact? How do you universalise democracy and human rights? And what are the actions you can take and the instruments you can use? This book will not be a success if it cannot help and encourage those people who are willing and able to work for the universal application of democracy and human rights. Hence, this is not philosophy or theoretical thinking. The focus is on practical political matters such as diplomacy, legislation, intervention, sanctions etc. But it is not political science either because it does not try to analyse, in a scientific way, which actions of foreign policy are useful and efficient. The ambition is rather limited. I merely wish to list the actions that are possible and desirable in a general sense. It is then up to politics and political science to determine which particular action can be used in an efficient way in a particular case.

We must have the courage of our convictions and apply our theories in the real world. Not doing so would be cowardice. If we say that democracy and human rights are universally valid, then we must also say how we can arrive at their universal application and what kind of action this implies, and of course we have to act ourselves. I will take for granted that the problem of the universal validity of democracy and human rights is settled, and I will only address myself to those of us who accept this. The keyword will be "how" rather than "why", and the arguments will be of an instrumental rather than a theoretical nature. I will no longer discuss the goal and the justification of the goal ("what" we want to universalise and "why"), only the possible roads towards the goal and the justification and acceptability of these roads.

Of course, one of the first actions is establishing a good theory of the universal desirability of democracy and human rights. Such a theory will motivate you and will put the weight of your convictions behind your other actions. But it may also convince some people who would otherwise be reticent and who would stand in the way of the universal application of

democracy and rights. If you do not know what you are doing and why you are doing it, then you will not persuade anybody that there are good reasons for the universalisation of democracy and rights. However, a good book on the universal value of democracy and rights will never be enough. Not everybody will be convinced by sound arguments. Other types of action, such as force, pressure, bargaining and the promotion of the necessary conditions, will also be necessary.

§ 2 The Usefulness of Retroactive Laws

George Steiner, in his magnificent book on the fate of an escaped Adolf Hitler in post-war South America,[2] describes rights as an ontological totality, or, in other words, a reality that encompasses the whole world and all phenomena in it. Rights are not just a set of local commands, only valid in some corner of the world or at some moment in history. It would be unacceptable to have one part of reality—either a part of the world or a part of time—that is free from the power of rights. The Israeli secret agents who captured the old Hitler in the forests of South America rightly believed that he could be tried by their makeshift court and that their present-day norms dealing with murder and persecution could be used to judge him, even though these norms did not exist at the time when Hitler committed his crimes or in the places where he committed them.

Human rights are an exception to the rule that laws should not be applied retroactively or "ex post facto". Certain actions that take place in a certain country at a certain moment in time, and that are not illegal in the context of the law as it is valid in that country and at that time, may afterwards—"ex post facto"—be judged as violations of human rights, even if human rights were not part of positive law at the time. Otherwise, a tyrannical legislator such as Hitler may make it forever impossible to judge his deeds of oppression and to punish him, even after he and his regime are defeated. I do not think that anybody is willing to accept an absolute definition of the prohibition on retroactive laws that leads to impunity. If violations of human rights can only be punished according to the laws that are in force in the country in which the violations occur, and that are in force at the moment that they occur, then a bit of creative legislation will lead to total freedom of action for the most brutal dictators. And no change of regime or military defeat will ever harm them. They will have a life-long insurance against justice.

However, the prohibition on retroactive laws is an important achievement, and is even part of the internationally accepted corpus of human rights. The fact that human rights laws are an exception to the general rule is justifiable on two grounds:

