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Review essay
Pandora's box?: humanitarian intervention and international law

First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia
By David N. Gibbs, Nashville: Vanderbilt University Press, 2009.
327 pp.
ISBN 978-0-82651-644-2 £24.95 paperback

International Law and its Others
Edited by Anne Orford, Cambridge: Cambridge University Press, 2009.
436 pp.
ISBN 978-0-52112-446-1 £29.99 paperback

Humanitarian Intervention: Confronting the Contradictions
By Michael Newman, London: Hurst and Co, 2009.
256 pp.
ISBN 978-1-85065-974-7 £15.99 paperback

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Introduction

The three books reviewed here all address the question of the efficacy of international law and advance concerns about its future trajectory, albeit in contrasting ways. As has been well documented, the role of international law – specifically in the regulation of the use of force – has undergone significant scrutiny in the post-Cold War era. To a much greater extent than during the Cold War, contemporary conflicts and crises are invariably discussed with reference to international law, and the legality of a particular use of force has become a significant factor in assessing its legitimacy; one need only think of the importance placed on the legality of the 2003 invasion of Iraq. This increase in prominence suggests that international law has become more important, and unsurprisingly those used to the discipline's previous role as *exotic curio* have welcomed this sudden promotion (Robertson, 2000).

In addition to the rise in prominence of international law in public and political discourse, recent years have witnessed a surprising new interest in the law from within the discipline of International Relations (IR). Long derided as essentially irrelevant, today international law is keenly debated within IR and the two disciplines are now certainly in contact, if not yet connected.

These positives have, however, come at a cost. The new focus on international law has, unsurprisingly, led to greater scrutiny of its tenets from outside as well as inside the discipline. This has unearthed a number of unpleasant truths previously obscured by the old idea that law was irrelevant. Indicatively, when IR scholars came to accept that international law had a role, many operated according to the notion that the written law enshrined sovereign equality and was designed to promote egalitarianism. Gerry Simpson's *Great Powers and Outlaw States* (2004),

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however, debunked this myth (and many others). The attraction of international law for IR specialists – particularly in the context of humanitarian intervention – was its ostensibly factual and objective foundations. Many craved the clarity we imagined it would bring by virtue of its (ostensibly) inherent freedom from politics and morality. Clearly this image of international law as definitive, as egalitarian, ultimately as a panacea, does not equate with the reality.

Additionally, while legal terms, and references to legal texts, now abound in political discourse and IR literature, it is not at all clear that this constitutes evidence of law's increased importance. Indeed, one could argue that the proliferation of references to the law is evidence of a new instrumental approach to the discipline and its tenets, whereby legal discourse is utilised to provide a veneer of authority to coat a subjective statement or political act. There is perhaps a lesson to be learnt from the fate of religion, which has often been cynically employed to excuse otherwise unpalatable acts, with obviously detrimental consequences for religion's popular perception.

Who is international law?

The contributors to *International Law and its Others* are (unashamedly) confused, critical and at times outraged by the rationale behind international law, its origins and its tenets. Indeed, this book reveals a profound existential crisis, with questions raised about the very notion that there is such a thing as 'international law'. Indicatively, Hilary Charlesworth and David Kennedy note: 'The more we looked at international law and its others, the less clear it became that the "international law" we were talking about was the same thing. There turns out to be more than one international law' (p. 404). They observe that, as a result, 'what had seemed legal judgements come into sharp relief as personal decisions' (p. 404). International law thus becomes 'a series of professional performances rather than an edifice of ideas and doctrines' (pp. 404–405). The question 'Who?' permeates this book: 'Who are the subjects?' 'Who speaks for the subjects?' 'Who creates/interprets the laws?' 'Who is outside the law?' and, ultimately, 'Who is the law for?'

Throughout the book various truisms are exposed as falsehoods: in the 'Introduction', Anne Orford describes the popular idea that the sovereign state depends upon exclusive jurisdiction over fixed territory and effective control over the inhabitants within as 'a powerful fantasy' (pp. 8–9). From this starting point of imagined and exaggerated jurisdiction, the theme of subject/other, insider/outsider is established. International law is held to be founded on exclusion – indeed to thrive on exclusion – and to expose its own inadequacies and faults most obviously at the intersection between the insiders and the outsiders, particularly in the context of issues such as humanitarian intervention and the war on terror.

