Deficits of International Law

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I approach my theme here today indirectly. [1] In his book *Just and Unjust Wars*, adapting a remark of Trotsky's about the dialectic Michael Walzer proposes the aphorism 'You may not be interested in war, but war is interested in you.' War is a scourge and a horror, and most of those whom it involves it draws in against their will. Hence the ambition, the age-old ideal, of a world at peace. Those of us who share a commitment to a just and more or less stable system of international law attach great weight, consequently, to the outlawing of aggressive war. That, however, is only one side of the story. It cannot be the whole of it. For although peace is an opposite of war, war is not the only opposite of peace. If we want to create a peace movement – a genuine peace movement with influence and moral standing across the planet – we need an understanding of international law that has thoroughly internalized this imbalance.

Consider a simple dictionary definition of 'war.' Here is what the *Shorter Oxford* gives: 'The state of armed conflict between nations or states; armed hostilities between nations or states, or between parties in the same nation or state...'

Between parties in the same nation or state. Let us press upon this aspect of the meaning. Most of you will probably think at once of civil war, to which indeed the definition applies. But now consider a famous passage from chapter 13 of *Leviathan* by Thomas Hobbes:

'Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary.'

My interest here is in the 'tract of time' and 'disposition' aspects of Hobbes's line of thought, as he reflects on the lawless violence characterizing the pre-political state of nature.

As you know, his own formula for securing internal peace was sovereign authority. But unless such sovereign authority is limited and just, for those subject to it can itself be a source of intense forms of oppression, backed by the threat of violence and, as needed, actual violence. To this what Hobbes says about both time and disposition applies in full measure.

I allude, by way of example, to the country of my birth, Zimbabwe – a country brought to ruin by those who govern it, its people hungry and abject, and the full brutality of the state deployed against them and against every sign of political opposition. I do not, for my part, call this state of things war. In the paradigm meanings it isn't – even though we may sometimes speak loosely of regimes being 'at war' with sections of their own people. But to call the condition of Zimbabwe today a condition of peace would be a cruel joke. The words of Tacitus are apt: 'They make a wilderness and call it peace.'

The point I'm perhaps labouring here was made more than thirty years ago in an essay by Alexander Solzhenitsyn entitled 'Peace and Violence.' He wrote:

'The "peace-war" opposition embodies a logical fault. The whole of the thesis is opposed to only a part of the anti-thesis. War is a mass phenomenon – concentrated, clamorous and clear-cut, but it is by no means the only expression of unceasing world-wide violence. The logically balanced and genuine moral opposites are peace-violence.'

Again, later in the same essay:

'To achieve not just a brief postponement of the threat of war, but a real peace, a genuine peace erected on sound foundations, it is necessary to fight the "quiet", hidden forms of violence no less fiercely than the "noisy" kinds. The aim must be not only to stop the rockets and cannons, but also *to set the limits of state violence at the threshold where the need to defend society's members ceases* [my italics]. The aim must be to outlaw from the human condition the very idea that some are permitted to use violence regardless of justice, law and mutual agreements.'

That is my theme here this afternoon. If I may repeat: although peace is an opposite of war, war is not the only opposite of peace. Today more than ever, a *just* international juridical system, and a peace movement supporting it, need to integrate this insight, by aiming to place the prohibition on aggressive war within an effective set of restraints and remedies against states that do violence to their own peoples.

We are not at square one. The world has already come some way in this regard. After the horror of what happened in Nazi-occupied Europe – in the ghettos, the shooting pits, the death camps – was exposed, the principle was formally established by the Nuremberg Trials that there are constraints upon what governments may permissibly do to people under their jurisdiction. This was established, be it noted, as a *legal* principle, a principle of international law – although not *de novo*. The idea had had a long pre-history within the traditions of moral, political and legal thought. But here it became, officially, part of the law of nations, and was backed up by an actual juridical process (whatever the shortcomings of this may have been). The Nuremberg Trials announced that state sovereignty was no longer sacrosanct, that there is an international code of law, and states themselves can be in violation of it.

