Global norms and international humanitarian law: an Asian perspective

by
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International humanitarian law is defined as "the principles and rules regulating the means and methods of warfare as well as the humanitarian protection of the civilian population, of sick and wounded combatants and of prisoners of war".[1] As such, international humanitarian law is on the one hand something more and of a higher order than norms. On the other hand, it is of a lower order and of a lesser scope in coverage than other parts of international law. In this article, I shall explore aspects of contemporary international humanitarian law and international norms as an Asian commentator.

An important preliminary point to note is that all three concepts in the equation — Asia, international humanitarian law and general international law — remain, as concepts, essentially contested. A second preliminary comment, equally significant in terms of its political ramifications, is that all three concepts are essentially non-Asian in origin and frames of reference. This does not mean that they lack validity or relevance in this part of the world. It does mean that, to the extent that norms and laws are mechanisms for regulating the social

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behaviour of human beings interacting with one another as organized groups, the socio-political construction of Asia, global norms and international humanitarian law cannot simply be dismissed. The argument must instead be confronted, addressed and to the extent possible answered.

In the age of colonialism, most Asians became the victims of Western superiority in the organization and weaponry of warfare. The danger today, I argue, is that they could continue to be the objects but not the authors of norms and laws that are supposedly international. But a world order in which Asians and other developing countries are *norm-takers*, while the Western countries are the *norm-setters* and *-enforcers*, will not be viable because the division of labour is based neither on comparative advantages — Asia, no less than other continents, is home to some of the world's oldest civilizations with their own distinctive value-systems — nor on equity. The risk is under-appreciated because the international discourse in turn is dominated by Western, in particular Anglo-American, scholarship.[2] Asian and African voices are largely silent.

The Western roots of international humanitarian law and global norms

Of the three concepts — Asia, international humanitarian law and general international law — the first is the least problematic despite having its roots in Europe. Asia is a geographical construct (hence its unproblematic politics) devised by Europeans to differentiate the self from the other. In some minds the distinction is sharpened to "us civilized insiders" versus the "heathen outsiders". In reality the continent is far too diverse in virtually all respects — language, scripts, religion, culture, politics, economics, legacies of literary and philosophical discourse — to connote much practical content as a collective entity. Arguably, "West" Asians have more in common with

1 *Basic Facts about the United Nations*, United Nations, New York, 1998, pp. 267-268.

2 For yet another recent documentation of this, see Ersel Aydinli and Julie Mathews, "Are the core and periphery irreconcilable? The curious world of publishing in contemporary international relations", *International Studies Perspectives*, December 2000, pp. 289–303.

Europeans than with "East" Asians. It is difficult to trace a sense of common Asian identity either among the people or the cultural, political or commercial élites. Asia simply does not have the theory, history or practice of European integration. Asians lack the sense of regionalism that is evident, in however rudimentary a form, among Africans and Latin Americans. In other words, of all the inhabited continents Asia is the only one that does not have a sense of constituting one distinct identity. It is not surprising, therefore, that Asia has the least developed pan-continental institutions (political, economic, even sporting) of any of the inhabited continents.

International humanitarian law[3]

To the extent that Asians are bound by shared institutions, laws and norms, they are at the international rather than the continental level. International society is anarchic but not lawless. Anarchy indicates the absence of central government; *society* indicates the existence of shared norms and values.[4] Most norms and principles of international law are obeyed most of the time by most States.

The radically different roots of international humanitarian law are to be found in the tradition of *just war*, which focused not simply upon the circumstances leading to the initiation of hostilities (*jus ad bellum*) but also on the conduct of hostilities themselves (*jus in bello*).[5] This tradition, expressed most forcefully in Hugo Grotius's *De Jure Belli ac Pacis* (1625), was amenable to justification in both religious and secular terms, and found resonance in the political traditions of other faiths, such as Islam. Yet in its concrete form international humanitarian law was very much a product of the Enlightenment, which

3 This subsection is adapted from Ramesh Thakur and William Maley, "The Ottawa Convention on landmines: A landmark humanitarian treaty in arms control?", *Global Governance*, July–September 1999, pp. 275–277.

4 The classic statement of the apparent paradox remains that of Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Macmillan, London, 1977.

5 See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1992, and Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, Weidenfeld & Nicolson, London, 1983.

witnessed the rise of individualism as a counterpoint to the potency of *raison d'État* as sufficient justification for the unconstrained use of force. With regard to humanity in warfare, until the decisive shifts in social values, economic activity and political structures which came in the late eighteenth and early nineteenth centuries the "barbarous" East, as represented in literature by notorious figures such as Tamerlane, had no reason to feel morally inferior to the "civilized" West, whose leaders during the Thirty Years' War showed an equal indifference to the sufferings of foot soldiers and non-combatants.

