# Intervention, Imperialism and Kant's Categorical Imperative

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Professor Jianming Shen has advocated with vigor and eloquence a time-honored perspective on the place in international law of cross-national interventions. It is a position that, during the last decade, has become less fashionable in our trendy profession. It is nonetheless a perspective that must be paid heed to, if only because the views that he expresses are bound to reassert the suzerainty that they enjoyed in our discipline as the current miasma in international law dictated on the basis of the special role of an "indispensable superpower" (or of an indispensable civilization) wears off. I cannot equal Professor Shen's energy and erudition, so I shall use the opportunity afforded by this response to proffer some elementary thoughts on why international law, as it emerges from this transitional phase, should not too readily disregard the prohibition on the use of force by one state or group of states to right wrongs that are taking place entirely within the acknowledged political boundaries of another state.

While the views that I shall put forward below may ultimately buttress Professor Shen's conclusions, I want to begin by disagreeing with him on a fundamental point of procedure. To the extent that Professor Shen is contend-

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ing that there is something static and inflexible about the way that international law treats or should treat the principle of nonintervention, I'm in disagreement with him. The principle of nonintervention, it seems to me, has no more claim to being sacrosanct than a host of other principles in international law. Certainly, pedigree and history alone do not mandate the inviolability of a principle, particularly if these considerations come up against reason and practice. Indeed, Professor Shen himself notes that nonintervention is but one of seven pillars on which the current public international legal order rests. The issue is not nonintervention simpliciter (collective or otherwise) versus humanitarianism, but rather, how at any given time, international law accommodates one to the other. The consequence is that international law is (like all law) dynamic. The accepted structural foundations of international law - namely that it arises just as readily from the interpretive intellect of jurists and expedient practices of diplomats and soldiers as from the reasoned commitments of statesmen and nation states – belies the notion of any immutable principle of international law. The particular province of international law scholars is the articulation of principles that may be deployed in gauging what essentially is a balancing act. The most that we can hope (and I shall argue, insist on) is that the yardsticks that we provide are not simply contingent on serving a narrowly defined national political interest. Viewed as a contribution to this process, Professor Shen's obvious suggestion that the pendulum has swung too far away from the norm of nonintervention is a valuable contribution to an ongoing debate.

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As we marched through the 1990s, it was obvious that the "international community" (or at least those who believe in the existence of such a community) became less and less reticent in approving of the use of coercion (economic as well as military) as a policy instrument. Whether this in fact reflected an increase in the actual application of force in interstate relations (my own view), or whether there was merely an increased appreciation or perception of the use of force as a policy tool, is, for the purposes of what I want to say here, not terribly significant. The point is that far from receiving outright condemnation or only mooted defense, the use of force came to be applauded by many international law scholars as furthering various legal principles - usually framed as a "right." "Humanitarian intervention" in defense of "democratic rights," "the right to self-determination," or "human rights" became broadly accepted in the West not as an occasional unfortunate aberration from international legal norms, but as integral to the post-Soviet international legal order. If the United Nations Security Council - or more accurately its five permanent members -- could be convinced to support coercion (as in the imposition of sanctions on Libya, or the expulsion of Iraqi forces from Kuwait), so-much the better. However, even in the absence of such support (as in the maintenance of "no fly zones" in Iraq, or of the NATO war with Serbia), the West, in defense of fundamental rights, should go-italone.

In one sense there's something romantically glorious about the selflessness of 22 year-old American and British fighter pilots risking their lives to preserve the national

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aspirations of Mohammedan Shi'as, Kurds and Kosovars, or of Swiss prosecutors and American human rights lawyers affirming in international tribunals the human rights and personal dignity of Rwandan Tutsis and Bosnian women. But the story is not about the individual acts and commitments of these persons (nor of any single one of us, for that matter), notwithstanding the standard subliminal propaganda of juxtaposing against these acts and commitments, the contrasting devilish conduct of others such as Saddam Hussein or Slobodan Milosevic. Those of us, who reflexively are not turned-off by "postcolonial" scholarship (or those of us who, even if we are, at least take the time to read the history of the "European expansion") find much of this glorification of the individual Western act over the barbarism of the non-Westerner all too familiar. The story that I'd rather tell to (or hear from) an international law scholar, is (or should be) about the principles by which interests, ideas and institutions are made accountable to a community that transcends any single nation state.