— First, it would be unreasonable to require that the system of human rights contains the seeds of its own destruction. Requiring the system to incorporate an absolute prohibition on retroactive laws, one that also makes retroactive human rights laws impossible, would mean introducing one rule in the system that can undo all other human rights rules. The absolute rule on retroactive laws would allow malevolent legislators to neutralise all other human rights rules in the system. In fact, the system would only have one rule left.
— The main rationale for the rule on retroactive laws is the fact that people must be able to know in advance whether their actions are or are not permitted by the law. Otherwise they are unable to plan their actions in a manner that is appropriate for law-abiding citizens and they run the risk of inadvertently violating the law (a law that is unknown to citizens is plainly absurd). People must be protected against a lack of knowledge caused by the implementation of laws punishing actions after they have occurred, because it is unfair that citizens are harmed by the unknown penal consequences of their actions, actions that they believe are legal. However, this rationale is absent in the case of human rights. Even if human rights are not part of existing law, most people will not inadvertently violate human rights. Human rights, even if they are not part of the law, are known to all citizens, and those who violate them know that even if their law allows them to do so, they can one day be held to account. Punishing someone on the basis of human rights that were not part of the law when the punishable act was committed, is clearly not the same thing as punishing someone for driving in a pedestrian zone when this zone was accessible for cars at the moment of the "infraction".

Rights violations must always be punishable, even if the law that makes them punishable only comes into force after the violations have happened, for example after the overthrow of a dictatorship or after the military defeat of the violators. All other acts that do not imply a violation of human rights can only be punishable if they are a crime in the law at the moment that these acts are committed. Generally, one cannot punish someone for an act that is not a crime and only becomes a crime afterwards, because otherwise this person is unable to know whether his act is legal or illegal. He must be able to plan his actions in a way that fits a law-abiding citizen.

The exception to the general rule—this general rule being itself a particular case of the even more general rule of "nullum crimen sine lege", no crime without a law—was introduced by the Nuremberg Tribunal. "[C]rimes against humanity were made punishable even if perpetrated in accordance with domestic laws . . . In so doing, it [the tribunal] indubitably applied ex post facto law; in other words it applied international law retroactively".[3] Some say that the other charges of "crimes against peace and waging an aggressive war" also introduced retroactive laws, but that was not the case: pre-war international common law already stipulated that these actions were criminal.[4]

> "The accusation about retroactive legislation is closer to the truth as regards crimes against humanity. These were defined in the Tribunal's Charter as follows: 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'. In some respects, crimes against humanity are wider than war crimes; they can be committed before a war as well as during a war, and they can be directed against 'any civilian population', including the wrongdoing state's own population. The prohibition of 'crimes against humanity' thus constituted an exception to the old rule that a state was entitled to treat its nationals as it pleased; and it is fairly clear that this prohibition was not accepted as part of international law before 1945."[5]

Why do I discuss all this? The obvious temporal aspect of retroactive laws can have spatial consequences. If we are not bound by the rule on retroactive laws where human rights are concerned—which is, I admit, a somewhat stretched interpretation of the Nuremberg exception that only mentions some types of rights violation—then we can act as if human rights are law and we can always punish rights violations, even if these violations were not illegal at the moment that they were committed. We can act as if human rights are part of the law even when this is plainly not the case. Now I will apply this principle in a spatial dimension rather than a temporal dimension. I do not want to presume that human rights were law in a previous period of history in which they evidently were not law; I want to presume that they are law in another place in the world, a place in which they are evidently not yet part of the local law. For me, this is no fundamental modification of the Nuremberg principle, but it has far-reaching consequences. And it is not as farfetched as it may seem at first glance. Most people will agree that it would be wrong to

judge someone solely by the laws of his country. Laws, after all, can be incomplete or even immoral.

§ 3 Hoping to Avoid Some Misunderstandings

I will, somewhat provocatively, use the expression "democratic imperialism" in order to describe the actions aimed at the universal application of democracy and human rights, even though provocation is not always the best strategy. The term "democratic imperialism" is meant to cover both democracy and human rights, which are inseparable, as I have argued elsewhere. I will not always mention both human rights and democracy. A reference to one is automatically a reference to both. Democratic imperialism is the imperialism of an idea, not of territory or power. The purpose is not the creation of a political and territorial empire but the establishment of the empire of democracy and human rights, although not at the expense of political, territorial, cultural or economic independence. That would be self-contradictory because democracy is impossible without independence.

