Evolution of an Applied Understanding of Humanitarianism
The China Challenge

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Abstract:

This thesis challenges two issues of humanitarianism. The first one is the idea that humanitarianism is universal and uncontroversial and the second one is the using of humanitarianism as a single standard to judge whether a nation's foreign policy is just. These issues underpin much of the comments on how China handles the humanitarian crises in the post-cold war period. The liberal world has perceived China as "irresponsible" and "unhumanitarian". The thesis questions whether these perceptions are reasonable. This thesis also questions the reduction of state behaviour to the solely maximization of material interests. China does not adhere to the established humanitarian standard in the post-cold war period. Many have attributed its behavior to economic and geopolitical interests, including overseas markets, oil and other natural resources. This thesis challenges the one-dimensional account of state behavior.

Humanitarianism purports to be a universally accepted standard, which transcends time and culture. This thesis is going to demonstrate that while the idea of helping people in need may be universal, but its content like the meaning of suffering and the understanding of how that suffering can be alleviated has evolved throughout the history. These contents are shaped by the constitutive norms of that timeframe. Therefore, humanitarianism is not understood the same way in all societies and in all historical periods. And humanitarianism is perceived as uncontroversial, as it is a manifestation of compassion, kindness and empathy which these qualities are innate to all human beings. This thesis is going to show that humanitarianism is controversial. The content of humanitarianism has been challenged for various reasons throughout the history. This thesis regards China's unwillingness to subscribe to the humanitarian standard as a reflection of the controversy that has surrounded humanitarianism in the post-cold war period.

And thesis argues that it is problematic to judge whether a nation's foreign policy is just by only referring to the humanitarian standard. It is because there are other social norms that are more fundamental in the current international order. For instance, the principle of non-interference, which is derived from the moral idea that all nations are equally entitled to the right of self-determination, is the bedrock of the current international society of states and has been codified into international law. To determine whether a nation's foreign policy is just, this

thesis argues that these well-established principles need to be taken into account. State's humanitarian actions should not derivate from these principles. Therefore, China, which insists on the principles of non-interference and self-determination in resolving humanitarian crises, should not be seen as "irresponsible" and "unhumanitarian" in spite of its refusal to support the post-cold war humanitarian standard.

This thesis does not deny that economic and geopolitical interests play a role in shaping the China's humanitarian policies. But material interests alone do not provide sufficient justification for China's humanitarian engagement with places that have little economic and political significance. Following the holistic constructivist approach, this thesis insists that ideational factors need to be taken into account in order to have a fully picture of state behaviours. This thesis looks at how Confucianism, particularly the teachings of Confucius and Mencius, shapes China's understanding of legitimate statehood and rightful state action, which informs China's understanding of the root causes of humanitarian crisis and conditions its humanitarian responses. Confucian ideas contribute towards China behaving differently in handling humanitarian crises.

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Introduction

China is widely regarded as an emergent power in international politics and is increasingly active and vocal in humanitarian issues, particularly in the areas of military intervention, foreign aid and international criminal justice. The way that China has engaged in humanitarian areas has been heavily criticized by the Western world. In terms of military intervention, China's reluctance to intervene in other states' domestic affairs, including in response to the occurrence of massive rights violation, has drawn criticism. Upholding the principle of non-interference in times of humanitarian crisis has been deemed by some Western political leaders and human rights advocates as irresponsible, even outrageous. During the Darfur humanitarian crisis, Robert Zoellick (2005), then US Deputy Secretary of State, urged China "to become a responsible stakeholder in the international system" and to play a constructive role in resolving the crisis. His speech carries a subtext that implies China is both irresponsible and destructive by insisting on the principle of non-intervention in respect of the Darfur Crisis. Darfur advocate Eric Reeves (2007b) called China a "silent partner in the Darfur genocide" because of its enabling role. China consistently obstructed the non-consensual deployment of UN peacekeeping forces and the UN's decision to put sanctions in place. In other crises, such as the Syrian civil war, which has not been a priority for Chinese foreign policy because of the geographic distance and insignificant economic interests, China has insisted on the notion of non-interference in domestic affairs (Sun 2016). China, with Russia, vetoed the UN Security Council Resolution that urged Syrian president Bashar al-Assad to give up power, withdraws troops from towns and begin a transition to democracy. The veto has been heavily criticized by other members of the UN Security Council. For instance, Susan Rice, the US ambassador to the UN, said, "any further bloodshed that flows will be on their [i.e. China and Russia's] hands". Similarly, France's Alain Juppe said they "carried a terrible responsibility in the eyes of the world and Syrian people" (The Irish Times 2012).

As for foreign aid, China's aid has been characterized as rogue aid. Donors have used aid as an incentive to encourage recipient governments to carry out political and structural

reforms. Alison Carnegie and Nikolay Marinov (2013) explain that aid can be used to maintain patronage and services, which help governments to stay in office, while aid can also mean that the recipient government has more money to spend; in this way, donors can use aid to extract change and to request reforms. Beijing's aid comes with no political strings attached[1]; the aid does not hinge on conditionalities pertaining to specific political objectives like democracy and human rights (Tull 2006: 463). China's aid aims to strengthen economic development and improve people's livelihoods. Promotion of democratic governance is not an objective (Tull 2006: 474). It is said that China's aid undermines the development efforts of Western donors to promote good governance in the developing world. For instance, Adaora Osondu-Oti (2016: 53 and 68) points out that Western officials and human rights organizations have expressed alarm at China's unconditional aid in places like Angola and Zimbabwe. China's "unconditional aid" undermines good governance and democratic principles, and fuels the unaccountability in the recipient governments. In the case of Angola, China's aid is considered to serve as a carrot for the dysfunctional Angolan government. In 2004, the Angolan ruling elite needed the loan for the post-civil war reconstruction efforts; the International Monetary Fund (hereinafter IMF) offered a loan that attached transparency measures requirements. The Angolan government was reluctant to sign the deal, and China came forward with an offer to provide USD 2 billion-worth of loans to rebuild infrastructure devastated or neglected during the civil war, with no conditions attached. The Angolan government accepted China's offer and turned down the IMF's assistance. China's aid was seen as undermining the international actors' effort in promoting good governance.

With regard to international criminal justice, China has been portrayed as being an obstacle to the global reach of the International Criminal Court and human rights organizations have criticized China's attitude towards the Court. China remains outside of the Rome Statute and does not fully support the work of International Criminal Court. For

[1] The only political condition that China attaches to its aid is to support the One China Policy, and limit the official recognition of Taiwan by breaking the diplomatic tie that recipient countries have with Taiwan (Kilby 2017: 17 and Tull 2006: 43).

instance, China has prevented the UN Security Council from referring the Syrian conflict to the Court for investigation and prosecution. Richard Dicker, director of Human Rights Watch's International Justice Program, calls China (together with the US and Russia) the key obstacle to the future of the ICC, saying that "these three who have remained outside the reach of the Rome Statute of the ICC have shielded themselves and, through their use of the veto on the Council, their allies from accountability when national courts in those countries don't do the job". China has not joined the Rome Statute and obstructs the International Criminal Court's functioning with a veto in the UN Security Council, which impedes the global reaches of the Court (IPS News Agency 2014).

These critics have consistently argued that China behaves in this way because of its national interests, particularly economic interests. China's engagement in humanitarian areas has been seen to serve economic self-interest, including overseas markets, oil and other natural resources to fuel the domestic economic development. Commentators suggest that China's adoption of the principle of non-interference in the face of humanitarian crises and its obstruction of the ICC's investigation of Sudanese president Omar al-Bashir over the Darfur crisis are to protect its oil trade and investment in the region (Large 2008; Ojha 2009; Manyok 2016); while the foreign aid (including loans) is used in exchange for or to secure access to natural resources (Lum et al. 2009). This thesis does not deny such economic considerations. However, focusing solely on material interests in order to understand China's behaviour, or any other political actors' actions, is too one-dimensional. Such explanation reduces the political behaviour to the logic of consequences that "see people making decisions using strategic logic, based on what will maximize their individual interests" (Barkin 2009); social behaviours are too complex to reduce to the strategies of utility maximization. Human actors also follow rules and norms because they are seen as "natural, rightful, expected and legitimate" (March and Olsen 2008: 689). Linking human behaviour exclusively to the logic of consequences ignores the substantial role of norms and rules in shaping behaviour. Explaining "real life" political behaviour requires both logic of consequence as well as logic of appropriateness. The logic of appropriateness that "see[s] people making decisions using a social logic, based

on social norms and the expectations of others" needs to be taken into consideration (Barkin 2009). The idea that behaviour is driven by a calculation of its consequences presumes "stable, consistent and exogenous preferences" (March and Olsen 1998: 951), which suggests that political actors are encountering one another with "a pre-existing set of preferences" (Reus-Smit 2009: 197), where the "pre-existing set of preferences" exist to maximize the utility of power and material interests. Pre-supposing that interests are exogenously determined overlooks the fact that interests are shaped by norms and identities, and by the process of interacting with these ideational factors. These ideational factors "strongly imply a particular set of interests or preferences with respect to choices of action in particular domains, and with respect to particular actors" (Hopf 1998: 175). These factors essentially condition the actors' behaviour. Therefore, ideational factors need to be taken into account in order to gain a comprehensive understanding of the way that China behaves in humanitarian areas. This thesis will pay attention to traditional Confucianism and look at how Confucian morals and political ideas shape China's understanding of humanitarianism and humanitarian activities.

China's stance on military intervention, foreign aid and international criminal justice is seen as an affront to international justice. International justice is a moral concept; it is a concept of what is right and wrong. The notion of justice has been framed within the context of humanitarianism in the post-cold war period. It requires the international community to protect suffering and threatened individuals. For instance, Mark Amstutz (2016: 185) notes that justice requires states to secure the security and well-being of their people, and to bear subsidiary responsibilities towards other societies, because states are members of a global community. Justice requires countries to assist societies that are unable to meet and protect the needs of their people. That is to say, in terms of justice, states have a moral obligation to alleviate human suffering and save lives as well as to prevent and strengthen preparedness of the occurrence of man-made crises and natural disasters. It is considered wrong not to do so. This thesis agrees that protection of people is an ethical and a right thing to do. However, the problem lies in the standard of

humanitarianism, and the concept that justice requires states to act in accordance with the standards that are advocated by liberal Western nations. For instance, the use of force is seen by many Western liberal countries as an effective mean of ending violence, saving civilians and achieving positive changes in the conditions of life in the receiving countries. Countries like France, the UK and the US proposed the use of force to protect the civilians in Liberia, which resulted in the adoption of UNSC Resolution 1973. In some cases, non-governmental organizations also campaign for military intervention; one such example is Amnesty International, which campaigned for intervention in Kosovo (Ortega 2001: 46). Similarly, foreign aid and assistance is seen by traditional donors, including many Western countries, as a tool to foster institutional change in recipient countries, with democratic governance being promoted as a way to address the root causes of humanitarian emergencies and to prevent them from arising. Therefore, these traditional donor governments attach political conditions to their aid and assistance. The United States Agency for International Development announced that progress towards democratization would be considered when determining its aid allocation in 1990, and the French President Francois Mitterrand in the same year stated that "French aid will be lukewarm towards authoritarian regimes and more enthusiastic for those initiating a democratic transition" (Resnick 2012). Likewise, many leading Western nations have supported and funded the International Criminal Court. All the European Union's member states are also parties to the Rome Statute. The EU adopted the Council of the European Union's conclusions on the occasion of the 20th anniversary of the adoption of the Rome Statute. In the conclusions, the Council resolved to promote cooperation between the EU and the International Criminal Court through the execution of outstanding arrest warrants[2]. The EU member states together have been the main financial contributors to the Court, and the EU has funded various actions related to the Court through the European Instrument for Democracy and Human Rights, including support measures such as building legal expertise and fostering cooperation of Rome Statute states parties (Zamfir 2018). To be viewed as supporting international justice, China needs to support and act in accordance

[2] Council of the European Union, Doc.11240/18, 17th July 2018.

with these standards. But, as demonstrated above, China questions these practices and does not fully comply with these standards.

To be seen as a member in good standing in international society, states must adhere to the humanitarian standards mentioned above. Due to not observing these practices, China is viewed as a pariah. A pariah is "associated with a certain degree of state violation of settled international rules and norms" (Li 2012: 28). Deon Geldenhuys claims that whether states are pariahs or not depends on how the international community perceives them and their behaviour, social norms and rules define the kinds of behaviours that are deemed appropriate, which specify some actions as right and forbid others as wrong. When states and non-state actors have acted against the standardized behavioural codes, these actors become pariahs (cited in Li 2012: 41 and 42). Since China does not comply with these humanitarian practices, people view the country as a pariah in the global order. For instance, China has been dubbed an "irresponsible power" for not having supported the West's solution to the Darfur crisis (Zoellick 2005); it has been portrayed as a "pariah" by the traditional foreign aid donors as China's unconditional aid allows governments to decline aid from traditional donors, giving them more room to manoeuvre (Swedlund 2017); it has been criticized for not being a party state to the International Criminal Court and refusing to act on the ICC's arrest warrant for Sudanese President al-Bashir when he travelled to China in 2011 (Sceats and Breslin 2012: 28). China is judged by these humanitarian norms, which reflects the fact that these norms purport to be of a universally accepted standard in the international society of states. This thesis challenges this view that humanitarianism is uncontroversial, and argues that humanitarian standards in the post-cold war period are not universally accepted. In doing so, this thesis questions the judgement of China as being an "irresponsible" and "unhumanitarian" nation in the international society of states.

This thesis argues that humanitarianism has always been controversial. The applied understanding of humanitarianism has been challenged vigorously throughout history.

This thesis will show that the ways of saving native populations in the New World in the early modern period had been challenged by Bartolomé de las Casas; the international humanitarian legal order, which has gradually developed since the mid-nineteenth century, has also been questioned due to its hegemonic nature. In addition, humanitarianism in the post-cold war period, which comprises military intervention, the International Criminal Court and the notion of responsibility of prevention (which links to foreign aid), has been challenged by many nations as it disputes the equalitarian regime which is fundamental to the modern international society of states. This thesis regards China's unwillingness to subscribe to these humanitarian practices as a reflection of the controversy that has surrounded the post-cold war humanitarian practices. The content of humanitarianism in the post-cold war period is not universally accepted. Therefore, it is not suitable for using humanitarianism in itself as a standard by which to judge whether China is a pariah state.

Rather than standing as an affront to international justice, this thesis intends to argue that China's self- awareness of its humanitarian obligations is consistent with international justice. This thesis holds that international justice can be conceptualized to significantly different extents depending on the context. International justice requires generally accepted norms, rules and principles. If conduct is consistent with social rules, principles and norms, then this behaviour is just. This thesis holds that there are various socially constitutive norms within the modern international society of states. For instance, Christian Reus-Smit (1999) points out that "augmentation of individuals' purpose and potentialities" is the constitutive norm in the modern-day international order, which manifests in the principles of non-interference and the right to autonomy. International justice also requires compliance with these established international social norms. Therefore, it is problematic to only understand international justice in a mono-dimensional term – in this case only referring to the applied understanding of humanitarianism in the post-cold war era. This applied understanding of humanitarianism is a risk to the existing international order. This thesis considers that legitimate

humanitarian activities should operate within the parameters of the existing order. China's humanitarian activities alleviate suffering while its works respect the existing international norms and rules, including the non-use of force, and the principle of non-interference, which constitutes the current international order. Therefore, China should not be considered a pariah.

This thesis explores the evolution of humanitarianism. By exploring the long history of humanitarianism, this thesis demonstrates that the interpretation of humanitarianism is shaped by the constitutive norms of, and has been dictated by, the Western world for a significant period of time. It also shows that humanitarian activities have been questioned and challenged throughout history. There is no universal humanitarianism that transcends time and culture. China's unwillingness to comply with post-cold war humanitarian standards indicates that the current applied understanding of humanitarianism is not universally accepted. Its perception of the applied understanding of humanitarianism is shaped by the domestic constitutive norm, in this case traditional Confucianism.

Understanding of Humanitarianism

Humanitarianism is concerned with suffering and a willingness to help people. Stanley Feldman and Marco Steenberg define the term as "a sense of responsibility for one's fellow human beings that translates into the belief that one should help those who are in need" (cited in Minn 2007). The term has been broadly applied to assistance given to people in need, prevention of human suffering and improvement of human conditions. The common perspective is that humanitarianism is "a universal value that transcends both time and context" (Hirono and O'Hagan 2012: 3), because the humanitarian notion is a manifestation of compassion, kindness and empathy, and includes a desire to provide support to those experiencing hardship and endangerment (Kyrou 2016: 34), these moral sentiments are regarded as transcending history and cultures, as many, if not all, religious, philosophical and spiritual texts have taught about the importance of having compassion

for others and practising kindness towards others; while various religious and lay figures have practised compassion in their daily life throughout history (Barnett 2011: 19 and 49). Therefore, humanitarianism is conventionally perceived as a universal concept, which is valid for all people, at all times and in all places. This thesis interrogates the concept of humanitarianism and challenges the idea that humanitarianism is understood the same way in all societies and in all historical periods.

In spite of the simple definition, this thesis holds that humanitarianism is a complex concept. There are diverse interpretations of humanitarianism. Michael Barnett (2011: 9) explains that humanitarianism is a creature of the world, which aspires to civilize the world by improving human conditions, but this moral vision is limited by culture, circumstances and contingency; these contexts shape what is imaginable, desirable and possible. It results in the existence of humanitarianisms, not humanitarianism. Different actors define and use humanitarianism in different ways. David Kennedy (2004: XV) observes that there have been "humanitarianisms of the left and of the right, of the establishment and the margin, and everything in between, there are humanitarianisms of Europe, of Africa, of the global, and of the local". State actors and NGOs do not define humanitarianism in the same way. Among states the term is used and understood very differently depending on moral and political ideals; while among NGOs the interpretation is affected by the mandates and perspective of organizations. Essentially, the term humanitarianism is widely used, but the meaning of humanitarianism is not universal.

The commonly applied understanding of humanitarianism is in accordance with the working principles of the International Committee of the Red Cross (hereinafter ICRC). The International Court of Justice (hereinafter ICJ) adopts the working principles of ICRC to define humanitarianism in the case of *Nicaragua v. United States* in 1986[3]; these

[3] ICJ (1986: para 243) rules that humanitarianism "must be limited to the purposes hallowed in the practice of the Red Cross, namely above all be given without discrimination, namely to prevent and alleviate human suffering, to protect life and health and to ensure respect for the human being; it must also, and above all, be given without discrimination".

principles are humanity, impartiality, neutrality, independence, voluntary service, unity and universality (ICRC 2016). These principles were carefully crafted by ICRC in response to its goal of delivering aid. Among these seven principles, humanity, impartiality, neutrality and independence are at the core of the ICRC's humanitarianism (O'Hagan 2007: 330). The principles are shaped by liberalism, which focuses on human dignity or individual welfare, stressing that "each individual matters, and he or she is worthy of equal attention to basic, minimal standards of human decency or dignity" (Forsythe 2005: 14 and 2001: 678). Among these core principles, humanity is the most essential one, "from which all other principles are derived" (Fast 2016: 111), and "the one concept that humanitarianism cannot exist without" (Radice 2018: 159). Humanity is "the sentiment of active goodwill towards mankind" (Pictet 1979). It represents the fundamental spirit of humanitarianism – the desire to bring assistance, to prevent and alleviate suffering, to protect life and help and to respect human beings (Pictet 1979). Humanity is the starting point of humanitarianism. From the ICRC's perspective, humanitarianism needs to observe three other guiding principles – impartiality, neutrality and independence. Neutrality entails the notion that humanitarian agents do not take sides and are non-partisan (O'Hagan 2007: 330); impartiality means providing assistance on the basis of need with priority given to the most urgent cases of distress (Pictet 1979), and without discrimination on the grounds of gender, age, nationality, race, social class, religious or political belief or on the basis of possible outcome (O'Hagan 2007: 330); and independence refers to "any interference, whether political, ideological or economic, capable of diverting them from the course of action laid down by the requirements of humanity, impartiality and neutrality" (Pictet 1979). These principles attempt to inoculate humanitarianism from politics and de-politicalize humanitarian action.

The ICRC's understanding of humanitarianism represents a partial view of the concept. Actors harbouring different (or broader) ambitions than providing immediate relief or facing different challenges have different definitions of humanitarianism to those of the ICRC. Principles of neutrality, independence and impartiality are less important in their

interpretation of humanitarianism; they deem politics as necessary in the humanitarian field. For instance, Wilsonian organizations like Save the Children, Oxfam and World Vision do not premise their action on these principles; these organizations not only take part in rescuing at-risk populations, but they also work in other activities that are designed to assist marginalized populations and in advocacy. These organizations adhere less to the principle of neutrality and may act in the interest of one group in order to address causes of suffering; they may advocate the redistribution of political power, reallocation of resources and enforcement of rights. Involvement in politics becomes inevitable (Barnett 2005: 728; 2010: 181 and 2011: 40). This alternative interpretation of humanitarianism demonstrates that humanitarianism is not a universally agreed concept even within the NGO sector in the post-cold war era. When there are various understandings applied to humanitarianism, it is arguable as to the extent to which humanitarianism can be used as a standard to determine whether international policy is legitimate or just.

The hypotheses of this thesis are that humanitarianism may be universal in its concern for humanity, but it has always been distinctive in its interpretation, and the notion in itself is not justified as a standard for just international policy as its legitimacy has been constantly challenged. This thesis places humanitarianism in a historical and political context to prove the hypothesis. It shows how this constitutive norm of international politics evolves[4]. In doing so, it emphasizes the changing aspects of humanitarianism and how the notion of humanitarianism is linked to ideas of justice and legitimacy. Essentially, this thesis argues that the applied understanding of humanitarianism in the post-cold war era has become unanchored from international legitimacy. The thesis then explores China's approach to humanitarian practice, arguing that China does not oppose the hegemonic ideal of humanitarianism – i.e. the notion of helping others – but is against the standards of legitimacy that are found in post-cold war humanitarian practices. This

[4] Constitutive norm refers to moral, cultural and political norms that create new actors, interests or categories of action (Finnmore and Sikkink 1998: 891 and Sutch 2012: 4).

thesis argues that China's Confucian humanitarianism remains a legitimate instantiation of humanitarianism while remaining distinct from the meaning that is used by liberal Western nations.

Chapter Review

Chapter 1 lays out the approach of this study. The research makes use of Christian Reus-Smit's historical approach to international order. His approach effectively reveals how constitutive norms shape the international order. It informs how this thesis studies the evolution of humanitarianism. His approach takes all relevant factors in domestic and international levels into consideration, but the emphasis is given to the moral ideals. Drawing from his approach, this thesis places the emphasis on the constitutive norms and looks at how the constitutive norms contribute to the change in applied understanding of humanitarianism. This chapter starts by outlining the main assumptions behind constructivism. In order to separate Reus-Smit's approach to other constructivist approaches, this chapter makes a distinction between conventional and critical constructivisms, as well as unit-level, systemic and holistic constructivisms, and then identifies where Reus-Smit stands within the broad spectrum of constructivism. Since this study focuses on the evolution of humanitarian norms, Reus-Smit's view on the history is also explored. His view on history is situated within constructivism, showing how moral arguments shape the political practices that essentially condition the development of history. Then this chapter moves to his view on international order. His understanding of modern international order lays the foundation for understanding of humanitarianism and its controversies in the post-mid-nineteenth century. On the one hand, the modern international order constitutes the international humanitarian legal order, which aims to regulate warfare and to protect people who are not or are no longer taking part in hostilities. On the other hand, the modern international order is also a rule-based order, which recognizes that sovereign states have the right to autonomy and self-determination and the principle of non-interference. The applied understanding of humanitarianism in the post-cold war period challenges these essential features of modern international

order, which results in some states questioning its legitimacy. The discussion of international order is followed by addressing a longue durée approach and periodization. These historical approaches help demonstrate that the applied understanding of humanitarianism is not a universal value, which cannot transcend time. In each period, humanitarianism is understood differently. By dividing the history of humanitarianism into different periods, this thesis demonstrates that the legitimacy of an applied understanding of humanitarianism has been challenged in each historical period. Therefore, humanitarianism in and of itself is not suitable to be seen as a standard by which one can judge where international policy is just or legitimate.

Chapter 2 begins the inquiry into the evolution of humanitarianism. This chapter looks at the humanitarianism in early modern Europe, arguing that legacies of the late medieval period shaped and conditioned Spain's international policies in the New World and actors appealed to the humanitarian concern that is embedded in these legacies to justify their actions including those violence and unfair laws. A study of the Spanish overseas expansion intends to demonstrate the power of constitutive norms in constituting international policies. Constitutive norms regulate behaviours by appealing to their humanitarian purpose. At the same time, this study also hopes to show that the applied understanding of humanitarianism is controversial and has always been challenged. Different actors present alternative understandings of humanitarianism, despite having being inspired by the same humanitarian motivation. Spanish expansion into the New World inspired a debate regarding how to Christianize the native Indians and to "civilize" these groups of people to a European standard. This chapter looks at the height of this intellectual debate – the Valladolid debate of 1550–51 between Juan Gines de Sepúlveda and Bartolomé de las Casas. They each presented a different applied understanding of humanitarianism despite sharing the same humanitarian goal: civilizing and Christianizing the Indians.

Chapters 3 and 4 proceed to evaluate humanitarianism in the post-nineteenth century. It is in these chapters where Reus-Smit's analysis of the modern-day international order comes into play. Chapter 3 examines the international humanitarian legal order, focusing

in particular on the Geneva Conventions and Additional Protocols. The construction of a legal order began with Henry Dunant, who intended to civilize armed conflicts by limiting suffering caused by warfare after witnessing a bloody battle in Solferino, Italy. In studying international order in the modern period, Reus-Smit identified two fundamental institutions that regulate how goals at an international level can be legitimately achieved: contractual international law and multilateralism. This chapter lays out his arguments on how these institutions came into being. The intention of this chapter is to show that fundamental intuitions limit how humanitarian concerns can be achieved, in this case protecting people who are not or who are no longer taking part in armed conflict. Despite the wide acceptance of multilateralism and contractual international law as a way of achieving a common international goal in the modern era, this chapter argues that political reality of material inequality among states should not be overlooked. This political reality may not sit comfortably with multilateralism and contractual international law that is based on the constitutive norm that places importance on social and legal equality. This inequality was displayed in the codification of international humanitarian law.

Chapter 4 examines how constitutive norms shape humanitarianism in the post-cold war period. This chapter identifies human rights protection as a constitutive norm of international politics in the post-cold war era. The intention of this chapter is to demonstrate that constitutive norms inform what legitimate behaviours are, and give rise to the new applied understanding of humanitarianism. This chapter outlines Reus-Smit's key argument, that sovereignty as an organizing principle of the current international order, which has always been justified with reference to a particular understanding of legitimate statehood and rightful state action. Instead of seeing sovereignty and human rights as inherently incoherent, this chapter follows Reus-Smit's views, arguing that the notion of human rights protection shapes the meanings of legitimate statehood and rightful state action; and the protection of basic human rights is "the dominant rationale that licenses the organization of power and authority into territorially defined sovereign units" (Reus-Smit 2001: 520). The new meanings of legitimate statehood and rightful state

action give rise to the intrusive form of humanitarianism. At the same time, this chapter intends to show that the intrusive form of humanitarianism is full of controversies and is not universally accepted. This form of humanitarianism goes too far in challenging other constitutive norms such as the right to autonomy and the principle of non-intervention. Its legitimacy is questioned by less developed nations. It is questionable whether the applied understanding of humanitarianism is suitable to be the standard of international justice.

Chapter 5 examines how China views the current applied understanding of humanitarianism. Prior to this chapter, this thesis has mainly focused on the constitutive norms at the international level. This chapter primarily looks at the domestic constitutive norms and intends to demonstrate how these engage with the applied understanding of humanitarianism, arguing that domestic constitutive norms play a role in shaping the understanding of humanitarian crises and defining what is legitimate and appropriate behaviour in responding to these crises. This chapter identifies Confucianism, particularly the moral and political teachings of Confucius and Mencius, as the main source of domestic constitutive norms in China and introduces their key notions briefly. This domestic constitutive norm conditions how China views and responds to the applied understanding of humanitarianism in the post-cold war period, and contributes towards China behaving differently. It results in people seeing China as rejecting humanitarianism. This chapter rejects the claim that China's attitude is an affront to international justice, arguing instead that its humanitarian practices are *in line with* the notion of international justice: that its humanitarian policies alleviate people's suffering while respecting the fundamental norms of the current international order, like the right to autonomy and the principle of non-intervention.