As importantly, the beneficiaries of this normative constraint upon the conduct of governments were not primarily other governments, other states, but individuals. As it was expressed by Sir Hartley Shawcross, the Chief Prosecutor for the United Kingdom at Nuremberg:

'[I]nternational law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind... [T]he right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal?'

That the individual human being – 'ultimate unit of all law' – is not disentitled to the protection of mankind is a radical principle indeed.

I say the world has come some way, and this fact should not be minimized; but neither should it be exaggerated. After World War II there was a public rhetoric of 'never again,' a rhetoric that is periodically revived in the face of some new

horror. I don't think it is unduly cynical to suggest that it is a rhetoric that should be abandoned for the time being. For the reality has been not one of 'never again,' but rather of 'always once more.' In Cambodia, in Rwanda, in Bosnia, in Darfur, the murderers go to work, and the international community that is the putative guardian of international law fails to react or it reacts too slowly.

Here one could say – and it would be true – that responsible moral criticism should not abstract from the realities of politics, diplomacy, statesmanship and what have you, which form the context of preventative action. Still, in what follows I want to highlight some of the ways in which the normative progress since World War II that I've just registered has been deficient; to highlight how the core value which Sir Hartley Shawcross emphasized at Nuremberg is in fact multiply compromised and betrayed by the concepts and the realities of the international legal system we presently have.

I go on to deal with four deficits of international law.

1. Crime against humanity

Let us examine, first, one of the fundamental concepts covering international political crimes, the concept of crime against humanity. The definition of this offence, whether in law or philosophically, is not without its problems; yet it is a common theme in the international law literature – indeed almost a truism of this literature – that the offence is intended to cover the most egregious violations of human rights.

So: murder, extermination, enslavement, severe deprivation of physical liberty, torture, rape, persecution, enforced disappearance of persons, apartheid – you get the picture. The picture you get is, however, complicated by the fact that, in the legal definition of the offence there is a threshold requirement, before a violation of whatever the relevant rights gets to count as being a crime against humanity. From the Nuremberg Charter to the Rome Statute of the International Criminal Court this requirement has been embodied in the qualification 'committed against any civilian population,' or 'when committed as part of a widespread or systematic attack directed against any civilian population.'

I think there are sound pragmatic reasons for having such a threshold of scale, as things presently stand. The first is a presumption that small-scale versions of these

crimes do not generally need the intervention of the international community since they fall within the province of domestic law and would usually be dealt with under this. Second, even where they are not, right now the international community and its recognized courts could not realistically handle every case of individualized or small-scale (even if egregious) rights violation across the planet.

But these pragmatic considerations shouldn't define the boundaries of the offence as such. For if they do, it has the result that smaller-scale instances of states violating the most fundamental human rights will not count as being in breach of international law. In such cases the principle enunciated by Sir Hartley Shawcross – that the individual human being is not disentitled to the protection of mankind – goes by the board. Individuals are so disentitled, unless they are part of a sufficient mass of victims. The threshold in question is a threshold of inhumanity.

Better that the law should incorporate smaller-scale examples within the definition of the offence, while recognizing that, for time being, these cannot always be pursued.

2. Humanitarian crisis

Here's a second such threshold and, as I contend, deficit of international law. It was argued for in connection with the Iraq war by people – including Kenneth Roth on behalf of Human Rights Watch – opposed to the idea that military action in Iraq for regime change purposes could be defended as a form of humanitarian intervention. The argument in a nutshell – one regarded by many as authoritatively delineating the proper legal threshold for humanitarian intervention – is that for such intervention to be justified there has to be an imminent or ongoing humanitarian crisis, involving mass killing – killing if not of genocidal scope, then at any rate on a very large scale: massacre, mass death through famine, or the danger of such.

Now, in view of how things have turned out in Iraq following the US-led military intervention and occupation – a spiralling human catastrophe – many of you may be inclined to endorse this threshold requirement without more ado. But it needs to be defended not only for the case in which intervention has (as we know here) failed, but for the case also where it might have a chance of succeeding. Any projected intervention on humanitarian grounds has obviously to try to justify itself in light of its probability of success. It's a separate question, however, what the

scale of atrocity and inhumanity is that makes this calculation of likely success or failure a live issue.