A watershed event in the law's development, although its full significance became clear only in retrospect, was the Battle of Solferino of 1859. Fought by the Austro-Hungarian Empire and the Kingdom of Sardinia against France, the battle would have disappeared into the oblivion of obscure footnotes had it not been witnessed by a young Swiss businessman, Jean-Henry Dunant, who captured its horrors in a powerful memoir.[6] Dunant became the driving force behind the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. He devoted his energies to the establishment of what is now the International Red Cross and Red Crescent Movement, which continues to play a major role in the development and dissemination of international humanitarian law. Other hands took up the task of developing instruments to regulate the conduct of war, and two major streams of law developed:[7] the *Law of The Hague*, taking its name from the First and Second Hague Peace Conferences held in 1899 and 1907 which resulted in a number of treaties and declarations concerned with the conduct of hostilities; and the *Law of Geneva*, taking its name in particular from the 1864 Convention and subsequent treaties adapting the law to changed circumstances and culminating in the four Geneva Conventions of 12 August 1949 on the protection of war victims. The *Law of Geneva* deals with the wounded, sick and shipwrecked, prisoners of war, and

6 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986.

7 Frits Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1991, pp. 8–18. There is, of course, a significant overlapping of these streams; see Geoffrey Best, *War and Law since 1945*, Oxford University Press, 1994, pp. 183–184.

protected civilians, and even imposes limitations on what is permissible in armed conflicts "not of an international character".[8]

Treaties are a major source of international humanitarian law and are recognized as such in Article 38, paragraph 1, of the Statute of the International Court of Justice. Underpinned by the principles set out in the 1969 Vienna Convention on the Law of Treaties, their force derives from their reflecting the free consent of States to be bound by particular rules. Such consent no more compromises the sovereignty of the State than entering into a contract compromises the autonomy of an individual: it simply reflects the societal as opposed to the anarchical dimension of the international system.

Another important source is custom. One of the most famous passages in the laws of armed conflict — the so-called *Martens Clause* – is generally regarded as a codified statement of customary law, and as set out in the Preamble to the 1907 Hague Convention respecting the Laws and Customs of War on Land provides that inhabitants and belligerents "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". Furthermore, two of the most important principles governing the conduct of hostilities, namely *proportionality* and *discrimination,* are fundamentally customary in character,[9] although they have been reflected in the shape of various codified texts.

Custom has typically been traced back to two elements: a pattern of behaviour on the part of States, and a psychological dimension (*opinio juris sive necessitatis*). Analysts also recognize the possibility of "instant custom", in which evidence of a sufficiently powerful *opinio juris* can compensate for the absence of long-standing State practice. Resolutions of the UN General Assembly are clearly candidates for attention in this respect: almost three decades ago, Richard Falk

8 For a compilation of relevant instruments, see Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War,* 3rd ed., Oxford University Press, 2000.

9 See the views of the majority of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, and 35 ILM 814.

highlighted them in arguing for "a trend from consent to consensus as the basis of international legal obligations".[10] More recently, the expression "soft law" has emerged as a way of describing the prescriptions contained in such resolutions. It is a useful expression for characterizing rules which are technically non-binding as a matter of international law, but secure a high level of compliance.[11] The international system is replete with such rules, and while clothed in legalistic form, their efficacy derives from extra-legal considerations. Yet they are no less potent on this account. D. W. Greig has argued that such technically non-binding norms should be labelled "soft rules", and that the term "soft law" should be reserved for provisions which are technically binding, but give rise to obligations which are "vague or inchoate".[12] Again, "soft law" in Greig's sense is not necessarily without effect in international relations: it may play a role in setting standards which States should attempt to honour if they are not to meet with disapproval (muted or vocal) from other States or from interest groups within their own territory.

It should also be noted that while States can exempt themselves from customary legal prohibitions by pointing to a sustained pattern of objection, this will not protect them from being deemed to have committed violations of a peremptory norm of general international law (*jus cogens*), which Article 53 of the 1969 Vienna Convention on the Law of Treaties defines as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Linehan has argued that the norms which attract the clearest support for status as *jus cogens* "are the prohibition on the use of force, the right to self-determination and the prohibitions against genocide, racial discrimination, slavery, and piracy on the high seas".[13]

10 Richard A. Falk, *The Status of Law in International Society*, Princeton University Press, 1970, p. 177.

11 Paul C. Szasz, "General law-making processes", in Christopher C. Joyner (ed.), *The United Nations and International Law*, Cambridge University Press, 1997, pp. 32–33.

12 Donald W. Greig, "Sources of international law", in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi (eds), *Public International Law: an Australian Perspective*, Oxford University Press, Melbourne, 1997, p. 86.

13 Jan Linehan, "The law of treaties", *ibid.*, p. 107.

Norms and law

Thus international law and international norms provide mutual underpinnings to each other. International law as we know it was a product of the European States system. As argued above, even international humanitarian law has its roots essentially in Europe. The status of law is not as clear-cut in international relations as it is in domestic systems. What then of norms? At its simplest, there is a binary divide in meaning. A norm can be defined statistically to mean the pattern of behaviour that is most common or usual; that is to say, to refer to the "normal curve". Or it can be defined ethically, to mean a pattern of behaviour that should be followed in accordance with a given value system; that is to say, to refer to the moral code of a society. In some instances, the two different meanings may converge in practice; in most cases, they will complement or supplement each other; but in others, they may diverge quite markedly. For example, corruption among public officials and politicians is ubiquitous and pervasive in many countries, so much so that citizens who have to engage in dealings with the government become part of the web of corruption as bribe givers. And yet, simultaneously, there is among the people almost universal revulsion at the level of institutionalized corruption in the country. In other words, corruption is the norm in the statistical sense of the word, while in the ethical sense the norm is the very opposite, public probity.