Chapter 6 constitutes the conclusion of this thesis. The conclusion chapter presents an overall finding about the applied understanding of humanitarianism. It concludes that the applied understanding of humanitarianism is not a universal concept reluctant to transcend time and culture. It is understood and interpreted differently by different actors and in different historical periods. The notion of humanitarianism in and of itself is

not suitable to be used as a standard against which international policies can be assessed as just or legitimate. This final chapter also presents the theoretical implications of this thesis, focusing on the role of constitutive norms in shaping international policies; the relations between humanitarianism and international orders; and the emancipatory project of critical theory. It concludes that China should not be seen as a pariah state despite the fact that it does not share the applied understanding of humanitarianism in the post-cold war period.

Constructivist Approach to International Relations

Introduction

This thesis sets out to explain that humanitarianism is not a universal concept and why the applied understanding of humanitarianism varies from one historical period to another. It explores the non-material factors that shape the applied understanding of humanitarianism. This thesis adopts a constructivist approach, based on three considerations. First, humanitarianism is a human creation that concerns the well-being of others and helps others in need. It is a constitutive norm because humanitarianism has a constitutive effect on political actors' identity, which shapes the actors' interests and action. Second, the adoption of constructive approach is based on the fact that neorealism and neoliberalism explicitly seek to explain international policies as the result of material forces and material interests; a norm is regarded as the product of a state's interests that are predetermined. Intersubjective beliefs have not been regarded as an important force in the construction of norms. And third, humanitarian activities do not necessarily conform to neorealist and neoliberal perspectives on international political behaviours; many of these humanitarian crises occur in places that have few geopolitical, strategic and economic significances, states have no obvious economic and political interests to intervene in these areas and to bear these economic, political and military burdens (Finnemore 2008). But many states still carry out humanitarian activities in these areas. Material interests alone are inadequate to provide a full picture of why nations carry out humanitarian activities.

This thesis's approach is influenced by *Reus-Smit's Moral Purpose of the State* (1999) and *Individual Rights and the Making of the International Systems* (2013). His studies provide crucial insight into what factors constitute and articulate the meaning of specific norms; constitutive norms have been identified as the key elements in this process. His finding directs the research attention towards the constitutive norms, this research looks at how constitutive norms constitute the applied understanding of humanitarianism. At the same

time, Reus-Smit adopts an historical approach in order to understand the evolution of international societies; he concludes that ideas impact upon the politics of legitimacy of their time, which gives rise to a new legitimate behaviour. It constitutes a shift in international societies i.e. the fundamental institutions and the expansion of the international society of states. This insight informs how this thesis interprets the change in applied understanding of humanitarianism in terms of its history. In addition, Reus-Smit's study uncovers the interaction between domestic and international norms, and how this interaction shapes behaviours. This thesis uses the interaction to assess how China's humanitarian activities are so different from those of the Western liberal nations, and how they are a result of different understandings of applied understanding of humanitarianism, constituted by domestic norms.

Reus-Smit's work explores the structure of the modern international society of states and the constitutive ideas behind the structure. His works provide some key insights into the post-nineteenth-century humanitarianisms. His works point out that from the mid-nineteenth century onward, it is generally accepted that the rightful law must be authorized by those subjects to the law and must be equally binding upon everyone in all like cases. These legislative principles dictate that multilateral forms of rule determination and contractual international law is the rightful way to reach a legitimate international agreement. It gives an insight into why a series of international conferences were held in order to codify the Geneva Conventions and Additional Protocols. At the same time, Reus-Smit's work identifies various constitutive norms within the current international order, including the right to autonomy and the principle of non-intervention. The applied understanding of humanitarianism in the post-cold war period has been seriously questioned because humanitarian activities in this period pose a risk to these norms. Therefore, this thesis regards it as important to have an overview on Reus-Smit's work on international order.

This chapter begins with a section that gives an overview of constructivism in international relations, outlining the divisions within constructivism, and then identifies where Reus-Smit stands within the broad spectrum of constructivism. This section also

explains why this thesis adopts a holistic approach to understanding the change in applied understanding of humanitarianism. After giving a detailed account on constructivism, this chapter moves on to the discussion of Reus-Smit's view on history. His view on the history gives an insight on the evolution of the applied understanding of humanitarianism, which has been driven by changing constitutive norms. Then the discussion moves on to the international order. The chapter gives a detailed account on Reus-Smit's view on international order and the constitutive norm behind the current international order. Finally, this chapter will explain why this thesis is going to divide the history of humanitarianism into different periods, and justify the division.

Constructivism in International Relations

Reus-Smit's approach to international order is drawn from the perspective of constructivism. Constructivism in international relations is not a unified approach. Rather, it is broadly divided into two camps: conventional constructivism and critical constructivism[5]. There are three levels of analysis: systemic level, unit level and holistic level. Despite the various approaches, constructivism is united in a common orientation towards the nature of social and political life, which is characterized by "three ontological propositions" (Reus-Smit 1999: 165; Price and Reus-Smit 1998: 266–7).

The first ontology of constructivism asserts that ideational and normative structures are as important as material structures in shaping actors' behaviours. It contrasts with neorealism and neoliberalism, which emphasize the influence of material structures and subjects. This constructivist proposition is partly attributed to the notion that a system of meanings dictates how actors interpret their material environment (Price & Reus-Smit 1998: 266). As Alexander Wendt (1995: 43) puts it, "material resources only acquire meaning for human action through the structure of shared knowledge in which they are

[5] In the literature on constructivism, different authors label these distinctions in various ways, such as modern and postmodern (Price and Reus-Smit 1998: 260). For the sake of simplicity, I have labelled these divisions in the same way as Ted Hopf (1998: 171–85) into conventional and critical.

embedded". To illustrate this view, Wendt (1995: 73) put forward an example: "500 British nuclear weapons are less threatening to the United States than 5 North Korean nuclear weapons, because the British are friends of the United States and the North Koreans are not, and amity or enmity is a function of shared understandings". That is to say, the way in which subjects and actors are interpreted is as important as subjects and actors themselves.

The second ontological proposition asserts that identities shape interests and actions (Price & Reus-Smit 1998: 267). From the perspective of constructivism, interests are shaped by identities that affect actors' action. Neorealism and neoliberalism hold that interests and preferences are fixed prior to state agents knowing their position in the society (Hurd 2008: 302; Price & Reus-Smit 1998: 267). For constructivists, the neorealist and neoliberal position is absurd, because states' interests and actions depend on identity (Price & Reus-Smit 1998: 267; Reus-Smit 1996: 9). Actors' social identity provides "role specific understanding and expectations about self" (Wendt 1992: 397). In other words, self-understanding and expectations inform the agents' wishes and constitute the basis of their interests, eventually shaping their actions. As Wendt (1999: 231) argues, "interests presuppose identities, because an actor cannot know what it wants until it knows who it is".

The third ontological proposition is to stress the mutual constitution of agents and social structures. Neorealism and neoliberalism consider that anarchy, a form of social structure, is an independent variant and is a detrimental factor in states' behaviour. On the one hand, constructivism draws attention to the fact that social structures are nothing more than routinized discursive and physical practices that persist over an extended temporal and spatial domain (Price and Reus-Smit 1998: 267). In other words, social structures are constructed by social agents, from which they cannot be separated. This position is summarized by Wendt (1992): "Anarchy is what states make of it". On the other hand, social structures have a considerable influence on states' behaviours. John Boli et al. (1989: 12) explains that social structures "define the meaning and identity of the

individual actor and the patterns of appropriate economic, political, and cultural activity engaged in by those individuals". That is to say, actors' actions shape the institutions and the norms of international life, and, in return, these institutions and norms define, socialize and influence states (Hurd 2008: 304).

Apart from these common ontological propositions, constructivism differs in the meta-theoretical levels and the level of analysis. The coming pages will make distinctions between conventional and critical constructivism and point out the differences between systemic, unit-level and holistic constructivism. At the same time, it will pinpoint Reus-Smit's approaches and his stance on constructivism.

-- Conventional Constructivism and Critical Constructivism

In line with ontological propositions of constructivism, conventional constructivism and critical constructivism aim to "denaturalize the social world", that is, to reveal that institutions, practices and identities that people assume to be natural and matter of fact are a result of human construction (Hopf 1998: 182). In addition, both forms of constructivism are based on the idea that "we make the world what it is, by doing what we do with each other and saying what we say to each other" (Onuf 2013: 4). The social world "does not consist of natural facts but is an artifice based on shared concepts and understandings" (Kratochwil 2008: 450). Therefore, intersubjective reality and meanings are crucial data for understanding the social world. And these data need to be contextualized, meaning that all "data" must be situated within the social environment where the data are collected in order to understand their meaning (Hopf 1998: 182). And both forms of constructivism share the assumptions about the mutual constitution of actor and structure and the notion that individuals can be agents in international relations (Hopf 1999: 182).

Despite these similarities in ontology [6], conventional constructivism and critical constructivism are significantly different. Critical constructivism criticizes the meta-theoretical position of conventional constructivism. Conventional constructivism adopts social ontology, meaning that it sees the world not only as consisting of material and tangible objects, but also social facts and intersubjective meanings, and "insists that human agents do not exist independently from their social environment and its collectively shared systems of meanings" (Risse 2009: 15). However, conventional and critical constructivism adopts a different epistemology[7]. Conventional constructivism does not reject the epistemological assumptions of positivism, which advocates the notion that "it is the world out there which is independent of our thoughts" (Donnelly 2013: 15). The positivist epistemology essentially separates the internal thought processes of the individual from the external world. By accepting a positivist epistemology, conventional constructivism "remains heavily indebted to more causal modes of analysis" (Donnelly 2013: 15), does not depart from the "normal science" (Hopf 1998: 82), and avoids "a break with the explanatory model of neorealism" (McSweeney 1999: 123). Critical constructivism criticizes the inconsistency at the core of conventional constructivism – the combination of a social ontology with a positivist epistemology. Faye Donnelly (2013: 16) explains, on the one hand, that the ontology of conventional constructivism argues that "social relationships are formed in interaction and can thus be changed"; on the other hand, the epistemology of conventional constructivism contends that "an objective world exists out there", which contradicts the fundamental claim of constructivism. There is an incoherence between social ontology and positivist epistemology. Critical constructivism adopts a social epistemology. Both social ontology and social epistemology accept the assumption of "the possibility of a reality to be

[6] Ontology can be simply understood as "what is the nature of the social world". And questions that are usually associated with the ontology of political research include whether the social world is fundamentally different from the natural world; whether it is an objective reality that exists independently of us or is in important respects subjectively created (Halperin and Heath 2012: 27).

[7] Epistemology is concerned with what is knowable, with what we can know about social phenomena, and, consequently, what type or form of knowledge we would pursue and treat as legitimate knowledge of the social world (Halperin and Heath 2012: 27).

constructed" (Fierke 2010: 196). Social epistemology of critical constructivism places the emphasis on language, discourse and communication. Unlike positivist epistemology, which sees "words as labels for objects which mirror reality", social epistemology contends that language "is more than a mere description of a reality" (Fierke 2010: 194). Words and languages are key to understanding and explaining social behaviours, because agents make sense of the world and attribute meaning to the objects and their activities through words, language and communicative utterances. In this respect, critical constructivism regards language as playing a constitutive role in the construction of knowledge, and knowledge only "finds expression in and through language" (Donnelly 2013: 17). And words do things: "By saying something, the agents do something"; by using words and languages we are actually constructing and reconstructing social realities, and talking is the most important way to make the world what it is (Donnelly 2013: 18). Therefore, language "is bound up in the world" (Fierke 2010: 194). With this in mind, critical constructivists focus on the "generation of meaning, norms and rules, as expressed in language, by the subjects of analysis" (Fierke 2010: 197). In this thesis, a conventional constructivist approach is adopted, and a causal mode of analysis is used to explain the connection between the constitutive norms and the applied understanding of humanitarianism. It explains why applied understanding of humanitarianism is understood differently in different timeframes and cultures.

Critical constructivism also criticizes conventional constructivism's support, explicitly and implicitly, of the existing domination. First of all, conventional constructivists acknowledge the contingent nature of all knowledge and recognize the connection between morality and power, but they hold that some criteria are needed to distinguish between plausible and implausible interpretations of social life, and minimal, consensually based ethical principles are required for meaningful emancipatory political action (Price and Reus-Smit 1998: 262). Conventional constructivism adopts what Mark Hoffman calls "minimal foundationalism, accepting that a contingent universalism is possible and may be necessary" (Hopf 1999: 183). However, critical constructivism rejects the desirability of "minimal foundationalism" (Hopf 1999: 183), because knowledge can

function as a form of domination as there is an intimate relationship between power and knowledge (Foucault, 1995: 27). Therefore, any forms of foundationalism will "silence and marginalize the alternative experiences and perspectives, in turn produce and reproduce relations of dominations" (Reus-Smit and Price 1998: 262). Conventional constructivism allows the normalization or naturalization of what is being observed, which risks hiding the patterns of domination and exploitation that might be revealed (Hopf 1999: 183). Second, the conjunction between observers and actors is overlooked by conventional constructivism (Hopf 1998: 184). Conventional constructivists do not regard observers as "a subject of inquiry"; they look at "the connectivity of subjects with other subjects in a web of intersubjective meaning". But critical constructivists recognize that observers and actors cannot be separated, because observers are more likely to project their own ideas onto the subjects that they study; as a result, observers participate in reproducing, constituting and fixing the intersubjective entities that they observe (Hopf 1999: 184 and Barkin 2010: 27–8). These observers have the ability to reinforce the existing domination. And third, conventional constructivism is not interested in examining power relations, even though it recognizes that power is everywhere because social practices reproduce the underlying power relations in society. Such stance arises because the aim of conventional constructivism is to produce new insights and knowledges based on novel understandings, not to unmask power relations (Hopf 1998: 185). Critical constructivism adopts a similar view on the power relations to conventional constructivism. It argues that power relations exist in all social relations and social exchange, and there is always a dominant actor in these relations and exchanges. In other words, hierarchy, domination and subordination are the nature of social relations and social exchange (Hopf 1998: 185). However, critical constructivism has been much more critical of power relations, it aims to unmask these power relations and to analyse "social constraints and cultural understandings from a supreme human interest in enlightenment and emancipation".

In addition to criticisms, conventional constructivism and critical constructivism address different questions. On the one hand, conventional constructivism is interested in uncovering the causal relationship between actors, norms, interest and identity" (Checkel

2008: 73), and wishes to discover identities, norms and their associated reproductive practices and then offer an account of how these imply and shape actors' actions in world politics (Farrel 2002: 56). Therefore, it is interested in the question of "why", such as "why were chemical weapons not used by the European belligerents in World War II and what is the role of the prohibitory norms against chemical weapons in effecting this behaviour?" (Reus-Smit 1996: 10). On the other hand, the main aim of critical constructivism is not to articulate the effects of norms or identities, but rather to focus on how people come to believe in a single version of truth (Hopf 1999: 184). That is to say, critical constructivism attempts to explode the myths associated with the formation of intersubjective meanings. As a result, critical constructivism concerns the question of "how", such as "how chemical weapons have come to be regarded as less legitimate than other weapons?" and "what meanings does the chemical weapon taboo consist?" (Reus-Smit 1996: 10). Therefore, critical constructivism examines social discourse (Checkel 2008: 73).

Robert Jackson and Georg Sorensen (2010: 165) suggest that Christian Reus-Smit is one of the prominent representatives of conventional constructivism. This thesis generally agrees with their assessment, but wants to emphasize that he is a conventional constructivist with a critical constructivist's mindset. He is a conventional constructivist, because of his adoption of positivist epistemology. The positivist epistemology maintains that the socially constructed international order contains patterns that are amenable to generalization, and these patterns are the product of underlying laws that govern social relations, where these laws can be identified by scientific research; the goal of this research is to explain the "cause and effects relationships that are believed to exist independently of the observer's presence" (Hurd 2008: 208). For instance, Reus-Smit (1999) offers law-like generalizations on the international society of states. Comparing and analysing interstates societies of ancient Greece, Renaissance Italy, absolutist Europe and modern international society, Reus-Smit (1999) generalizes the constitutional structures of international societies which incorporate three normative elements, these are the moral purpose of the states, the organizing principle of sovereignty and a norm of pure procedural justice which shape the fundamental institutions, the different ideals of

moral purpose of the state and procedural justice leads to different fundamental institutions in different interstates societies. At the same time, Reus-Smit is sceptical about the claim of critical constructivists that "there can be no common body of observational or tested data that we can turn to for a neutral, objective knowledge of the world, there can be no ultimate knowledge, for example, that actually corresponds to reality per se" (Price and Reus-Smit 1998: 272). He upholds that it is possible to obtain the "small-t" truth about the subject that have been investigated, because logically and empirically plausible interpretations of action, events or processes can be reached after undertaking sustained empirical analyses, the truth claim can then be sustained by appealing to the weight of evidence (Price and Reus-Smit 1998: 272). Reus-Smit (1999) claims that the different understandings of the moral purpose of a state and norm of procedural justice are the most plausible explanation of the institutional differences between societies of states in history.

Although Reus-Smit is a conventional constructivist, this thesis argues that he has a critical constructivist's mindset. First, despite upholding that there can be a "law-like generalization" and "objective knowledge", Reus-Smit is well aware that these claims are not infallible. He admits that these knowledges are always contingent and a partial interpretation of a complex world, because these knowledges are based on particular evidence. Actions, events and processes are open to alternative interpretations. A logical alternative conclusion can be reached after undertaking sustained empirical analyses. (Price and Reus-Smit 1998: 272). Second, despite it not being his aim to address power relations, Reus-Smit is conscious of the power relations that underlie the processes of international order construction – a main concern of critical constructivism. His works note that political actors tried to dominate the discourse of self-determination and to establish a dominant interpretation of a legitimate way of resolving the problem of cooperation. And through the longue durée approach, his works demonstrate that power has played a decisive role in meaning construction. He unravels that actors with power assert their interpretation and shape the interpretation of legitimate statehood and

rightful state action in each historical period, their interpretation becomes hegemonic and shapes the constitutional structures and the fundamental institutions of interstate societies in each period (Reus-Smit 1999: 37). Therefore, this thesis considers that Reus-Smit is a conventional constructivist with a critical mindset.

-- Systemic, Unit and Holistic Levels of Analysis

In addition to the division at a meta-theoretical level, the level of analysis in constructivism is also divided. The analysis is split into three categories: systemic, unit-level and holistic. The different levels of analysis arise from different understandings of identity. According to Wendt (1994: 385), there are two forms of identity: corporate and social. Wendt (1994: 385) defines corporate identity as "the intrinsic, self-organizing qualities that constitute actor individuality" and explains that "for human beings, this means the body and experience of consciousness, while for organizations, it means their constituent individuals, physical resources, and the shared beliefs and institutions in virtue of which individuals function as a 'we'". In other words, internal organizational structure can be said to create a corporate identity (Wight 2006: 190). Corporate identity serves as a dividing line between domestic and international politics and makes the domestic "we" coherent with the singular "I" at the international level (Wight 2006: 191). This identity generates "motivation for engaging in action" or, in other words, interests. These interests include "physical security, including its differentiation from other actors"; "ontological security or predictability in relation to the world, which creates a desire for stable social identities"; "recognition as an actor by others, above and beyond survival through brute force"; and "development, in the sense of meeting the human aspiration for a better life, for which states are repositories at the collective level". These corporate interests are considered "to some extent prior to interaction" (Wendt 1994: 385). As for social identity, Wendt (1994: 385) defines this as a "set of meanings that an actor attributes to itself while taking the perspective of others, that is, as a social object". That is to say, social identities, including status and role, are constructed through interaction with other states. For example, a state cannot be an oppressor if there is no one to be

oppressed and it cannot be an outsider of the norm formation process if there are no norm makers. Social identities have both individual and social structural properties, meaning that they enable actors to determine "who I am/we are" in a situation and determine "me/our" position in a social role structure of shared understandings and expectations (Wendt 2994: 385). The corporate and social identities are important to the evolution of humanitarianism because they shape and condition how political actors interpret humanitarianism, and its applied meaning. These identities essentially shape the history of humanitarianism. These identities are shaped by the constitutive norms of a particular timeframe and culture. Since the constitutive norms are different in each period and culture, the applied understanding of humanitarianism is different in each period, therefore it is not a universal concept that transcends time and culture. These constitutive norms essentially shape the trajectory of the history of humanitarianism.

The unit-level analysis is inspired by corporate identity. It argues that corporate identity shapes the entities' actions. Peter Katzenstein (1993) explains how differences in domestic political, social and legal norms led Japan and Germany to construct different state identities and interests that made them respond differently to terrorist threats after 1945 despite sharing similar conditions, i.e. being suspicious of any kind of military action, reluctant to be drawn into further confrontations and determined to prioritize economic competitiveness in the international market over military engagements. Katzenstein argues that Germany adopted a proactive approach to pursuing multilateral agreements to fight terrorism driven by German "abstract universalism", which translates into a need to be good world citizens and enhance the country's moral leadership in Europe. The Japanese approach was much more passive. Instead of combating terrorism, Japan sought to export their terrorist problem – they had little concern for terrorist activity outside their borders. Katzenstein argues that this position was the result of self-imposed isolation, a uniquely Japanese characteristic. In his own words, "Japan lacks in international society what it has in domestic society, an ideology of law and moral vision of a good society". This approach essentially looks at how domestic structures shape foreign policy. Drawing from this insight, this thesis examines how the non-systemic

source of a state's identity shapes how the state views the prevailing applied understanding of humanitarianism and their approach to humanitarian crises. This thesis looks at China's domestic moral and political ideas in order to understand its view on the applied understanding of humanitarianism in the post-cold war period.

The systemic analysis stresses the social identity. Wendt (1999: 244) argues that identity goes beyond a self-given understanding; it exists in relation to others and comes from social interaction. Whether or not the identity generated by an actor has the same meaning to others will often depend on whether or not others see it in the same way. That is to say, identity will only have meaning when it is shared by others. This means that state identities emanate only from interaction with other states. Identity defines interests, and interests are not predetermined or static. Interests will change along with social identity. For example, great powers and developing nations will have different interests in international politics, corresponding with their respective social identities. This form of analysis focuses on the international constitutive norm. It contends that international institutional structures constitute actors' identities, interests and practices; in turn these practices reproduce structures (Price and Reus-Smit 1998: 268). The systemic level analysis could provide an explanation as to why political actors respond a certain way despite their differences in domestic society. Drawing from this insight, this thesis argues that the constitutive norms condition nations with different cultural and social backgrounds to adopt a multilateral form of rule determination, which results in the codification of international humanitarian law.

The holistic approach is a cross-level analysis which encompasses the full spectrum of factors conditioning the identities and interests of states. This approach brings the corporate and the social identities together into a unified analysis perspective in order to gain a comprehensive understanding of states' preference and the formation of norms in the international system (Reus-Smit 1999: 167; 2005a: 201). In other words, this form of constructivism breaks down the dichotomy between national analysis and international analysis. It "treats the domestic and the international as two faces of a single social and political order" (Reus-Smit 1999: 167; 2005a: 201). The holistic approach emphasizes that

"the domestic and the international are deeply entwined" and that the "domestic norm dynamic affect and is affected by the international sphere" (Finnemore & Sikkink 1998: 893; Dixon 2013: 138). When ideas, values and norms in the domestic system change, these changes shape the mind of institutional architects, which makes some practices appear essential and others inappropriate, and condition the practices of the agents. Through repetition, the practices that are regarded as essential are institutionalized and become new features of the international society. The structure conditions the agents' behaviours and shapes states' actions, which in turn reinforces the norms and the structure (Reus-Smit 1999: 34 and 167). Drawing from the holistic approach, this thesis analyses both domestic and international norms in order to develop a better understanding of the evolution of humanitarianism and China's view on the applied understanding of humanitarianism in the post-cold war period.

There are four main reasons that lead this thesis to adopt the holistic approach to analyse the evolution of humanitarianism. First of all, rationalist theoretical models like neorealism and neoliberalism do not offer best fit models in analysing the development of humanitarianism. The core assumptions of rationalism are that humans are rational actors. They are motivated by self-interest, usually referring to the desire for power, security or wealth, which are formed before entering social relations; they and strive to maximize their interests, and subsequently they do what serves their interest best (Nugent 2010: 441). As Vaughn Shannon (2000: 296) put it, norms are created for this self-interest. Therefore, rationalism can explain certain kinds of norms such as free trade. However, humanitarianism is derived from the moral concern for human suffering across borders of nation, race, religion and other categories. Humanity is at the heart of humanitarianism. It is concerned with human suffering, human interaction and the human ability to feel empathy and compassion for, and then respond to, the sufferings and the needs of other humans. Many humanitarian activities are carried out in places where the great powers have no geopolitical, economic and strategic interests[8]. At the

[8] For instance, Martha Finnemore (2008: 156–57) points out that the 1989 US action in Somalia is a case of humanitarian intervention without obvious interests. Somalia was economically and in terms of security

same time, rationalist theoretical models do not explain why states with similar capabilities address the same crisis differently. Preferences are shaped by non-material factors. Since humanitarianism cannot be purely explained by material concerns, it has to take non-material factors like moral and political idea into consideration in order to have a comprehensive view on this norm. This thesis places the emphasis on the constitutive norms, and stresses that these intersubjective ideas are the key to understanding humanitarianism and the change in it. But the rationalist model of analysis excludes the non-material factors. Therefore, this thesis adopts a constructivist approach to explain humanitarianism.

Second, a systemic approach has a significant analytical limitation as it focuses on how systemic sources of identity shape states' interest behaviours, yet it ignores the role of domestic factors. It does not take local culture and local moral and political ideas into account, which means it is difficult to provide a comprehensive answer as to why states adopt different approaches in addressing humanitarian crises. Without taking the domestic constitutive norm into consideration, the systemic approach would not be able explain why China does not adopt an intrusive from of humanitarianism in the post-cold war era and how China understands humanitarian crises. Its understanding and approach are different from other powerful nations. Third, the unit-level approach also has a limitation. Since this approach solely focuses on internal and domestic determinants and their influences on national policy, it neglects international norms. However, without considering international norms, it is difficult to explain how the international humanitarian legal order is constructed. To have a comprehensive view of the evolution of humanitarianism domestic and international norms need to be taken into account. Therefore, this thesis adopts a holistic approach in order to understand humanitarianism. Finally, the reasons to adopt a holistic approach are that the approach sets out to show how ideas, norms and cultural values inform the practices of agents, and it accommodates

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insignificant to the US. Intervention to reconstruct Cambodia is another example. Cambodia is economically insignificant and strategically insignificant to the US in the post-cold war era. Finnemore points out that the US involvement is not motivated by the geopolitical and economic interests, rather by the opposition to the return of the Khmer Rouge on moral grounds.

both domestic and international norms into its analysis (Reus-Smit 1999: 167). This thesis explores how international norms shape the applied understanding of humanitarianism. This thesis argues that late medieval legacies have shaped the applied understanding of humanitarianism in the early modern period, while multilateralism and contractual international law condition how the international humanitarian legal order is constructed, and the notion of human rights constitutes the intrusive form of humanitarianism in the post-cold war era. By using international norms alone, this thesis could not explain why some countries do not share the same understanding of humanitarianism in the post-cold war period. China is the case in point; it generally rejects the use of military force to resolve the humanitarian crises, has not signed the Rome Statute and provides aid that does not have political conditions attached, such as structural reforms. To address this issue, this thesis needs to take domestic norms into account. This thesis pays particular attention to traditional Confucian morals and political ideals, arguing that these domestic ideas condition how China views the applied understanding of humanitarianism in the post-cold war period and essentially shapes its actions.

Constructivism and History

Different international relations theories introduce different views on history. Rationalist theories do not attach a lot of weight to history. Reus-Smit (2005a: 206; 2008: 395) explains that rationalist theories assume that "states are driven by context-transcendent survival motives or universal modes of rationality; the lessons of history were reduced to proposition that nothing of substance of ever changes. Such assumptions denied the rich diversity of human experience and the possibilities of meaningful change and differences, thus flattening out international history into a monotone tale of 'recurrence and repetition'". Similarly, the rationalist theories aim to generate law-like propositions about relations among states, then continuity and repetition are prioritized over change and variations. Everything to do with cultural particularity and variation vanishes. History becomes a monotone story: once its law-like lessons have been distilled, history has little

to teach us. Form these perspectives, international history was side-lined by rationalist theories.

Unlike rationalist theories, constructivism embraces history. Reus-Smit (2008: 397–8) argues that history is embraced consistently by constructivists because of the theoretical reasons. First of all, constructivism focuses on the change of norms, and this concern translates into a concern with history. Only through adopting the longue durée approach can it be understood how the norms and the fundamental institutions change. Second, constructivism emphasizes how social structures constitute the actors' identities and interests, and how these structures are produced and reproduced by the practices of social and political agents. He argues that the way to understand the structures is "to cut into a social order at a particular time, identify the agents and social structures, and then trace how they condition one another over time". Third, the study of history links to the theoretical agenda of constructivism, which is to remind people that humans have politically consequential capacities to shape the future world. And finally, constructivism insists that ideational factors like ideas, beliefs, norms and values constitute the world that we live in, and therefore history provides an insight to the present world – why the current world is the way it is. The following pages will lay out the constructivists' view on history.