The contemporary era has witnessed a proliferation of proposals for protecting human rights by altering international law. The implicit (if not at times explicit) assumption is that international law is a positive, universalising, force for change and a means by which (ostensibly) universal human rights can be actualised. The contributors here, by contrast, challenge this conception of an all-embracing, and ever-embracing, international legal system and paint an altogether less benign portrait. While a common theoretical disposition towards post-structuralism is evident throughout, there is no coherent narrative or set of answers in this book but rather a series of questions and exposed dilemmas. This is to be welcomed, and the various contradictions and paradoxes – within and between chapters – add greatly to the book's appeal.

While sovereignty has become synonymous with exclusion, Costas Douzinas argues that the initial effect of the establishment of sovereign rule and the codification of domestic law is unifying: the establishment of a locus of legal power and the legal rulings articulated by this authority 'transform[s] sovereignty from an expression of plural beings together into that of a singular body politic' (p. 44). Cosmopolitanism, Douzinas warns, speaks of inclusivity but '[t]here

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can be no community at the global level and jurisdiction, rather than expressing autonomy and self-constitution of community, marks its heteronomy and decline' (p. 55). Yet, as Ian Duncanson notes, historically the proliferation of sovereignty has often been predicated on the creation of an 'other'. Citing the aftermath of World War I as an example, he writes: 'Self-determining sovereignty was an apparently liberating doctrine of citizenship, but one which then immediately cut its exclusionary teeth on a diet of displaced persons' (p. 62). It is not possible therefore to equate cosmopolitanism or sovereign inviolability with either exclusion or inclusion.

Many lament the extent to which the international legal system supports the proliferation of hierarchy, inequality and oppression while presenting a self-image of emancipation and fairness. Orford criticises the emancipatory conception of international law presented by Martii Koskenniemi, comparing this to 'messianic themes' which serve 'to act as yet another mask for the civilising missionary' (p. 202), while Antony Anghie likewise asserts 'international law is fundamentally animated by the civilising mission' (p. 394). There is an obvious doubt among the contributors as to the place of the international lawyer and especially his/her relationship with power. David Kennedy, focusing on what he sees as the subsuming of the humanitarian agenda by the military, cautions that those eager to change the system must 'relate to power pragmatically, consequentially, functionally – in a word, realistically' (p. 137). Charlesworth and Kennedy ultimately claim that, despite the hype, 'we should accept that we will only ever have a minor direct impact on the generation of foreign policy' (pp. 407–408). Indeed, the findings of the various enquiries into Kosovo and Iraq suggest that there is a sufficient array of legal advice available to justify all but the most egregious violations of international law, and the choice of lawyer then is a matter of political expediency rather than a function of professional repute.

The post-structuralist concern with identity and self-constitution through the creation of 'the other' is a theme explored in many of the chapters. This is perhaps most evident in Juliet Rogers's analysis of the determination in the West to outlaw female genital mutilation. The language and imagery of female genital mutilation used during the drafting of related legislation, she argues, 'enables the production, in fantasy, of an ideal subjectivity of the "non-mutilated" subject. The Western "I" is comparatively a non-mutilated subject able to retain all its bits' (p. 358). What, however, are we expected to take from this? That the drafting of legislation banning female genital mutilation is somehow to be construed as a negative development or a subconscious nefarious plot? This particular query is indicative of a broader concern that less cerebral readers may have with this volume, namely that it is at times somewhat indulgent, with a tendency to be overly conspiratorial and somewhat formulaic; Agamben and Derrida are ubiquitous figures throughout, and there is often an unconvincing attempt to discern hidden meaning in almost every word uttered by policy-makers and politicians. Obscure analogies are frequently drawn between ostensibly revealed hidden meanings and protagonists of literary or biblical fiction (often Abraham), and, having made the connection between, for example, Donald Rumsfeld and Antigone, a new narrative is 'uncovered' and dissected. At times, the initial focus of analysis is subjected to so much interpretation and analogising that there is a bewildering chasm between the actual event/speech/issue and the final critique. Indicatively, Judith Grbich begins by discussing the Rwandan genocide and concludes by cryptically asserting: 'We have remained as creatures of images of abandoned beings for a long time' (p. 219). This is certainly not a book that will dispel the popular myth that academics live in ivory towers.

