

Discussion

Does the US Have a Unilateralist Approach to International Law?

John Norton Moore:

This question is addressed to Adam Roberts who I intend to gently take to task. I do so, however, after saying that I'm an admirer of your paper in general. I say gently because actually I suspect that in terms of the purpose of your statement, you and I would have exactly the same underlying purpose to be served. We would both agree on the great importance of the United States and our European allies working together. I particularly enjoyed the entire intellectual sweep of what you were dealing with. I thought it was quite extraordinary.

My comment relates to the specifics of your statement that somehow we need to be concerned that the United States currently is set out on a course to ensure that laws apply to others, but they do not apply to the United States. I believe it's quite dangerous to be making these generalizations. I'm just back from the country of some of my good European colleagues and I know that one is hearing quite a few generalizations about American isolationism and nonparticipation in various treaties. I think that we have to actually proceed treaty-by-treaty in looking at these. There are very different reasons for US nonparticipation in a number of these treaties and the kinds of generalizations that we're hearing are not helping us move forward.

With respect to the Law of the Sea Convention, US leadership actually resulted in an effective renegotiation of Part XI. Our President then submitted the treaty to the Senate. There is no opposition of any significant kind in the United States to it. There is a peculiarity in the US Constitution over requirements in relation to how it goes through the US Senate, and I fully expect that the United States will be a party to that treaty at some point.

The landmines convention is eminently reasonable in seeking to bring under control the reckless scattering of landmines by aggressive leaders. (Saddam Hussein, for example, threw landmines around Kuwait with no

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records kept.) That is an entirely understandable and reasonable thing to do. On the other hand, the United States believes strongly that we need to differentiate between the uses of a variety of weapons systems. For example, our forces in South Korea maintain a well-marked mined area between North and South Korea. The laws of war and arms control ought to differentiate appropriately between those two examples. The United States did not reject the landmine convention because we want to have different laws for everyone, but because we don't think the right thing is being done.

Adam Roberts:

For the sake of brevity, I made my remarks in a way that was perhaps tactless. I agree with you that there are different reasons for nonparticipation in many of these treaty regimes and sometimes there is sound, sensible, prudential reasoning on the part of the United States in thinking seriously about the consequences of becoming party to a particular agreement. I wouldn't deny any of that for one second. And of course, the United States is not alone on the landmines treaty. Finland has similar concerns to those of the United States about the possible defensive value of landmines. So there's no suggestion that it is not a serious position.

My concern is not that the United States in fact views itself as above the law, but that there may be a perception of that because of the range and number of treaties that we're talking about and because the United States has such a peculiar—as you yourself have indicated—and slow system of ratification of treaties, which has been a nightmare for successive presidents of the United States. In respect of some of the treaties in this area, a good deal can be achieved by reservation. Not of course with the landmines treaty and not of course with the ICC statute, because, in my opinion unwisely, reservations have been excluded from those treaties. There really is a structural problem there. It is not clever of the majority of the like-minded States to exclude the possibility of reservations, because reservations, although they have had a bad name among some progressive international lawyers, are actually a very important means of bringing treaties into a relationship with the needs, interests, plans and intentions of States. So I agree with you in a large part of what you say. But I think, for example in relation to Protocol I or a number of the other treaties I listed, a good deal could be achieved by participating with reservations rather than staying formally outside the regime. I hasten to add I'm well aware that the United States, even while formally outside certain regimes, in fact has contributed very powerfully to them.

Is There a Right of Humanitarian Intervention?

Adam Roberts:

While it is impossible to establish a general right of humanitarian intervention, in individual cases one can argue that there are powerful factors supporting intervention. I'm not sure whether they are all containable within the category of necessity. I don't think they are. But there are very powerful factors, including legal factors, which may point to a justification for the use of force in a particular case. It is the concentration on the specificities of a particular and urgent situation that seems to me to be the right legal as well as political approach.