Whichever definition we choose to adopt between the *is* and the *ought*, it is clear that norms and laws are alternative mechanisms for regulating human and social behaviour. Moreover, their role and efficacy change at different levels of social and political organization. *At the local level*, norms are far more important. Village society is governed principally by norms — that is what it makes it a society. *At the national level*, in modern societies laws take over from norms. But there must be a degree of congruence between the laws enacted by a parliament and the prevailing values — norms — of that society. Otherwise, not only will the laws be disregarded; habitual disobedience to particular laws will engender a more generalized disrespect for the system of laws, for the principle of a polity being governed by laws and all its players — rulers as well as citizens — being subject to

the rule of law. For example, the net effect of the ban by the Western-influenced elite in India upon centuries-old social practices among Hindus, such as dowry and caste discrimination, was to divorce the legal system from everyday behaviour rather than change entrenched social practices. At the *regional* level, norms are more important than laws. At the *international* level of analysis, finally, both norms and laws, including "soft" laws, are at work in shaping the behaviour of different classes of players.

The most effective form of behaviour regulation is complete convergence between laws and norms, for example with regard to murder. Conversely, the most problematic is when there is near-total dissonance, as with corruption, dowry and caste in India. We shall return to the implications of this proposition for our present discussion.

The Ottawa Treaty as an example

Because we have dealt with this subject elsewhere,[14] I do not propose to discuss at length here the implications of the Ottawa Treaty banning the manufacture, transfer and use of anti-personnel landmines.[15] Briefly, our argument is that the Ottawa Treaty makes more sense as a normative advance in international humanitarian law than as an arms control treaty. It purports to ban an entire class of weapons already in general and widespread use. As such it is without precedent in the history of arms control and disarmament. But it is also fatally flawed from the point of view of an arms control regime. This is so with respect to adherents: States that are among the most relevant to the landmines issue, including China, India, Pakistan and the United States, are not party to the treaty. It is just as true with respect to verification machinery: the Ottawa Treaty contains no monitoring, inspection and compliance clauses. What the Ottawa Treaty seeks to do, and succeeds in doing, is to establish a new norm against landmines. And it

14 *Op. cit.* (note 3), pp. 273–302.

15 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997.

anathematizes this class of weapons by pointing to the inhumane nature of the damage wrought by them when used *as designed to be used* (much like cigarettes). They are victim-activated, they cannot tell a soldier from a child, they cause injuries years after conflicts have ended, and so on. That is, they are contrary to international humanitarian law.

The example of the Ottawa Treaty begs the question of the process by which norms emerge and are globalized. How are they articulated and consolidated? Who interprets them, and who has the right to monitor them to ensure and, if necessary, enforce compliance? We know very little about the answers to these questions. Certainly the fact that the Ottawa Treaty was negotiated outside the United Nations Conference on Disarmament in Geneva, the world's only authentic and duly authorized standing multilateral forum on arms control, affected its legitimacy in the minds of some Asian leaders. Equally important, since they were not involved in drafting the clauses of the treaty, will they consider themselves morally bound by its prohibitionary *norms*? And if they do not, then what are the implications for the efficacy of the Ottawa Treaty in general?

The *norm-setters* behind the Ottawa Treaty were Canada, Norway and Austria. Norm generation by Western middle powers was reinforced by standard-setting by the UN Secretary-General when he endorsed the Ottawa process as the negotiating track and the convention which resulted from it. Asian nations were essentially consumers, neither producers nor retailers, of the new norm. The Canadians, for example, led the effort to proselytize Asian countries through two major back-to-back conferences and workshops in the region in July 1997 in Sydney and Manila.[16]

Human rights as a global norm

Part of the reason for the gathering strength of the anti-nuclear movement in the early and mid-1980s lay in the feeling that the two superpowers held the fate of humanity hostage to their bilateral relations. The logic of nuclear deterrence gave humanity the right to voice its preferences about the nuclear equation: "no

16 I had the privilege of chairing the four-day conference in Sydney.

annihilation without representation". International humanitarian law is concerned with protection of the humanitarian norm in the midst of armed conflict. What if the war itself is being fought over humanitarian norms?

Before that question can be answered, it must be contextualized within the broader global human rights norm. The Charter of the United Nations is the embodiment of the international political and moral code. It encapsulates the international consensus and articulates best-practice international behaviour by States and regional and international organizations. In 1948, conscious of the atrocities committed by the Nazis while the world looked silently away, the United Nations adopted in 1948 the Universal Declaration of Human Rights. On a par with other great historical documents like the French Declaration of the Rights of Man and the American Declaration of Independence, this was the first *international* affirmation of the rights held in common by all.

The Universal Declaration is a startlingly bold proclamation of the human rights norm. The two 1966 Covenants[17] added force and specificity, affirming both civil-political and social-economic-cultural rights without privileging either. Together they mapped out the international human rights agenda, established the benchmark for State conduct, inspired provisions in many national laws and international conventions, and provided a beacon of hope to many whose rights had been snuffed out by brutal regimes.

A right is a claim, an entitlement that may neither be conferred nor denied by anyone else. A human right, owing to every person simply as a human being, is inherently universal. Held only by human beings, but equally by all, it does not flow from any office, rank or relationship.

The idea of universal rights is denied by some who insist that moral standards are always culture-specific. If value relativism were to be accepted *in extremis*, then no tyrant — Adolf Hitler, Josef Stalin,

17 International Convention on Economic, Social and Cultural Rights, and International Convention on Civil and Political Rights, both of 16 December 1966.