My own view is that setting the threshold so high that Saddam Hussein's regime fell on the 'safe' side of it, setting it at the level of immediate humanitarian crisis in the meaning I've already indicated, sets it too high – by accepting a level of state criminality that makes a mockery of the idea of international law as a real force constraining governments.

I don't mean to reopen the arguments over the Iraq war, which are by now familiar to us all; I will only say therefore, in support of the more general argument I'm making, that Saddam's regime had been responsible for two genocides – against the Kurds and the Marsh Arabs – and according to Human Rights Watch's own estimates was responsible for the deaths and disappearances of more than a quarter of a million people. Although by early 2003 the rate of killing in Iraq had 'ebbed,' in Kenneth Roth's unintentionally brutal way of putting it, the Baathist regime was one of the most murderous on the planet. In the words of Peter Galbraith: 'In a more lawful world, the United Nations, or a coalition of willing states, would have removed this regime from power long before 2003.'

If the threshold for humanitarian intervention is set by humanitarian crisis (in the meaning of that term which I've given), this means that the sovereignty of a regime that has just perpetrated, just finished perpetrating, a genocide but is no longer doing so is to be respected. It means that the sovereignty of a regime which over an extended period murders and tortures large numbers of people but never on a scale you could describe as genocidal, never on a scale such as to precipitate a general humanitarian crisis, likewise is to be respected. It means that the sovereignty of a regime that presides over people starving to death through its own misrule is to be respected. An international system that accommodates such things cannot lay claim to providing the framework of a 'lawful world,' of laws meriting support because they secure peace for the peoples of the world.

Here it might be argued – as Roth did argue for Human Rights Watch in January 2004 – that the threshold I'm discussing applies only to humanitarian *military* intervention; but the perpetrators of state crimes may still be brought to justice after the event. I don't belittle the importance of this. Dispensing justice is a necessary part of an effective international juridical system. But that doesn't address the issue of prevention, which is an equally necessary part of a system of law. Punishing the

perpetrators after the event doesn't change the fact that, left standing, regimes of the kind I've just sketched remain legitimate actors within the system of states.

Can I prescribe an alternative threshold to that of immediate humanitarian crisis? I don't pretend this is easy to do, but the difficulty isn't mine alone; it's integral to the issue, and so I'm not embarrassed by it. Here, in any case, is what I have tentatively proposed by way of a more defensible threshold for humanitarian intervention. This threshold is reached in two sets of circumstances:

(a) Where a state is on the point of committing (or permitting), or is actually committing (or permitting), or has recently committed (or permitted) massacres and other atrocities against its own population of genocidal, or tendentially genocidal, scope.

(b) Where, even short of this, a state commits, supports or overlooks murders, tortures and other extreme brutalities or deprivations such as to result in a regular flow of thousands upon thousands of victims.

Anyone is free to try to improve upon the proposal.

3. Genocide

The third deficit concerns the prevention of genocide.

The UN Genocide Convention defines genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,' with the acts in question including '(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part...' By Article 1 of the Convention the signatory nations 'undertake to prevent and to punish' this 'crime under international law.'

It is estimated that more than 200,000 people have been killed in Darfur and two million have fled their homes. Two years ago a UN report found that 'killing of civilians, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement [were taking place] throughout Darfur.' The report, however, stopped short of calling this a genocide, even though

there is substantial evidence of the Sudanese government orchestrating and participating in these crimes – as, indeed, a more recent UN enquiry has found. But the panel reporting two years ago said there wasn't decisive evidence of a policy to commit genocide, of *intent* to destroy a population group.