Yet, abstract and at times egregiously cerebral as many of these reflections may be, there is no doubt such work has an important function: as Florian Hoffman notes, critiques of human rights have too often been glibly dismissed with the result that 'it seemed possible … to spend an entire working life "doing" human rights without ever stepping back to reflect on why one was actually doing them, on what ground and with what final vision of the world and the human beings in it' (p. 221). Within the burgeoning literature, he argues, 'it seemed self-evident that human rights

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were both real and good, and that their absence essentially denoted intolerable human suffering' (p. 221). The notion that promoting human rights is axiomatically positive forecloses much important debate and ignores many essential existential questions. Likewise, the attendant notion that drafting international laws on human rights is progressive is open to debate. This fascinating and unique collection of essays will appeal greatly to those uncomfortable with the contemporary ascendency of international law, who wonder at its trajectory and the motivation behind its newly exalted status.

History as war by other means

The implosion of the Socialist Federal Republic of Yugoslavia is of seminal import to contemporary debates on international law. The bloody disintegration straddles a number of key themes in international law, such as the right to secession, criminal responsibility and humanitarian intervention, and remains an oft-ploughed field of research. The popularity of this case-study has, of course, led to the proliferation of many very different historical narratives. According to Tim Judah, in the Balkans 'history is war by other means' (2000, p. 1) and, judging by the steady proliferation of literature offering contrasting accounts of various issues and incidents during the break-up of the land of 'brotherhood and unity', this statement can be broadened beyond the Balkans. It is perhaps fitting that the land synonymous with division and 'ancient ethnic hatreds' has catalysed bitter partisanship within Western academia.

David N. Gibbs articulates a very controversial perspective on the role of the 'international community' – especially the US – that stands in stark contrast to the majority of sources which generally criticise the West for not doing enough. Gibbs, by contrast, argues that external actors did *too much* and are implicated in the destruction of Yugoslavia.

Gibbs argues that two myths have proliferated about the implosion of Yugoslavia: first that the Serbs – and specifically Slobodan Milošević – were primarily responsible for the carnage; second that the international community didn't react quickly enough to events and was generally reluctant to become involved. Gibbs argues that while Milošević 'was surely a villain' he was but one among many which included in particular Croatian President Franjo Tudjman and Bosnian President Alija Izetbegovic (p. 46). Gibbs goes to greater lengths, however, to dispel the myth that the causes of the conflict were endogenous, emphasising in particular 'the culpability of the Western financial community … in contributing to [Yugoslavia's] deterioration' (p. 75). Economic collapse, he argues, was caused by the World Bank and others, which precipitated the emergence of ethnic tensions. When these tensions erupted in the late 1980s, and especially the early 1990s, certain states in Europe, so Gibbs claims, actively promoted secession. 'By early 1991', Gibbs argues, 'Germany was consolidating a sphere of influence in the Balkans' as part of its new determination to flex its muscle post-reunification (p. 80).

Gibbs's greatest criticism, however, is reserved for the US. He maintains that a unique coincidence of factors contrived to convince the US to take an interest in Yugoslavia, which enabled Washington to execute a broader nefarious agenda. With the end of the Cold War, the US, Gibbs maintains, had lost its utility as protector – and hence leader – of Europe and the free world. This created a need to reinvent the US's role, and humanitarian intervention 'formed the main justification for US hegemony' (p. 16). The US determined to reinvigorate NATO by refocusing its *raison d'être* towards humanitarian intervention. This enabled the US to counter the emerging EU independent military capability and ensure continued US primacy in military affairs (p. 27). Reinvigorating NATO 'required enemies' and Milošević and the Serbs served this function (p. 43).