The German Bundestag, for example, when it debated the issue of Kosovo in October, 1998, essentially said that whereas it was not asserting any general right of humanitarian intervention, in the extraordinary circumstances of Kosovo, it would support an operation and would permit the use of German forces to take part in that operation. I personally think that is a more powerful and a clearer position than the very fragile one of asserting a general right of states to engage in humanitarian intervention.

One can of course buttress such an approach by making certain general propositions about particular cases, be it Bangladesh in 1971 or northern Iraq in 1991, when a use of force without the consent of the receiving sovereign State was tolerated by the international community even though it didn't have explicit UN Security Council blessing. There is also the relevant legal consideration that an intervention may be in support of UN Security Council objectives even if it is not with the specific consent of the Security Council. There's also the relevant legal consideration that some of these actions have not been condemned. All of that falls short of a general right. But it's a considerable advance over the position that you have attributed to me, which is not the position I hold—that one simply has to throw up one's hands in despair and say these questions cannot be answered. On the contrary, in specific cases, they can be answered, and they need to be answered.

Humanitarian Intervention: Ethically Right, Although Legally Wrong?

Christopher Greenwood:

There is one lesson offered to us that seems to be a pit of vipers that we need to avoid like the plague. That is the suggestion that it may be better to proceed on the basis that something is ethically right and not worry too much if it's legally wrong. Now I can see that there are times when you have a

situation where something is ethically justified, and the law has not yet caught up with that. But when that's the case, surely as lawyers we ought to be trying to ensure the law is changed in order to accommodate what we recognize as the ethical need. The suggestion that we can simply fall back on an ethical justification and think that is the end of the matter is frankly wet. It's no good at all if you've got to defend what we have done in Kosovo in front of an international court. It doesn't give the kind of steer that we ought to be giving to the people who go out and do the fighting and it's frankly an abdication of our responsibility as lawyers. It comes pretty much to saying this: "It's too difficult to formulate a rule that isn't capable of abuse, therefore it would be better if we don't formulate a rule at all." That's something which I as a lawyer simply cannot accept. We're paid to deal with difficult situations and we should face up to our responsibility in that regard.

Adam Roberts:

It's not my position that one can summarize the state of affairs and justification for the Kosovo operation as ethically right but legally dubious or legally wrong. That's a position that was advanced in a number of articles by lawyers, including the articles by Bruno Simma and Antonio Cassese in the *European Journal of International Law*,¹ and I think it's a very extraordinary position to take. It's perhaps a comment on the puzzling state of the law to say that something may be legally dubious, even legally wrong, but ethically right.

The position I would take is different. It is impossible to establish a general right of humanitarian intervention. There is virtually no chance of getting any significant group of states to assert a general right of humanitarian intervention and no serious effort has been made since the Kosovo war to do that. Admittedly, the NATO Parliamentary Assembly passed a resolution urging there should be such a right, but they got absolutely nowhere.² The reason they're getting nowhere is: first, States that fear they might be the subject of intervention, have recent memories of colonialism, or are governed by seedy dictators are never going to agree; secondly, the States that might do the intervening turn out—and especially the United States—to be not very interested in

1. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 23 (1999).

2. The NATO Parliamentary Assembly is completely independent of NATO but constitutes a link between national parliaments and the Alliance. It encourages governments to take Alliance concerns into account when framing national legislation. For more information, see the NATO Handbook at <http://www.nato.int/docu/handbook/2001/hb1601.htm>.

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propounding a general doctrine that might obligate them to act in situations where for one reason or another they may be unable or unwilling to. So there is simply no chance of getting an international agreement of the kind that lawyers might recognize as law asserting a general right.

However, one can say—and here I think we agree—that there may be a tolerated occasional practice of intervention. Here the fact that there has been no General Assembly resolution condemning the Kosovo action and the fact that the Security Council draft resolution of March 26, 1999 put forward by Russia and others condemning the Kosovo action failed, is evidence that while there is no established general right, certain cases of humanitarian intervention may be tolerated. Another example is the Indian intervention over East Bengal in 1971, which was defended partly on grounds similar to those on which the NATO action over Kosovo was defended. I think that is as far as one can go. It is not saying that there is a distinction between ethics and law, but rather that there is an odd legal situation where a practice is occasionally tolerated that cannot be asserted as a general right. One actually weakens the argument for humanitarian intervention if one makes the legitimacy of a particular intervention seem to be dependent upon the existence of the general right. I think it is a very occasional practice.