This prompts the question, for me, whether both prevention and punishment should be covered by the one definition of genocide. So far as punishment is concerned, the prosecution of individuals has to be governed by standards of proof of the most robust kind, and therefore intent must presumably be construed in the strictest way, to establish – 'mens rea' – that those responsible at government level had a deliberate genocidal purpose. But if proof of this order – which can be established only by a legal process, often long and drawn-out – is also made a condition of the *prevention* of genocide, then the definition of genocide is in danger of serving as a barrier to action, which it was surely not supposed to be. For, in these circumstances, even with all the material elements of the crime apparently present, and some possibility (to put it no more strongly) of intent as well, the UN Convention cannot be held to apply without rigorous legal-type proof. If even Darfur cannot be thought to demand a preventative intervention by the international community in light of the law on genocide, then that law not only doesn't protect individuals in small numbers, it doesn't protect them in large masses either. And it certainly doesn't secure them peace.

4. Legality and politics

The fourth and last deficit I want to deal with is more quickly explained. It concerns not normative definitions (of crime against humanity, the threshold for humanitarian intervention, genocide), but the politics of the global community. Whatever may be happening in some given country and to some very large number of people, and however ghastly it may be, if China (or that could be France, or the US) has a mind to block concerted international action via the UN, then there will be no action. If, as is now often said, because of the Iraq war there is no stomach internationally for further interventions; or if a key player in a given region – think of Thabo Mbeki for South Africa and vis-à-vis Zimbabwe – plays the role of protector to a criminal regime, there will be no action.

I am not so naïve as to imagine the possibility of a juridical system altogether free from external political influences. However, what we have here is a system of would-be law that is so thoroughly enmeshed in the interplay between major political

forces and actors as to lack any substantial degree of independence such as is surely necessary for it to function as a legal system.

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I wind up now. In December 2001 the International Commission on Intervention and State Sovereignty – an independent body, but working in support of the UN – published its report, in which it said (amongst many other things):

'The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation...'

In September 2005 the UN General Assembly adopted a document (the 'outcome document') which included the...

'... unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity; [and] willingness to take timely and decisive collective action for this purpose, through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to do it.'

This, of course, is a pronouncement, and no more than a pronouncement, until we see what actually comes of it. But in any case the issue it puts before us, and which is before us even without the pronouncement, is this. What do we do when states or those within states commit crimes against humanity on a large scale? Hilary Benn recently answered the question by saying in effect: we strive for a multilateral approach, with the legitimacy of a reformed UN. OK, call that the ideal answer to the question. But now suppose that, in a particular, terrible case – of Rwanda-type proportions – his answer isn't effective; no multilateral action to halt an ongoing slaughter or genocide occurs *in fact*. Is there then a right of humanitarian intervention that may be exercised unilaterally by a self-selecting individual state or group of states?

It might be said that to allow such a right is to create a space for the powerful, for states who might have other interests at stake in intervening. This is true. On the

other hand, to deny the same right is to say that in the face of anything whatsoever – crimes against humanity on however large a scale, genocide – the victims have no recourse and no hope. Pending the time when effective and putatively legitimate multilateral mechanisms of protection have come into existence, nothing may be done to save those being murdered.

It isn't an easy choice structure but it's there, out in the real world. Defining an ideal answer is important, yet it doesn't establish that that answer is always available. I began with a quote from Michael Walzer and will end with another. In an interview not long ago he said:

'It is a good idea to strengthen the UN and to take whatever steps are possible to establish a global rule of law. It is a very bad idea to pretend that a strong UN and a global rule of law already exist.'

From what I've said here I think it's clear enough that our world is still a very long way from those conditions of peace spelled out 30 years ago by Alexander Solzhenitsyn: that the limits of state violence be set at the threshold where the need to defend society's members ceases; that we outlaw from the human condition the very idea that some are permitted to use violence regardless of justice, law and mutual agreements.

Where there is state lawlessness there is no peace, and the victims of such lawlessness are entitled to seek what help or escape they may, and others to provide it. That is why the tasks of a global peace movement go beyond the prevention of aggressive war.

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Notes

[1] This is the text of a talk at the conference 'Solidarity and Rights: The Euston Manifesto one year on,' held on 30 May 2007.