With respect to the legality of the Western response to the break-up of Yugoslavia, Gibbs adopts a traditional approach, arguing that the law served only to provide an additional rhetorical cover for manifestly illegal actions. In relation to the occasional obvious lack of legality, such as the

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intervention in Kosovo in 1999, Gibbs argues that humanitarianism was cynically employed to 'endow intervention with extralegal legitimacy' (p. 9). The fact that international law was so easily discarded and manipulated during the Yugoslav crises, he asserts, stimulated a pattern whereby the US believed itself capable of acting outside the law provided it presented its actions in a similar way to its interventions in the Balkans in the 1990s. Thus, while in the wake of the controversy surrounding the 2003 invasion of Iraq the Yugoslav wars have come to be remembered with nostalgia, there is a causal link between the rhetoric and methods employed in the Balkans and later interventions during the war on terror (p. 205).

The title of Gibbs's book comes from the Hippocratic Oath sworn by medical professionals, an analogy previously employed by Noam Chomsky (1999). Gibbs's conclusion reflects this maxim: 'sometimes the best course of action is to take no action ... Perhaps the same cautions should apply with regard to humanitarian crises' (p. 222). While it is certainly true that the so-called 'do something brigade' of NGOs (non-governmental organisations) and concerned citizens have too often issued knee-jerk appeals for action, it is debatable whether Gibbs's advice contributes much. Historically there has been a deficit of humanitarian intervention: as Simon Chesterman wrote, there have been far more instances of 'in-humanitarian non-intervention' than cynical interventions legitimised as humanitarian (2003, p. 54). There are certainly cases where to intervene would likely exacerbate the problem but 'likelihood of success' has long been one of the *jus ad bellum* criteria of the just war tradition (Hehir, 2010, p. 24). 'Do no harm' has definite applicability – and perhaps particular relevance to the response to the disintegration of Yugoslavia – but a limited applicability. This caution can be, and indeed has been, used to justify illegitimate non-intervention – think of Rwanda in 1994 and Darfur in 2004 – and does not readily constitute a solution to the myriad problems posed by humanitarian intervention.

Additionally, in his quest to balance the historical record Gibbs has a tendency to exaggerate the violent impulses of the 'victim' group: Izetbegovic's government, he claims, 'was just as intolerant and prone to violence as its Serb adversaries' (p. 114). While the Bosnian Muslims were certainly not the passive victims the Western media invariably portrayed them as, this claim is difficult to sustain. Gibbs also credits the administrations of George Bush senior and Bill Clinton with a degree of Machiavellian cunning and foresight that does not square with the historical record of indecision, error and infighting (see Bellamy, 2002; Gow, 1997; Mandelbaum, 1999). While *First Do No Harm* is a very well-researched book that challenges a number of questionable myths surrounding the response to the break-up of Yugoslavia, Gibbs's conclusions about humanitarian intervention and more broadly the efficacy of international law are quite conservative and lack an obviously helpful set of prescriptions for overcoming the many problems he comprehensively outlines.

Grasping the nettle?

While *International Law and its Others* addresses a number of the dilemmas within international law and *First Do No Harm* outlines the extent to which in practice international law appears to have limited relevance, *Humanitarian Intervention: Confronting the Contradictions* seeks to resolve a number of conceptual and practical problems specifically associated with humanitarian intervention. There has been a proliferation of literature about humanitarian intervention in the post-Cold War era (albeit somewhat stemmed by the war on terror) and disappointingly the vast majority has been either derivative or dogmatic and thus ultimately of limited utility. It is not difficult to write a book excoriating the idea of humanitarian intervention from a realist or Marxist standpoint without addressing the question of how we should respond to a Rwanda-type crisis, and likewise it takes little effort to draft grandiose clarion cries extolling the virtues of 'human security' or 'cosmopolitan humanitarianism' without detailing how such utopian ideals can be achieved. Michael Newman must be commended, therefore, for seeking to transcend the

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often circular and introverted debate by advancing a proposal for, as he puts it, 'confronting the contradictions'.