Rein Müllerson:

During my comments I supported the view now expressed by Chris Greenwood. I also think that there cannot be and there shouldn't be such difference between what is ethically or morally right and legally wrong. Adam spoke about toleration of certain interventions. The toleration of them leads to change in the law or at least it undermines, it destabilizes the existing prohibition on the use of force. I think that perhaps the least we can say today about the use of force for humanitarian purposes is that it is not unquestionably unlawful in a certain set of circumstances. Every right is general—you can't say non-general or otherwise. In international law, and I am not going into theory, there are treaties that create legal obligations. These are not general rights or obligations, but customary international law certainly is general. Therefore, every right under customary international law has to be general. There was considerable toleration of Operation Allied Force on the part of many States for very different reasons. I think that this, if it hasn't led towards the emergence of a new rule, has undermined the existence of the rule (if there was such a rule) prohibiting the use of force for humanitarian purposes.

Leslie Green:

There probably is not at present a general or a non-general right of intervention, but when I look back, I often feel that in the humanitarian field, our classical writers were far more advanced than we are. I'm thinking now of the writings of Grotius, Vattel, Hall, Westlake, and the greatest of them all on the subject of intervention, Stowell. They would argue that if the situation is so unique and so outrageous, then while there may not be a right, perhaps we are moving into a stage where there is a duty to intervene. If we develop the law with regard to humanitarian principles we may find that in the light of Bangladesh, in the light of Kosovo, perhaps in the light of Rwanda where we should have taken stronger action, we are now in a position where the situation has become so outrageous that we go back to Hall and Westlake and say that there is a duty upon those who believe in the personality of the human being and those who believe in the rule of law; there is a duty upon us even if there are written documents that suggest we may be going outside the ambit of the law.

Michael Bothe:

If law and ethics seem to clash, then something must be wrong either with the law or with ethics. The problem we are facing here is that most of us are lawyers. We know how to make nice arguments of what the law is. My impression is that many people who speak about ethics just feel in their hearts what it is. I sometimes question whether this is the correct source for ethical principles.

Ruth Wedgwood:

Actually it's a great pity that international law doesn't really have a vocabulary with which to recapture the brilliant British distinction between law and equity that is also found in American nineteenth century jurisprudence. It is the skeptical doubt that any rule could ever capture all of the necessary instances of exception—the role of equity *contra legem* and *intra legem*. Instead we seem to lapse into almost a sociological or psychological vocabulary of acquiescence or tolerance or diplomatic signal. My own suspicion is that the flat rule against humanitarian intervention is in some ways a historical period piece. It's part of anti-colonialism.

One of the curious books in my library is a 1940 monograph by the “German Library of Information” on so-called “Polish Acts of Atrocity Against the German Minority in Poland,” published in New York in 1940. The fact that humanitarian intervention was proffered by Germany as an excuse for the

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invasion of Czechoslovakia and Poland in World War II gave it a very bad name for a very long time. So even in Europe the feeling of Turkey or other States was that mistreatment of coreligionists would be used as an excuse for intervention. The reflex against humanitarian intervention may become less automatic as the majority of members of the United Nations system become more democratic and mature. I wouldn't go so far as to coin a duty to intervene because it's going to be breached so often.

Adam Roberts:

I was pleased that Leslie Green put this in its proper context along centuries of historical debate about the issue. Maybe in a sense we can all blame Grotius for the way in which the debate has been phrased because he was the one who actually used the term “right” in respect of intervention for what we now regard as humanitarian causes. He raised the issue in terms of whether States had a right to do it. For reasons I've indicated that may be a problematic way of looking at a very difficult issue. I do think that there is bound to be skepticism in the post-colonial era about any general assertion of such a right and for pretty good reasons. One of the most notorious episodes of European colonialism—the Belgian role in the Congo—began as a humanitarian enterprise with a congress held in Brussels on Central Africa during which the word humanitarian was uttered countless times. It can very easily happen that a cause embarked upon for humanitarian or mercy purposes can end up very nasty as we have seen in Somalia. So the nervousness about a general right seems to me to be justifiable and not just to be a fad of the present post-colonial era.