Idi Amin, Pol Pot — could be criticized by outsiders for any action. Relativism is often the first refuge of repressive governments. The false dichotomy between development and human rights is usually a smokescreen for corruption and cronyism. Relativism merely requires an acknowledgement that each culture has its own moral system. Government behaviour is still open to evaluation by the moral code of its own society. Internal moral standards can be congruent with international conventions. Because moral precepts vary from culture to culture, this does not mean that different peoples do not hold some values in common. Few if any moral systems proscribe the act of killing absolutely under all circumstances. At different times, in different societies, war, capital punishment or abortion may or may not be morally permissible. Yet for every society, murder itself is always wrong. All societies require retribution to be proportionate to the wrong done. Every society prizes children, the link between succeeding generations of human civilization; every culture abhors their abuse.

The doctrine of national security has been especially corrosive of human rights. It is used frequently by governments, charged with the responsibility to protect citizens, to assault them instead. Under military rule, the instrument of protection from without becomes the means of attack from within.

An argument sometimes invoked for a policy of "See Nothing, Hear Nothing, Do Nothing" is that an activist concern would merely worsen the plight of victims. Prisoners of conscience beg to disagree. It is important to them to know that they have not been forgotten.[18] Lack of open criticism is grist to the propaganda mill of repressive regimes.

The United Nations — an organization of, by and for member States — has been impartial and successful in a standard-setting role, selectively successful in monitoring abuses, but feeble in

18 Nelson Mandela notes in his autobiography, for instance, that sanctions were the best lever to force changes on South Africa's apartheid regime, and even in the early 1990s he was still urging the US Congress not to loosen US sanctions as favoured by the Bush Administration; Nelson Mandela, *Long Walk to Freedom*, 1994, paperback ed., Abacus, pp. 697–699. He was unhappy that "[e]ven during the bleakest years on Robben Island, Amnesty International would not campaign for us on the ground that we had pursued an armed struggle". *Ibid.*, p. 734.

enforcement. Governments usually subordinate considerations of UN effectiveness to the principle of non-interference.

The modesty of UN achievement should not blind us to its reality. The 1948 Universal Declaration embodies the moral code, political consensus and legal synthesis of human rights. The world has grown vastly more complex in the fifty years since. The simplicity of language belies the passion of conviction underpinning them: its elegance has been the font of inspiration down the decades, its provisions comprise the vocabulary of complaint. Activists and non-governmental organizations (NGOs) use the Human Rights Declaration as the concrete point of reference against which to judge State conduct. The 1966 Covenants require the submission of periodic reports by signatory countries, and so entail the creation of long-term national infrastructures for the protection and promotion of human rights. United Nations efforts are greatly helped by NGOs and other elements of civil society. NGOs work to protect victims and contribute to the development and promotion of social commitment and enactment of laws reflecting the more enlightened human rights culture.

Between them, the UN and NGOs have achieved many successes. National laws and international instruments have been improved, many political prisoners have been freed and some abuse victims have been compensated. The United Nations has helped also by creating the post of a High Commissioner for Human Rights who has given the UN campaign a human face and a more public profile. The most recent advances on international human rights, like the Ottawa Treaty banning landmines and the Rome Treaty establishing the International Criminal Court,[19] are the progressive incorporation of wartime behaviour within the prohibitionary provisions of international humanitarian law.

Not quite universal

And yet — of the 51 founding members of the United Nations in 1945, only eight were geographically Asian: China, India,

19 Rome Statute of the International Criminal Court, 17 July 1998.

Iran, Iraq, Lebanon, Philippines, Saudi Arabia and Syria. As can be seen, of these only three are from Asia proper (the others belonging more to the Middle East than Asia in political terms). Even from within this tiny group of three, one (India) was still a British colony. If the UN Charter articulates the "global" political norm of its time, then why should Asians feel bound by it? Today, Asia accounts for more than half the world's population. But Asian countries make up only 26 per cent of the UN membership, and only 20 per cent of the UN Security Council's membership.[20] Thus the organization under-represents Asian countries, and seriously under-represents Asian peoples. Once again, therefore, why should UN-sourced "global" norms be construed as having binding effects on Asian internal and international behaviour?

Asians are neither amused nor mindful at being lectured on universal human values by those who failed to practice the same during European colonialism[21] and now urge them to cooperate in promoting "global" human rights norms. The displacement and ethnic cleansing of indigenous populations was carried out with such ruthless efficiency that the place of settler societies like Australia, Canada and the United States in contemporary international society is accepted as a given. The superiority of Western ways has remained a constant theme over the past few centuries, only the universal truths of Christianity have been replaced by the universal rights of humankind. Mahatma Gandhi, asked what he thought of European civilization, is said to have replied, "I think it is a very good idea". Gandhi of course had a pronounced sense of mischief. But the story, even if apocryphal, serves to illustrate the resentment of people whose societies are backed by centuries of civilization against presumptuous preaching by

20 For a discussion of the origins, evolution and limitations of geographical representation in the United Nations, see Ramesh Thakur (ed.), *What is Equitable Geographic Representation in the Twenty-first Century?*, United Nations University, Tokyo, 1999.