Newman aims 'to establish a theoretical proposition in favour of humanitarian intervention as a possibility, so that it cannot be precluded on principle' (p. 7). The first argument against humanitarian intervention that Newman confronts is that such action is contrary to both the spirit and the letter of international law regarding state sovereignty. He correctly notes that 'sovereign inviolability' has been routinely touted as an almost sacred principle that will be forever lost if humanitarian intervention becomes an accepted legal and political principle. While statesmen and academics from a variety of disciplines and theoretical schools have advanced this claim, Newman convincingly argues that this idea of sovereign inviolability has never been matched by reality, at least since the UN Charter was signed in 1945 (p. 11). There have always been limits on the powers enjoyed by sovereign states, he argues, and it is disingenuous to claim otherwise.

Newman is equally mindful, however, of the historical record; like Gibbs, he notes that humanitarian rhetoric has often been employed to legitimise inhumanitarian action and he draws parallels between the invasion of Iraq and the discourse of humanitarian intervention – especially the 'illegal but legitimate' argument – articulated in the 1990s. This evolution was not a coincidence, he maintains, but rather the result of 'American attempts to reduce the centrality of the UN as the basis for legitimacy in legal and normative terms' (p. 81). Newman departs from Gibbs, however, in his determination to separate the need for humanitarian intervention from the record of humanitarian intervention. He argues that 'while it is true that human rights diplomacy can be used for imperialist purposes, it is hardly sufficient to provide a rhetorical denunciation that seems blind to the reality of appalling abuses carried out by some governments' (p. 83). This is the starting point for Newman's prescriptions; he argues that there is a need for 'an alternative notion of humanitarianism that helps to differentiate between an exception case for military intervention and unwarranted interventions' (p. 84). The concept of humanitarianism has, he claims, traditionally been defined too narrowly and he supports, and advances, a broader definition that 'may be used to provide a critique of current international policies in relation to developing and transitional countries' (p. 84).

Newman initially argues that the idea that intra-state conflicts are caused by endogenous factors has to be dispelled. Like many of the chapters in *International Law and its Others* and Gibbs's analysis of the catalysts for the disintegration of Yugoslavia, Newman draws a causal link between 'changes in international political economy and the policy prescriptions that accompany them' and the outbreak of ethnic tensions and civil unrest (p. 112). Additionally, he criticises the early introduction of democracy and capitalism into post-conflict and post-communist states, asserting that this creates 'an explosive cocktail' which often exacerbates underlining societal tensions (p. 117).

While Newman is supportive of the ethos underpinning the 'Responsibility to Protect' concept, he argues that it placed insufficient emphasis on prevention (p. 190) and that its effectiveness is predicated on its being underpinned by 'a wider development agenda' (p. 211). Newman laments the fact that, as he sees it, NGOs and the broader global civil society movement allowed themselves to cohere with the strategy pursued by major states with respect to the Responsibility to Protect, which was narrowly focused on responding to mass atrocities rather than changing the dynamics of the international system – both economically and politically – so as to ensure a more equitable distribution of resources and power that would prevent the periodic eruption of these crises (pp. 214–15).

The central premise of the book, therefore, and the primary means by which the 'contradictions' can be 'confronted', is the need for a holistic approach to humanitarian intervention which would involve fundamental structural change. As a theoretical proposition this is not in itself necessarily dubious (nor especially unique), and Newman convincingly links structural inequality with

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societal disruption through case-studies on Angola and Rwanda. What is arguably missing here, however, is a coherent set of steps by which the structural change he advocates can be achieved. He writes that 'rich states should be adopting economic and political policies that help developing and transitional countries, rather than policies that reinforce the instabilities' (p. 198). Perhaps morally they should, but would such action be prudent both economically and politically? What powerful state would voluntarily risk domestic outrage by initiating such a selfless act? Is there any precedent for such altruism? The answers to these questions suggest that ethically appealing prescriptions such as this must be grounded in a sound cost/benefit analysis which favours such a policy change. This is lacking.