Where I think there may be scope for developing a new principle is in the direction of thinking about a duty, not to intervene, but a duty to take appropriate action (whatever that may be) in case of extreme violations of humanitarian norms. In many cases, the appropriate action will not be intervention. There may be numerous other forms of action that are better for whatever reasons—prudential reasons, tactical reasons and so on. I think it would be very unwise to promote the idea of a duty to intervene as such, but a duty to take action may make more sense.

Michael Glennon:³

I am a bit surprised by both Adam Roberts's and Chris Greenwood's discomfort with the notion that ethical or moral considerations may, or could

3. Professor of Law, University of California at Davis

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under certain circumstances, provide a justification for law violation. That tradition of civil disobedience is of course one with a long-standing and rather time-honored pedigree and not simply in Anglo-Saxon jurisprudence. Why should international law not be subject to the same considerations? Is it not possible that the law has come over in the fullness of time and the course of recent events to reflect evolving social mores or whatever it is that the law seeks to correspond to? Isn't that perhaps precisely what occurred with respect to Article 2(4) when it confronted the moral justifications or the felt ethical needs of NATO leaders? I myself initially conceptualized this as kind of a problem of civil disobedience in international law. I must say on further reflection, I've come to think that the real issue is not whether there is an exception for humanitarian intervention, but whether there is a rule for which an exception could or should exist. My current conclusion I suppose would be that international law simply provides no satisfactory answer to the question of lawfulness of the NATO intervention in Yugoslavia.

Wolff H. von Heinegg:

If you read Wilhelm Grewe's book *Epochs of International Law*, which has now been translated into English by Michael Byers, you will find a chapter on humanitarian intervention. The discussion that was held in the nineteenth century and much of what has been discussed since Kosovo is identical. Even though I'm a professor of international law, I have to admit that it's not us lawyers that make international law. I have always understood international law to be made by States who are the main subjects of public international law. Necessity—I just want to remind you that the Latin phrase *opinio juris* is shortened because it is *opinio juris sive necessitates*—has to be articulated by the subject of international law, which means by States. So when it comes to humanitarian intervention in Kosovo, there were a couple of States who obviously felt the necessity to do something. Whether this will develop into a rule of international law, customary or whatever, depends on the States and not on us.

Is There a Link Between Jus ad Bellum and Jus in Bello?

Wolff H. von Heinegg:

We are not only stepping on a slippery slope (as Admiral Robertson put it) when it comes to the question of whether those who are fighting for the just cause are less bound by *jus in bello* than the one who is fighting for the unjust cause. Let me remind you once again that *jus in bello* according to the

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consensus of States is the utmost the international community is willing to tolerate, so everything which goes beyond these limits is clearly illegal. The lesson I have learned from this colloquium, maybe not from the Kosovo conflict, is that we should leave *jus in bello* as it is. I have problems putting stronger limits on belligerents by referring to *jus ad bellum*. I certainly do have severe problems with lightening the limits or by brushing them away and thus jeopardizing the achievements of the law of armed conflict.

Henry Shue:

I admire Professor Wedgwood's courage in saying the unconventional during her presentation. I think it's very helpful, but I'm sure she'll agree that if we're going to speak the unspeakable, we should do it very precisely. I just want to emphasize how narrow a point I think there is here. That is, I didn't take her suggestion to be that the more just one's cause, the more discretion one has about the *in bello* rules. I took it to be that there are exceptional cases in which one's moral responsibility is to win because one's adversary is so evil that one is justified in doing what one would otherwise not be justified in doing. I'm willing to concede that there is such a category in the abstract, which I think puts me a couple of inches away from Professor Greenwood. I would also suggest that so far there's only been one case—the Nazi's. The danger here of course is that since all nations tend to demonize their enemies anyway (it's sort of notorious that George Bush first referred to Saddam Hussein as another Hitler; while Saddam Hussein is a nasty piece of work, he's not a Hitler) we really have to be very careful. It seems to me that honorable defeat without atrocity is still preferable to victory with atrocity except in these very rare cases. So although I think you're right in principle, I'm not sure that the point shouldn't stay unspoken.