-- Constructivists' view on History

Reus-Smit (2008: 405–6) suggests that the constructivists' view on history is informed by four interrelated assumptions of constructivism. First of all, social structures shape individual and collective action, and ideational structures are more important than material structures in shaping political behaviour. For constructivists, material structures are certainly important, as the material structures constrain and enable certain actions. However, most of the work is done by the intersubjective ideas, beliefs and values. Constructivists believe that these intersubjective meanings constitute identities and interests, as well as make sense and give meaning to the material structures. Second, actors' identities inform their interests and, in turn, their actions. Other international

relations theories predetermine actors' interests. Therefore, interest formation is not the main concern of these theories. However, constructivists insist that interests are not fixed and the way interests are established is key to understanding a wide range of international phenomena. From the perspective of constructivism, actors' interests are shaped by their identities, and the identities are constituted through actors' engagement with the intersubjective meanings in society. Third, agents and structures are mutually constituted. Constructivists argues that structures constitute actors' identities and interests, and the existence of the structures depends on the practices of agents. Ian Hurd (2008: 304) puts it thus: "actions of states contribute to making the institutions and norms of international life, and these institutions and norms contribute to defining, socializing, and influencing states". Finally, constructivists argue that communication is important. It is through communication that ideational structures condition actors' identities, interests and action, and that actors produce and reproduce the ideational structures. Communication is an important practice in mediating the relationship between agents and structures and it is this communication that allows change to take place.

Building on these assumptions, constructivists believe in a plurality of international histories. This view is different from some grand international relations theories such as neorealism. They treat international history as a singular whole, a monotone story and an objective realm of past experience that reveals a set of truths about the inherent nature of relations among states (Reus-Smit 2008: 400). Their views on history is attributed by the purpose of these theories, which is to formulate "general propositions about international life based on empirically verified regularities in interstate behavior" (Reus-Smit 2008: 400). A coherent set of general propositions can be yielded through the process of reduction, and the essential dynamics of international relations and eternal verities about politics among nations can be revealed (Morgenthau 1959: 20). As a result, these general propositions produce a singular international history. However, for the constructivists, international history cannot be separated from social history because constructivists focus on how ideas, practices and institutions that permeate and structure

the wider social order shape international relations (Reus-Smit 2008: 402). The interest in ideas creates a space in which to rethink the history that has been taken as given.

Traditionally, historians are regarded as objective observers, standing outside of history. Their responsibility is to identify the facts and the objective truths and to distinguish the propaganda from the truths of historical events and practices. Neorealists invoke these facts provided by historians to advocate particular truths about international relations (Reus-Smit 2008: 402). However, Reus-Smit believes that history is more than these particular truths. He holds that history is constituted by historians. As history contains an infinite collection of facts, it is the "historian who chooses which take the stage and which becomes historical facts" (Reus-Smit 2008: 404). It is historians that give value to the factual information, because historical facts can be woven together in many different ways depending on historians' interpretation and their decision as to what they want to understand from this information (Reus-Smit 2008: 404; Skinner 2002: 20). This selection and interpretation are not an objective process. As Mlada Bukovansky (2002: 57) put it, historians are also a strategic actor who construct history for their own purpose and are not conditioned by any objective rule of logic. The interpreted nature of history does not mean history is unknowable, but rather that it highlights "plausibility not infallibility" (Reus-Smit 2008: 405). Such view encourages a rethinking of the history of Spanish colonization in the New World and in terms of colonialization as a humanitarian project.

Constructivists explore history in terms of studying the impact of ideas on the politics of their time (Reus-Smit 2008: 408), which is particularly significant for understanding the evolution of humanitarianism. Ideas constitute history in two ways. First, ideas warrant, justify and license certain kinds of institutions. Reus-Smit's *Moral Purpose of the State* (1999) illustrates this point. The work sets out to explain how and why the fundamental institutions have changed over time. His central argument is that beliefs about the moral purpose of the state constitute certain possibilities and, in that sense, cause certain kinds of fundamental institutions to regulate the relations between states. Second, political actors employ "evaluative-descriptive terms" to justify their actions; these terms "simultaneously describe the action and commend or condemn it" and can be

manipulated yet are not infinitely elastic. The reinterpretation of these terms is constrained by the constitutive norms of the society. A successful reinterpretation of these terms legitimates certain behaviours that otherwise would have been regarded as improper. Reus-Smit's *Individual Rights and Making of the International System* (2013a) explains why there is an emergence of new sovereign states, an emergence he attributes to the struggle for the individual rights of subject people and the failure of the imperial administrations to respond. In the struggle, elites redefined the meaning of individual rights according to the constitutive norms of the time. For example, in the wave of decolonization after 1945, political elites in the colonies attached the individual rights to national self-determination, which legitimized the decolonization and essentially bankrupted the legitimacy of the institution of Empire. Therefore, constitutive norm is seen as a constitutive force of history. This insight contributes towards an understanding of the evolution of humanitarianism. This thesis argues that constitutive norms have shaped the applied understanding of humanitarianism and have conditioned the humanitarian activities. Constitutive norm in each historical period essentially shapes the history of humanitarianism.

The constructivists' perspective of history is significant to this thesis in two significant ways. On the one hand, constructivists advocate the pluralist view of history, which allows an alternative view of the history of humanitarianism. The establishment of the International Committee of the Red Cross (ICRC) is commonly viewed as the beginning of humanitarianism. This thesis posits that the evolution of humanitarianism can go further back in history. In Chapter 1, this thesis will reinterpret the history of Spanish colonialization and will view the colonialization as part of the history of humanitarianism. On the other hand, the constructivists' perspective permits examination of how ideational factors constitute the history of humanitarianism. The coming chapters will look at how the constitutive norms of a specific timeframe and specific culture condition the applied understanding of humanitarianism and humanitarian activities. The constructivist historical framework lays the foundation for this study of the evolution of humanitarianism.

-- History's Contribution

For constructivists, the main benefit of studying history is to remind people that humans have politically consequential capacities to shape the future world. This corresponds to the emancipatory project advocated by critical theory. Critical theory refuses to take the current social relationships and institutions for granted and believes that it is possible to have an alternative world order. However, the range of choice of alternative orders is limited. The comprehension of historical process in critical theory works as a filter that limits the alternatives (Sari 2014: 229). In Robert Cox's words, critical theory "must reject improbable alternative order just as it rejects the permanency of the existing order" (Cox, 1981: 130). To achieve an alternative order, the emancipatory project is advocated by the critical theorists, which requires the exposure and dissolution of structures of domination, shedding light on existing political possibilities.

The emancipatory project involves three interrelated tasks: the normative, the praxeological, and the sociological (Linklater 1998: 5 & 115). The normative task is to question the moral foundations of the existing international system, a system based on inclusion and exclusion in which the dominant group deprives the majority of the population of the social and political rights they should enjoy (Linklater 1998: 115). It also explores how to foster new moral justifications through culturally sensitive dialogic communities that might contribute to the development of more inclusive systems that give voice and representation to the marginalized and excluded groups (Price and Reus-Smit 1998:284).

Sociological task entails an inquiry into the origins of the international structures and the prospects for and the constraints upon the emergence of new international structures. In Cox's words (1981: 129), critical theory "does not take institutions and social and power relations for granted but calls them into question by concerning itself with their origins and whether they might be in the process of changing". Historical inquiry is essential to the sociological task. This approach enables the illustration of the historical contingency of the normative foundations that underpin the international structures. It reveals the

hegemonic moral ideas in society that inform the institutional rationality of international institutional architects, which leads to constructing distinctive types of fundamental institutions. This approach also expands the understanding of international change (Reus-Smit 1999: 169) and sheds light on how norms and structures emerge and evolve, informing the hegemonic nature of the current structures, which can be transformed or replaced by different arrangements. Identifying the elements susceptible to change in the existing order is an important step in realizing such transformation (Linklater 1998: 3).

The praxeological task concerns the possibilities for reconstructing the current international relations; it asks "how states and non-states actors can exploit promising dynamics of change to promote emancipatory transformation in the nature of social and political community" (Reus-Smit 1999: 168). Andrew Linklater (1998: 115) and Richard Price (2008:196) suggest identifying moral resources within the social arrangement that can be used by political actors to develop a more inclusive, emancipatory and cosmopolitan society. To illuminate the scope for reform, a dialogue between those explored the development and the impact of normative and ideational foundations of international society and those engaged in the more philosophical project of normative critique and elaboration is required (Reus-Smit 2005a: 204). History inquiry facilitates this dialogue by looking at the evolution and the ideational foundation of current social arrangement.

By inquiring into the evolution of humanitarianism, it becomes clear that the applied understanding of humanitarianism is historically contingent; its meaning does not transcend time and culture and is shaped by the constitutive norms. This suggests that humanitarianism is a diverse concept and is interpreted differently by different actors and in different timeframes. By studying the long history of humanitarianism, it also becomes clear that there are elements in the existing order that could facilitate the emancipatory project of critical theory.

International Order

Reus-Smit (2017: 854) argues that international order can be understood in two different ways. First, it can be used to "describe stability in international relations". Second, it can be used to describe "how international political life is organized". "Order in the second sense is essential to the order in the first". This section is concerned with international order in the second sense. The following pages address the structure of the international order, the different levels of institution and the contractual international law as a fundamental institution in regulating the behaviours among states.

-- Structure of International Order

Reus-Smit disagrees with Hedley Bull's understanding of international order. Bull (2007: 8) defines international order as an arrangement that "sustains the elementary or primary goals of society of states or international society", including "preservation of the system and society of states", "maintaining the independence of external sovereignty of individual states", "peace", "limitation of violence", "stability of possession" and "the keeping of promises" (Bull 2007: 16–18). These goals facilitate an arrangement such as multilateralism and international law. For Bull, international order is a purposive arrangement and a social construction. Reus-Smit (2013b: 168) believes that Bull's interpretation has significant limitations. First, Bull defines the arrangement narrowly and sees it as pertaining to external institutional practices only. An arrangement that characterizes an international order begins with something more fundamental: the system of sovereign states. Not all international orders are structured on the system of sovereign states; the order can also be structured on systems like heteronomous and suzerain. To consider the international order as a purposive arrangement, the arrangement needs to be conceived broadly to include the nature and the constitution of units, in this case the sovereign state system. Second, Bull (2007: 19–21) distinguishes the international order from the world order. The world order is defined as an arrangement of human activity that "sustain the elementary or primary goals of social among mankind

as a whole". The world order is wider than the international order: it not only encompasses sovereign states and their related institutional practices, but also individual human beings and the practices and institutions that they are embedded within. For Reus-Smit, there should not be a rigid dichotomy between world order and international order, because international order is not constituted by the external interactions between states alone. It is constituted by social forces in a complex social and political process.

Because of these problems, Reus-Smit (2013b: 168) has advanced a more expansive concept of international order, and argues that international order contains three basic elements. First, international order is "a system-wide configuration of institutionalized power and authority", which is an organizing principle that governs the distribution of political authority. In a sovereign order, political authority is organized according to the principle of sovereignty, the system is divided into multiple, territorially defined sovereign units. Within these sovereign units, political authority is "centralized, exclusive and bounded". Political authority can be organized differently according to different principles which can generate a different international order (Reus-Smit 2013b: 196; 2013c: 46). For example, the imperial order is organized according to the principle of hierarchy, a system in which the dominant unit controls subordinate units in terms of the internal and external policy. Second, international order is "an architecture of fundamental rules and practices that facilitate co-existence and cooperation between loci of political authority". According to Reus-Smit (1999), different international orders can develop different fundamental institutions. In his account, contractual international law and multilateralism are fundamental institutions of the modern-day international order, whereas Ancient Greek system of city-states adopted an inter-state arbitration as their fundamental institution to facilitate co-existence and cooperation. Oratorical diplomacy was used at fundamental institutions in the case of Italian city-states of the Renaissance period, while natural international law and old diplomacy were used by the states of absolutist Europe. Reus-Smit (2013b: 169) regards these fundamental institutions as "second -order institutional constructions". These fundamental institutions are embedded with deeper values. These values that prop up the particular kind of system-wide configuration of

political authority and fundamental institutional practices are seen by Reus-Smit as the third element of international order, and he terms these values "constitutional structures". Constitutional structure is the foundation of an entire international order. The constitutional structure contains intersubjective values and norms that license and legitimize a system-wide configuration of institutionalized power and authority and fundamental rules and practices (Reus-Smit 2013b: 170). In international societies of states, constitutional structures contain three interrelated values: the moral purpose of the state; the organizing principle of sovereignty and the norm of procedural justice (Reus-Smit 1999: 7).

-- Different levels of Institutions

Reus-Smit considers that there is a hierarchy among institutions. He (1997: 558 and 1999: 13) argues that there are three different institutions which operate at different levels of the international order: issue-specific regimes, fundamental institutions and constitutional structures. International regimes work at the superficial level of the international order. Neoliberals have elaborated upon the idea of regime. They argue that states seek to maximize their interest in all areas in an anarchic environment; such interests, including reducing the impact of climate change, promoting free trade and prevention of the spread of weapons of mass destruction, can only be achieved through cooperation. However, a successful cooperation is hindered by high transaction cost, non-compliance and cheating. To address these obstacles, a multitude of international regimes are constructed by states. Stephen Krasner (1982: 186) defines regimes as "sets of implicit and explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations". Regimes are "more specialized arrangements that pertain to well-defined activities, resources, or geographical areas and often involve only some subset of the members of international society" (Yong 1989: 13). Regimes enable the state to cooperate in many common concerns.

By comparison with regimes, fundamental institutions operate at a deeper level of international society. In order to pursue the international order, actors face the problems of coordination and collaboration. Fundamental institutions encapsulate "the elementary rules of practices that states formulate to solve the coordination and collaboration problems associated with co-existence under anarchy" (Reus-Smit 1999: 14; 1997: 557). That is to say, fundamental institutions are the rules that govern how actors interact. These institutions play a constitutive role in establishing regimes and are "produced and reproduced by basic institutional practices, and the meaning of such practices is defined by the fundamental institutional rules they embody" (Reus-Smit 1999: 14; 1997: 558). A society of states usually exhibits a variety of fundamental institutions. Reus-Smit (1999) identifies contractual international law and multilateralism as the most significant fundamental institutions in modern international society. International law as a fundamental institution in international society will be discussed in the next section. However, it is important to note that other fundamental institutions have emerged in other historical societies of states. For example, the fundamental institution in the Ancient Greek city- states was arbitration while the fundamental institutions in the Italian city-states of the Renaissance period was oratorical diplomacy (Reus-Smit 1999). The different fundamental institutions that emerge across history show that societies of states in different timeframes and cultural contexts tend to privilege certain fundamental institutions over others. This preference is informed by the constitutional structures.

"Constitutional structures" operate even at a deeper level than the fundamental institutions. Reus-Smit (1999: 30) defines the constitutional structure as "coherent ensembles of intersubjective beliefs, principles and norms that perform two functions in ordering international society: they define what constitutes a legitimate actor, entitled to all rights and privileges of statehood; and they define the basic parameters of rightful state action". He (1999: 30–31) argues that the structure is "constitutional" as the structure incorporates the basic principles "that define and shape international polities" and it is structure as it "limits and molds agents and agencies and points them in ways that tend toward a common quality of outcomes even though the efforts and aims of

agents and agencies vary". In societies of states, the constitutional structure incorporates three normative elements, which include "a hegemonic belief about the moral purpose of the states, an organizing principle of sovereignty and a norm of pure procedural justice" (Reus-Smit 1999). The moral purpose of the state is the core element of this constitutional structure. The moral purpose is conditioned by social and historical context, and it provides the justificatory foundations for the organizing principle of sovereignty and the norm of procedural justice. These three normative elements are deeply connected and form a single constitutional structure.

The norm of procedural justice constitutes the fundamental institution. But this norm is deeply influenced by the moral purpose. Different conceptions of the moral purpose of the state generate different norms of procedural justice. The norm of procedural justice specifies: "the correct procedures that legitimate or good states employ, internally and externally, to formulate basic rules of internal and external conduct" (Reus-Smit 1999: 32). The generally accepted norm of procedural justice is "a prerequisite for ordered social relations, domestically and internationally" (Reus-Smit 1999: 33), as there will be no basis for collective action unless there is a minimal baseline agreement among the society's members as to how rules of co-existence and cooperation should be formulated. The prevailing norm of procedural justice dictates: "the basic parameters of rightful state action" and has a "profound influence on the nature of fundamental institutions" in that specific timeframe. Resus-Smit (1999) argues that legislative justice leads to multilateralism and contractual international law, which are regarded as a fundamental institution in the modern international order.

-- International Law as Fundamental Institution

International law is considered a fundamental institution, which facilitates ordered inter-state relationships in the modern international society of states. The formation and the nature of international law are understood differently by neorealism and neoliberalism. However, their interpretations are not fully satisfactory. To address these limitations, Reus-Smit provides another account of international law. For neorealism, international

law is to serve the political purpose of powerful states. E.H. Carr (1946: 176) sees law as a reflection of the "policy and interests of the dominant group". John Mearsheimer (1994: 13) adopts a similar view, observing that the "most powerful states in the system create and shape institutions (i.e. international law) so that they can maintain their share of world power or even increase it". By implication, the content of law is determined by the dominant states. However, when the law contradicts the interests of these states, law will not be upheld. That is to say, the will of powerful states determines whether the law can be enforced, therefore the law cannot be seen as binding (Reus-Smit 2004: 16). Neoliberalism provides another account of international law. Neoliberals argue that states seek the most effective and efficient ways available to realize their interests. The best way to achieve their interests is through mutual cooperation. To achieve cooperation, states work together to create "persistent and connected sets of rules that prescribe behavioural roles, constrain activity and shape expectations". When formally codified, these sets of rules constitute international law, which is "understood as a functional, regulatory institution of international society" (Reus-Smit 2004: 17).

Neorealism and neoliberalism cannot fully account for international law as a fundamental institution. According to the logic of neorealism, dominant states should prefer the bilateral form of inter-state cooperation, as it should be easier for the hegemons to exploit other states. International law constrains the actions of hegemons; as breaking international law involves political cost, the hegemons need to "justify" and "legitimate" their actions. At the same time, international law can be used by the weaker states to protect their interests and to deter exploitation by powerful states (Reus-Smit 1999: 18; 2004: 17). Based on the above, dominant states should adopt other institutions like bilateral cooperation, rather than international law. Nor can neoliberalism provide a satisfactory account for the institutional preference of hegemons. As for neoliberals, international law is seen as the fundamental institution to resolve the cooperation problems in an anarchic international environment. Yet the problems of cooperation recur over history. Reus-Smit (1999) argues that different fundamental institutions have developed in different international societies in history. Neoliberalism does not provide

an account of why different institutions are established to resolve the recurring problems and why international law was adopted in the nineteenth century to solve the problems of cooperation.

The holistic approach sheds new light on the relations between politics and international law. Like neorealism, which argues that politics and international law are closely interwoven, Reus-Smit (2004: 36) contends that international law as a fundamental institution in modern international society is deeply structured and permeated by politics. Reus-Smit (2003: 607; 2004: 25) holds that politics is more than the pursuit of power; it should be seen as "integrating four principal modes of social deliberation and action – idiographic, purposive, ethical and instrumental" [9]. This separates Reus-Smit from neorealists and neoliberals, who reduce politics to instrumental deliberation and action and think that identity formation, ethical reflection and interest definition lie outside of the realm of politics (Reus-Smit 2003: 607). Politics is seen by Reus-Smit as a form of reason, motive and action that generates multiple institutional imperatives. Contractual international law is an institution created by political actors "as structuring or ordering derives, as mechanism for framing the politics that enshrine predominant notion of legitimate agency, stabilize individual and collective purposes, and facilitates the pursuit of instrumental goals" (Reus-Smit 2004: 36). It is important to recognize that international law is constituted by politics, but it in turn transforms politics. International politics takes place within a framework of norms and rules, and international law is central to this framework (Reus-Smit 2004: 3). Following the logic of constructivism, the normative structure shapes the behaviour of states and other actors. When politics is conducted within the realm of international law, it will take a unique form as certain political types of political behaviour are delegitimized and foreclosed and other legal types are licensed

[9] Idiographic deliberation takes place when actors confront the question of "who am I" or "who are we", and is thus identity-constitutive. Purposive deliberation occurs when actors ask "what do I want" or "what do we want"; it engages actors in the process of interest and preference formation. Ethical deliberation happens when actors address the issue of "how should I act" or "how should we act"; it situates their purposive and instrumental decisions within the realm of socially sanctioned norms of rightful agency and conduct. Instrumental deliberation and action take place when actors confront two questions: "how do I get what I want" or "how do we get what we want" and "what do I need to get what I want" or " what do we need to get what we want" (Reus-Smit 2003: 607; 2004: 25).

and empowered (Reus-Smit 2004: 14 & 37). At the same time, these laws provide a communicative framework which enables actors to debate the issues of legitimate agency, purpose and strategy, as the debate cannot take place in a vacuum and must take place within the context of pre-existing values (Reus-Smit 1999: 27). That is to say, actors engage in a distinctive type of debate, in which their claims and action must be justified in terms of established legal norms. In other words, these values structure the debate, and the claims that actors make must satisfy certain criteria.

The holistic approach provides a better way of understanding the international law as a fundamental institution of the modern international society of states for two reasons. First, the holistic approach regards international law, as a fundamental institution, as a result of the specific social and political context of a specific timeframe. Reus-Smit argues that institutional formations are historically contingent. Constitutional structure is the deepest level of institution, which shapes the fundamental institution. Within the constitutional structure, the norm of procedural justice, which licenses certain forms of the rule of governance, is responsible for constituting the fundamental institutions. The crucial point is that the norm of procedural justice is determined by the moral purpose of states. That is to say, once the different conception of moral purpose of states emerges, the new fundamental institutions will follow. In the absolutist Europe, the moral purpose of states was to preserve divinely ordinated social order; it spawned an authoritative norm of procedural justice, which was the idea that the rightful social conducts were determined by a supreme authority – god and monarch. This norm licensed naturalist international law and old diplomacy as fundamental institutions (Reus-Smit 1999). This order was constituted by the socio-political context in that timeframe – the pyramidal social order at the domestic level, which emphasizes superordinate and subordinate relations. A fundamental change of socio-political context transforms the fundamental institutions. In the Enlightenment period, a hierarchical social ontology was gradually replaced by an individualist social ontology. This social context informed a new understanding of the moral purpose of the state, which was to realize individuals' purpose and potentialities by cultivating a socio-political and economic order that enabled

individuals to engage in pursuing their interests. This generated a legislative norm of procedural justice, which focused on the idea that only those subject to the law had the right to legislate, and the law applied equally to all citizens in all like cases. The change in socio-political context shapes the people's preference for certain kinds of fundamental institutions in international societies of states over the others. This change led to the collapse of the naturalist international law and old diplomacy in absolutist Europe and to the emergence of contractual international law as a fundamental institution in modern international society (Reus-Smit 1999).

International law has conditioned the development of humanitarianism since the mid-nineteenth century. There are two main features of international law in the modern-day international society of states, which are the multilateral forms of determination and mutual consent. A legitimate international law must be codified through the multilateral forms of determination, and law is based on mutual consent that places a legal obligation upon the state to observe rules (Reus-Smit 1999). Through a series of international diplomatic conferences, the Geneva Conventions and Additional Protocols were developed in order to achieve the protection of people that do not participate or no longer participate in the armed conflicts. These conventions are mutually binding and almost all nations have become party to them. They restrict how nations conduct warfare and treat those affected by wars. At the same time, the underlying assumption of modern international law is equal sovereignty, which entails the notion of non-interference in domestic affairs (Reus-Smit 1999). These have been codified in the UN Charter[10], and widely accepted among nation states. The applied understanding of humanitarianism in the post-cold war period has proved a challenge to the assumption of equal sovereignty, which results in the controversies of humanitarianism, undermining the universality of the concept. China's rejection of the post-cold war applied understanding of humanitarianism is the case in point. Its applied understanding of humanitarianism is

[10] The principle of equal sovereignty is codified in Article 2(1) of the UN Charter while the principle of non-interference is also recognized in Article 2 (7) of the UN Charter.

within the parameters of current international law. Therefore, its humanitarian activities should not be seen as an affront to international justice.

Second, the holistic approach accommodates several different types of reasoning in its analysis. International law as a fundamental institution is a result of a combination of factors. Reus-Smit (1999: 37) does not deny the role of powerful nations in constructing international law as a fundamental institution but recognizes that core states are the principal agents in producing and reproducing fundamental institutions. Another element that contributes to international law being a fundamental institution in the modern international society of states is the dominant moral and political ideas of the society. Reus-Smit (1999) believes that contractual international law, as a fundamental institution of the contemporary international order, stems from a deeper set of social values. It is a result of the rise of popular sovereignty and the legislative norm of procedural justice at the domestic level. The new rationale behind the legitimate state took root in the nineteenth century, and held that the state is a human artefact whose role is to protect the natural and inalienable rights of men, including liberty, and that states need to provide an institutional environment for individuals to pursue their interests freely and to maximize their potential (Reus-Smit 1999: 128)[11]. Under this rationale, the state is to serve the people and to rule the society according to the common will (Reus-Smit 1999: 129). In addition, the authority of the state arises from the "earthly collectivities", rather than from the divine will (Reus-Smit 1999: 129). As a result, states are bound to serve the general will. This has profound implications in terms of the norm of procedural justice. Since the source of authority is located in the people, the hierarchical social order and the law as command lose their legitimacy, giving rise to the legislative norm of procedural justice. This norm entails two elements: those who subject to the rules have the right to define them personally or through the representatives; and the rules whether are for protection or punishment must apply equally to all citizens in all like cases (Reus-Smit 1999: 129). The participation in legislation is the basis of legal obligation. This political

[11] These ideas are expressed clearly in the United States Declaration of Independence of 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789.

thought filters into the international legal thought during the eighteenth century. For example, the eighteenth-century jurist Georg Friedrich von Martens points out that states are obligated to respect international treaties and conventions because of the "mutual will of the nations concerned" (cited in Reus-Smit 1999: 133). Once members of these societies accepted that the rules governing the relations between states should be authorized by those who subject to these rules, the idea of "collective legislation of international law" is legitimated. From the mid-nineteenth century onward, the development of international law included participation, negotiation and dialogue. The process aims to achieve a mutually binding agreement and this process lies at the heart of multilateralism. Multilateralism and contractual international law have become inseparable in the modern-day international order.

Following the logic of the holistic approach, Reus-Smit presents an analytical framework to conceive institutional change; he summarizes that the prevailing moral and political ideals (or the constitutive norm) are the primary determinant of international institutional change. The constitutive norms need to be examined in order to understand the change in the applied understanding of humanitarianism across history.

Individual Rights and International Order

Individual rights are "the rights of sole persons", and such right "provides a rational basis for a justified demand" and "licenses demand-like claims" (Reus-Smit 2011: 1209 and 2013a: 36). Reus-Smit (2013a: 36) divides individual rights into two categories. The first is "special right", which is the right that individuals have because of special transactions or a special relationship. For example, the legal contract gives certain rights and obligations to the parties that are signatories. The second category is "general rights", which are the rights that individuals have because "they constitute a particular kind of moral being". The idea of human rights is an example of general individual rights; an individual has such rights simply because they are rational moral agents. However, the zone of application is varied in history. Many groups of people, including women, men with no property, non-

Europeans, peoples of colours, slaves and indigenous peoples were denied their individual rights which had been enjoyed by others in history, as they were not considered a “fully developed moral being” (Reus-Smit 2013: 38–9). General individual rights are also interpreted differently in different historical periods and places, including the right to liberty of religious conscience in seventeenth-century Europe, the right to equal political representation in nineteenth-century Latin America and the civil and political rights in the post-1945 era (Reus-Smit 2013a: 37). The notion of individual rights constitutes the international order the way it is today.

Reus-Smit (1999) argues that the international order is historically constituted. The modern-day international order is conditioned by the constitutional structure of societies of states established in the eighteenth and nineteenth centuries. As mentioned above, Reus-Smit (1999) argues that the constitutional structure of societies of states contains three interrelated ideas – the moral purpose of the states; the organizing principle of sovereignty; and the systemic norm of procedural justice. The moral purpose of the state holds the hegemonic position in this normative complex, providing justification for the organizing principle of sovereignty and the systemic norm of procedural justice. Informed by a wider socio-political context in the eighteenth and the nineteenth centuries, the moral purpose of the modern states lies in “the augmentation of individual’s purposes and potentialities” and in “the cultivation of a social, economic and political order that enables individuals to engage in the self-directed pursuit of their interests” (Reus-Smit 1999: 124). The state is to serve the people’s interests according to the common will, and the authority of state comes from the people. It informs the particular kind of norm of procedural justice.