Although the expression "democratic imperialism" originates from a comparison to cultural imperialism—instead of promoting a specific cultural model, one now wants to promote a specific political model—it does not imply the wish to colonise the world, civilise the uncivilised, or assimilate other cultures. The purpose is the effective global enforcement of respect for human rights and democracy. This does not require a clash of civilisations, colonisation, assimilation or the loss of cultural identity.[6] We can promote the universal application of democracy and human rights and, at the same time, maintain the coexistence of different independent and equal cultures or civilisations. Colonising other countries, forcing a people to give up their culture or excessive meddling, are not the means to promote democracy and human rights. A global evangelism or a crusade for democracy and human rights will only cause resentment and reactions. We do not like other people to pretend to know better how we should live. One has to be careful when choosing a strategy. On the other hand, extreme reticence or indifference in the face of human rights violations is not acceptable either, and simple condemnations are not enough. We cannot look away and build a wall around us; we cannot from a moral perspective, and we cannot from a pragmatic perspective either because in our globalised world it is likely that rights violations elsewhere will one day catch up with us. Some kind of intervention, meddling and pressure are necessary, both from a moral and a

self-interested point of view. The trick is to choose a wise strategy somewhere between indifference and overkill.

§ 4 The Three Steps of the International "Trias Politica"

Before going into the specifics of the strategy or actions required, one can say that, in general, democratic imperialism consists of three steps or phases, comparable to the three parts of the traditional "trias politica", the division of power between a legislative power, an executive power and a judiciary. These three powers are extrapolated and enlarged to an international setting, because traditionally they are conceived as being part of a single state. Notwithstanding the fact that we can act as if human rights are part of law everywhere, it is still better to try to include human rights and the principles of democracy in all local legislation or in international legislation that is directly applicable in all countries. Once this is done, we must supervise or monitor the respect of the laws and condemn violations. If necessary, this can also be an international matter, just like legislation.

This second step can come before the first one, because we can act as if human rights are part of the law. The third step of democratic imperialism is the enforcement of respect, if necessary with violent means as is also the case in any national division of powers. This is the enforcement of the rules and of the judicial verdicts of violations and it necessarily comes after the second step, but not necessarily after the first one (again for the same reason). I will discuss these three steps in more detail below and use them as a device to structure the discussion of the different kinds of action that are part of democratic imperialism.

If it is not possible to legislate and to have judicial and executive powers monitoring and enforcing respect for the laws, then we can do as if the institutions necessary for steps two and three exist, just as we do if legislation is absent. Instead of a court monitoring the respect of the laws, we can have non-governmental organisations (NGOs) or the press monitoring the observance of moral rules. Instead of a verdict (a judicial condemnation), we can have international diplomatic condemnation or other kinds of extra-judicial condemnation. And instead of a police force enforcing respect for laws, we can have military intervention by a coalition of states or, on a lighter touch, mobilisation of shame as a means to enforce moral rules or perhaps even "laws in the making" ("ius constituendum", a kind of no-man's-land between morality and law—law in an embryonic form.)

Needless to say, this is a second best solution. It is better to have real laws enforced by a real judiciary and a real police force rather than human rights in the guise of moral norms or "ius constituendum" enforced by states intervening in other states. But often it is unacceptable to wait with monitoring and enforcement until human rights have taken on a legal form. If you can only enforce human rights where they are enshrined in the law, then you will be unable to deal with the worst violations. The countries in which rights have been included in the law have already shown that they are concerned with human rights. It is not impossible that they violate rights, but it is less likely. The less legislation, the more need for international monitoring and enforcement.

However, the first step of democratic imperialism, legislation, is not the most difficult one. Most countries have included human rights in their constitutions, even notoriously despotic ones such as the former USSR. And most countries have also adhered to international treaties guaranteeing human rights and the principles of democracy. The main problem with international legislation seems to be the fact that it requires consensus and hence voluntary submission to a rule. Submission, therefore, can be lacking or can be revoked. No criminal will accept or continue to accept a law that can be used to punish him. International law is made up of treaties and common law, and neither can exist without the approval of each of the parties subject to the legislation. It is difficult to force a country to accept a treaty or to continue to accept a treaty, and once there is disagreement on a rule of international common law, the rule ceases to be part of common law. Common law is based on practices that are habitually and generally accepted. Hence, it is relatively easy to escape the force of international law. All that is required is the repeal of consent or the initial refusal of consent.