21 The seat of Europe today is Brussels. For a recent account of the scale of humanitarian atrocities committed by Belgium in its African colony, see Adam Hochschild, *King Leopold's Ghost*, Houghton Mifflin, Boston, 1999.

Westerners.

Western countries, including America, are quite happy to use Amnesty International reports as a lever with which to nudge other countries on human rights. But they are outraged at the idea that their own human rights record, for example with respect to the racial bias in the death penalty, might merit independent international scrutiny. The major Anglophile outpost in Asia is Australia. At the same time as many Australians preach universalism to Asians, Australia rejects the right of the United Nations or any outsider to comment on the plight of Aborigines. Between 1910 and 1970, 100,000 Australian aboriginal children were taken from their families and placed in white foster homes. The goal was to wipe out the 40,000-year-old Aboriginal culture through detribalization: assimilating the children into European civilization while the adults died out. The result was dispossession, dislocation and devastation of Australia's first inhabitants.

The official inquiry into the "stolen generation", chaired by Judge Sir Ronald Wilson, President of the Human Rights Commission, listened to the stories of 535 aborigines and received written submissions from another 1,000.[22] The 689-page report into the sorry saga used a UN definition — the deliberate extermination of a culture of one group through the forcible transfer of its children to another group — to conclude that the policy was one of genocide. The collective pain inflicted on two generations of Aborigines adds to the distress over their current plight. Their life expectancy is significantly lower than that of other Australians; their infant mortality is four times higher; they are grossly over-represented in the prisons; too many die in custody.

The report is compelling, painful, even harrowing. Many children were used as free labour or sex objects by those responsible for rescuing them from their primitive culture. Rape, child abuse, beatings and mental breakdowns were commonplace. One family engaged in ritual grieving over its stolen child every sunrise for 32 years. Publication of the report provoked shame and controversy. It avoided

22 *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, Sydney, 1997.

assigning guilt, preferring healing to retribution. Opposition leader Kim Beazley broke down and wept in parliament at the memory of the case studies. The government reacted angrily to the emotive charge of genocide and rejected the recommendations for an official apology, reparation and an annual "sorry day". In 2000, the government threatened to curtail cooperation with UN human rights agencies and inquiries because of their presumptuousness in investigating human rights in Australia. When Australians preach to Asians on human rights, they revive memories of the White Australia policy on immigration, whose structural continuity can be seen in parts of detention practices of illegal immigrants to this day.[23]

Australia is not alone in acting as though only non-Westerners should be targets of norms that are supposedly universal. Which rights that Westerners hold dear would they be prepared to give up in the name of universalism? Or is the concept of universalism just a one-way street — what we Westerners have is ours, what you heathens have is open to negotiation? Similarly, where is the borderline between universal norms of environmental, labour and children's rights protection, and disguised trade protection measures (i.e., non-tariff barriers)?

In other words, even if we agree on universal human rights, the question remains of the agency and procedure for determining what they are, how they apply in specific circumstances and cases, what the proper remedies might be to breaches, and who decides, following what rules of procedure and evidence. With world realities as they are today, the political calculus — relations based on military might and economic power, not to mention the nuisance value of NGOs — cannot be taken out. As far as many Asians are concerned, *that* is the problem.

23 See Amin Saikal, "Afghans are mistreated in Australia", *International Herald Tribune*, 4 January 2001.

From human rights to "humanitarian intervention"

The problem becomes more intractable when we slip across from human rights to armed intervention for humanitarian reasons. In international affairs, intervention can be defined broadly to mean just about anything that is done or said about an independent political entity by someone who is not a member of that entity. Or it can be defined narrowly to mean coercive interference by one State in the affairs of another State through the employment or threat of force. In medicine, it is commonly used to describe action taken to arrest and cure pathological conditions. In law-enforcement, it is an accepted part of the repertoire of community policing. In humanitarian crises, "low-level" humanitarian intervention to help with emergency relief and assistance, as indeed epitomized by the ICRC, is welcome and uncontroversial. At the high-politics end of international security, however, the term is used pejoratively to connote action that is illegitimate within the prevailing legal or normative order. Together, the two (range of meanings and impermissibility) produce the strange result that nations agree that intervention is unlawful, but disagree on what precisely is intervention.

Contrary to what many European governments claimed, the application of a right of "humanitarian intervention" in Kosovo was not self-evidently (self-righteously?) based in law or morality. During the Security Council debate on Kosovo in 1999, for example, the Sino-Russian draft resolution condemning bombing by the NATO forces was defeated by a vote of 12 to 3. Yet the Indian Ambassador claimed that since China, Russia and India had opposed the bombing, the representatives of half of humanity were opposed to the action.

Contemporary norms prohibit ill-treatment of citizens by their own States. But they also prohibit interference in the internal affairs of States. The UN Charter reflects this inherent tension between the intervention-proscribing principle of State sovereignty and the intervention-prescribing concern with human rights. For four decades after the signing of the Charter, State sovereignty was privileged almost exclusively, with the one significant exception of apartheid in southern Africa.

Venerable commentators assert that "[i]ntervention has become the new norm [in] a climate in which non-intervention appears as a dereliction of duty, requiring explanation, excuse or apology".[24] The assertion can be challenged both on empirical and doctrinal grounds. Claude's claim is surely easy to refute empirically. In 1999, intervention took place in just two cases (Kosovo and East Timor) from a universe of several where it could have been justified across Asia and Africa. Even East Timor is an arguable example. Since Indonesia's annexation had not been legally recognized by the UN, the international community could not legally be said to have intervened in internal Indonesian affairs.