The moral purpose of the modern state informs a legislative norm of procedural justice. This principle prescribes that individuals have the right to define those rules that they are subject to, such right exercisable in person or/and through their representatives. This right is enshrined in the French Declaration of the Rights of Man and of the Citizen, which

states that “all citizens have the right to concur personally, or through their representatives, in its (rules) formation”. Legislative power belongs to the people alone and yet the right to participate in legislation initially was only given to certain groups of individuals[12]. However, this concept of right gradually takes root in society; it slowly transforms the institutions and the national governance; and an increasing number of groups are given individual rights throughout the nineteenth and twentieth centuries (Reus-Smit 1999: 129–31). As David Thomson (1962: 323) observes, most of the Western and central European nations adopted parliamentary institutions between 1871 and 1914. This domestic idea of the legislative norm of procedural justice gradually infiltrates into the international order. Reus-Smit (1999: 141) points out that a legislative norm of procedural justice began to be championed at the international level (or at least among the European nations) in the 1850s, which reflected on the growing use of multilateralism and contractual international law to achieve a common goal. Multilateralism involves “participation, negotiation and dialogue” (Reus-Smit 1999: 132). Since the state is “individual writ large”, multilateralism secures the right of people to participate in legislation on an international level. Reus-Smit (1999: 141) notes that European states collectively championed both the ideas of multilateralism and contractual international law in The Hague conferences of 1899 and 1907. The adoption of multilateralism and contractual international law also marks the beginning of legal humanitarianism, these methods being used to form the basis of the widely accepted Geneva Conventions and its Additional Protocols.

The modern international society of states is structured in accordance with the organizing principle of the sovereign state, which replaced the empire as the legitimate institution in the international order. Individual rights played a significant role in delegitimizing the empire. Reus-Smit (2013a: 38) regards individual rights as power mediators which allow materially weak actors “to alter the power relationship between themselves and

[12] Prior to the twentieth century, not all adults were qualified to vote and most countries required special qualification. For instance, there was a property and income qualification to vote and only men were qualified to vote in eighteenth- and nineteenth-century Britain. These restrictions were gradually removed after the First World War.

materially preponderant actors or institutions". His view is similar to John Vincent (1986: 7) who argues that "rights are a weapon of the weak against the strong". Such view is informed by the nature of individual rights. Individual rights may not be universal, in the sense of transhistorical and transcultural truths, but individual rights are universalist (Reus-Smit 2011: 1217). The idea of individual rights itself is inherently universalizable, its purview expandable through argument and debate (Reus-Smit 2011: 2017). All individuals can claim general rights on the grounds that they constitute a fully developed moral being (Reus-Smit 2013a: 37). Reus-Smit (2011: 2017) explains: "the fact that they cannot, coherently, be claimed by one but denied to another." Individuals rights have a functional potential in concrete political struggles. A subordinate group can invoke the notion of general individual rights to stretch the international order in a more inclusive direction. The excluded group can use the individual rights to question the legitimacy of the existing structure and claim the once morally desirable social institutions and practices as unjust (Reus-Smit 2013a: 196). Therefore, the concept of individual right is highly political; the concept can be invoked to challenge the existing relations in society. The imperial order was sustained by the prevailing norm of unequal entitlement. Exclusion provides a strong incentive to the excluded group of people to challenge the existing boundary between inclusion and exclusion (Reus-Smit 2013a: 195). The notion of individual rights was invoked by the colonized peoples in the struggle for the right of self-determination. Through reasoning in favour of individual rights, the norm of unequal entitlement, which was the pillar of the imperial order, was contested, and the legitimacy of imperial order was undermined. It shook the foundation of empire and eventually dissolved it (Reus-smit 2013a). It opened a window for change in the international order. The peoples and the societies within the empire gained independence and formed the sovereign state, which brought an official end to colonization. The de-legitimacy of colonization helped the Geneva Conventions and Additional Protocol to expand their scope of protection; those that participated in the anti-colonial conflicts were given protection in the Additional Protocol I in 1977. In short, individual rights have constituted multilateralism and contractual international law as fundamental institutions in the international society of

states. The result is that rules that regulate the relations between states can only be achieved via international agreements, in which only those subject to the rules have the right to legislate, and those agreements must be reciprocal, as rules must apply equally to all in all like scenarios. Individual rights have contributed to the collapse of the legitimacy of colonialization and to the expansion of sovereign states based on the international order.

-- Protection of Individual Rights and Liberal International Order

As noted earlier, individual rights have played a significant role in constituting the structure of the modern-day international order, which should be regarded as liberal, as "liberalism has historically sought to protect individual rights" (Starr 2007: 17). Securing individual rights is embedded in the moral purposes of modern states. This purpose has manifested in the current configuration of political authority and the current fundamental institutions, as well as in the dominant idea of humanitarianism.

Protecting individual rights has enabled the construction of the present configuration that is based on universal state sovereignty. Reus-Smit (2013b: 179) defines universal sovereignty as "where the territorially demarcated sovereign state is the sole legitimate form of political organization, and where the system of sovereign states encompasses the entire globe". He (2013b: 179) considers this configuration of political authority as liberal in three aspects. First, the present international order comprises independent states. Each sovereign state is perceived as, in Plato's words (1953: 368), an "individual writ large", as every state is made up of individuals and is a result of a contract among equal individuals. Each state is pursuing its own purpose, exercising its sovereign liberties. Exercising liberties is the essential part of the liberal political order. Second, sovereignty acts as a protective barrier which allows individuals to develop their own forms of collective value. This entails the norm of non-intervention. This mirrors a classical liberal idea of self-realization, by which people should be able to pursue their own conception of good and their political, cultural, economic and social development, free from external interference. Third, the liberal ideals of the moral purpose of states, i.e. the right to

autonomy, have constituted the political struggle which essentially produces this systemic configuration of political authority, giving rise to the configuration that is based on sovereign states.

The current fundamental institutions of the modern international order, such as multilateralism and contractual international law, also represent the liberal nature of international order. In liberal politics, legitimate norms, rules and principles need to be authorized by those who are subject to them or by their duly appointed representatives and need to be applied equally to all in all like cases; in practice, liberal politics is in favour of parliamentary forms of legislation and conceptions of positive law in domestic politics (Reus-Smit 2013b: 178). Such view on rule formation has been transposed onto the international level. Positive international law is embraced, the legitimacy of international law depends on the consent of states and legitimate international law must be in the form of a mutually binding agreement. As a result, a legitimate international law in the modern era must be codified through multilateralism, which involves the process of "participation, negotiation and dialogue", and must apply equally to all state parties in all like cases (Reus-Smit 1999: 132). This process in essence recognizes the individual right of people to participate in international law-making.

Admittedly, not all peoples support and adopt liberal politics at the domestic level, but this should not be a reason to exclude these nations from the international society of states. Exclusion here means that a range of rights that derived from being a member of international society are denied, including "debarring from the possibility of entering into bilateral and/or multilateral negotiations of a commercial or strategic nature, as well as from the possibility of shaping international arrangements" (De Bona 2013: 91). Excluding states from international society because of the adoption of a non-liberal political system is, to borrow David Fidler's words, "a return of the standard of civilization" (Fidler 2001). In the nineteenth century, the standard of civilization was applied to the relations between European nations and non-Western political communities. The standard of civilization is a set of social, political and legal criteria that non-Western political communities need to meet in order to gain full recognition of sovereignty in international

society. The standard was invoked in order to exclude the peoples of Africa, Asia, the Americas and the Pacific from full participation in international law making that is enjoyed by European counterparts (Chesterman 2017: 947). Denying states the ability to participate in international law-making because of their political system essentially reinstates a standard of civilization. The problem is that the legitimacy of the standard of civilization was cast into doubt in the mid-twentieth century. International community rejected the idea of civilization as a criterion for sovereignty, sovereign rights should be recognized by other regardless their perceived understanding of civilized government (O' Hagan 2017: 197). UN Resolution 1514 clearly states that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence". Using the domestic political system to determine whether states should be allowed to participate in international society is a backward movement. At the same time, the reinstatement of a standard of civilization is a return to the hierarchical international order. It contradicts the reason behind having a liberal international order in the first place: social and legal equality among states.

Protection of individual rights have also manifested in the applied understanding of humanitarianism. The individual right of a sovereign state is protected by the process of the legislative norm of procedural justice. Despite the different cultural backgrounds and material capabilities between states, all sovereign states were invited to the multilateral conferences and participated in the process of legislation, which constructed the current international humanitarian legal order. Individuals gain rights under legal humanitarianism. The Geneva Conventions and Additional Protocols confer substantive rights upon individuals. For instance, Geneva Convention (IV) of 1949 is designed primarily to protect civilians in times of war; it specifies that the wounded and sick as well as the infirm and expectant mothers shall be given extra protection and respect; and protected persons shall all times be treated humanely and shall be protected against all acts of violence or threats and against insults and public curiosity [13]. In addition, the intrusive

[13] Articles 16 and 27 of the Geneva Convention (IV) of 1949.

form of humanitarianism in the post-cold war period protects people from suffering. For instance, the use of force in places like Rwanda and Kosovo saved lives and protected the security of people, and foreign aid and assistance alleviate poverty and promote economic growth. These activities essentially protect the basic rights of people such as right to life and right to adequate standards of living. Humanitarianism and protection of individual rights are closely linked in the modern era.

-- Criticisms of the Liberal Cosmopolitan International Order

Liberal cosmopolitanism places the emphasis on protecting basic individual rights including the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity. It promotes basic individual rights protection as more important than the other constitutive norms in international politics, including the liberal idea of legal equality of sovereign states, which entails a basket of rights such as the right to autonomy; the right to self-determination and the principle of non-intervention. This liberal cosmopolitan view is reflected in Allen Buchanan and Robert Keohane's claim that protecting individual rights should be a legitimate ground for the use of force, and the international order should be re-hierarchized to facilitate the use of force when the UNSC does not effectively respond to humanitarian crises (Buchanan and Keohane 2004). Despite agreeing with the importance of protecting people's basic rights, Reus-Smit (2018) proposes an alternative understanding of liberal cosmopolitanism. For him, cosmopolitanism should be understood in communicative and procedural terms, rather than as a set of substantive moral values; and protection can only be universally recognized when all affected parties participate in the construction process and reach an international agreement. Moral justification then can be drawn from the international moral agreement for the purpose of protection. At the same time, Reus-Smit (2005b) regards the re-hierarchization of the international order as a contradiction of liberal ideas. This thesis posits that his criticism on Buchanan and Keohane does not go far enough. The use of force, a significant feature of humanitarianism in the post-cold war period, on its own is already a violation of constitutive norms in the modern international society of states. Other main features of

post-cold war humanitarianism like the International Criminal Court and the responsibility to prevent also share the similar tendency of crossing beyond the parameters of the current international order.

Buchanan and Keohane (2004: 4) endorsed the “moderate cosmopolitanism”, which is a liberal form of cosmopolitanism, a form that emphasizes the basic individual rights of all persons, such as “the right to physical security of the person, including the right against torture, and rights against at least the more damaging forms of discrimination on grounds of religion, gender, race, or ethnicity, as well as rights against slavery, servitude or forced labour, and the right to the means of subsistence”. It enables the giving of a limited priority to the interests of one’s own nation. From this perspective, Buchanan and Keohane (2004) were frustrated with the effectiveness of the current international order in response to the massive violation of people’s basic rights, like genocide in Rwanda and Bosnia. Buchanan and Keohane (2005) advocate the protection of basic rights and prevention of a massive violation of these rights, and propose a reform of the laws that relate to the preventative use of force and suggest a hierarchization of international society that places the liberal states at the top of the hierarchy.

Buchanan and Keohane (2004) justify the preventative war from the cosmopolitan perspective. Preventative war is referred to “using force to prevent massive violation of basic human rights” (Buchanan and Keohane 2004: 5). It is important to note that Buchanan and Keohane extend the notion of “massive violation of basic human rights” beyond acts like enslavement, genocide and ethnic cleansing. They include the potential use of weapons of mass destruction by state or non-state actors in the category (Buchanan and Keohane 2004: 5). The notion of permissibility of a preventative war is built on the cosmopolitan idea, which “recognize[s] the basic human rights of all persons, not just citizens of a particular country or countries” (Buchanan and Keohane 2004: 5). This suggests that humanity is regarded as “a single moral community” despite humanity being divided by “historically constituted communities” like political borders and religious and ideological divides (Shapcott 2011: 200 and Erskine 2013: 42). Within such a community, there are no morally significant differences between people. In other words,

everyone has an equal moral standing. The adoption of a equal moral standing for everyone constitutes cosmopolitanism, which advocates that neither a particular social affiliation nor a blood tie counts over and above another (Erskine 2013: 42). According to this rationale, everyone has a duty to help other people. Based on this cosmopolitan assumption, Buchanan and Keohane (2005: 4) argue that there is a "morally permissibility" in using force to prevent massive violation of basic human rights.

To facilitate the preventative war, Buchanan and Keohane (2004) propose the re-hierarchization of the international order and suggest "a coalition of democratic states" whereby democratic states would be given special governance rights, particularly with regard to the use of force. Other states would have their categorical rights to self-determination and non-intervention qualified (Reus-Smit 2005b: 72). The reason behind giving the special right to democracies is that they are comparatively more morally reliable agents than autocracies (Buchanan and Keohane 2004: 19), because of their assumption in democratic states. Under the assumption, "when democracies violate cosmopolitan principles, they are more likely to be criticized by their citizens for doing so, and will be more likely to rectify their behavior in response" (Buchanan and Keohane 2004: 19). The proposal of a democratic coalition of states begins with a core group of states whose democratic credentials are uncontroversial, and this coalition would be open to states from all regions of the world. Additional countries would be admitted through a transparent process. The only reason to use force or authorize the use of force would be to prevent the massive violation of human rights. The way that preventative force is used would need to reflect the cosmopolitan commitment to basic human rights (Buchanan and Keohane 2004: 11). In order to prevent the abuse of the cosmopolitan justification for preventative war, an institutionalization of the procedures that hold states accountable is suggested (Buchanan and Keohane 2004: 19). The preventative war decision must satisfy the conditions of "ex ante" accountability. There must also be an "ex post" accountability mechanism (Buchanan and Keohane 2004: 13).

This model for preventative war would "constitute a progressive step in international governance" (Buchanan and Keohane 2004: 22) because if a state, or a group of states,

were unable to gain the UN Security Council's authorization for the preventative use of force, these states could present the case to the democratic coalition. The coalition would then evaluate the case on the basis of "ex ante" and "ex post" accountability and judge the application. It is important to note that the UN Security Council would not be replaced and the coalition would only come into function when should there be a deadlock in the Council (Buchanan and Keohane 2004: 20). Buchanan and Keohane (2004: 20) believe that the coalition would "provide an incentive for the Security Council to act more responsibly". Permanent members of the Security Council would be more reluctant to use the veto power to block the preventative war without good reasons and substantial support because the decision-making authority would transfer to the coalition, where the permanent members of the Security Council would not have the veto power and would not be present in the coalition. Therefore, competition from the coalition would improve international governance.

Buchanan and Keohane's radical proposal on protecting human rights has been heavily criticized. Reus-Smit (2005b) argues that it contradicts the idea of individual rights and liberalism. Drawing from Michael Walzer's idea, Reus-Smit argues that Buchanan and Keohane's proposal violates the main rights of political communities. These rights are territorial integrity and political sovereignty, which "derive ultimately from the rights of individuals" (Walzer 1977: 53). They are "the collective form of individual right", which "rest[s] on the consent of members of these political communities" (Walzer 1977: 53). From Reus-Smit's perspective, the collective right to self-determination must be respected. It is the state that "provides necessary protection of its members' rights and of the collective life they have created" (Reus-Smit 2005: 89). Outsiders will not impede the success or prevent the failure of a state, while political sovereignty is cast as a necessary and prerequisite condition for the enjoyment of all basic human rights (Reus-Smit 2013b: 188). Any change and improvement to a political community can only be won by the members of that community. In Reus-Smit's words (2013b: 181), "if freedom is to mean anything to a people, they must fight for themselves". Thus, Reus-Smit criticizes Buchanan and Keohane's preventative war, which fundamentally contradicts the

principle of collective individual rights in determining their own affairs and liberalism, and argues that the political sovereignty and the notion of non-intervention must be respected.

At the same time, Reus-Smit (2005b: 90) argues that the idea of restoration of hierarchy in the international order contradicts the principle of liberal thought, which stresses that political rights must be separated from other forms of morally arbitrary social power. This principle emphasizes that "rights of political decision, participation or representation ought to be held by all members of a political community equally, irrespective of their beliefs, social status, or material power". The separation prevents the political rights from being captured by particularistic interests. However, Buchanan and Keohane's proposal on the liberal hierarchy, which gives a special right to democracies in the decision to use force, and give the states with uncontroversial democratic credentials the power to make the rules for admitting the additional states to the coalition, betrays the liberal idea of equal individual right, as Buchanan and Keohane privilege a certain group of people. These liberal core states as suggested by Buchanan and Keohane (2004: 18) include the members of the European Union, Australia, Canada, Japan and South Korea. They are already the most technologically advanced, the richest and the most militarily capable nations under the current international system. Giving these nations special rights is to give privileges to the powerful and strengthen their voice in shaping the international order. It disempowers the weak actors, which contradicts the liberal idea of political equality.

Drawing from social contract theories, Reus-Smit further criticizes the liberal hierarchy. Social contract models argue that a political community is formed when each individual agrees to transfer their individual rights that they have in the state of nature to a sovereign. Based on the liberal model, power redistribution can be legitimate only if it is based on mutual consent. According to Reus-Smit (1999: 130), only those who are subject to the international agreement have the right to legislate, and their participation in the agreement formation and consensus is the sole basis for their compliance. Yet the liberal hierarchy contradicts the liberal model in terms of how the political community should

build and how the power should be distributed. Reus-Smit (2005b: 90) argues that democratic states can contract themselves to form a democratic coalition, but the liberal hierarchy proposed by Buchanan and Keohane suggests not only giving special rights to states in the coalition, but also giving these states a right to take away existing rights such as non-interference, as well as the sovereign rights from other states that are non-members of the coalition. Based on the social contractual model, the existing rights of a state can only be taken away through contract. The proposed model betrays this idea as the non-member states are excluded from participating in the formation of a liberal hierarchy and their existing rights are taken away without their consent.

In addition to the rejection of Buchanan and Keohane's proposed liberal form of cosmopolitan order (i.e. re-hierarchization of international order), which goes too far and breaks the cardinal rules of the current liberal international order such as legal equality among sovereign states, Reus-Smit questions the notion of cosmopolitanism, which "holds that some values are human, not particularistic, and that there are moral obligations that transcend cultural, social and political boundaries". For Reus-Smit, the cosmopolitan ideas do not put enough emphasis on culture and cultural diversity, and these cultures do affect individuals' views on these moral values. Instead of a universal moral claim, Reus-Smit proposes cosmopolitanism in a communicative term. For him, the value that can work at a cosmopolitan level is not a substantive but a procedural one: "individuals, brought together through global webs of interdependence, have a moral obligation to resolve conflicts of value through unforced dialogue between all affected". The universal moral conventions then can be formulated, which can be the foundation for the cosmopolitan moral arguments (Reus-Smit 2018: 231–2). Multilateralism is precisely a reflection of this idea. Allowing dialogue between all affected is a recognition of individual rights, the right for people to participate in forming rules that affect them: a liberal idea of self-determination. The Geneva Conventions and Additional Protocols are a case in point. Since these international agreements are widely verified, they provide cosmopolitan moral arguments concerning the well-being of people in the time of armed

conflicts, responding to the violation of these agreements and holding people accountable for the violation.

This thesis agrees with Reus-Smit's criticisms of the re-hierarchization of the international order. However, this thesis argues that his criticism of Buchanan and Keohane's proposal does not go far enough. He does not address the problems of humanitarian interventions. Humanitarian intervention itself already fundamentally challenges the current international order, which is based on the sovereign state system and the rule of law. These criticisms of humanitarian intervention can also extend to other forms of humanitarian activities in the post-cold war period. Humanitarianism in this period has overreached its legitimacy, as it challenges the well-established principles and norms at the international level, which will be addressed in the coming chapter.

Longue Durée and Periodization: History of Humanitarianism

The longue durée approach is consistent with Reus-Smit's approach to constructivism. The holistic approach is more historical. It focuses on the grand shifts between the international system and changes within the modern society of states (Reus-Smit 1999: 167). Change is more likely in a longer time frame. Turning to history is a way to make sense of change. Reus-Smit (2001: 526) suggests that interests and identities of actors are constituted by intersubjective structures, and all intersubjective structures have history because they are normative products of moral debate and dialogue between states, and emerge out of a complex process of communicative action. These structures are maintained through conscious, and at times unconscious, practices. These intersubjective values are quite stable; change will take place when a new constitutional value emerges from human consciousness. The longue durée approach, which is concerned with change over a long period of time, provides a platform for studying evolution, as the longue durée embraces a long period of time, and is told according to the scale of centuries (McCants 2004).

This approach will be used to study the evolution of humanitarianism for three reasons. First, longue durée focuses on how the "structures" constitute and condition human activities. According to Fernand Braudel and Immanuel Wallerstein (2009: 174), a structure, for historians, is "an assemblage, an architecture, but even more it is a reality that time can only slowly erode, one that goes on for a long time", and certain structures become a stable element of an infinity of generations. These structures include geographical environment, mode of production and a mental framework such as moral and political values. They can be pillars of and obstacles to human activities. In terms of obstacles, these structures, in Braudel and Wallerstein's words (2009: 174), "provide limitation from which men and his experiences cannot liberate themselves". In terms of pillars, these structures, in Dale Tomich's words (2011: 55), are a "constitutive element of human history", which sharpens human actions over an extended period of time. Following the concerns of constructivism, this thesis puts the emphasis on ideational structure, and looks at how constitutive norms, which are conditioned by a particular timeframe and culture, shape the content of humanitarianism. Second, the longue durée approach develops a historical perspective of contemporary phenomena and makes the past relevant to the present. Braudel and Wallerstein (2009: 182) argue that "each 'current reality' is the conjoining together of movements with different origins and rhythms. The time of today is composed simultaneously of yesterday, of the day before yesterday, and of bygone days". By looking at humanitarianism from a broader historical perspective, this thesis can explain why humanitarianism is the way it is; can show the distinctiveness and the uniqueness of modern-day humanitarianism; can identify the patterns in the process of constituting humanitarianism that remain stable over an extended time; and can detect the changes in humanitarianism in its course of evolution. Third, the short durée approach, or in Immanuel Wallerstein's words, episodic history (2009: 161), is problematic. The short durée is essentially the duration of an event which encompasses the amount of time that precedes and concludes the event. Within this period, there can be a series of events which in effect leads to the main event. Historians study the causes and the effects of these consecutive events and make extensive

connections between these events. The problem of this approach is that “many things appear to happen with no apparent explanation in the brief temporal frame of the episode” (Wallerstein 2009: 161). For example, the reason why nations codify international law to deal with war victims cannot be fully explained without looking at the distant past.

The humanitarianism that this thesis studies encompasses roughly the period from the late fifteenth century to the present time, periodizing the history of humanitarianism. Periodization rests on the assumptions that “a discrete subsection of the temporal continuum (a period) is marked by some distinctive cultural qualities, institutions, or practices” (Donner 2014: 24) and there is “a degree of coherence exists during a particular time-span” (Morony 1981: 249). This thesis is going to divide the development of humanitarianism into three stages, each of which has distinctive features due to the wider moral, political and cultural contexts.

This thesis terms the first stage religious humanitarianism, which covers the period of early modern Europe. It is going to argue that humanitarianism at that time was understood significantly differently from what we call humanitarian actions today. The legacies of the medieval period such as the notion of natural law and propagation of Catholic faith played a significant role in shaping the meaning of humanitarianism at that time. Then there is a significant leap to the nineteenth century, as a result of emerging changes within new social, moral and political ideas in the Enlightenment period, which took place between the late seventeenth and the early nineteenth centuries. These new ideas took root slowly in domestic society, but did not transform institutions and practices immediately, because institutional change does not happen as quickly as the change of idea. It is only by the mid-nineteenth century that these values are gradually realized in institutional forms. The second stage is termed legal humanitarianism, which covers the mid-nineteenth century to the end of the cold war. This thesis is going to argue that the notions of multilateralism and contractual international law have shaped the history of humanitarianism profoundly. Multilateralism and contractual international law condition the way those victims are protected in armed conflicts. Two parallel streams of

international humanitarian law were codified in a series of multilateral conferences. The law of Geneva was designed to "ensure respect, protection and humane treatment of war casualties and non-combatants", and the law of The Hague "lays down the rights and duties of belligerents in conducting operations and limits the method of warfare" (Bailey 1972: 58). This thesis focuses on the law of Geneva, in which its evolution is driven by three responses – international wars, decolonization and domestic conflicts. The third stage begins with the post-cold war era, and is termed intervening humanitarianism, when the notion of human rights protection shaped humanitarianism in the post-cold war period. Military intervention, the establishment of the International Criminal Court and the responsibility to prevent are the significant features of this form of humanitarianism. This stage of humanitarianism is the most controversial, as these humanitarian actions challenge some fundamental features of the current liberal international order which undermines the legitimacy of post-cold war humanitarianism. After discussing the evolution of humanitarianism, this thesis proceeds to discuss China's view on humanitarianism in the post-war period. The case of China demonstrates that the legitimacy of post-cold war humanitarianism is questioned and the universality of humanitarianism can be interrogated.

Admittedly, setting a strict temporal border which divides different time periods can obscure an understanding of the historical development of humanitarianism. The problem of a temporal border is well presented by Michael Morony (1981: 249), who argues that periodization "tends to overlook continuities by emphasizing differences and changes from one period to the next". Designating an institution as belonging exclusively to one period or to another forces the study to suppress or deny certain important historical development of institutions. In the case of humanitarianism, the development of the International Criminal Court took place over two periods of humanitarianisms: legal and intervening humanitarianisms. The period of legal humanitarianism lays the foundation for the International Criminal Court to establish and to flourish in the post-cold war era. Therefore, this thesis is not going to adopt a strict division of time periods. Instead, it views certain stretches of time as necessary. This thesis may transcend some

chronological limits in order to have a full picture of the development of international institutions.

Another problem is that these temporal borders are not real but artificial and do not truly reflect reality. Periodization overstates the coherences that exist within individual periods (Donner 2014: 24). Michael Morony (1981: 249) therefore believes that "a continuously changing, dynamic, kaleidoscopic historical model is closer to the reality". In spite of these problems, this thesis believes that periodization is a good historical model to be used to study the development of humanitarianism, because the understanding of humanitarianism changes over time and the thesis intends to cover an extensive period of time. Periodization allows the presentation of the development of humanitarianism in an organized fashion and makes "the historical continuum comprehensible" (Donner 2014:14). Periodization also makes it possible to break down the period for analysis and allows us to compare and contrast with other periods beyond temporal boundaries at either end. The change and the continuity of humanitarianism over the last 500 years can be unveiled.

Conclusion

This chapter outlines the constructivist approaches to international politics and Reus-Smit's view on the international order. This thesis is closely aligned with the conventional constructivist approach to understanding how intersubjective ideas shape the applied understanding of humanitarianism. This thesis also adopts a holistic approach, which takes both domestic and international norms into account in order to have a comprehensive view on the history of humanitarianism. Reus-Smit's understanding of the modern-day international order provides some key insights into the applied understanding of humanitarianism, including why mutually binding international agreements are used to protect the people who do not or no longer participate in armed conflicts and why humanitarianism in the post-cold war period is so controversial.

At the same time, this chapter outlines the constructivists' view on history. Constructivism emphasizes the role of intersubjective ideas in shaping history. Such view is consistent with a longue durée approach. This thesis adopts a longue durée approach in order to understand the change in the applied understanding of humanitarianism across history. Periodization is also adopted in this thesis. This chapter explains why this thesis divides the history of humanitarianism into three periods. The applied understanding of humanitarianism is shaped by different prevailing moral and political ideas in a particular timeframe. The meaning of humanitarianism therefore is quite different depending on the time period. The applied understanding of humanitarianism is not a universal concept that transcends time and culture.

Religious Humanitarianism

Introduction

This chapter begins the inquiry into the evolution of humanitarianism. Much literature marks the mid-nineteenth century as the beginning of humanitarianism. For instance, Hugo Slim (1997) suggests that the creation of the International Red Cross Committee in 1864 marked the beginning of humanitarianism. Eleanor Davey et al. (2013) echo this idea. Little research has been done on the applied understanding of humanitarianism in the pre-nineteenth century. A part of humanitarian history is missing from these studies, because a concern with suffering and a desire to help those that suffer are not unique to the modern society, which has existed throughout history. In order to give a more comprehensive view of the evolution of humanitarianism, this chapter looks at humanitarianism in the early modern age. This chapter identifies that moral, legal and political legacies of the late medieval period contribute to the constitutive norms in the early modern era, which shapes the applied understanding of humanitarianism in the early modern age.