Intuitively, one would think that a law that cannot be imposed without the consent of those subject to the law—as is the case with international law—is useless because laws are mainly designed for people who do not accept them (people who accept the law will generally observe the rule contained in the law, even if there is no law). States that are planning to violate human rights will not voluntarily accept a treaty protecting human rights or will step out of such a treaty. However, human rights treaties have been almost generally accepted and almost never revoked. Furthermore, as we will see below there is now also international law that is not so easy to revoke.

A reason for this continued acceptance is perhaps the difficulty to control and enforce respect for international law. Monitoring of international law is more difficult than legislation, because there are as yet few international judicial institutions capable of dealing effectively with rights violations and

breaches of international human rights law, and many national judicial institutions are just as ineffective. This is because most governments are ready to accept human rights in the form of a piece of paper, but less ready to accept an effective national or international judicial institution capable of rendering judgements against them and, for example, demanding extradition of their citizens (look at the way in which the International Criminal Court is treated by the US). Some such institutions exist, and I will discuss their effectiveness, or lack thereof. Most human rights treaties have created institutions for monitoring the observance of the treaty rules, or have appointed certain existing institutions as their guardians. The United Nations too has some monitoring institutions.

However, the acceptance of such an institution is not automatically linked to the acceptance of the treaty. Moreover, these institutions often have a very limited competence. It is not always fair to call them judicial institutions in the sense of the "trias politica". Their judgements are mostly not binding, and their powers of investigation very limited because monitoring is often considered to be a kind of meddling or intervention in internal affairs. In most cases, these institutions can only issue a formal condemnation on the basis of incomplete evidence. Much will depend on the powers of investigation and the sources of information: an institution that cannot visit countries, that cannot hear complaints from victims of violations and that cannot use a courtroom as a kind of stage on which defendants and prosecutors can discuss the case, will never be very effective. Monitoring human rights violations is a kind of catch-22: monitoring is most needed in those countries that are governed in a tyrannical way; but this kind of government makes it very hard to monitor rights violations, and the relative absence of monitoring will tempt some people to violate rights even more. It goes without saying that monitoring outside the framework of treaty institutions is even more difficult because the press, NGOs and other non-treaty monitoring institutions often have very few powers of investigation.

Without effective monitoring, it is not easy to enforce either, especially in international law. There are some international courts and some quasi-judicial institutions able to deal with (some) human rights, but many countries do not accept their authority. However, there are absolutely no enforcement agencies. There is no world police (no "central authority wielding exclusive power"[7]) comparable to the national police forces, even though some powerful countries, some coalitions of countries or some international organisations, such as the UN Security Council, sometimes feel the urge to fill the vacuum. However, because we rely on power politics and on a UN often paralysed by the veto system, we are in a situation in which

powerful states and their friends receive preferential treatment and are almost free to do as they like.

Even when there is effective monitoring by international judicial institutions or by extra-judicial agencies capable of finding the evidence, step three of enforcing the judicial or quasi-judicial decisions is never easy. There are no real enforcement agencies because states are not willing to accept a power above them, able to force them in a certain direction. The use of non-traditional executive forces (e.g. NATO intervention, the use of trade sanctions etc.) for the enforcement of laws or laws in the making is sometimes better than nothing, but there is always a problem of legitimacy and of equal treatment.

So we have a lot of legislation, few and often ineffective monitoring systems, and even fewer enforcement systems. Nevertheless, it seems to be worthwhile to keep the scheme of the "trias politica", for the simple reason that there is no alternative. Notwithstanding all the limitations, history has shown that it is sometimes possible to monitor rights violations and to enforce respect for rights and for the principles of democracy. Moreover, the strategy is part of the content. If we use the "trias politica" as a means to promote democracy, then we use a democratic means. The division of power is typical of the rule of law, and the rule of law is typical of democracy.