But what of Claude's claim with regard to the ethical meaning of norms? Can we separate power politics from decisions that were made in Kosovo? The Kosovo campaign was a very good illustration of how different norms can come into conflict, and of the lack of institutional mechanisms for resolving such tension in the existing world order. The Security Council is the core of the international law-enforcement system. The precedent of having launched an offensive war without its prior authorization remains deeply troubling.

The doctrine of national sovereignty in its absolute and unqualified form, which gave rulers protection against attack from without while engaged within in the most brutal assault on their own citizens, has gone with the wind. But we cannot accept the doctrine that any one State or coalition can decide when to intervene with force in the internal affairs of other countries, for down that path lies total chaos. War is itself a major human tragedy: hence the paradox of armed intervention that can unleash still more all-round destruction. The use of force to attack a sovereign State is an extreme measure that can be justified only under the most compelling circumstances regarding the provocation, the likelihood of success — bearing in mind that goals are metamorphosed in the crucible of war once started —

24 Inis L. Claude, "The evolution of concepts of global governance and the State in the twentieth century", paper delivered at the annual conference of the Academic Council on the United Nations System (ACUNS), Oslo, 16–18 June 2000. Claude does note, however, that the new norm "has been no less challenged in principle and dishonored in practice than was the old norm of non-intervention".

and the consequences that may reasonably be predicted. Moreover, the burden of proof rests on the proponents of force, not on the dissenters.

Critics argued that NATO acted illegally in terms of its own constitution, the UN Charter, State practice, and on prudential grounds. This line of argument was articulated most forcefully by China, Russia and India (as well as Serbia). Under the UN Charter, States are committed to settling their disputes by peaceful means (Article 2, paragraph 3) and refraining from the threat or use of force against the territorial integrity or political independence of any State (Article 2, paragraph 4). Furthermore, Article 53, paragraph 1, empowers the Security Council to "utilize ... regional arrangements or agencies for enforcement action under its authority. *But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council*", with the exception of action against enemy States during the Second World War (emphasis added).

Neither the UN Charter nor the corpus of modern international law incorporates the right to armed intervention for humanitarian motives. State practice in the past two centuries, and especially since 1945, provides no unquestionably genuine case of such intervention. Moreover, on prudential grounds, the scope for abusing such a right is so great as to argue strongly against its creation. According to the weight of legal opinion and authority, the prohibition on the use of force has become a peremptory norm of international law from which no derogation is permitted and NATO was not permitted to contract out at a regional level. In this view, in circumventing the anticipated Security Council veto NATO repudiated the universally agreed rules of the game when the likely outcome was not to its liking. The prospects of a world order based on the rule of law are no brighter. The overriding message is not that force has been put to the service of law, but that might is right.

Over the course of the twentieth century, the international community placed many legislative, normative and operational fetters on the rights of States to go to war without international authorization. Progress was slow, difficult and protracted. After the Second

World War, the focus of all such efforts was centred on the United Nations. The Kosovo war was a major setback to the cause of slowly but steadily outlawing the use of force in solving disputes except under UN authorization. The argument that NATO had no intention to set a precedent is less relevant than that its actions were interpreted by others as having set a dangerous precedent.

NATO leaders argued that military action outside the UN framework was not their preferred option of choice. Rather, NATO's resort to force was a critical comment on the institutional hurdles to effective and timely action by the United Nations. The lacuna in the architecture of the security management of world order that was starkly highlighted by the NATO bombing needs to be filled. While NATO action was not explicitly authorized by the United Nations, it was an implicit evolution from UN resolutions, and certainly not prohibited by any UN resolution. NATO's campaign against Serbia took place in the context of a history of defiance of UN resolutions by Yugoslav President Slobodan Milosevic. Serbian atrocities in Kosovo challenged some of the cherished basic values of the United Nations. Had Milosevic been allowed to get away with his murderous campaign of ethnic cleansing, the net result would have been a fundamental erosion of the idealistic base on which the UN structure rests.

Over the years, the Security Council had become increasingly specific in focusing on human rights violations by the Milosevic regime, not by both sides; and increasingly coercive in the use of language threatening unspecified response by the international community. The Russian and Chinese draft resolution of March 1999 condemning NATO action received the support of only one other member of the Security Council, Namibia; the remaining 12 members voted against it. (Although India was granted permission to speak in the debate, it was not at that time a member of the Security Council.) Moreover, the Security Council had relied progressively on NATO as its enforcement arm in the Balkans over the 1990s. Its actions in Kosovo were thus a logical extension and evolution of a role already sanctified by the Security Council. NATO action was not a regression to old-style balance-of-power politics, but a progression to new-age community of power. After all, in values, orientation and finan-

cial contributions, some of the NATO countries, for example Canada and the northern Europeans, represent the best UN citizen-States.

Faced with the controversy arising from different first principles, we come back to the same set of operational dilemmas: who decides, by what right and authority, following what rules of procedure and evidence, that atrocities have been committed requiring external intervention? How do we weigh in the balance the costs of not doing anything against the international and long-term consequences of going to war without due process?