As Professor Shen persuasively demonstrates, the new scholarship of "humanitarian intervention" sits uncomfortably on the shoulders of prior scholarship on nonintervention. The principle of "human rights," if neutrally applied, should provide, one would think, at least the veneer of legitimation for humanitarian intervention. But the apparently one-way flow of the application of the principle, its exception-ridden definition, and the outright refusal to invoke it when applied to certain nationalities undermines this argument. The cursory dismissal by the Hague-based Yugoslavia War Crimes Tribunal Prosecutor

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of charges of war crimes against those NATO policymakers who felt it perfectly acceptable to drop depleted-Uranium loaded bombs from three and more miles above their targets on civilian-loaded trains crossing bridges in densely populated cities (even as she doggedly insists that international law disenfranchises Serbians of the right to try Milosevic in their own court), or the equally dismissive treatment by many opinion-mongers in the West of recent revelations of atrocities by a respected former Senator in the U.S. and a decorated General of France, along with the differential approach by such countries as Belgium, Italy and Canada in considering accusations of war crimes levied against their nationals (even as they would have us applaud the beacons of light they shine on the misdeeds of African nuns and politicians), indicate that the interestbased taint on the deployment of the human rights doctrine is not exclusive to hypocritical politicians, but is an integral component of purportedly law-driven practice. Of course, theorizing and practicing law requires us to parse texts and distinguish among related and unrelated facts and situations. But it is no longer tenable to maintain that the new human rights doctrine is an equal opportunity humbler of the powerful and mighty.

The one foundational concept in public international law that rivals the idea of human rights, of course, is "the S word," sovereignty. Not surprisingly, proponents of the primacy of human rights appear to believe that the security of human rights lies in disparaging sovereignty. There are undoubtedly problems with the idea of sovereignty, not the least of which is that given its interdisciplinary usage, it does embody amorphous conceptions.

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As a legal proposition, however, the concept of sovereignty is reasonably well understood, and, more importantly, it is essential to the functioning of international law – even for the human rights practitioner. At core, sovereignty as a juridical notion embodies the truism that however compassionate or selfless the outsider may be, the best form of accountability is that which originates from within. Incidentally, this is a belief that is also at the heart of liberal democratic governance. Sovereignty, as a legal proposition, serves essentially to define the boundaries of the outsider and the insider. There's nothing fixed about those boundaries; indeed, frequently, they are porous. National territorial boundaries have become the modern signifiers of the applicable borderlines, but territories have changed constantly, and increasingly new forms of communities having only minimal connection with physical territoriality are emerging. From the perspective of sovereignty, what is crucial is that members of such communities be allowed to experiment and figure out how best to cohabit with each other. The notion of rules from without imposed by an overarching dictatorship that knows best is surely not what those who argue for the abandonment of sovereignty would not readily subscribe to. Yet, they never consider this risk. What explains the omission? Can it possibly be because those who are currently dictating the rules are confident that they will never be dictated to?

It now has become fashionable in international legal scholarship to invoke Kant's writing on "perpetual peace" as justification for the renewal of imperial legal attitudes. Only "democratic societies," we are told, have a legitimate

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claim to deciding for themselves those rules by which they ought to be governed under international law. Putting aside whether this is an accurate and faithful rendition of Kant's own views, it is worth reminding ourselves that there is an even better known Kantian proposition, the socalled "categorical imperative." Paraphrased, in mandating rules of behavior, we ought to ask if the rules are such as we would apply, were positions reversed. Ultimately, it is the deficiency in the transference of our imaginative capacities that should give us pause in departing too hastily from the doctrine of nonintervention.

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