Ruth Wedgwood:

I take and agree with the point. Indeed one of the problems with codification always is that (a) it is looking for simplicity and (b) both lawyers and courts take litigating positions. They choose to enunciate bright line rules that they think will lead to the best result in the majority of cases. But most States also take the relationship between *jus in bello* and *jus ad bellum* to be broader than we ordinarily admit—because very few States (at least in the age of total war) would choose to be conquered honorably and many States would use any justifiable means if, in the last analysis, they thought there was a magic bullet that would preserve them from brutal occupation. This is grounded on

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strategic anticipation of an adversary's expected breach of the laws of honorable occupation.

One of the purposes of the law of war (e.g., Geneva IV's provisions protecting occupied territories) is to say to States that the alternative of being conquered isn't all that bad because civil life will go on. There will be a regime change, but your private life and private property will be preserved and your families can conduct themselves as always. This is simply a quarrel among princes. But in the age of total war, if one is skeptical about the efficacy of enforcement of Geneva IV or its first-cousin principles, then I think you would see lots of deviation from *jus in bello* for the sake of avoiding a devastating occupation and social destruction. In a way, *jus in bello* is a very, very stringent rule of exhaustion, but in the last analysis, for total war (not limited war), most countries would ultimately deviate from it, at least in detail, and within the bounds of humane standards.

Yves Sandoz:

It is a fact that the law of war is fundamentally separated between the *ad bellum* and *in bello*. I share your view that humanitarian law cannot force a country to lose a war. That's why it's so important to examine the rules for the conduct of hostilities. That's also why I cannot share your suggestion that in some cases you could violate humanitarian law because if you accept that, it's the end of humanitarian law. Every State that goes to war believes it is defending a good cause.

Ruth Wedgwood:

We've been talking about lots of different senses in which *jus in bello* and *jus ad bellum* could be linked. One was Professor Roberts' point that if there are so many systematic *in bello* violations, that itself is the *casus belli* for humanitarian intervention. There's the other argument offered at Nuremberg by the prosecution, but rejected by the judges, that in an illegal war all acts of force are illegal. Harvard Professor Sheldon Glueck makes this point in his little volume on war crimes, introduced by Justice Robert Jackson.⁴ My third type of linkage was to argue that there may be cases in which the urgency of concluding the war should influence the interpretation of military necessity or the unclear borderline between civilian objects and military objects. If indeed Milosevic had continued killing people at a rapid pace and we knew or could infer that, then a rapid conclusion of the war would have been all the more urgent.

4. See SHELDON GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* (1946).

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That in turn would have arguably justified designations of military targets that were realistic in light of the problems of persuading Milosevic to cease and desist. It's a sliding scale. It's at the edges, but it doesn't mean to reject what is crucial. I agree with Yves Sandoz and the others that from the point of view of educating ground-level military operators and ordinary politicians, one wants to preserve the formal distinction of *in bello* and *ad bellum*.

Critiquing the Report to the Prosecutor

Natalino Ronzitti:

Adam Roberts said that the Report of the Committee established by the ICTY Prosecutor has not been properly critiqued. I am one of those who have heavily criticized the Report to the Prosecutor in an article published in the *European Journal of International Law*. My main critique is that it said the facts were not well established, that is, that it is the Committee's assertion that it is very difficult to establish the facts. This is very strange because the prosecutor has the full power of the ICTY to summon people. The second critique is that the Report has said that the law is not very clear. You cannot say within a court that the law is not very clear. That, together with the anonymity of the Committee because we don't know officially who they are, is not, I'm afraid, in keeping with the prestige of this Tribunal.