If NATO can do so with regard to Kosovo without authorization by the Security Council, then why not the Arab League with regard to Palestine today? To say that they lack the power or military capacity to do so is to say that might is right. Similarly, would we accept former or present Israeli leaders being put on trial for crimes against humanity by a tribunal that was set up essentially by the Arab League, funded by them and dependent on them for collecting crucial evidence through national intelligence assets and for enforcement of arrest warrants? How plausible is the argument that the decade-old sanctions on Iraq are responsible for one of the great human atrocities of our times — more deaths than caused by all the weapons of mass destruction throughout the twentieth century,[25] in violation of the laws of war requirements of proportionality and of discrimination between combatants and civilians?[26] Who is to decide the answer to this question and, if the answer is in the affirmative, what is to be done against the perpetrators?

Many Asian countries are former colonies who achieved independence on the back of extensive and protracted nationalist struggles against the major European powers. The party and leaders at the forefront of the fight for independence helped to establish the new

25 John Mueller and Karl Mueller, "Sanctions of mass destruction", *Foreign Affairs*, May/June 1999, pp. 43–53.

26 See Joy Gordon, "A peaceful, silent, deadly remedy: The ethics of economic sanctions", *Ethics & International Affairs*, Vol. 13, 1999, pp. 123–142; Drew Christiansen and Gerard F. Powers, "Economic sanctions and just-war doctrine", in David Cortright and George A. Lopez (eds), *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World*, Westview, Boulder, 1995, pp. 97–120; Albert C. Pierce, "Just war principles and economic sanctions", *Ethics & International Affairs*, Vol. 10, 1996, pp. 99–113; and Adam Winkler, "Just sanctions", *Human Rights Quarterly*, Vol. 21, 1999, pp. 133–155.

States and shape and guide the founding principles of foreign policies. The anti-colonial impulse in their world view was instilled in their countries' foreign policies and survives as a powerful sentiment in the corporate memory of the Asian élites. For most Westerners, NATO is an alliance of democracies and as such a standing validation of the democratic peace thesis. For most Asian ex-colonies, however, the most notable feature of NATO is that it is a military alliance of former colonial powers: every former European colonial power is a member of NATO. It is simply not possible to understand the strength of India's reaction to the 1999 war in Kosovo without first appreciating the significance of the trauma of historical input: countries that in previous centuries had carved up Africa and Asia were now carving up central Europe and pursuing familiar policies of divide-and-leave. NATO and Europe do not own the copyright on moral outrage. For many Asians, the norm of non-intervention remains a moral imperative, not simply a legal inconvenience to be discarded at the whim and will of the West. They were morally outraged at its violation by NATO in 1999.

The reason for much disquiet around the world about NATO military action in Kosovo was not because those countries' abhorrence of ethnic cleansing is any less. Rather, it was because of their preference for an order in which principles or values are embedded in universally applicable norms, and the rough edges of power are softened by institutionalized multilateralism. Even Japan, the staunchest of US Asian allies, neither condemned (because it understood the provocation) nor condoned (because it was unhappy with the circumvention of the UN) NATO bombing.

United Nations and norm generation

The Kosovo war brought to a head the risk of the world's pre-eminent international organization and indispensable power marching down separate paths with potentially fatal consequences for world order. In today's unstable world full of dangerous and complex

27 These issues are explored in full detail in Albrecht Schnabel and Ramesh Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, United Nations University Press, Tokyo, 2000.

conflicts, we face the painful dilemma of being damned if we do and damned if we don't:[27]

- To respect sovereignty all the time is to be sometimes complicit in human rights violations.
- To argue that the UN Security Council must give its consent to armed intervention on humanitarian grounds is to risk policy paralysis by handing over the agenda to the most egregious and obstreperous.
- To use force unilaterally is to violate international law and undermine world order.

The bottom-line question is this: faced with another Holocaust or Rwanda-type genocide on the one hand and a Security Council veto on the other, what would we do? Because there is no clear answer to this poignant question within the existing consensus as embodied in the UN Charter, a new consensus on external armed intervention is urgently needed. Logically, there are five alternatives:

- Any one country/coalition can wage war against a country or group outside the coalition — a recipe for international anarchy.
- Only NATO has such a right with respect to launching military action against a non-NATO country — a claim to unilateralism and exceptionalism that will never be conceded by Asia and the "international community".
- Only NATO has the right to determine if military intervention, whether by NATO or any other coalition, is justified against others outside the coalition. Such a position is implicit in the argument by some European leaders and commentators that NATO's actions in Kosovo cannot be construed as having set a precedent. The assumption underlying the claim is both demonstrably false, as argued above with respect to Russian actions in Chechnya, and almost breathtakingly arrogant in setting up NATO as the final arbiter of military intervention by itself or any other coalition.
- A regional organization can take military action against one of its errant members (e.g. the Organization of African Unity against deviant OAU members, or NATO against deviant NATO members) if they have agreed in advance to such rules of the game for governing internal relations, but not against non-members.

- Only the United Nations can legitimately authorize armed intervention.

The fourth and fifth options pose the fewest difficulties. The urge for humanitarian intervention by powerful regional organizations outside their own area of operations must be bridled by the legitimating authority of *the* international organization. The only just and lasting resolution of the challenge to intervene on humanitarian grounds would be a new consensus proclaimed by the peoples of the world through their governments at the United Nations and embodied in its Charter.