There are two reasons to adopt the Spanish expansion to the New World as an illustration of the power of constitutive norms in constituting humanitarianism and international politics. First, the European expansion to the New World is a significant event in history, as it was the first time that the Europeans extended their influence across the Atlantic Ocean. A vast territory was brought into the European circle of influence, marking the beginning of European domination in international politics. European moral and political values became hegemonic and transposed beyond the European continent. Their values would shape international politics and the applied understanding of humanitarianism for the next few centuries. Second, the Spanish conquest of the New World resembles the controversy of humanitarianism in the post-cold war period, in terms of whether states should interfere with a given state on the ground of alleviating suffering. Both the Spanish in the early modern period and the liberal Western states in the modern era appealed to

the humanitarian elements of the constitutive norms of the international order to legitimate their international policies. For instance, Spanish monarchs appealed to the Catholic faith to justify the conquest of the New World, arguing that they sought to civilize and Christianize these people that they encountered, while Western liberal nations in the post-cold war era interfere with the underdeveloped and fragile states on the ground of human rights, arguing that their interferences are intended to protect people's basic rights such as the right to life and security. At the same time, the way humanitarian activities have been carried out in both eras is a controversial and highly debated subject. Las Casas questioned the way that Spanish "civilized" and Christianized the habitants in the New World, demonstrated in his discussion with Sepúlveda in the Valladolid debate, while many countries such as China have questioned the legitimacy of the intrusive nature of humanitarianism in the post-cold war period. By studying humanitarianism in the early modern period, this thesis demonstrates that the applied understanding of humanitarianism has always been controversial and does not transcend time and culture.

This chapter intends to demonstrate the power of the constitutive norm in international politics. The argument unfolds in a number of stages. It begins with an overview of the Spanish expansion into the New World. This chapter is not satisfied with how the Spanish expansion is interpreted as a sole materialistic project and argues that expansion amounted to more than a materialistic project, and was also a humanitarian project because it corresponded with the moral concerns in that period of time. This chapter proceeds to identify that the legacies of the late medieval period constitute the constitutive norms and condition the understandings of the moral purpose of the political associations and legitimate and rightful actions. The chapter then demonstrates that Spanish international policies were permitted and constrained by the moral purpose of political associations at that time. At that point, this chapter turns to the Valladolid debate, which discussed how the Spanish should interact with the native populations. It demonstrates that humanitarianism was as controversial in the past as in today's world, and that constitutive norms at that time also conditioned the debate.

Spanish Expansion: Material Interests and Religion

Spanish expansion has often been understood from the rationalist perspective. Johnathan Hart (2008: 27) argues that the Spanish expansion was motivated by an attempt to rebalance the power in the Iberian Peninsula. Due to the monopolizing of trade in the newly discovered land, Portugal became a potential threat to the kingdoms of Aragon and Castile. After the success of Reconquista, the kingdoms of Aragon and Castile were able to concentrate on rebalancing the power in the peninsula and compete with Portugal for overseas discovery and trade. The Spanish expansion to the New World was an attempt to achieve a favourable change of the status quo between Spain and Portugal. Meanwhile, Malvin Miranda (1997: 16) looks at the economic factors and argues that silver and gold mining motivated the Spanish expansion in South America and that without a promising outlook in terms of the discovery of precious metals, the Spanish expansion to the New World would not continue. The economic motivation was reflected in the Spanish colonial policy, which aimed to take control over the mines and to monopolize the trade between Europe and the New World in order to maximize profits. However, unlike Hart and Miranda, this chapter does not propose that material reasons alone are enough to give a comprehensive account of the Spanish expansion. This chapter holds that "real-life" behaviour is more complicated and is shaped by various factors. Drawing from the holistic constructivist approach, which stresses the importance of material and ideational factors in understanding actors' behaviour, this chapter argues that Spanish expansion was motivated by both material interests and ideas. This chapter focus on how the constitutional norms motivated and regulated the Spanish expansion in the New World.

This chapter agrees that the security and economic considerations motivated the Spanish expansion. However, religion cannot be overlooked. Religion inspired many people to participate in the expansion. For instance, Carol Delaney (2006: 266) draws on Libro de Las Profecias, which was written by Christopher Columbus and argues that Columbus's transatlantic excursion was driven at least partly by religious ideas. In Columbus's writing, he proclaimed that the purpose of his voyages was to "discover and evangelize the islands

of the Indies and all other peoples and nations". The view that religion played a role in constituting the Spanish overseas expansion has been supported by other historians. Adriaan C. Van Oss's study (1986) shows that the Spanish Crown dispatched missionaries to more than 65 destinations, and more than 15,000 missionaries crossed the Atlantic under royal auspices between 1493 and 1821. In addition, the Crown paid for the sending of missionaries. Therefore, he concludes that "if we had to choose a single, irreducible idea underlying Spanish colonialism in the New World, it would undoubtedly be the propagation of the Catholic faith" (Van Oss 1986: xi).

Religion is important because it constructs identity, with identity playing a significant role in shaping these actors' action. From Reus-Smit's perspective (2005a: 197 and 2008: 397), "understanding how actors come to have their interests is part of understanding how they behave the way they do". Interests are informed by identity, and an actor's identity is conditioned by social structures, particularly systems of intersubjective ideas, values and beliefs. Therefore, identity informs actions. At the same time, social structures define the pattern of appropriate social, political and economic activities engaged in by those actors (Price and Reus-Smit 1998: 267). These structures license one form of political action over another. Religion remained one of the most important features of life in the early modern period, when the Christian faith was predominant in Europe (Brunton 2017). It informed the people's identity at that time. Being a Christian in the medieval period entailed a wide range of values such as following the Catholic moral codes as well as interests such as spreading the Catholic faith and converting non-believers. Following constructivist logic, Delaney (2006: 262) argues that his identity as a faithful Christian inspired Columbus to sail the Atlantic Ocean in order to spread the Catholic faith. Similarly, Van Oss (1986: 2) argues that the identity of the Christian monarch motivated the Spanish monarchs to sponsor the missionaries to the New World over the years. In short, the Catholic identity shaped the European view of the people in the New World and enabled the massive conversion and the spreading of the Catholic faith in the New World.

The Spanish expansion into the New World has rarely been seen as a humanitarian action because all too often people are affected by the assumptions and ideologies of their own

time. We accept that the way things are is the way they have to be, which results in people drawing on a modern-day understanding of humanitarianism to interpret humanitarianism in the early modern age. For instance, Peter Stamatov (2013) argues that humanitarianism began in 1511 when the Catholic missionaries challenged the exploitation of, and the way the Spanish converted, the native population in the Caribbean islands. Stamatov does not consider the Spanish expansion as humanitarian because he is confined by the modern-day understanding of humanitarianism. Humanitarianism is understood in terms of saving lives, alleviating physical suffering and maintaining human dignity in response to physical need in today's world (Peterson 2016: 233). The Spanish expansion not only did not correspond with this definition, but it also caused massive physical suffering of the native population in the New World. Therefore, the Spanish expansion would not qualify as humanitarianism from today's perspective, which explains why Stamatov does not view the Spanish expansion as humanitarian.

This chapter argues that the answer to whether the Spanish expansion was a humanitarian project needs to take into account the social context of early modern Europe, as the humanitarian impulse is a socially constructed concept, which is heavily shaped by the constitutive norms of that timeframe. This chapter identifies the moral and political legacies of the late medieval period as constitutive norms in the early modern era. These legacies were heavily connected to the Roman Catholic doctrine, which shaped the meaning of humanitarianism and its application. Humanitarianism was understood as bringing salvation to heathens and civilizing the people according to the European (and medieval Roman Catholic) standards. Since the Spanish international policies were in line with the Roman Catholic doctrine of the time, Spanish expansion could be seen as an "early modern age" humanitarian project.

Legacies of the Late Medieval Period

This chapter identifies that the Catholic faith was a significant legacy of the late medieval period, remaining influential in the early modern period. According to Danielle Watson (2017: 8–9), Catholic Christianity was the official religion of nearly every country in

Western Europe by the fourteenth century, and Lithuania, the last European country that held the ancient belief system, became officially Christian in 1386. The last Muslim Kingdom in Europe (i.e. Granada) was conquered by the Crown of Castile and was dissolved with the Treaty of Granada in 1492. Watson also points out that nearly all European people were converted to Catholicism, and the common approach was "from the top down". First the king would convert to Christianity, and his nobles would gradually follow suit. With the support of the ruling class, the Church then was able to start establishing local or neighbourhood churches throughout the country. Over time, commoners began to adopt Christianity. The Catholic faith became widespread, and an integral part of everyone's life[14]. The Catholic identity was formed. Identity shapes political action. Reus-Smit (1999: 29) argues that all human actors, both individuals and collective, have social identities that allow them to operate in a social world; identity fulfils a variety of social and psychological purposes, including to provide actors with reasons for their action. Drawing from George McCall and Jerry Simmons' arguments, Reus-Smit (1997: 564–5) argues that identity has two functions. In a purposive sense, it provides the primary source of plans for action, informing an actor's goals as well as the strategies they formulate to achieve them. In a justificatory sense, identity provides the

[14] The influence of Christianity and the Church permeated all aspects of social life. Children were baptized by a priest shortly after birth; most weddings were conducted in church and chaired by priests; the priests administered the last rites to dying individuals; and funerary rituals like memorial prayers and masses were also based on biblical ideas (Wesner-Hanks 2006: 35). The biblical teachings were the main source of knowledge, and intellectual life in the fifteenth century was closely linked to the religion. Monasteries, convents and cathedral schools remained the main venues for receiving literacy training from the tenth century. Even though wealthy individuals started establishing schools that taught basic reading and mathematics in the twelfth century, these private schools also used the biblical texts as their teaching materials (Wesner-Hanks 2006: 35). At the university level, teaching was largely based on the Christian faith. As Bishop J. Michel Miller explains, "all the great European Universities – from Oxford, to Paris, to Cologne, to Prague, to Bologna – were established with close ties to the church … they prepared students for services to society and the Church" (cited in Stegu 2015: 484). Politics could not escape the influence of the Christian faith either. The Pope's decisions had a great influence on secular affairs. Excommunication was a weapon used by the medieval Roman Catholic Church against people that disobeyed the Church's authority. It was an "ecclesiastical censure barring a person from receiving communion, which meant exclusion from the Christian community until repentance" (Bloackmans and Hoppenbrouwers 2014: 441). If a king was excluded from the Church, he could easily lose trust and political authority in the community. Bishops, key figures in the institution of the Church, were also influential figures within the state system. Therefore, it was not uncommon for a bishop to serve as advisor to the king. For example, under the reign of Isabella and Ferdinand, the Royal Council of the Spanish Crown was composed of a bishop and other members (Plunket 1919: 142).

basis upon which action can be rationalized; it can provide actors with a reason for being and acting. Reus-Smit uses the doctor's identity as an example, arguing that it implies a certain form of action such as prescribing drugs and carrying out surgery; it gives reason and meaning to those actions. In his words, "I am a doctor, that's why I do such things". The Roman Catholic identity entails a set of values and beliefs, which categorize what is right or wrong and which behaviours are desirable or undesirable. The Catholic identity informed the view of violation of natural law and shaped the attitude towards missionaries and the conversion of "heathens", contributing to the understanding of legitimate and rightful action in the early modern age.

Natural law has a long history. Its beginning can be traced back to the writings of Ancient Greek philosophers such as Plato and Aristotle, and the concept was widely adopted by Roman jurists and orators like Cicero. Despite its non-Christian origins, the idea of natural law has been part of Christian theology since the very beginning, as is stated in the scripture. James B. Scott (2002: 180) found that in the Letter to the Romans, St Paul wrote that people by nature do what the law requires even when they do not have the law and laws are written in the hearts of men (Romans 2: 14–15). Many early Christian thinkers like Ambrose and Augustine identified this passage of St Paul with the natural law. For instance, Ambrose says that "it is the Apostle who teach[es] us that the natural law is in our heart". Similarly, in discussing natural law, Augustine cited St Paul's "words in a passage in which he divides law into three species"[15] (Scott 2002: 180–81). At the same time, the early Christian thinkers like Augustine drew from the writings of ancient writers like Cicero[16], and concluded that natural law is connected with God. Donald McConnell

[15] Augustine's Contra Faustum Manichaeum (Against Faustus the Manichean) points out that there are three kinds of law: "one of them is that of Hebrews, which Paul calls the law of sin and death. The other is that of gentiles, which he calls the natural law. Because, he says, the gentiles do by nature what is according to the law; and thus, they who do not have a law, are a law to themselves, who show the work of the law written in their hearts. The third kind of law is that of the truth, what is indicated by the apostle, when he says: Because the law of spirit of the life in Christ Jesus has liberated me from the law of sins and death. So there are three kinds of law" (cited in van den Berg 2013: 32–33).

[16] Cicero in the De Re Publica wrote that God is the author of natural law. In Cicero's words: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to

(2008: 817–18) explains that Augustine saw God's mind as the source of all ideas, including law and order; God had in his mind the form or pattern for all things, and things are what they are due to conformity to the pattern in which he created and sustains them. Augustine also believed that God's creation of moral law was not a mere arbitrary act of will. From Augustine's perspective, "logics, law, order and meaning flow from the nature of god himself and are provided to man by god through the image of god in man and through the direct influence on the human mind". This idea constructed Augustine's fundamental understanding of natural law – God is the source of natural law. This idea lays the foundation of the Christian understanding of natural law.

In ethics, natural law is regarded as moral law (or principles) which "prescribes how individual ought to behave" (Timmons 2002: 66). In explaining the ethics of natural law, David Boucher (2009: 46–8) points out that natural law is believed to have existed since the creation of humans and is regarded as innate, engraved in men's heart, soul and mind as an inner guide to conduct by God. Since the law is innate, the law is discovered through the exercise of reasoning. Since human beings are rational creatures, all humans are endowed with reason, which all humans can use to learn what is good and evil. In other words, all humans can have access to natural law, irrespective of being a heathen, non-believer or depraved. This law is regarded as an objective set of moral principles, because the law is constructed on the notion of common human nature. Since the sources of natural law (like human nature) are unchanging and universal, the law are supposed to be unchanging and universally valid, meaning that the law can be applied to all human races in all places and times. The moral ideas that are contained in natural law cannot be erased from the minds of men, although these ideas can be clouded by depravity and vice. The ethics in natural law can be used to determine whether a man's action is just or unjust

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alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or an interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment" (Cicero 1928: 211).

and whether a particular deed is righteous or unrighteous. It is the natural law imprinted in men's minds that enables humans to have some idea of justice, which informs legal and political institutions.

Natural law lies at the heart of medieval European ethics. The law constituted the medieval understanding of good and evil, evidenced by Pope Innocent IV's Commentary on the Decretal. In discussing whether Christians had the right to wage war against infidels, Innocent IV referred in particular to natural law, stating that force is legitimate if infidels sinned against natural law (cited in Muldoon 1980: 305). His statement implies that natural law was a moral standard, acts that violated natural law were immoral, and therefore people that committed these acts should be punished. It informed the view that using violence to stop the acts against natural law was a rightful action. However, the Church fathers were often not very precise in the way that they used the term and often the term was used as a way of approving whatever idea and action they supported[17] (Boucher 2009: 45). Essentially, the papacy can interpret natural law and decide what actions count as violation of natural law and compliance with it, because natural law is a form of divine governance and a reflection of divine reason, and the Pope is God's representative on earth, i.e. Vicar of Christ. Therefore, the Church had the highest authority to define what natural law is. And in that particular period of time, there was a belief that the earth and everything in it belonged to God, and Christ had dominion over all humanity. Since the Pope is God's representative on earth, he had dominion over both the faithful and the non-Christians. Therefore, the Pope also had the right to judge and punish non-Christians when they violated the natural law.

But what actions were generally considered sins against natural law? Thomas Aquinas (2016: 1351) identified that the highest principle of natural law is that "good is to be done and pursued, and evil is to be avoided", and that all actions that are related to our natural inclinations to "preserve life", "sexual reproduction", "strive to know god's truth", and

[17] For instance, Boucher (2009: 45) points out that the Church fathers condoned slavery despite preaching natural equality and urging slave maters to remember the fundamental equality of souls, to desist from cruelty and forced prostitution.

"to live with other human beings in a society" fall under natural law (Boucher 2009: 53). Combining the highest principle of natural law and the natural inclinations, Aquinas (2016) identified a wide range of activities that could fall within the category of violation of natural law, including idolatry, unjustifiable killing and incest. Aquinas's understanding of violation of natural law remained significant up to the fifteenth and sixteenth centuries. One of the charges that Sepúlveda put forward against the native population in the New World was that the Indians committed crimes against natural law with abominations including devil worship (Boisen 2005: 65). The commission of these sins against natural law has been the justification of Europeans to use violence in the New World.

From the Christian's perspective, the violation of natural law was considered a grave crime. These crimes were seen as sins against God. People at that time conceived that committing these sins would lead to exceptional suffering in Hell. Suffering was not a static concept but was rather perceived differently throughout history. Drawing from historical and anthropological work, Arthur Kleinman and Joan Kleinman (1996: 2) argue that the culture of the specific time and place plays a significant role in shaping the understanding of suffering, therefore the meaning of suffering is greatly diverse; there is no single way to suffer and there is no timeless or spaceless universal shape to suffering. Suffering could mean more than physical pain. In medieval and early modern periods, suffering was also equated with condemnation to Hell. An apocalyptic and eschatological view of the Christian world was prevailing, with this view focusing on the idea of Heaven and Hell; the salvation of souls; the final days of mankind and the second coming of Christ (Rivera 1992, West 1992 and Sandberg 2006). To people at that time, Hell was real, evidenced by the fact that "exact calculations of the distance between earth and hell were routinely offered". For instance, the sixteenth-century Spanish priest Alejo Venegas calculated that "hell was precisely 1193 leagues beneath the earth's surface" (Eire 2000: 288). For them, Hell was rather a "vividly pictured place of unspeakable horror" and "a real, physical, eternal furnace, a woeful abode for the damned, a fitting end for anyone who had transgressed God's law" (Eire 2000: 288). Committing sins against the natural

law could land one in Hell for eternity. With this at stake, natural law should not be violated. The violation would trigger the humanitarian urge of people in Christian Europe.

In addition to natural law, the Catholic identity also shaped the view on missionary and conversion of the heathens. Missionary and conversion have been part of the Christian doctrine for centuries. In the New Testament, Jesus directed his disciples to preach to the "lost sheep of the house of Israel" (Matthew 10: 6), but essentially extended the mission to "the entire world" and "to all creation" (Mark 15: 16). Paul the Apostle advocated that the Gospel was for everyone, and extended access to the Church to Gentiles (non-Jewish people). In a letter to the Ephesians, St Paul wrote that "the Gentiles would be coheirs and parts of the same body, and that they would share with the Jews in the promises of God in Christ Jesus through the gospel" and "God gave his grace to me, the least of all God's people, to preach the good news about the immeasurable riches of Christ to the Gentiles" (Ephesians 3: 6 and 8). Christianity needed to spread to all nations in order to bring salvation to all human beings. St Paul's teaching on spreading God's word and converting the heathens remained powerful in the later medieval and early modern periods. Drawing from St Paul's teaching, various Popes issued papal bulls, which encouraged the propagation of Christianity and conversion of the heathens. For instance, Pope Gregory IX issued the papal bull Cum hora undecima in 1235, which stressed that "it is necessary that spiritual men (possessing) purity of life and the gift of intelligence should go forth with John (of Baptist) again to all men and all peoples of every tongue and in every kingdom to prophesy" (cited in Muldoon 1999: 159). This bull licensed missionaries who were expected to preach to a wide range of people, including pagans and Saracens. Similarly, Pope Nicholas V (1917: 21) issued the papal bull Romanus Pontifex in 1455, which required King Alfonso V of Portugal to "propagate the orthodox faith" to inhabitants or dwellers in the newly discovered islands, in order for them "to come to the knowledge of the true God", "to receive holy baptism", "to praise and glorify God", because this would prevent the souls of native inhabitants in these islands from suffering eternal damnation in Hell.

Europeans assumed that non-Christian societies would and should accept the Christian missionaries and allow them to preach in peace. This assumption is in line with the Catholic understanding of natural law, which believes that it is the human natural inclination to know God's truth. The Catholic faith was believed to hold God's truth, and therefore people would want to learn about the Catholic faith. This assumption was reflected in the idea that Christian missionaries had the right to enter non-Christian societies to preach peacefully (Muldoon 1999: 162). Pope Innocent IV acted on this assumption when he sent the Franciscan John of Plano Carpini and a companion on a mission to the Mongol Khan. In a letter to Khan, the Pope requested that he "receive these Friars kindly and to treat them in considerate fashion", because they represented the Pope in the preaching of God's word (Muldoon 1999: 160). If a non-Christian ruler forbade Christian missionaries or was unable to ensure the safety of the missionaries, the Pope could call upon the Christian rulers to send troops to protect the missionaries (Muldoon 1999: 162), an idea that persisted to the early modern period, evidenced by the Requerimiento of 1513. The Requerimiento followed the view of Pope Innocent IV, which required the Indians to consent and permit the missionary to preach to them because they had an obligation to hear the Gospel under God's law. If the Indian refused to do so, the Spaniard, "with the help of god", would invade and make war against them (Williams 1990: 92).

The constitutive norm of the late medieval Catholic faith constituted and gave content to the humanitarian impulse in the early modern age. Sins against the Catholic version of natural law and being a heretic were deemed as grievous crimes and were enough to trigger humanitarian impulses. This provided the motivation to carry out humanitarian activities and was the underlying justification for these actions. Propagating the Catholic faith and stopping these sins were perceived as ethically necessary, because this could prevent people from facing the worst consequence of all – eternal suffering in Hell with no hope of escaping, and essentially could save their souls. These beliefs shaped and conditioned Spanish attitudes and policies towards the native population in the New World and their international policies.

Moral Purpose of Political Associations and Rightful Action in the Early Modern Period

Reus-Smit (1999: 123 and 2013b: 169) identified that, in the current sovereign state-based international order, political authority is organized into multiple, territorially demarcated political units, and authority within these units is centralized, exclusive and bounded; and the fundamental rules that regulate the interaction are multilateralism and contractual international law. This form of order is enabled by the individualist social ontology. He recognizes that international order had changed, different kinds of orders had developed over the course of history, that power and authority were organized differently and that fundamental institutions were also developed in different ways. This change was engineered by the change of constitutive norm of that specific timeframe.

International order in early modern age is really different from the current international order. In the late medieval and the early modern periods, the international order was not organized into a sovereign order, but a heteronomous order. Heteronomy was the organizing principle of that period (Reus-Smit 2013a: 79), because that period was a time "when the universal political organization of western Christendom was still in the process of disintegration, and modern states in the process of articulation" (Bull 2006: 11). Therefore, at that time there were "multiple centers of political authority, all with overlapping jurisdiction" (Reus-Smit 2013a: 169). Andrew Phillips (2008: 106) shares a similar view with Reus-Smit, and describes the order at that time: "far from being concentrated, singular and precisely circumscribed within a particular territorial jurisdiction, [it] was rather fragmented, plural and simultaneously operative within particular functional domains across multiple territories".

Reus-Smit (2013a: 79) and Philips (2017:58) identify that the states and the ecclesiastical institutions were the principal, but not exclusive, political associations at the time. Each of these associations "operated within the context of their own distinctive legal codes and norms of conducts intended to authoritatively regulate activity within a specified realm

of social activities" (Phillips 2008: 107). All these associations working in the same territorial spaces presented overlapping jurisdictional claims (Phillips 2008: 107).

The states and the ecclesiastical institutions were deeply entwined as they were serving the same purpose. Drawing from Aristotle's writings, Reus-Smit (1999:31) recognizes that all political associations are formed with a purpose, the purpose is historically and culturally contingent, which reflects the constitutive norms of that time. That is to say, the purpose of these political associations is intimately connected to the social and political context of their time frame (Reus-Smit 2013a: 81). Late medieval and early modern Europe was first and foremost a community of the Catholic faith (Phillips 2008: 109). The Catholic faith conditioned the purpose of these institutions, or in Phillips words, a "raison d'être of collective association" (2008: 110). The state was regarded as having a similar purpose as the Church – a commitment to protect and to spread the Catholic faith. It brought an ideological unity to the state and the Church. James Muldoon (1994: 17–18) describes the state in the late medieval period as like a "secular arm of the body of the church". The unity of Roman Catholic church and states reflected on various historical events like the crusades against Muslim infidels and pagans, and the Inter Caetera of 1493.

The moral purpose of the states and the Church conditioned the meaning of legitimate and rightful action in this era. Due to the Catholic faith, which prioritized the spreading and protecting of Christianity, sins against the natural law were seen as grievous crimes, resulting in a humanitarian impulse. Spreading the "true faith" to the non-Catholics and bringing salvation to all people within their influence was seen by state and Church as ethically necessary. These activities were deemed as legitimate and rightful, as they were in line with the constitutive norm at that time: the Catholic faith. These understandings of rightful and legitimate behaviours motivated and shaped Spanish international policies.

Spanish International Policies

The Catholic faith shaped the way that the Spanish expansion was conducted. Reus-Smit (2005a: 196 and 167) explains that the constitutive norm moulds the identity of a political actor, and identity also informs views on right and wrong. Identity "consists of values and attitudes that specify criteria for distinguishing right from wrong or just from unjust" and "imply associated standards of behavior" (cited in Jackson and Sorenson 2010: 167). In this case of the early modern age, the violation of natural law, the refusal of Christian missionaries to enter cities and circulate freely and the refusal of Christian teaching were regarded as wrong because of the Catholic doctrine at that time. These views conditioned how Spaniards perceived the culture and the behaviour of the native population. At the same time, the Catholic doctrine at that time also shapes the understanding of the moral purpose of political association, and conditions the meaning of legitimate and rightful action. Spreading the Catholic faith and bringing salvation to the people was perceived as rightful, legitimate and ethically necessary. These perceptions conditioned and guided how Spaniards interacted with the native people in the New World, who had different cultures and values.

The native population in the New World had a culture that was totally different from that of the Europeans. Europeans viewed these newly "discovered" groups of people as "savages". Indigenous people were almost completely naked [18], and belonged to polytheistic tribes. They had different ideas about property, and their wealth was shared and distributed via kinship (Davidann and Gilbert 2013: 15). They also practised sodomy, cannibalism and human sacrifices (Abbattista 2011). These behaviours were deemed a violation of natural law by the Spaniards, who regarded these people as uncatholic, immoral and cruel. In their view, the Indians would face eternal damnation and needed to be brought to the true faith for eternal salvation, and their behaviours needed to be

[18] Columbus describes that "all of them, women and men alike, go about naked as their mother bore them, although some of the women wear a small piece of cotton or a patch of grass with which they covered themselves" (cited Zamora 1993: 4).

civilized according to the European Christian standard. The expansion to the New World was perceived by the Spaniards as "a paternalistic concern for the salvation of the soul of gentiles" (Rubies 2017: 70); it allowed the Spaniards to introduce the Catholic faith to the local population. The expansion was regarded as legitimate and good for the native population in the New World.

Actors justified their behaviour by appealing to the humanitarian elements of the constitutive norm. The Spanish expansion to the New World was justified on the ground of bringing the natives to Christianity and civilizing them. King Ferdinand once wrote: "it [the reasons for the expansion to the New World] has always been and still in these matters of the Indies to convert the Indies to our holy Catholic faith so that their soul may not be lost, and therefore it is necessary for them to be taught the truths of our religions" (cited in Ramsey 1973: 250). These justifications were not random, but artfully articulated. They deliberately corresponded with the prevailing constitutive norms of that time. These justifications were politically enabling. Reus-Smit (2013a: 175-6) explains that all political actors possess a strong motive to legitimize their behaviours, particularly when these behaviours seem questionable. It can help to legitimize political behaviours when political actors successfully develop the connection between their behaviours and the constitutive norms, which empowers the behaviours. Claiming that the expansion is for propagating the Catholic faith and civilizing the natives gave legitimacy to the action.

In addition to enabling political behaviours, the role of the constitutive norm also poses a constraint to political actions. Reus-Smit (2013a: 176) notes that when political actors claim that their actions are consistent with the constitutive norms, the subsequent behaviours must bear some relation to the norms that they invoke. Even when political actors are not motivated by these constitutive norms, these actors will find themselves committing to the behaviours that remain compatible with the constitutive norms because incompatible behaviours "carry them with costs, reputational costs in particular" and "acting in way that contradicts one's rhetoric is to expose oneself to accusations of

hypocrisy". Since Spanish expansion in and conquest of America was justified on the ground of spreading the Catholic faith to the New World and civilizing the native population, Spanish policies in the New World needed to be compatible with these justifications. Various policies were adopted by the Spanish to spread the faith and rectify the behaviours of native population.