The argument that expanding the definition of humanitarianism constitutes the basis of a lasting solution seems to lack real utility other than to act as a counter to claims that humanitarian intervention fails to get to the source/root of the problem. There is certainly some merit to the argument that debates on humanitarian intervention often neglect to interrogate the international and regional contexts and in particular the fundamental international inequality which is behind many of the problems in so-called 'failed states' and 'trouble zones'. Certainly, in broad terms, any proposed solution to the perennial cycle of intra-state crises must include provisions and recommendations for substantial reform of the international system (in both economic and political terms). Earlier in the book, Newman criticises Mary Kaldor for 'bury[ing] the notion of "humanitarian intervention" within a concept of "human security"' (p. 79) on the basis that such a broad agenda lacks specifics, and yet his own prescriptions appear to do the same. While we await both Newman's hypothetical panacea and its implementation, we must confront reality. There is no reason, therefore, to be ashamed or defensive about focusing purely on the question of how best to respond to intra-state mass atrocities. Challenging policy-makers and academics to 'broaden their focus' to include, and indeed prioritise, holistic preventative prescriptions is of limited utility in the face of crises happening in real time. What reasonable person would criticise firemen for not spending their time working for an equitable society so that disgruntled individuals did not turn to arson? Newman largely fudges the most contentious issue regarding humanitarian intervention, namely the question of rightful authority, by providing an overview of different perspectives and proposals without advocating a particular position (pp. 198–201), and it is not clear, therefore, what his views are with respect to the legality and legitimacy of unilateral humanitarian intervention.

While I believe there are a number of contentious conceptual issues and significant omissions here, Newman presents a very interesting addition to the literature on humanitarian intervention which bravely champions an ambitious agenda. Although his prescriptions will not be met with universal approval, this book, in contrast to the majority of contemporary literature on this subject, will stimulate discussion and adds significantly to the ongoing debate.

Conclusion: international law as religion

Dan Danielsen describes the international legal system as 'a global governance regime that seems to lack a constitutional or institutional framework to order what looks to many of us like chaos' (Orford, p. 99). This image of chaos permeates all three books and a general, if not perhaps primary, unifying theme is disaffection with international law both in terms of what it does and doesn't do.

These books make for dispiriting reading and do little to dispel the oft-repeated claim that international law is in the midst of a crisis. Interestingly, while the invasion of Iraq is acknowledged as the most manifest example of this crisis, these books argue that the roots can be found in the 1990s and the debates on humanitarian intervention which, as Gibbs notes, are often fondly remembered post-September 11, 2001 as a more enlightened time. Charlesworth and Kennedy introduce a dose of realism into this navel-gazing, however, observing that 'international

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lawyers specialize in crises … We will always feel as though there is something peculiarly challenging and significant about this moment in international law and that the core of our discipline is somehow under threat' (Orford, p. 405). Accepting this perennial sense of pessimism, there does appear to be something about the contemporary era – reflected in these books – which suggests we have reached the limits of the current system's efficacy. The key issue appears to be both the interpretation and enforcement of international law and specifically the centrality of the Security Council. The illegality of the Iraq invasion was a function not of custodians of the law bravely upholding its tenets but of particular states making a *political* decision not to sanction the action. Had the French agreed to support the invasion, as they had agreed to support the military action against Yugoslavia in 1999, and had Russia and China abstained from using their veto, then questions regarding the legality of the invasion would have been largely assuaged.[1] The fact that the invasion would have been deemed legal if different attitudes and political calculations had prevailed in Paris, Moscow and Beijing demonstrates quite clearly the extent to which law in this context is a reflection of what states support rather than an objective judgement of what states do. The legality of any action is dependent on a coincidence of variables of which legal doctrine is but (a very minor) one. So long as the legal system is intrinsically linked with, and dependent on, political interests, the concerns raised in these books are likely to continue to frustrate the evolution of international law and undermine both its popular and academic repute.

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1 Not totally, of course: many have argued that the Security Council cannot do whatever it wants and is bound by the UN Charter; see White (2004).

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