Intervention that is authorized by the United Nations entails the presumption of legitimacy, that which is not so authorized bears the presumption of illegitimacy. But there are exceptions to both parts of the proposition. In the United Nations system, the normative centre of gravity is the General Assembly, but the geopolitical centre of gravity and the enforcement body is the Security Council in which the Asian peoples are grossly under-represented. The preferences of the two can be at odds.

There is an additional caveat. In national systems, bills passed into law by the legislature and actions of the executive arm of government can be found, by judicial review, to violate constitutionally guaranteed rights of citizens. In principle, Security Council resolutions could similarly violate the rights of member States guaranteed by the UN Charter. But there is no mechanism to hold the Security Council to independent international judicial account for its actions. Given the unrepresentative nature of the Council, there are occasional tremors of apprehension among developing countries about the potential for the UN, which they see as the best protection that the weak have against the strong in international affairs, to become instead the instrument for legitimating the actions of the strong against the weak. Thus, authorization by the United Nations is not a sufficient condition of international legitimacy. Conversely, it may not even be a necessary condition: simply because the UN has not authorized it does not mean that a particular intervention in any given instance is automatically illegitimate. But the overwhelming majority of such cases over time will be deemed to be illegitimate.

Conclusion

International humanitarian law neither develops nor operates in a vacuum. It has to be placed within its particular temporal and political contexts. In particular, norms and international law are the two end points on the continuum along which international humanitarian law needs to be located. The threshold of the new millennium is also the cusp of a new era in world affairs. The business of the world has changed almost beyond recognition over the course of the last one hundred years. There are many more players today, and their patterns of interaction are far more complex. The locus of power and influence is shifting. The demands and expectations made on governments and international organizations by the people of the world can no longer be satisfied through isolated and self-contained efforts. The international policy-making stage is increasingly congested as private and public non-State players jostle alongside national governments in setting and implementing the agenda of the new century. The multitude of new players adds depth and texture to the increasingly rich tapestry of international civil society.

In today's seamless world, political frontiers have become less salient both for international organizations, whose rights and duties can extend beyond borders, and for member States, whose responsibilities within borders can be held to international scrutiny. The gradual erosion of the once sacrosanct principle of national sovereignty is rooted today in the reality of global interdependence: no country is an island unto itself any more. Ours is a world of major cities and agglomerations, with nodes of financial and economic power and their globally wired transport and communications networks. Cumulatively, they span an increasingly interconnected and interactive world characterized more by technology-driven exchange and communication than by territorial borders and political separation.

In a world in such a state of flux, there are problems enough with efforts to provide philosophical underpinnings to global norms. The difficulties multiply when we move to the operational realm of giving policy shape and content to them. Yet the difficulties must somehow be overcome if we are to make the transition from the culture of impunity for crimes against humanity of yesteryear towards a culture of accountability.

Norms are effective as a behaviour-regulating mechanism

only if they are accepted as legitimate by the target player — whether Israel, India, Japan or the USA. We, as the international community, need in every particular instance either:

- to forge a genuine normative consensus; or
- to make realistic assessments of our capacity to coerce recalcitrant players versus their capacity to break out of the constraining regime.

Rules and regulations that have already attained the status of binding provisions of international humanitarian law do not need the same requirement of internalization by the intended target countries. But there is the very grave danger that "cherry picking" articles of international humanitarian law or of other parts of international law to suit one's partisan interests of the day will undermine respect for the principle of world order founded on law. That is to say, the normative consensus on which law rests will begin to fray and the international order will risk collapsing. The dangers of this are magnified because of the potentially competing and conflicting norms and principles at play on most controversial/important issues, such as landmines, nuclear weapons or intervention for humanitarian reasons.

In many Asian minds, there is bemusement at the confusion. But there is also resentment that, yet again, Asians seem to be consigned to being norm-and-law-takers, not setters. Many of the twentieth-century advances in globalizing norms and international law have been progressive and beneficial. However, their viability will be threatened if developing countries are not brought more attentively into the process of norm formation, promulgation, interpretation and articulation; that is, made equal partners in the management of regimes in which international norms and laws are embedded.

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Résumé

Normes universelles et droit international humanitaire : perspective asiatique

par RAMESH THAKUR

La communauté internationale, telle qu'elle est organisée actuellement, est l'œuvre des pays occidentaux. Ainsi, parmi les 51 États qui ont fondé les Nations Unies en 1945, on ne compte que huit États du continent asiatique. Il en est de même du droit international humanitaire moderne et codifié : c'est un « produit » occidental. Certes, les États asiatiques acceptent les valeurs à la base des traités de droit humanitaire, mais l'auteur attire notre attention sur les divergences de vues qui peuvent surgir dans le choix des moyens utilisés pour leur mise en œuvre. En parlant de l'action humanitaire, il faut se rappeler que ce sont souvent d'anciens États coloniaux qui en assurent activement la promotion. Les frontières disparaissant, il faut trouver de nouvelles justifications aux règles internationales, dont celles du droit international humanitaire. Il est urgent d'associer à ce processus les pays qui n'y participaient pas jusqu'à ce jour, à savoir, les pays en développement. Un nouveau consensus pourra ainsi se faire jour qui renforcera les fondements du droit international humanitaire.