For instance, Spanish Inquisition was introduced to the New World in order to "rectify" the native behaviours. With the formal consent from Pope Sixtus IV in 1478, the Inquisition was first established by Queen Isabella and King Ferdinand in order to detect and punish heresy, which was perceived as a threat to the Roman Catholic identity in Spain. Despite the fact that the Spanish Inquisition was only officially introduced to the New World in 1569, bishops had already acted as inquisitors and carried out inquisitorial activities. The Inquisition intended to root out the heretics and other transgressions of Catholic orthodoxy. Juan de Zumarraga, appointed by the Spanish Crown as the apostolic inquisitor of Mexico City, organized episcopal tribunals and tried a wide range of offences that were considered as uncatholic and a violation of natural law. These offences included blasphemy, bigamy, heretical propositions, idolatry, sorcery and superstition, and the convicts were whipped, fined, forced to take part in autos de fe or burned at the stake. Indigenous leader Don Carlos of Texcoco was burned at the stake for "dogmatizing heresy" (Bakewell 1997: 139 and Cortegiera 2012: 20). Although the Inquisition fell short of acceptability by modern-day norms, it was compatible with the constitutive norm of the early modern age, which prioritized the respect for the Christian faith. The Inquisition forced the native to convert and to act according to the Catholic orthodoxy, in order to avoid persecution.

In addition to Spanish Inquisition, a series of laws, directives and ordinances were issued by the Spanish monarchs in the sixteenth century, in order to facilitate the spread of the Catholic faith in the New World and to rectify the behaviours of the native population. The law of Burgos was issued in 1512 by King Ferdinand. Many provisions in the law intended to catholicize the native population and to rectify their uncivilized behaviours.

Article III instructed that "each morning, before they [the Indians] go to work, they shall be obliged to go to the said church and pray as they do in the evening"; Article XVI forbade Indians from having more than one wife at a time or abandoning her[19] (Bakewell 1998). The Requerimiento was written by the Council of Castile and was issued by King Ferdinand in 1513; the document "asked" the Indians to give consent and allow these religious fathers to preach to them about the holy faith. If the native population rejected the request, the Spanish would enter the territory forcefully, and would "make war against you in all ways and manners that we can" (Guitar 1997: 545). King Charles I, the successor of King Ferdinand and Queen Joanna, also issued the New laws of the Indies for the Good Treatment and Preservation of the Indian in 1542. It instructed that Encomendero (people who have the right of encomienda) had the responsibility to take care of the native population, which included teaching Catholic values and the Christian way of living, such as the Communion, to the native (Halsall 1998). King Phillip II, the successor of King Charles I, issued the Ordinances for the Discovery, New Settlement and Pacification of the Indies in 1573, which required that the native should be instructed in giving up such things as human sacrifices "that are contrary to our catholic faith and evangelical doctrine" (Charles I 2008: 68–70). All these laws corresponded to the justification of the Spanish expansion to the New World.

In short, constitutive norms in the early modern period shaped the Europeans' perception. Due to the Catholic faith, they deemed the behaviours of the native population as the violation of natural law. These behaviours could lead to eternal damnation in Hell and encouraged a humanitarian impulse. At the same time, spreading the Catholic faith and converting people was regarded as a rightful and legitimate action. Only these actions would bring salvation to the native people. Spanish policies in the New World facilitated this objective. Since the Spanish expansion corresponded to the humanitarian impulse as

[19] Other articles directly related to religious matters included Article 4, which instructed that the Indians needed to be taught Christian teachings such as the Ten Commandments and the seven deadly sins, and Article 5, which commanded the building of churches where settlers and Indians could attend Mass.

well as their understanding of right and wrong, therefore, this chapter considers the expansion as humanitarian by the standard of the early modern period.

Disputes on Saving Indians: Valladolid Debate

The discovery of America introduced an intellectual and theological debate about the relations between the Europeans and the native population in the New World. One of the debates was on how to Christianize the Indians in order to civilize them and to save their soul from eternal damnation, as spreading the Catholic faith and Christianizing the Indians was deemed important by the Europeans. The debate reached its height in the mid-sixteenth century when the Spanish King Charles V ordered the suspension of exploration in the New World until a jury of eminent doctors and theologians, including Domingo de Soto, held a hearing and issued a ruling on issues such as the meaning of Christianizing the Indians. An official debate on the meaning of Christianizing Indians was a testimony that a considerable number of people felt uneasy about how the Spanish were treating the native population in the New World, in spite of their humanitarian intention.

The debate on how Spaniards should or should not treat the natives occurred "within the context of pre-existing values". Reus-Smit (1999: 27) explains that questioning whether the action is right or wrong could not take place in a value vacuum, because values enable and proscribe some behaviours, and determine whether the behaviours are just or unjust. Las Casas and Sepúlveda drew on pre-existing values and ideas such as Aristotle's theory of natural slavery, the Bible, and natural law in order to formulate their arguments and defend their positions (Turner 1997: 44), but came to a very different conclusion on how to interact with the native population in the New World. Despite their differences, Las Casas and Sepúlveda did not deviate from the constitutive norms of the early modern period, insisting on the need convert the native population to Christianity.

Las Casas advocated peaceful and persuasive ways of converting the Indians. In contrast, Sepúlveda provided justification for the use of violence to evangelize the native peoples. The debate demonstrated that the methods of saving people was controversial and was

subjected to a huge debate, which ran parallel to the controversy on humanitarianism in the post-cold war period, which will be addressed in later chapters. Contrary to what one may expect, this thesis deems that there was a humanitarian motivation within Sepúlveda's arguments, as he was motivated to save the Indians from eternal damnation and to bring them to salvation. The main purpose of this section is to explore Las Casas's arguments against Sepúlveda's view on the treatment of the Indians. The debate between Las Casas and Sepúlveda reflects the controversial nature of humanitarianism and the lack of consensus on how to react from a humanitarian perspective. Prior to that, this chapter will first outline Sepúlveda's key arguments and the logic behind them.

--- Sepúlveda: Saving Indians by Force and Violence

Sepúlveda drew heavily from Aristotle's theory of natural slavery to establish his account of the Indians. Aristotle (1999: 6–9) argued that in any society, it is natural that "some should rule and others be ruled". He stated that all living creatures "consist of soul and body". Of these two, one is by nature the ruler, and the other the subject. Those whose business is to use their bodies are slaves by nature. This group of people "lacked a fundamental quality, namely practical reason" (Boisen 2005: 68). In the words of Aristotle (1996: 9), these people can only "participate in rational principle enough to apprehend, but not to have, such a principle". Therefore, it is better for them to be under the rule of masters, because only then can they attain virtue[20]. Sepúlveda believed that the barbaric behaviours confirmed that the Indians did not possess autonomous rationality. He deemed Indians as natural slaves. Since all Indians were natural slaves, they all could be enslaved. In a sharp contrast, Sepúlveda believed that the Spaniards were masters by nature. He argued that the Spaniards were better than the Indians in every aspect of life: they were inferior to no one in the fields of theology and philosophy and they possessed inborn virtues such as strength, humanity, justice and religiousness. For Sepúlveda, the

[20] In his Commentary on the Politics, Aquinas endorsed the view of Aristotle. He (2007: 10) claimed that natural slaves need guidance from their master because physical strength alone is not enough for them to survive: "nor would those who abound in physical powers be able to be preserved unless the practical wisdom of another were to rule over them".

position of the Spaniards and the Indians in society could be compared to that of adults and children in the family or men and apes in the natural world. Hence, the natives should submit their authority to the Spaniards, and therefore Spaniards could instruct them in the appropriate behaviours, i.e. European and Catholic behaviours. In Sepúlveda's own words, these peoples "require, by their own nature and in their own interests, to be placed under the authority of civilized and virtuous princes or nations, so that they may learn from the might, wisdom and law of their conquerors, to practice better morals, worthier customs, and a more civilized way of life" (cited in Hanke 1970: 47). Essentially, for Sepúlveda, enslavement was to restrain the Indians from committing crimes against the natural law and against God, and the Spanish subjugation was for the good of the native population. It could lead them to give up these sins against natural law and bring them to follow the Catholic doctrine, which would save them from eternal damnation.

Sepúlveda insisted that the Indians committed crimes against natural law, and therefore the Spanish had a humanitarian obligation to eradicate these crimes that offended nature. As far as he was concerned, punishment, including war, would put Indians on the right path to salvation and force them to follow the natural law (Boisen 2005: 72). For Sepúlveda, the practice of idolatry by Indians was viewed as "evil and blasphemous ritual" and cannibalism and human sacrifices as "crimes against nature" (Orique 2011: 151). Sepúlveda viewed cannibalism and human sacrifices as the most disturbed behaviours (Boisen 2005: 65). In terms of human sacrifices, it was because a large number of innocent people were slaughtered in religious ceremonies each year. Sepúlveda (1973: 17) was convinced that "more than 20,000 were usually sacrificed yearly in New Spain alone". As for cannibalism, the cruelty of Indians towards their enemies was driven by emotions such as hate and anger, rather than rationality. In his words, "they were making war continuously and ferociously against each other and with such rage that they considered their victory worthless if they did not satisfy the monstrous hunger for the flesh of their enemies" (cited in Berkhofer 1978: 12). The violence, therefore, could not be understood as a means to carry out justice, but was driven by animalistic instinct. To punish those

who committed acts against the natural law was actually to save their souls from suffering eternally in Hell. Stopping them from committing these crimes could also save their potential victims. By these ideas, Sepúlveda regarded that the use of violence against the Indians was a humanitarian act.

Sepúlveda argued that violence could be used as a means to preach the Catholic faith in the New World. He drew on the Bible for the authority and concluded that Christianization of heathens could be through force. The importance of propagating the Catholic faith in the New World lay in the belief that Indians' souls were dangerous. In Sepúlveda's words, "men who wander outside the Christian religion will perish in eternal death" (Sepúlveda 1973: 18). In keeping with the Requerimiento, Sepúlveda contended that Christians did have the right and the moral responsibility to spread the Gospel and were rightfully permitted to compel the Indians to follow the Christian doctrine for the sake of salvation. For Sepúlveda, salvation could be achieved in two ways: by peaceful ways or by employing force and punishment. In his words:

> It is necessary to send deputies and warn the barbarians to desist from idolatry and publicly admit the Christian preachers before preparing for war so that if they acquiesce to our demands, the salvation of their soul could be provided without recourse to war; but if however, it should be impossible to obtain these concessions from them, then they may be compelled to perform these commands having been subdued by just arms of war. (Sepúlveda 1973: 29).

That is to say, although peaceful means should be prioritized, forceful measures should also be on the table. However, Sepúlveda (1973: 32) contended that the elements of fear and force "accomplished more toward their conversion in one month than would be accomplished in a hundred years by preaching alone without pacifying the barbarians". If the element of fear was removed, Sepúlveda believed that the Indians could relapse into their unchristian acts and risk eternal suffering. Despite the alleged effectiveness of forceful means, Sepúlveda conceded that only a change in their hearts and minds would

make the Indians follow the Christian doctrines faithfully. He (1973: 19) stated that "nobody can be made faithful if the will, which cannot be forced, resists". The fear and the violence could instead reduce the barriers in preaching the Gospel to the Indians. As Sepúlveda (1954) wrote, "how can they (preach) to these barbarians if they are not sent to them ... and how are they to be sent if these barbarians are not conquered first?". For Sepúlveda, either by peaceful ways like preaching and teaching or by force and violence, Indians would have to follow the Catholic doctrine, in order that they would not face eternal suffering in Hell.

In short, Sepúlveda's arguments were based on the notion that Indians were a barbaric race. All barbarians were "by habit and most even by nature, illiterate, imprudent and contaminated by many barbarous vices" (cited in Boisen 2005: 65). Because of their barbaric nature, Sepúlveda believed that the Indians were caught up in the sins against natural law, which included cannibalism, killing innocent people, devil worship and human sacrifices. These sins were essentially against God and could lead them to eternal damnation. They needed to be saved from themselves. Therefore, they needed to be instructed in the Catholic faith and their behaviours needed to be civilized; any obstacles that stood in the way of preaching the Gospel needed to be eliminated. Since the Spaniards were Catholic, they believed that they had the moral responsibility to Christianize the Indians. For Sepúlveda, "the loss of a single soul dead without baptism exceeds in gravity the death of countless victims, even if they were innocent" (cited in Boisen 2005: 77). Such statement underlines Sepúlveda's humanitarian reasons for the use of force and violence in the New World.

--- Las Casas: A Case Against the Use of Violence

Las Casas presented a different view on how the Indians should be saved. Unlike Sepúlveda, who advocated that the Spaniards could forcibly Christianize the Indians if it was necessary, Las Casas argued that Indians must be converted by peaceful and not violent means. Las Casas challenged Sepúlveda's main claim that Indians were natural

slaves. He did not challenge the Aristotelian' doctrine of natural slavery, but rather Sepúlveda's argument that Indians belonged to such category. Las Casas argued that Sepúlveda overgeneralized the Aristotelian doctrine and demonstrated that Aristotle spoke of several types of barbarians, only one of which fitted into the category of "natural slave" [21]. From Las Casas' perspective, the only barbarians that could be seen as Aristotle's natural slaves were those who "are cruel, savage, sottish, stupid and strangers to reason"; "are not governed by law or right, do not cultivate friendship, and have no state or politically organized community" and "do not engage in civilized commerce". Essentially these barbarians "lead a life very much that of brute animals", but barbarians of this kind "are few in number when compared with the rest of mankind" (Hanke 1974: 83). Indians did not fall into this category, because they had a functional government with laws and jurisdiction. And he argued that the Indians were God's creations and that since God is perfect, it is reasonable to believe that this type of barbarians were few in number. If a large number of human beings were barbaric in this sense, it would mean God had failed. Since God is flawless, that could not happen (Hanke 1974: 83–4). Las Casas posited that even if there were good reasons, such as saving them from eternal damnation, to enslave the Indians, enslavement should not be seen as legitimate since they were not natural slaves.

Another point that Las Casas disagreed with Sepúlveda upon was the notion that the Indians should be punished because of their acts against natural law. Sepúlveda believed that punishment could rectify people's behaviour. However, all punishments presuppose jurisdiction over those who receive the punishment (Hanke 1974: 87). Las Casa doubted that there were any grounds for the Church and the Christian kings to exert jurisdiction

[21] The first type of barbarians was represented by those with "savage behaviour", guided not by reason but by passions and emotions such as hate and anger. The second type of barbarians were defined by their lack of language. The third category of barbarians were those who "lacked a reasoning and way of life suited to human beings … they have no law which they fear or by which all affairs are regulated … they lead a life very much that of brute animals". And the fourth type of barbarian was those that do not acknowledge Christ (Hanke 1974:83-84; Cantens 2010:31).

over the Indians[22]. For Las Casas, Christian rulers only had jurisdiction over the faithful, and therefore Christians could not punish Indians for their acts against natural law. His fundamental argument was that Indians were never properly instructed in the Christian faith, so they fell outside the jurisdiction of the Church. For instance, Las Casas claimed that idolatry was a serious crime, but Indians did that out of ignorance as they thought they were worshipping the true God; it was not done out of unbelief or maliciousness, and therefore, the Indians could not be punished even if the Church had jurisdiction (Boisen 2005: 79). At the same time, Las Casas directly challenged the Requerimiento, which gave these lands to the Spanish monarchs. He insisted that the Indians were rational beings and were the legitimate owners of their land[23]. Therefore, the Pope could not give the land to the Spanish monarchs. In other words, the Spanish monarchs could not have jurisdiction over the Indians, as the legitimacy of the Spanish ownership of the New World was based on the Pope's authorization. Therefore, the Christian kings could only punish those that betrayed the true faith while living within the Christian territories (Cantens 2010: 33; Hanke 1974: 88). No matter how sinful the crimes committed by the Indians were, neither the Church nor the Christian monarchs had the authority to mete out punishment.

[22] Las Casas divided non-believers into four different types. The first group comprised believers of other religions that lived peacefully in the Christian kingdoms; the second one was those who at one point in their life were Christian but turned away from their commitment to Christianity. The third one was those who believed in other religions and persecuted Christians. The last group was made up of those who had never heard of Christianity, such as the Indians. Christian rulers may have jurisdiction to punish unbelievers who are heretics and live within Christian territories, but do not have jurisdiction over those who are not heretic or apostates and who live in remote territories (Cantens 2010: 32).

[23] Being rational means to have the capacity to reason. Las Casas asserted that the native inhabitants had the capacity to reason. First of all, he stressed that God had given humans the capacity to reason, and all humans had this capacity as they belonged to the same design. Second, he contended that the American Indians were rational as they had the social structures to govern the affairs in their society. Las Casas rejected Sepúlveda's claim that there was no law in governing affairs and the natives lived like brute animals (Hanke 1974: 83–4 and Cantens 2010: 31), and argued that "rather, long before they [native population] had heard the word Spaniard they had properly organized states, wisely ordered by excellent laws, religion, and custom … wisely administered the affairs of both peace and war justly and equitably, truly governed by laws" (Las Casas 1999: 43). In additional to functional government, the native inhabitants also had arts, religion and written language. Las Casas argued that with all these creations the native inhabitants had sufficient civilization and could not be irrational. Therefore, Las Casas concluded that the native inhabitants were "intelligent, far sighted, diligent, and talented" (Las Casas 1999: 38); and were as rational as the Spaniards.

Las Casas agreed with Sepúlveda that cannibalism and human sacrifices were against natural law. For Sepúlveda, the use of violence was to eradicate these customs and to uphold the natural law (Brunstetter and Zartner 2010: 736–8). However, Las Casas argued that such horrible crimes, which were committed by a few, could not justify the massive use of violence by the Spaniards in the New World. From Las Casas' perspective, violence, particularly war, was "the sea of all evil" (Las Casas 1999: 248). Las Casas was not a pacifist, and insisted that violence was sometimes necessary[24]. However, in the case of the use of violence against the Indians, he argued that violence had caused physical damage to the local population and the local community. It had already led a countless number of people to perish. This damage was out of proportion. Las Casas believed that accepting that some innocent people may be killed in human sacrifices or cannibalistic practices was better than using violence against the whole nation, because there were more victims as a result of violence. Therefore, Las Casas (1999: 203) argued that it was best to avoid violence although violence might produce some good. In addition, violence would "implant a hatred for the Christian religion in their souls, and so that they will never want to hear the name or teaching of Christ for all eternity" (Hanke 1970: 92). Instead of motivating the Indians to follow the Christian faith, the violence was contrary to the purpose of saving the Indians from eternal damnation. In other words, violence would cause more death and suffering and in turn generate more hate towards the "Catholic", meaning that saving non-believers from eternal damnation could not be achieved.

For Las Casas, the Indians needed to be converted to Christianity (Hernandez 2001). Peaceful persuasion was the only way to attract the Indians to the Catholic faith. In his words:

[24] Like Francesco de Vitoria, he approved of the use of force under certain conditions. One of them was the absence of freedom to spread the faith. In his words, "Such war does not apply to unbelievers in the absolute sense of the term but to unbelievers like the Saracens and Turks, who obviously bear an age-old hatred for the name of Christ" (cited in Wilson 2012: 4). Another condition was reclaiming Christian territory. Las Casas also argued that since the Moors and the Turks had taken control of Christian subjects and Christian lands, Christian rulers could justly launch a war to reclaim them. He stated that "Jews and Muslims are unrightfully usurpers of Christian territory" (cited in Wilson 2012: 5).

> divine providence has established, for all the world and for all time, one and only one method which teaches men the true religion, that which persuades the understanding by reason and invention and gently attracts the will. Indubitably, this method must be common to all men of the world, without distinction because of sects, errors or corruption of customs. (Cited in Abbott 1996: 63)

According to Don Paul Abbott (1996: 63–4), Las Casas reaffirmed "the essential uniformity of all human beings"; because of Christ "affirming the predestination of all human beings", no nation was excluded from this promise, and therefore the Indians were necessarily included. Since all were predestined for eternal salvation, all must necessarily possess the intelligence and rationality that were required to comprehend God's word, and it was "not possible that there is an entire nation, people, city or town that is so without understanding as to be incapable of accepting gospel". Because the Indians were rational and intelligent beings, they must be persuaded to accept Christianity in a peaceful and rational way: no other method could be justified. For Las Casas, persuasion, without the violence of arms and without the force against natural reason, can "transform beasts into human beings and teach savages to love justice, equality, and virtue and, ultimately, to revere the faith, that is, to revere god"[25]. In support of his position, Las Casas quoted Pope Paul III's papal bull Sublimis Deus, which declared that "Indians, as true men, [are] not only capable of receiving the Christian faith, but as we have learned, eager to receive it". Therefore, "the Indians and other nations must be invited to receive the said faith of Christ with the preaching of the word of god and with examples of good life". The

[25] According to Abbott (1996: 64–5) Las Casas stressed that the responsibility of communicating God's messages rested entirely with the preachers, and the preachers must present the Gospel in a way that appealed to the souls of those who heard it. Las Casas recommended five conditions that would enhance the effectiveness of preaching. First, the hearers must understand that the preacher does not seek to establish dominance over them. Second, the hearers must know that the preacher does not preach because of a desire for wealth. Third, the preacher must speak in a manner "sweet and humble, affable and gentle, kind and benevolent" to the hearers, in order to instil in them a desire to attend church and accept the Christian doctrine. Fourth, the preachers must show the same love and charity towards humanity as did St Paul. And fifth, the preachers must live "an exemplary life, resplendent with virtuous work; a life that offends no one and is totally above reproach".

authority of the papal bull validates Las Casas' argument that peaceful persuasion was the only way to bring the Gospel to the Indians and lead them away from eternal suffering.

Despite the differences between Sepúlveda and Las Casas, both sides of the argument do not deviate from the constitutive norms of that time. The constitutive norms shaped Sepúlveda's and Las Casas's perceptions, including their understanding of right and wrong and their understanding of Spain's responsibility towards the native population in the New World. Sepúlveda believed that human sacrifices, cannibalism and idolatry were sins against natural law. This view was shared by Las Casas, who agreed that these sins were horrible crimes. Both agreed that Spain had a moral responsibility to rectify these behaviours. Essentially, Sepúlveda and Las Casas shared the same objective. Their differences lay in how to achieve the objective. At the same time, the constitutive norm constrains their arguments. Reus-Smit (1999: 28) explains that reasons that carry most weight are those "that resonate with pre-existing and mutually recognized higher ordered values". At the time, the highest moral value was placed on a commitment to protect and spread the Catholic faith due to the Catholic identity. In order to convince the panel, they both appealed to the constitutive norm to justify their position. Sepúlveda argued that imposing the Catholic way of life upon the native population required the use of force; while Las Casas maintained that the best way to introduce the Catholic way of life was by peaceful means such as preaching and living a Catholic life. As Daniel Brunstetter and Dana Zartner (2011: 745) put it, Sepúlveda and Las Casas are essentially two sides of the same coin despite their disagreement.

Conclusion

This chapter asserts that the Spanish expansion is more than a materialistic project. The expansion corresponds with the moral concern at that time, which was the salvation of people's souls. The Spanish international policies were largely in line with this objective. Due to the different moral concerns, humanitarianism in the early modern period was

applied differently from that of the post-cold war period. Spreading the Catholic faith and converting the non-believers do not count as “humanitarian” in the modern era or the post-cold war period, which will be further elaborated upon in coming chapters. This chapter demonstrates that humanitarianism is historically and culturally contingent. The concept is not universal and could not transcend time and culture. It needs to take social and political context into account in order to understand how humanitarianism is understood and applied.

The Spanish expansion to the New World demonstrates the importance of constitutive norms in international politics. This chapter identifies the late medieval Roman Catholic doctrine as the constitutive norm in the early modern period. The constitutive norm shapes the perception of right and wrong. The Catholic faith constitutes the notion that the behaviours of the natives were backward and uncivilized. At the same time, the constitutive norms conditioned the moral purpose of political associations, and shaped the understanding of legitimate and rightful actions. Due to the Catholic faith, spreading the “true faith” to the non-Catholics and bringing salvation to all people was deemed to be ethically necessary and a rightful action. Spanish monarchs appealed to the humanitarian elements of the constitutive norm, i.e. saving people’s souls and bringing salvation, to justify their expansion in the New World, which also restricted their policies in the New World. Spanish policies needed to be in line with the constitutive norm. The constitutive norm permitted and restrained political actors’ behaviours at the same time.

As in today’s world, humanitarianism in the early modern period was controversial, demonstrated by the Valladolid debate on how to “civilize” and convert the native population. The constitutive norm played a significant role in shaping the debate, essentially conditioning how Sepúlveda and Las Casas viewed the Spanish expansion. Both agreed that it was important to impose Catholic values and the European way of life upon the local communities in the New World. The late medieval Catholic doctrine also conditioned the arguments deployed by Las Casas and Sepúlveda. Their arguments did not deviate from the constitutive norm, and both respectively appealed to the constitutive norm at that time to justify and to reject the use of violence.

Legal Humanitarianism

Introduction

This thesis argues that humanitarianism was applied differently in the early modern period, being heavily influenced by the late medieval legacies. People in the early modern period regarded violation of natural law as crimes against God which could lead to eternal damnation in Hell. Christians believed they had a moral responsibility to save the souls of those who carried out these violations. By doing so, they believed they could also save innocent people from the acts of autocracies. This view shaped how Europeans dealt with the native inhabitants in the New World. The Europeans regarded their actions as spreading the Gospel and the conversion to Christianity as humanitarian because these actions would save those affected from eternal damnation. Despite the humanitarian intention of the Spanish conquest of the New World, the conquest was not usually considered part of the history of humanitarianism because it was not in line with the contemporary understanding of humanitarianism. Most people conceived that the history of humanitarianism began in the nineteenth century.

Michael Barnett (2011: 19–22) identifies the nineteenth century as the beginning of the history of humanitarianism, because the nineteenth century was the time in which people began to use the term humanitarianism to characterize their action, and the term gradually entered into everyday vocabulary. In his narrative of the history of humanitarianism, Barnett focuses on the works of humanitarian agencies like ICRC, UNHCR, CARE International, Oxfam, MSF and Catholic Relief Services, World Vision International and Lutheran World Relief. He (2011: 17) acknowledges that there are a variety of public and private actors such as religious bodies, states, commercial outfits, philanthropies and individuals which engage in humanitarian actions and shape the meaning of humanitarianism. Barnett mainly concentrates on the work of humanitarian organizations, which excludes states; he explains that the fundamental purpose of these organizations is to “relieve human suffering”. This thesis holds that humanitarian agencies

are one of the many actors that work in the humanitarian field, and their work is only one part of the history of humanitarianism. Barnett's narrative of history of humanitarianism is incomplete. It is unreasonable to overlook the role of other actors, particularly nation states. Despite the fact that the fundamental purpose of the state is not to protect foreign individuals or groups, a lot of work, such as the codification of international humanitarian law, military intervention and foreign aid can only be done by the sovereign state or with its help, as it has greater resources and capabilities. This chapter looks at the role of the state in shaping humanitarianism, focusing on the development of the Geneva Conventions (hereinafter GCs) and Additional Protocols (hereinafter APs). This thesis looks at international humanitarian law because this law limits the atrocities of war, which essentially save people's lives and alleviate the suffering of people.

Similarly, Peter Walker and Daniel Maxwell (2009) argue that the history of humanitarianism began around the middle of the nineteenth century. It was because the humanitarian action at that time began to transform into "a more organized series of thought-through policies and activities with global connections". The globe was more connected under the European empires; the world became connected through the revolution of railways and telegraph. The enlightened, the philanthropic and the politically ambitious had a global stage to play on, and the wealth and the tools to make a change. The suffering on the other side of the world was no longer remote, because suffering was reported after the event through telegraph and mass circulation of newspapers. People at that time were also growing familiar with remote countries as these places supplied commodities like tea, coffee, sugar and raw materials to the empire. There was a sense of global village which allowed the notion of humanitarianism to take seed. Walker and Maxwell recognize the role that the International Red Cross Committee plays in constituting the current international humanitarian order. Little attention is given to the international humanitarian legal order, although the ICRC was deemed the guardian of international humanitarian law. The authors focus on the other works that the ICRC carries out, such as negotiating access to war wounded and initiating relief and protection actions. However, without the legal framework that the ICRC helps to

construct, its works are almost impossible to legitimately (or legally) carry out. Instead of focusing on the ICRC, this chapter looks at the humanitarian legal order, particularly its expansion and evolution. It is going to argue that constitutive norms in the modern international society of states have a causal effect on the evolution of the humanitarian legal order.