Adam Roberts:

What I intended to say about the ICTY Report is that there hasn't been a full-blooded criticism of its conclusion that there were no violations justifying reference to the ICTY by those who asserted that NATO did commit war crimes. On the whole, the Report has remained inviolate against that kind of criticism and it remains a valuable comment on Operation Allied Force. I am in fact aware of the article that you have contributed on the subject, which does not set out to be the kind of full-blooded critique that I had in mind. I will certainly be referring to it.

Applying the Law of Armed Conflict in the Future

Ruth Wedgwood:

A few responses to what I thought were some very thoughtful comments. The distinction that academics face between the interior view of law and the exterior view is always there. There's a language you speak as a citizen, advocate or judge that has a crisp vocabulary, rejects alternative readings, and

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stabilizes the legal text for the sake of clear communication and workable guidelines for behavior. But when you step back and ask how satisfactory that framework is or what meta-principles will influence interpretation, then you can dare to be a little more dangerous. Most of my scruples about not losing wars and avoiding utterly catastrophic humanitarian harm can be accommodated by interpretation within the existing rules of *jus in bello*. The worry I suppose is the *milieu* of the decision maker. If you have someone as a war crimes judge who is deeply skeptical about the right to use force in any circumstance, who fundamentally at heart is a type of a pacifist, then you're going to get a very different reading of these rules than you will from somebody who survived World War II or the Korean War or any number of other conflicts. So my concern is how you explain the appropriate balancing to somebody who's approaching these rules as an ingénue, which I hasten to say the war crimes tribunal judges are not. Europe has lived through its wars. Don't mistake my exceptional chancellor's foot for an antinomianism wanting to overthrow the rules as such.

It would be helpful to make some clear distinctions for participants who apply the law of armed conflict. Number one, some textual statements are rules and others are principles. Some norms are bright-line rules, sharp-edged and self-executing, and others are circumstance and fact specific and will garner lots of variation in lawyers' interpretation of what they mean in a particular circumstance. Professor Dolzer's invocation of margin of appreciation indeed might be one very good way of putting it into accepted vernacular. But we have too easily given the impression that all laws of war are created equal, that they all are equally easily applied, and that all are amenable to application without experience. In general, I have to agree, we're very far down the road indeed. ICTY, ICTR, ICC, European Court—the cow is out of the barn and the only cure for the movement to “juridicalize” war may be the attempt by the military community and by extraordinary judges like Judge Pocar of really coming to learn each other's trade craft.

My advice to friends in Washington has been that of forced familiarity—to smother the ICC with seminars. Have lots of NATO gatherings in which you begin to educate the judges and persuade them that they do need military law clerks. They do need a roster of expert witnesses. They do need to go to whatever the European equivalent is of CINC conferences to come to understand some of the practical operations of the law of war. I see this as an incredibly difficult field because it requires people who are versed in history, versed in criminal law, versed in international law, versed in humanitarian law, versed in military operations and versed in military law. It requires a kind of

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omni-competent synthesis. Perhaps the die has been cast. But the purpose of my observation was to try to invoke a sense of modesty in civilian judges and NGO's (as well as in myself) in approaching the application of rules to battlefield operations.

If I may give a parallel New Haven anecdote: Yale used to pride itself on being the vanguard for law and psychiatry. Judge David Bazelon, and some of the other judges on the US Court of Appeals for the District of Columbia Circuit, thought that if only they could get the right kind of psychiatrists testifying about the nature of legal insanity and moral choice, they could reform the law of criminal responsibility. Ultimately the judges decided, after much gnashing of teeth, that to do so would be an abdication from their own responsibility under the law to decide about the nature of moral choice. You couldn't call a randomly-selected expert witness. This wasn't an objective question of fact. In the context of battlefield law, my worry is that if there is a great distance between the two communities of judges and military operators—if all you have is an amateur criminal lawyer, acting as prosecutor, calling random experts to say what they think should happen on the Kosovo battlefield—then that's going to inhibit necessary military planning.