Humanitarianism changed significantly in the mid-nineteenth century because of a humanitarian impulse. This humanitarian impulse is no longer primarily defined by the late medieval Roman Catholic legacies, but the ideas in the Enlightenment period. The central concern of the Enlightenment was how to make this life better. Alex Michalos and Daniel Weijers (2017: 43) argues that the Enlightenment thinkers like Voltaire, Adam Smith, and Jean-Jacques Rousseau began to consider that "happiness on earth was the most important good for humans and perhaps even our natural state". For instance, Voltaire claimed that "the great and only concern is to be happy"; Adam Smith argued that "happiness is our natural or usual state", and Rousseau saw happiness as the "natural end of every being which senses". In effect, the Enlightenment saw the transition of the ultimate question from "how can I be saved" from eternal damnation to "how can I be happy" (Porter 2001: 22). By shifting actors' fundamental concern in life, the humanitarian impulse was transformed and attention at that time was directed towards alleviating the physical suffering of human beings. For instance, Dunant was motivated to alleviate the suffering of injured solders in the armed conflicts. His effort results in the process of codification of international humanitarian law, which is the focus of this chapter. There are two parallel streams of international humanitarian law: the law of Geneva and the law of The Hague, and both sets of law are entwined. The Hague Conventions protect combatants and non-combatants by limiting the methods and means of conflict, while GCs protect those already affected by war. In this sense the Hague Conventions are working "upstream" from the GCs (Bugnion 2004: 200). This chapter only focuses on the law of Geneva as it gives direct protection to the victims of armed conflicts, its scope of protection covers wounded soldiers, prisoners of war and civilians; and international armed conflicts and internal armed conflicts; and these laws

are the foundation of the modern-day international humanitarian legal order, which essentially contributes to the establishment of International Criminal Court.

This chapter intends to show how the constitutive norm of individualism shaped the fundamental institutions and then how these institutions, such as multilateralism, plays an influential role in shaping humanitarianism in the modern era. It also intends to demonstrate that the humanitarian international legal order historically has a hegemonic tendency because of inequality in political power. This political reality sits uncomfortably with the equalitarian regime that underpins the liberal international order. The arguments of this chapter unfold in a number of stages. First, this chapter outlines Reus-Smit's narrative of the formation of multilateralism and contractual international law, and how the constitutive norms shape the fundamental institutions. Multilateralism and contractual international law conditioned how the GCs and APs were codified. Before moving to the next section, this chapter argues that the universalizing of these fundamental institutions does not fully correspond with Reus-Smit's narrative on the expansion of these institutions; the process was much more coercive. At that point, this chapter turns to the law of Geneva, whose evolution was driven by international war, internal armed conflict and anti-colonial struggle. International war constituted the initial development of GCs, while internal armed conflict drove Common Article 3 of the Geneva Conventions of 1949 (hereinafter CA 3) and its Additional Protocol II (hereinafter Protocol II), and the anti-colonial struggle constituted its Additional Protocol I (hereinafter Protocol I). After dealing with the historical evolution of GCs and APs, this chapter argues that the international humanitarian legal order does not sit comfortably with the liberal international order, because of the power inequality in international politics.

Multilateralism and Contractual International Law

Throughout European history, the protection of victims of armed conflicts was guided by codes of chivalry or military orders issued by the sovereign[26]. However, Dunant (1986: 29)

[26] Charles VII of Orleans issued a unilateral military order per which officers were to be held responsible for the abuses, ills and offences committed by members of their company in 1439. Another example is a

suggested that nation states should adopt an international treaty to protect injured soldiers on the battlefield in his book, *A Memory of Solferino*. By the second half of the nineteenth century, multilateralism and contractual international law were prominent ideas on how to achieve the common goals among states in Europe (Reus-Smit 1999: 141), which had a causal effect on Dunant and his colleagues' decision on how to minimize the suffering of wounded soldiers on the battlefield[27]. Dunant's suggestion resulted in the holding of a diplomatic conference, convened at Geneva in 1864 and concluding in the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (hereinafter GC I). It marked the beginning of the modern-day humanitarian legal regime and guided how the humanitarian legal regime should develop in the future.

Multilateralism and contractual international law are informed and justified by constitutive norms. According to Reus-Smit (1999: 7), multilateralism and contractual international law are fundamental institutions of modern international societies, which govern how states interact. From his perspective, fundamental institutions are conditioned by a deeper level of international institution – constitutional structure[28] – which incorporates the moral purpose of centralized autonomous political organization, the organizing principle of sovereignty and the norm of procedural justice (Reus-Smit 1999: 31). These normative elements are interconnected. Among these elements, the moral purpose of centralized autonomous political organization occupies a hegemonic position. All these elements are informed by the constitutive norm of a specific timeframe.

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convention signed by Elector of Brandenburg and the Count of Asfield to demand respect for hospitals and the wounded in 1679 (Green 1999: 10).

[27] Reus-Smit (2005a: 198) explains that the prevailing ideas on how to resolve the problems of collaboration and coordination affects what strategies political actors can imagine and are possible in both practical and ethical senses. Living in that specific timeframe, Dunant and his colleagues' imagination on how to regulate war was constrained by the prevailing ideas of that time. Legitimate international law which includes the process of "participation, negotiation and dialogue" becomes a practical and ethical option in achieving the objective of alleviating the suffering of war victims.

[28] Reus-Smit (1999: 30) defines constitutional structure as "coherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitled to all the right and privileges of statehood and they define the basic parameters of rightful state action".

All forms of political organization like societies of sovereign states, suzerain systems and heteronomous systems are structured by organizing principles. These principles establish "the basis on which the constituent units are separated from one another". In societies of states, the organizing principle of sovereignty "differentiates political units on the basis of particularity and exclusivity, creating a system of territorially demarcated, autonomous centers of political authority" (Reus-Smit 1999: 31-32). Sovereign states as the centralized autonomous political organization set the modern international society of states apart from the heteronomous order in the early modern age. Historical agents organize their political life into a sovereign state form of political organization for some purposes, these purposes are "moral", as they usually entail a conception of social or individual good (Reus-Smit 1999: 31). The moral purpose of the state constitutes the prevailing, socially sanctioned justification for sovereign rights (Reus-Smit 1999:31). Drawing from the historical analysis of four different societies of states[29] , Reus-Smit (1999: 32) concludes that the moral purpose of the state is shaped by the constitutive norms of a specific timeframe and is socially constituted and historically contingent. It means that the moral purpose of the state can change from one society of a state to another and from one timeframe to another. Meanings that the justifications for sovereign rights can be altered (Reus-Smit 1999: 32).

The moral purpose of the state informs the norm of procedural justice, which specifies the "correct procedures that 'legitimate' or 'good' states employ, internally and externally, to formulate basic rules of internal and external conduct" (Reus-Smit 1999: 32). The norm of procedural justice is essential in organizing an orderly social relationship on both domestic and international levels. It has a profound impact on the nature of fundamental institutions of a society of states (Reus-Smit 1999: 33). Like the organizing principle of sovereignty, Reus-Smit (1999: 33) contends that a change in understanding the moral purpose of the state can result in an entirely different norm of procedural justice, which leads to changing fundamental institutions. Ideas in the Enlightenment period shaped the

[29] They are "Ancient Greece"; "Renaissance Italy"; "absolutist Europe"; and the "modern international society" (Reus-Smit 1999).

moral purpose of the modern state, which constituted the legislative norm of procedural justice; the norm created favourable conditions for developing multilateralism and contractual international law as fundamental institutions in achieving the common goal among states.

The constitutional structure of a society of states conditions what fundamental institutions look like. Informed by the moral purpose of the state, the norm of procedural justice shapes the institution's choice and promotes one form of fundamental institution over others (Reus-Smit 1999: 34). Reus-Smit (1999: 34) explains that the norm of procedural justice shaped the production and reproduction of fundamental institutions in two ways. First, it shapes the imagination of the political actors who engage in producing and reproducing fundamental institutions, and opens up some ways of achieving a common goal as more feasible and other methods unconceivable. Fundamental institutions are produced and reproduced, because political actors cannot conceive of another legitimate alternative to achieve the common goal among states, or regard the alternatives that they can imagine as unrealistic. Second, the norm of procedural justice denotes higher-order values in the moral dialogue that produces and reproduces fundamental institutions of a society of states. The fundamental institution is a set of prescriptive principles that specify how states ought to achieve their common goal (or resolve their differences). Construction and maintenance of fundamental institutions require an ongoing moral dialogue among states about what these norms and principles should be. Political actors enter dialogue with different values and try to justify the values as right and true in building fundamental institutions. Institutional architects appeal to the norm of procedural justice when justifying the specific form of institutions as solutions to resolve conflicts or achieve a common goal. In a similar vein, political actors can resort to values loftier than the one they wish to change if they want to modify the existing fundamental institutions in a society of states. That is to say, when the complex values of the constitutional structure are altered, the legitimacy of existing fundamental institutions will be questioned and open up the possibility of new fundamental institutions.

The existence of fundamental institutions in a society of states is a result of consensus among the majority of states about the nature and validity of the prevailing norm of procedural justice (Reus-Smit 1999: 35). However, there are states that may not subscribe to the prevailing norm of procedural justice or that did not participate in the process of constituting fundamental institutions, and these states are called “outlier” states (Reus-Smit 1999: 35). Reus-Smit (1999: 35–6) contends that there are two additional mechanisms that draw these outlier states into the process of production and reproduction of fundamental institutions. First, the norm of procedural justice constrained the cooperative action of outlier states. Drawing from Quentin Skinner’s observation of human social action, Reus-Smit concludes that an outlier state wishes its interaction with other states to be seen as legitimate; a state then is under a strong compulsion to justify its interaction in terms of prevailing norms. Justification is more than language; the successful legitimization of the interaction requires some coherence between rhetoric and action. A state is compelled to tailor its action to correspond with the prevailing norm. That is to say, the norm of procedural justice constrains the action of outlier states even though they may not subscribe to the consensus.

Second, states wish to have stable and predictable encounters in terms of social interaction, and this desire provides a strong incentive to employ the existing fundamental institutions to govern their interactions. New states, like those who are outside a society of states or a newly independent country, who wish to be a member of a society of states, face no choice but to join the existing fundamental institutions. Since these institutions benefit from the consensus among states, and deeply embedded practices, sponsoring new practices is politically and materially costly, and a refusal to observe fundamental institutional practices is likely to undermine the state in pursuit of its interests. These practical considerations drive all states to participate in the existing fundamental institutions even though some of them do not share the consensus. In participating in fundamental institutions, a state reproduces and strengthens the existing institutional practices. At the same time, the legitimacy of existing fundamental

institutions is enhanced by the participation of fundamental institutions, which further reaffirms the legitimacy of the norm of procedural justice.

The emergence of multilateralism and contractual international law as the fundamental institutions in a modern international society of states was a result of the rise of individualism, which gave new meaning to the moral purpose of the state in the nineteenth century (Reus-Smit 1999: 122). Individualism was the constitutive norm that underpinned the modern-day international order. New political thought contributed to the rise of individualism. John Locke reconceptualized the political community, which stressed that it was not a divinely ordained social order[30], but a contractual community. Locke theorized that the contractual community was a result of a social contract "between individuals" (Reus-Smit 1999: 125). His assumption was that all individuals were "equal and independent", as "creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties" (Locke 1823). The social contract was an agreement among these "free, equal and independent men" to make "one political community" and "one body politick" (Reus-Smit 1999: 125). Jean-Jacques Rousseau advanced this new understanding of political community. Prior to the agreement on the form of government, Rousseau stressed that people must agree that polity is to be formed; a legitimate rule must be based on agreement; and "the process by which a people elect a king or government must be preceded by the 'act by which a people becomes a people, for, since this act is necessarily prior to the other, it is the true foundation of society'" (Reus-Smit 1999: 125). The idea that "people are free, equal and independent" moved beyond political thought and gained public popularity at the end of the eighteenth century. Reus-Smit (1999: 126) observes that people at that time increasingly saw humans as "kernels of possibility, each with their own desires, aptitudes

[30] Jean Bodin (1955) contended that the idea of equal human relations was unrealistic and the social order should reflect unequal human relations. A family order was the most natural social order, which was hierarchical. The father is the head of the household and all members of that unit owe him obedience. Each member of the unit should live their life according to their functions. Political order was an extension of the hierarchical order in the family. Monarchs had that authoritative power. Each member of the political unit needed to perform their duties according to their assigned role in the society.

and capacities"; cultivating these inner qualities of individuals became a significant concern, with the "self-appearing as an object of contemplation and development". The new concern with individuality gave rise to the new meaning of the moral purpose of the state in modern international society[31]. Individualism spurred on a new understanding of the moral purpose of the state in the mid-nineteenth century, which was "the cultivation of a social, economic and political order that enables individuals to engage in the self-directed pursuit of their interests" (Reus-Smit 1999: 123). People at that time no longer saw the state as a creation of God, but an artefact that was created by individuals. Citizens were no longer seen as subjects but as sovereign agents, people were regarded as the source of state authority. The collective individuals endowed the state with sovereignty and the purpose of the state was to protect people's liberties, allowing people to freely pursue their desires, fulfil their potential and develop their individuality (Reus-Smit 1999: 128). These were expressed in the United States Declaration of Independence of 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789[32]. Legitimate states were those that expressed and furthered the interests of their citizens and a government that served the people according to the common will. It informed the legislative norm of procedural justice.

The constitutive norm of individualism conditioned the meaning of the moral purpose of the state; it was interpreted as cultivating an order that allowed individuals to pursue their interests, which gave rise to the idea of legislative justice. The legislative norm of procedural justice prevailed in the nineteenth century. According to Reus-Smit (1999: 129), the legislative procedural justice was based on two elements: "only those subject to the rules have the right to define them" and "the rules of society must apply equally to

[31] The moral purpose of state in absolutist Europe was significantly different from the modern international society of the state. Reus-Smit (1999: 96) suggests that the mainstream political thought at that time was the idea of supreme authority of European monarchs, which constituted the preservation of a divinely ordained, rigidly hierarchical social order as the moral purpose of the state in absolutist Europe.

[32] The American Declaration declared that "governments are instituted among men, deriving their just powers from the consent of the governed", while the Article 2 of the French Declaration of the Rights of Man and of the Citizen of 1789 similarly announced that "the goal of any political association is the conservation of the natural and imprescriptible rights of man, these rights are liberty, property, safety and resistance against oppression."

all citizens, in all like cases". Such view was enshrined in Rousseau's writing on law. He (1923: 49) contended that the legislative power belongs to the people and only they have the right to legislate the law. Since the people or their representatives participated in the process of legislation – negotiation and dialogue and eventually an agreement – and the participation was the sole basis of legal obligation, any law that went through such legislative process applied equally to all members of the public (Reus-Smit 1999: 130). All binding law should be legislated in this particular way. The French Declaration concurred with Rousseau's writing, which stated that "law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes". To quote Rousseau (1929: 33), "obedience to a law which we prescribe to ourselves is liberty", because it is an autonomous choice of the people. The moral purpose of the state and the legislative norm of procedural justice gradually transformed the institutions and practices of national governance in Western society. Constitutional and representative forms of governance became the prevailing form of Western governments in the nineteenth century (Reus-Smit 1999: 131). The majority of governments in Europe adopted parliamentary institutions, and there was a gradual movement towards universal suffrage (Thomson 1962: 323).

The idea of legislative justice infiltrated into international legal thinking and shaped the fundamental institution of international society. Emmerich de Vattel proposed that international law was the "positive law of nations", which was a law that "grounded in the will of states and expressed through conventions, treaties and customs" (Reus-Smit 1999: 132). Such view was reinforced by other international legal theorists like Robert Ward and G. F. von Martens. Ward surveyed the history of the law of nations and concluded that international treaties, conventions and customs were "founded on the collective will of states" (Reus-Smit 1999: 133). Von Martens supported Rousseau's remarks on the relations between law and legal obligation, and stated that states were obligated to respect international law as these laws represented the "mutual will of the nations concerned" (Reus-Smit 1999: 133). This international legal thinking allowed

international actors to give up the fundamental institutions of absolutist Europe – "old diplomacy" and "natural international law" (Reus-Smit 1999: 103-110) and informed new fundamental institutions: multilateralism and contractual international law. This thinking suggested that international law should be achieved through multilateralism, which involves participation, negotiation and dialogue and should aim at achieving a mutually binding agreement (Reus-Smit 1999: 132). The new international legal thinking motivated the American and the French revolutionary governments to call for a new diplomatic and legal order based on the legislative norm of procedural justice, meaning that rules at the international level must be authorized by those that are subject to them, and these international rules should be equally applied to all states (Reus-Smit 1999: 133). Despite the fact that their calls were ignored, the legislative norm of procedural justice began to structure the actual interactions between states. Over the century, multilateralism and contractual international law was widely used to resolve problems and achieve common goals among European states. The number of multilateral conferences and multilateral treaties increased significantly: Europe concluded 127 multilateral treaties in the period between 1648 and 1841, but the number jumped to 817 in the period between 1814 and 1914 (Reus-Smit 1999: 133). These institutional practices became the prevailing norm in Europe, and this norm conditioned Dunant's imagination on how to alleviate the suffering of (international) war victims.

From Reus-Smit's perspective, multilateralism and contractual international law represent the liberal nature of the international order, because these fundamental institutions reflect some core elements and assumptions of liberal politics. First, multilateralism and contractual international law are built on the assumption of sovereign equality. All states, like individuals at the domestic level, are assumed to be "independent and equal", they are "self-interested actors, possessing their own conceptions of the good" and "are at liberty to pursue their own conceptions of the good, as long as "they do not encroach on the liberty of other states" (Reus-Smit 2005c: 364); Second, like the parliamentary forms of legislation at the domestic level, international law, rules and

principles are authorized by those subject to them, which gives legitimacy and binding power to these international regulations, as they have the consent of states (Reus-Smit 2013b: 178); and third, these international regulations apply equally to all in all like cases (Reus-Smit 2013b: 178).

This chapter does not dispute the liberal nature of multilateralism and international contractual international law and acknowledges that the notion of equal sovereignty is widely accepted in the international society of states. However, Reus-Smit's narrative of universalization of multilateralism and contractual international law is problematic. Reus-Smit (1999) identifies four key moments in the development of the current fundamental institutions: the Congress of Vienna of 1814; the Hague Conferences of 1899 and 1907; the Versailles Peace Conference of 1918; and the San Francisco Conference of 1945. These conferences are considered by Reus-Smit as evidence that states gradually accept multilateralism and international contractual law as fundamental institutions in regulating the interaction between states. Reus-Smit's narrative overlooks the violence and the discrimination involved in the process of universalizing these institutions.

First, the universalization of multilateralism and international contractual law as fundamental institutions of the international society of states is through war. Fundamental institutions reflect a certain set of ideas, with this set translated and legitimized into rules that regulate the interaction of states. These institutions represent a certain culture surrounding how to handle social relations, resolve problems and achieve common goals. B.S. Chimni (2006: 15) observes that this set of ideas and this culture are usually those of the powerful nations. As Reus-Smit demonstrates, multilateralism and international contractual law were a predominantly a Western project and reflected European values – the legislative norm of procedural justice. The universalization of international contractual international law and multilateralism was a consequence of the imperial expansion in the age of empire. Most territories of Asia, Africa and the Pacific were, directly or indirectly, controlled by the European powers

through conflicts at that time. Non-European people and societies were assimilated into a system of law which was fundamentally European in that it derived from European thought and experience (Anghie 2004: 32). For instance, military conflicts with the West brought China into the framework of multilateralism and contractual international law. Rune Sarverud (2007) observes that China had its own particular, i.e. a tributary system for managing its inter-state relations prior to its exposure to the Western international order[33]. By the late nineteenth century, China wanted to be perceived as a "civilized" member. Civilized members ought to observe the primary norm that regulates how common goals are achieved and problems resolved. This desire to be acknowledged as a civilized member compelled China to abandon the tributary system, which had been used to manage the relations between China and other states for centuries[34]. China gradually participated in multilateral conferences. China's participation in the Hague Conferences and adoption of the Hague Conventions was an indication of its acceptance of multilateralism and contractual international law as a way to regulate relations between states (Tang 2005: 46). The traditional system in East Asia eventually collapsed and was replaced by the Western international system by the late nineteenth century.

[33] The tributary system requires a periodic journey of principals or their envoys to China bearing gifts and performing Kowtow, and, in return, being presented with precious gifts as well as the confirmation of the ruler's legitimacy in governing the states (Dreyer 2015: 1016). It is a system based on formal inequality and multi-bilateral relations. It is important to stress that these relations were hierarchical only in name. As David Kang (2010: 91) puts it, within the tributary system, the relationship between China and its tribute states "was explicit and formally unequal but informally equal": China stood at the top of the hierarchical system and adopted a non-intervention policy, while tribute states rarely challenged China's position in the system and had substantial latitude in their actual behaviour.

[34] Reus-Smit (1999: 35–6) explains that the state wants its interaction with other states to be seen as legitimate when a state wishes to be regarded as a civilized member. Therefore, the state is under a strong compulsion to justify its action in line with the primary norm. Claiming that one's relations with other states are consistent with the system's primary norm is a legitimating strategy, and the strategy is only successful when there is some coincidence between rhetoric and action. These existing practices of how states interact presumably attract widespread support, and are already embedded in the practical interactions in international society. A new member has little choice but to follow the already existing practices, because refusal to observe basic institutional practices in an interdependent society of states will lead to them being seen as an outsider, their behaviours will be seen as "uncivilized". Therefore, the state has a strong incentive to adhere to existing practices.

Second, “uncivilized states” were excluded from international law for a significant period of time. Many nations were not regarded as members of the international society of states by the Western powers (Lawrence 1900: 58). To be a member of a society of states, sovereign states needed to satisfy certain criteria. International law was only applied to the civilized members. To distinguish between member and non-member, the idea of civilization was adopted. Geritt Gong (1984: 24) points out that the idea of civilization determined which nations deserved legal recognition and legal personality in the society of states. European societies were deemed as civilized; therefore, they were sovereign; while non-Europeans were seen as uncivilized, and as a result they were deprived of the membership of the realm of law and the ability to assert any rights cognizable as legal. International law was exclusive to the European nations for a significant period of time (Anghie 2004: 53–4). Shogo Suzuki (2005) observes that European nations had two modes of interaction: the first mode applied to intra-European (or Western members) relations, which treated the members more equally; the second mode governed the relationship between “civilized” Western states and “uncivilized” non-Western states. The second mode of interaction treated non-Western states unequally and coercively. Non-Western states were considered too primitive and were also denied access to the family of nations, hence these states were excluded from these institutions of multilateralism and contractual international law. Only when non-Western, non-European states were considered as meeting the Western “standard of civilization”, could such states qualify for entering the first mode of interaction. Gong (1984: 14–15) points out that these standards consisted of guarantees of basic rights as understood in the West, such as life, property and liberty (particularly for the foreign nationals); organized political bureaucracies with the capacity to run the government and to organize self-defence; acceptance of international law; a Western-style domestic legal system which administered legal justice for all within its territories; adequate and permanent avenues for diplomatic communication and interchange; and conformance of customs, accepted norms and practices of “Western” society, for example, suttee, polygamy and slavery were considered uncivilized, therefore “unacceptable”. That is to say, non-Western

nations were compelled to accept the Western standard of civilization in order to be seen as equal and to participate in these institutions of multilateralism and contractual international law. This reflected the prejudice against non-Western civilizations.

Evolution of the Law of Geneva

The evolution of the law of Geneva is evidence that multilateralism and international contractual law are widely recognized as the fundamental institutions in the modern society of states. These institutions condition how an international humanitarian legal order should be developed in the modern international society of states. A legitimate international legal order must be achieved through multilateralism, which involves "participation; negotiation and dialogue" and the agreement must be mutually binding in all like cases (Reus-Smit 1999: 131). It cannot be established through the command from the "superior". Therefore, GCs and APs were developed through dialogue and negotiation and were codified in a series of multilateral conferences. These institutional practices extended from the point of only governing interaction between European states to managing the relations between all sovereign states. The international humanitarian legal order was originally exclusive to European nations. Only 12 Western European nations participated in the Geneva Diplomatic Conference of 1864. By the time the Geneva Conventions of 1949 were negotiated, 59 states were participating, from all continents. Likewise, 135 states participated in the negotiation of the APs in 1977, with 39 states from Africa taking part in the conference, a continent that had been largely underrepresented in previous negotiations (Waschefort 2016: 601). The evolution and the expansion of the international humanitarian legal order reflects a gradual acceptance of these institutional practices as ways to achieve a common goal.

This section divides the development of the Geneva law into three phases, driven by different kinds of conflicts: international wars, decolonization and internal armed conflicts. International war is the driver for the initial development of the GCs, which spanned from the mid-nineteenth century to the end of the Second World War; internal armed conflicts were the driving force for the codification of CA 3 and Protocol II; and the

recognition of the legitimacy of the anti-colonial movement prompted the development of Protocol I. All these conventions were developed through multilateral dialogue and were binding upon all. The following pages demonstrate how the Geneva Conventions expanded the scope of protection over the course of a century, from wounded soldiers to shipwrecked members of the armed forces, prisoners of war (hereinafter POWs) and the civilian population, and from victims of international armed conflicts to internal ones.

-- International War

For a significant period of time, GCs focused on giving protection to the victims in international armed conflicts because of the traditional view of international law. Under this model, international law had only governed inter-state, not intra-state, relations. “International law has traditionally been just that – international” (Slaughter and Burke-White 2006: 327). Anne-Marie Slaughter and Willian Burke-White (2006: 328) explain that the principle of Westphalian sovereignty limited international law’s scope of protection in the nineteenth and twentieth centuries. Under the Westphalian principle, the state was a “defined physical territory within which domestic political authorities are the sole arbiters of legitimate behavior”. The principle was interpreted as “the right to be left alone, to exclude, to be free from any external meddling or interference”. This interpretation of sovereign principle set a boundary between domestic and international affairs. International law was limited to facilitating the state-to-state cooperation in order to achieve a common goal, and the treatment of one state’s nationals by another state (Slaughter and Burke-White 2006: 327). Domestic relations between government and its people was regarded as an exclusive zone which was governed by domestic law. Drawing from Reus-Smit (2005a: 207), who emphasizes that ideas shape and constrain political actions, the Westphalian understanding of sovereignty limits the actors’ imagination in terms of the scope of protection of international law, and conditions the application of international law. International law then only regulates relations among states. To expand the application scope of international law, political actors need to provide a reason that carries a higher weight and that appeals to deep-rooted, collectively shared ideas (Reus-Smit 1999: 28). However, in the mid-late nineteenth century, the Westphalian

understanding of sovereignty was in its heyday; sovereign states enjoyed "almost unfettered independence of action", state was an ultimate authority in domestic issue (Cox 2002: 26). Giving up sovereign control at the domestic level in favour of international agreements was regarded by political actors as unthinkable. Therefore, international law was understood as rules that governed relations between states, and the law of Geneva for almost a century only governed international armed conflicts.

The Battle of Solferino between Franco-Sardinian forces and Austrian troops in 1859, which killed more than 6,000 soldiers and wounded another 40,000 soldiers, marked the beginning of the development of the law of Geneva. The aftermath of war motivated Dunant to found the International Relief Committee for Injured Combatants (what became the International Committee of the Red Cross), with an aim of promoting the protection of those wounded on the battlefield and the neutrality of medical personnel through inviolable international agreements[35]. The relief committee aimed to "lay down general rules for the future so as to protect the medical service and those wounded in war time" (Bugnion 2012: 1324) and developed rules that "would be binding on the states that accepted it" (Bugnion 2012: 1321), and the committee recognized that legitimate rules required participation, negotiation and dialogue among states. Therefore, a multilateral diplomatic conference needed to be convened. Following a request from the relief committee, the Swiss government, with the support of France, agreed to convene a diplomatic conference in Geneva in 1864. It was mainly a conference of Western countries. The Swiss government sent an invitation to all governments in Europe (including the Ottoman Empire) as well as to the USA, Brazil and Mexico. Delegates from 16 states participated in the diplomatic conference, including the US and the UK. All the participants were seen as equal and all had the right to speak and to vote. Such method was evidence of the extent to which multilateralism and international contractual law was shaping how states conducted themselves in international politics. It set the precedent for how international humanitarian law was codified and how the international

[35] Minutes of the Sub-committee of the Society for the Relief of Combatants Wounded in the Time of War held on February 17, 1863.

humanitarian legal order evolved. GC I was adopted on 22 August 1864, recognizing the right to life of wounded soldiers and giving protection to the military personnel that fought on land. The convention specified that "wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for"[36]. To facilitate the protection and welfare of military personnel on the battlefield, the convention required the high contracting parties to recognize the neutrality of ambulances and military hospitals[37], hospital and ambulance personnel[38], and citizens who help the wounded[39]. GC I was signed by representatives from 12 nations, including France, Prussia and Italy. Most of the states in Europe had become signatories to the convention by the end of the 1860s.

Naval warfare was not covered by GC I, yet many of the bloodiest battles in the late nineteenth and twentieth centuries took place at sea. The Battle of the Yellow Sea (1904) and the Battle of Tsushima (1905) were the cases in point. Since GC I does not set out rules for maritime warfare and for the use of hospital ships, the high contracting parties of GC I had no legal obligation to recuse soldiers that drowned at sea, and hospital ships were deliberatively misused and attacked[40]. The scope of protection needed to expand. In response to this situation, the ICRC lobbied for the protection of military personnel in naval warfare. It argued that "individuals serving in their country's navy were no less entitled to basic medical treatment than their counterparts on land" (Forsythe and Rieffer-Flanagan 2007: 43). Therefore, like their counterparts on land, the right to life of military personnel at sea should be recognized, and hospital ships and their crews should also be protected. Another multilateral conference was held. One of the goals of the Hague Conference of 1907 was to extend the rules of war to maritime warfare. Unlike the diplomatic conference of Geneva in 1864, which essentially was a European conference, the Hague Conference of 1907 was a much larger multilateral conference, with 44 nations

[36] Article 6 of GC I.
[37] Article 1 of GC I.
[38] Article 3 of GC I.
[39] Article 5 of GC I.
[40] In the case of the Russo-Japanese war, Russia claimed that Russian hospital ships had been attacked by the Japanese army during the siege of Port Arthur in May 1904. At the same time, the Japanese condemned Russia's use of hospital ships for military purposes (Grunawalt 2005: 91).

taking part. Many non-Western nations such as China, Siam and Persia were invited. Tang ChiHua (2005: 55) comments that the Hague Conference of 1907 was the first international conference in which "all sovereign states participated", "all states were recognized as equal", and "the rule of 'one nation one vote' was adopted". The Hague Convention (X) of 1907 was adopted. Its provisions used the text of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906 (hereinafter GC II), which amended and enriched the provisions of GC I on the treatment of the wounded and sick on land. The Convention (X) granted protection to the hospital ships and their crews and forbade the use of the hospital ship for military service[41].

GC I and the Hague Convention (X) provided protection to military personnel during land and maritime warfare, but these conventions were inadequate to protect the prisoner of war (hereinafter POWs). During the First World War, ICRC delegates were given permission to carry out over 500 visits to POW camps in Europe, North Africa, India and Japan (ICRC 2014). ICRC delegates witnessed the appalling conditions in which the prisoners lived and worked and the abusive treatment to which many of them were subjected. For example, both sides of the war made POWs work in dangerous locations such as the battlefield of Verdun; POWs were also used as labour to build the camps; and POW camps were usually unsanitary, which led to a severe typhus epidemic breaking out, costing the lives of thousands of prisoners (Jones 2014). In response to these abuses, ICRC began to push for the expansion of the scope of protection after the war. A multilateral diplomatic conference was held in Geneva in 1929, where the 47 participants included 22 non-European governments and British dominions. The Convention relating to the Treatment of Prisoners of War (hereinafter GC III) was codified at the conference and recognized a number of fundamental rights for captured soldiers. The convention recognized that captured soldiers had the right to life and the right to security. Therefore,

[41] Article 4 of The Hague Convention (X).

the convention required the detaining power to provide adequate food and water[42], medical treatment when needed[43] and housing for the POWs[44]. At the same time, the convention established that the dignity of POWs should also be respected. POWs should not be insulted, exposed to unpleasantness or disadvantages of any kind[45], and should be humanely treated, particularly against acts of violence, from insults and from public curiosity[46].

Prior to the Second World War, GCs had already given legal protection to soldiers. Civilians were overlooked. The situation only changed because of the "tragedy of the Second World War" (ICRC 2009). Protection of civilians was a response to "the egregious violation of the most basic humanitarian concerns by the Axis power during World War II" (Kolb 2014: 13). For instance, millions of civilians were exterminated in the Nazi death camps. The ICRC, partnering with the Swiss government, called for a diplomatic conference in 1949. The Geneva Conference was held in 1949 and was attended by delegations from 59 states and observers from four other states. The Geneva Conventions of 1949 (hereinafter GCs of 1949), which is comprised of four international treaties, were adopted. The GCs of 1949 revised and incorporated many aspects of previous conventions, which were designed to protect military personnel. One of the significant differences in the GCs of 1949 was that the scope of protection was extended to civilians. According to Convention (IV) of GCs of 1949, the fundamental rights of civilians should be respected in times of conflict. The convention prohibited any acts of violence to life and person, including murder, mutilation, cruel treatment and torture; taking civilians as hostages; humiliation and degrading treatment[47]. Civilians were entitled to food, water, and medical supplies from the occupying power[48]. The adoption of the Geneva Convention of

[42] Article 11 of GC III.
[43] Article 58 of GC III.
[44] Article 10 of GC III.
[45] Article 5 of GC III.
[46] Article 2 of GC III.
[47] Article 3 of the Convention (IV) of GC of 1949.
[48] Chapter 3 and 4 of the Convention (IV) of GC of 1949.

1949 expanded the scope of the GCs to civilians, fixing a major loophole in the protection of war victims that had been seriously exploited by belligerents during the Second World War.

-- Internal Armed Conflict

The expansion of legal protection into internal armed conflict was a result of the growing consensus between states that the alleviation of people's suffering as a result of armed conflicts should be applied at both international and domestic levels. Before 1949, the law of Geneva applied only in an armed conflict between states. The main reason behind this was that internal armed conflicts was regarded as a domestic affair; a relation between its government and its people was within the realm of domestic law. Non-state groups were seen as "criminal groups having no rights, legal or moral, to fight against their rulers" (Zamir 2017: 10). Such view contributed to the failure of the ICRC, which attempted to introduce a draft international convention on giving protection to the victims of civil conflict at the ninth International Conference of the Red Cross in 1912 (Elder 1979: 41). Representatives of most European governments at the conference regarded the provision of emergency relief to resistant groups as an interference in domestic affairs, and therefore many were not even interested in considering the proposal[49]. However, there was a growing consensus after the Second World War that the relationship between the government and its people in times of internal armed conflict should be regulated. This consensus was reflected in the fact that there was no rejection of the basic concept of regulating the internal armed conflict at the Conference of Government Expert of 1947 and the Special Committee of the Geneva Diplomatic

[49] General Termolov, a representative of the Russian Imperial government at the conference, put it plainly: "As the delegate of the Imperial Government, I consider and declare that the Imperial Government would under no circumstances, and in no form whatever, become a party to, or even discuss, any agreement or recommendation on this subject; I consider that, in view of its politically serious nature, this subject should not even be a matter for discussion at a conference devoted exclusively to humanitarian and peaceful affairs. I further consider that Red Cross Societies have no duty whatsoever towards bands of insurgents or revolutionaries who cannot be considered by the laws of my country as anything other than criminals …. Any offer of services from Red Cross Societies, whether direct or indirect, to insurgents or revolutionaries could be seen only as a breach of friendly relations, indeed as an unfriendly act likely to encourage and foment sedition and rebellion …" (cited in Bugnion 2003: 249).

Conference of 1949 voted, by ten votes to one, with one abstention, in favour of extending humanitarian norms to internal armed conflicts (Zamir 2017: 27 and 32). Noam Zamir (2017:23) explains that this consensus was a result of "the horrors and the suffering that war created in general and the atrocities perpetrated by the Nazi regime in particular" and "the experience of the Spanish civil war". However, this chapter argues that these experiences, more importantly, led to a change of mind – how one government treats its people was no longer a solely domestic issue. This was reflected in the development of the international law of human rights. This change of mindset motivated states to agree that there was a need to narrow the protection gap between international and domestic armed conflict.

As mentioned above, regulating the relations between the government and its people was beyond the scope of international law prior to the Second World War. Such notion changed after the war. A new notion emerged, which was reflected in the UN Charter. The Charter contained articles with explicit reference to the relations between a government and its people[50]. It marked a new stage of international law, which no longer only regulated inter-state relations. The individual "becomes a subject of international law" (Humphrey 1973: 2). For instance, the Universal Declaration of Human Rights (hereinafter UDHR) and the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention) articulated a set of norms on how a government should treat its citizens. The UDHR declaration states that the government has to respect its citizens' "right to life, liberty and security"[51], while the Genocide Convention prohibited state parties from committing acts that intended to "destroy, in whole or in part, a national, ethnical, racial or religious group", including killing members of the group; preventing birth within the group and transferring children of the group to another group[52]. These conventions legitimized the idea that how a government treats its people is an international concern. States could no longer rely on the plea of domestic

[50] For instance, Articles 1 (3); 13; 55 of the Charter of UN stress the importance of universal respect for and observance of human rights for all without distinction as to race, sex, language or religion.
[51] Article 3 of UDHR.
[52] Article 2 of the Genocide Convention.

jurisdiction over its own citizens to avoid their domestic obligations under international law (Humphery 1973: 2). The relations between sovereignty and human rights will be addressed in the next chapter. The concept of relations between a government and its people as a matter of international concern is a constitutive force which justifies the law of Geneva to "spread downward into the domestic sphere" (Oberleitner 2015: 49). This new notion provides political actors with a justification to advocate for expanding the scope of the protection of the law of Geneva[53]. At the Geneva Diplomatic Conference of 1949, the Soviet Union along with other Communist bloc nations, for instance, appealed to the notion that how a government treats its own citizens is an international concern. This group of states argued that civil war was an international issue and advocated an international agreement to regulate the conduct of civil war; they rebutted the Burmese claim that internal matters could not be ruled by international laws and conventions (Elder 1979: 50). The idea enabled the scope of protection of the law of Geneva to extend to internal armed conflicts.

The CA 3 was concluded at the Geneva Diplomatic Conference of 1949. The article is embedded in all four GCs of 1949. CA 3 was applied to "armed conflict not of an international character occurring in the territory of the High Contract Parties". Despite a lack of legal definition of non-international armed conflict, it is widely accepted that CA 3 governs armed conflicts that are waged "between state armed force and non-state armed force or between groups themselves" (Pejic 2011: 3). Armed conflict not of an international character can vary greatly, including "traditional civil wars, internal armed conflicts that spill over into other States or internal conflicts in which third States or a multinational force intervenes alongside the government" (ICRC 2010b). CA 3 protects "people who take no active part in hostilities, including members of the armed forces who have laid down their arms"; and "those placed 'hors de combat' by sickness, wounds, detentions or any other causes"[54]. According to Kolb (2014: 108–9), CA 3 can be applied

[53] Reus-Smit (2005a: 198) explains that political actors need to justify their behaviours and decisions in order to achieve their objective; they always appeal to the established norm of legitimate conduct, so that their reason can carry more weight and legitimate their action.
[54] Common Article 3 (1) of GCs of 1949.

when two conditions are met: a minimum level of organization and a minimum level of intensity. A minimum level of organization means that the non-state armed group must be "organized in some military way, as a relatively disciplined group of persons, subjected to a responsible command and thus capable of respecting rules of armed conflict", but "the discipline and organization must not reach the levels of a well-organized state army". The minimum level of intensity means that the armed conflict is "an open fight", which involves "a distinctive segment of social forces" and reaches "the threshold of a collective social fight". These criteria distinguish non-international armed conflict from internal disturbance or tensions. The article reaffirms that certain rights, like the right to life, prohibit murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial[55]. Since the GCs of 1949 were signed and ratified by all states of the world, conferring the universal application of the CA 3.

Protocol II is another international agreement that intends to give protection to the victims of internal armed conflicts. For almost 30 years, CA 3 was the only legal instrument available to the victims of internal armed conflict. However, the rules contained in the CA 3 were mainly of a general nature (ICRC 2009). CA 3 was very vague. Amendment and clarification of the rules for governing internal armed conflicts were needed. As a result, Protocol II was developed, which aimed to "develop the existing humanitarian law of internal armed conflict, shoring up any gaps, especially with regard to the conduct of hostilities and methods and means of combat"; "clarify the ambit of humanitarian law with regard to internal armed conflict, especially the questions of the threshold and ceiling"; and "to safeguard what Common Article 3 had already achieved by providing it would retain its own autonomous existence" (Moir 2004: 91). Unlike CA 3, Protocol II does not apply to hostile relations between rebel groups or between rebel group and dissident forces. According to Kolb (2014: 114–15), in addition to a minimum level of organization and a minimum level of intensity, there are two additional conditions under Protocol II: "rebels control a part of territory" which implies that rebel forces can carry out concrete

[55] Common Article 3 (1) of GCs of 1949 .

and sustainable attacks and the duties under Article 5 of Protocol II[56]; and "the hostile relations" between the government forces and the rebel (or dissident state army) force". Protocol II requires the nation in times of internal armed conflict to respect the fundamental rights of its citizens such as the right to be treated humanely and without discrimination; and the prohibition of violence towards life, health and physical or mental well-being of persons[57]. According to Noelle Quenivet (2014: 36), the threshold of Protocol II was so high that only a full-scale civil war (or at least a conflict of a very similar level) could meet those conditions.

-- Decolonization

The conclusion of the APs was a result of four years of multilateral negotiation with over 100 states participating in the diplomatic conferences between 1974 and 1977[58]. All state parties to the GCs or members of the UN were invited to participate in the conference. This section will focus on Protocol I. Conventionally, the adoption of Protocol I was constituted for two reasons. First, most of the conflicts that broke out after the Second World War were not international. They were mostly caused by anti-colonial struggles and the political instability of newly independent states, and guerrilla warfare was common. The GCs of 1949 were ill-equipped to respond to these new types of conflict. The adoption of Protocol I was a response to the post-war anti-colonial struggles in the colonies, and was an attempt to provide adequate protection to the victims of anti-colonial movements (Kolb 2014: 15). In addition, many countries that became independent after 1945 had no influence in creating the GCs of 1945. These newly independent nations questioned the legitimacy of these conventions and intended to revise the existing GCs in order to be able to protect freedom fighters who actively fought against colonial powers and foreign invaders (Forsythe 2005: 93). This section does not

[56] It includes that the wounded and the sick shall be treated, persons whose liberty has been restricted shall be allowed to practise their religions and so on.
[57] Article 4 of Protocol II.
[58] The diplomatic conference was convened by the Swiss government and held four sessions in Geneva (20 February to 29 March 1974, from 3 February to 18 April 1975, from 21 April to 11 June 1976 and from 17 March to 10 June 1977).

deny that these are the important factors in constituting the codification and the adoption of Protocol I. However, this section argues that these reasons do not explain why many colonial powers supported this section of Protocol I as it contradicted their interests. This section argues that the lost legitimacy of the institution of empire also played a role in constituting the codification and the adoption of Protocol I. The delegitimizing of empire permitted the law of Geneva to extend the scope of protection to the peoples that were "fighting against colonial domination, alien occupation or racist regimes" in the 1970s[59]. These people were not protected by the previous GCs.

From Reus-Smit's perspective, the collapse of the institution of empire contributed to the development of the liberal international order, as the sovereign state can act as a protective barrier that allows a community of peoples to pursue their own conception of good and development without interference from another community (2013b: 179). The relation between the liberal international order and the humanitarian legal order will be addressed in the next section. In addition to the liberal international order, this section stresses that the delegitimization justified and enabled the codification of Protocol I. It helped the expansion of the international humanitarian legal order. The following pages draw heavily on Reus-Smit's understanding of the delegitimization of the institution of Empire. Reus-Smit (2013a: 35) argues that the institution of empire is a hierarchical institution, and that its institutional legitimacy is sustained by "the regime of unequal entitlements", which is an "institutional framework that allocates individuals of different social positions different social powers and entitlements". The institution is legitimate when those who are subject to its rules see the institution as "desirable, proper appropriate within some socially constructed system of norm" (Reus-Smit 2013a: 43). The legitimacy of the institution of empire is rationalized. "Differences" such as levels of "civilization" have been used to rationalize the empire and to justify unequal entitlement. The institution will suffer a crisis of legitimacy when the justification that sustains unequal entitlement is questioned. Questioning of the legitimacy of the institution of empire was

[59] Article 1(4) of Protocol I.

driven by the struggle for the recognition of rights. Reus-Smit (2013a: 36–8) states that a right is "a distinctive kind of entitlement", which "licenses demand like claim", and is also "a power mediator" in which "materially weak actors can invoke to alter the power relations between themselves and materially preponderant actors or institutions". Here the right refers to the general rights which are rights that individuals thought that they should have simply because they constitute a particular kind of moral being[60]. Drawing from Reus-Smit's understanding, general rights are socially constructed and historically contingent. The meaning of right depends on the existing rules, norms and principles. The substances of general rights have been understood differently across different historical periods and various locations, like the right to religious freedom in Westphalian Europe; the right to have equal political representation in nineteenth-century Latin America; and the right to a collection of civil and political rights in the post-1945 world. The perceived zone of application can be variable as well, comprising "the community of individuals who were thought to constitute integral moral beings entitled these rights" (Reus-Smit 2013a: 37). For a significant period of time, not all human species were regarded as fully developed moral beings, therefore their claim to general rights was denied. The articulation and mobilization of general rights, i.e. what these rights are and who is entitled to these rights, has a revolutionary effect on the legitimacy of unequal entitlement and the institution of empire.

This chapter regards that idea is a "necessary" but an "insufficient" factor in institutional change. In the case of the collapse of the institution of empire, Reus-Smit (2013a: 43) argues that the idea of general rights delegitimized the institution in two ways. First, the new idea about general rights emerged, took root and spread; people who were deprived of those rights would reimagine themselves as integral moral beings also entitled to those rights. In this, the new thinking gave a new interest to these people, who were recognizing

[60] Reus-Smit (2013a: 37) identifies another type of right, special rights; these rights are those of individuals because of a special transaction or special relations in which they stand. For instance, these rights stem from a legal contract such as the contract to buy a house. The buyer only has the right to the property because of the contract. If there is no contract, the buyer will have no right.

their entitlement to new rights and protection. It motivated them to challenge the regime of unequal entitlements and to seek institutional change. Second, the idea of general rights was used in the struggle against authority, it was mobilized as justificatory resource to question the legitimacy of empire and. Supporters of the anti-colonial movement used the idea of general rights as a moral basis to critique the existing institutional arrangements. Therefore, the idea of general rights mattered in constituting the collapse of empires, particularly in the post-1945 world. However, the idea of general rights alone was insufficient because the collapse of empire was a complex process. Multiple factors were implicated in the collapse[61]. But without the idea of general rights, the history of decolonization would be very different (Reus-Smit 2013a: 50). Therefore, the idea of general rights matters in the process of the collapse of the institution of empire.

The legitimacy of unequal entitlement, which sustained the institutions of empire in the first half of the twentieth century, was maintained by the idea of "a civilizational responsibility". Woodrow Wilson introduced "the principle of self-determination" at the peace conference of Versailles. The principle suggests that "all nations have a right to self-determination" (Reus-Smit 2013a: 172). It establishes the self-determination as a general right. However, level of civilization was attached to the application of self-determination. Self-determination was only applied to those that were deemed civilized. Non-European people were deemed "uncivilized", and therefore they were not ready for independence. They needed European powers to protect and to ensure their well-being. This was expressed in the Covenant of the League of Nations, whereby the colonial peoples were "not yet able to stand by themselves under the strenuous conditions of the modern world" and "the well-being and development of such peoples" should be overseen by a sacred trust of civilization[62]. Non-European peoples were excluded from the right to self-determination. The idea of "civilizational responsibility" remained largely intact in the immediate aftermath of the Second World War. The Declaration Regarding Non-Self-

[61] Reus-Smith (2013a: 157-165) identifies few factors, like nationalism, the weakness of European colonial powers in the post war period and the pressure from the USSR and the USA.
[62] Article 22 of the Covenant of the League of Nations

Governing territories contained within the UN Charter was a case in point. The declaration reaffirms that members of the UN have "responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" and that is for "the well-being of the inhabitants of these territories"[63]. The article reflected that having colonies remained morally justifiable shortly after the war. It provided the justification for not extending the GCs of 1949 to protect the freedom fighters in anti-colonial armed conflicts, and any reference related to colonial conflicts in the draft of the GCs of 1949 that was proposed by the ICRC was deemed unacceptable by Western nations therefore was deleted (ICRC 2017a: 146).

The right to self-determination was reconceptualized and its content rehabilitated in the 1950s. At the peace conference of Versailles, the level of civilization was established as a criterion for self-determination. This connection between the right to self-determination and the level of civilization gradually became invalid in the post-Second World War period. This invalidity reflected on the claim that "all peoples have the right to self-determination" irrespective of their levels of political, economic and social development in the UN General Assembly[64]. The right to self-determination became an idea that applied to all peoples regardless of their level of civilization. This new understanding of self-determination challenged the legitimacy of unequal entitlement. In addition to the disconnect between self-determination and level of civilization, the right to self-determination was reconceptualized as the precondition for achieving other rights. The right to self-determination as the prerequisite of other rights began to be articulated in the 1950s, during the negotiation process of two international covenants of human rights. For instance, the representatives of Egypt, India, Indonesia, Saudi Arabia and other newly independent states and developing countries called for the UN General Assembly to insert an article on the right to self-determination into both draft covenants. These nations asserted that "no basic human rights could be ensured unless this right [i.e. right to self-

[63] Article 73 of the UN Charter.
[64] Article 3 of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960.

determination] were ensured" (UN 1951: 485). These nations continued to link self-determination with the enjoyment of other rights. They passed the UN General Assembly Resolution 637 A (VII) in 1952, stressing that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights", and pressing the state members of the UN (implicitly referring to the colonial powers) to "recognize and promote the realization of self-determination of the peoples of non-self-governing and trust territories". The reconceptualization of self-determination continued throughout the 1960s. The Declaration on the Granting of Independence of Colonial Countries and Peoples, adopted in 1960, intended to "bring the end of colonialism in all its manifestations" [65], arguing that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights"[66] and urging that all the colonial powers allow dependent peoples to decide their own political future[67]. More importantly, both international covenants of human rights recognize that "all peoples have the right of self-determination"[68]. The adoption of both covenants is a reorganization in the sense that the right to self-determination is no longer attached to other conditions and explicitly is tied to the satisfaction of other rights. The new understanding undermined the regime of unequal entitlement.

The post-1945 interpretation of the right to self-determination provided the justificatory resources for the nationalist elites in the colonial territories to question the legitimacy of the institution of empire. Self-determination is now a right that all colonial peoples have, regardless of the level of civilization. A new interpretation of the right to self-determination was embraced by the colonial people; they acquired a new political interest, which demanded their right to self-determination were recognized. This new idea formed the normative core of the anti-colonial struggles in the 1960s and 1970s (Jacob 2014: 50). Many new states in Africa, Asia and the Pacific gained independence

[65] Preamble of the Declaration on the Granting of Independence of Colonial Countries and Peoples.
[66] Article 1 of the Declaration on the Granting of Independence of Colonial Countries and Peoples.
[67] Articles 4 and 5 of the Declaration on the Granting of Independence of Colonial Countries and Peoples.
[68] Article 1 of International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

after 1960. Seventeen African nations gained independence from the European colonial powers in 1960 alone. The progressive loss of colonies reflected how the institution of empire had become less desirable, less proper and less appropriate in the eyes of colonial people. At the same time, the debate about self-determination in the UN affected the legitimacy of the institution of empire, because it challenged its justification, i.e. the backwardness of the colonial people. For instance, the Soviet representative argued that "alleged lack of political maturity cannot serve as a ground for disregarding the national rights of any group" (cited in Normand and Zaidi 2008: 218). These made the colonial rule less and less tenable (Ekel 2010: 127). These post-colonial states used the UN General Assembly as a platform to further undermine the legitimacy of the institution of empire by passing resolutions such as the General Assembly Resolution 2621 of 1970, which declared the further continuation of colonialism in all its forms and manifestations a crime and a violation of the principles of international law[69]; and the General Assembly Resolution 32/14 of 1977 which gave "the legitimacy of the struggle for independence, territorial integrity, national unity and liberation from colonial and foreign domination and alien subjugation by all available means"[70]. By 1970, having colonies was regarded as morally unacceptable.

Post-colonial states intended to give POW status to combatants who actively fought against colonial powers and foreign invaders if they were captured. Such suggestion was rejected in the negotiation of the GCs of 1949. However, the delegitimization of empire offered a new momentum to revise and develop the GCs of 1949. Colonial struggles gradually gained legitimacy in the international community. The legitimacy of the anti-colonial movement provided a space for the international community to consider a new international legal instrument to protect anti-colonial fighters. Without the legitimacy that was granted to the anti-colonial movement, it was hard to imagine that the international community would support the development of a new legal instrument to

[69] Article 1 of the General Assembly's Resolution 2621(XXV) Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
[70] UN General Assembly resolution 32/14 of 7 November 1977.

protect those participating in the anti-colonial conflicts. Protocol I was adopted in 1977 and recognizes liberalization of war as an international conflict. It extends legal protection to "armed conflicts in which people are fighting against colonial domination and alien occupation … in the exercise of their right of self-determination"[71]. Liberal fighters were granted the status of combatants and therefore a POW status if captured. These fighters would be able to access all provisions of the law of Geneva. Their fundamental rights were protected by international law. Protocol I required that all these combatants had to be treated humanely. Torture, murder, corporal punishment and mutilation were prohibited[72]. At the same time, when GC protection was invoked by the national liberation movement under Protocol I, the movement assumed "the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocols"[73]. That is to say, the movement was then obligated to respect numerous prohibitions that were written in the Protocol. The ways in which they conducted the war and treated the captured soldiers would be limited. For instance, the Protocol prohibits the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering", as well as the use of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"[74]. Hence, people that fought in the anti-colonial struggles were protected.

Sitting Uncomfortably with the Liberal International Order

The GCs and APs laid the foundation of the international humanitarian order. This section argues that the international humanitarian legal order is a hegemonic order for a significant period of time. Robert Cox (1996: 517) explains that the hegemonic order is based on a shared set of values that derived "from the ways of doing and thinking of the dominant social strata of the dominant state or states" and "these ways of doing and

[71] Article 1(4) of Protocol I.
[72] Article 75 (2) of Protocol I.
[73] Article 96 (3) of Protocol I.
[74] Article 35 (2) and Article 35 (3) of Protocol I.

thinking have acquired the acquiesce of the dominant social strata of other states". The order can be expanded and maintained by the appeal they exert upon other states and other social strata, through the process that Antonio Gramsci described as passive revolution. Passive revolution is used in reference to a fundamental change in society and any other social structure which does not take the form of revolution or rupture, but is rather a slow, gradual metamorphosis that could take years or generations to accomplish (Erskine 2014: 6). The international humanitarian legal order is regarded by this thesis as a hegemonic order, because the order was largely conceived in the West and is derived from the Western moral and political ideas. The order then gradually expanded and was accepted by others, which eventually framed the thoughts and shaped the action of non-European states.

Hegemonic order sits uncomfortably with Reus-Smit's liberal international legal order. The constitutive norm of individualism constitutes what Reus-Smit calls a "equalitarian regime", which is the bedrock of the liberal international order (Reus-Smit 2005: 73). The "equalitarian regime" is defined by Reus-Smit as "the idea that all sovereigns were legally or socially equal", all recognized states have a basket of rights and entitlements including the rights of legal standing and participation in international society. Multilateralism is a reflection of the "equalitarian regime", all recognized states are supposed to be equal in the law-making procedure and legitimate international law requires consent. However, the equalitarian regime is largely an inspiration of what ought to be in the law-making process. In reality, states have different capabilities in material levels, in production and reproduction of ideology and in transferring an ideology from one group to another. These differences sit uncomfortably with the equalitarian regime. This political reality of power imbalance allows the great powers to exert more influence in constructing the international legal order. The outcome tends to incline towards powerful states' preferences.

Despite the different levels of power in influencing the construction of the legal order, hegemonic order does not fundamentally challenge the equalitarian regime because the focus of the equalitarian regime is on legal equality, which means that all recognized

sovereign states are equal as international persons, and they are given a right to participate in the management of international governance and the political processes, regardless of whatever inequality may exist between states, such as their size, population, power, degree of civilization, wealth, and other qualities (Oppenheim 2018: 130). However, having legal equality does not mean that political influence must be equally shared, because there are enormous differences between states with regard to their strength (Oppenheim 2018: 131). Despite politically inequality, the legal equality of sovereign states means that any alteration of an existing international legal order or creation of a new international legal order can only be achieved through the formal consent of members of the international society of states. In constructing the international humanitarian legal order in the post-colonial era, consent from weaker states has become more important, as these nations make up the majority of members of the international society of states. Without consent from the majority, it is difficult to form a legitimate international legal order.

The following pages intend to explain why this chapter considers that the international humanitarian legal order is a hegemonic order over a significant period of time: because the hegemonic powers and their ideas played the dominant role in shaping the international humanitarian order, while minor countries were marginalized for a significant period of time.

-- Pressure from Leading Nations

The position as signatory and ratification are signs of a state's willingness to endorse an international norm, which indicates a consensus (Provost 2007: 641). All the countries (in total 196 countries as of today) in the world have signed and ratified the GCs of 1949; Protocol I was ratified by 174 countries and Protocol II by 168 countries. Although the US does not ratify the APs, most of the main countries including France, the UK, China and Russia have ratified the GCs of 1949 and the APs. Rene Provost (2007: 640) contends that "universal participation in the 1949 Geneva Conventions and widespread ratification of the 1977 Additional Protocols testify to a broad consensus among states as to the

desirability and acceptable character of these humanitarian norms". However, this consensus may be a result of pressure. Although the countries signed the treaties, this does not necessarily mean that they strongly supported the values underlying them; their signature could be the result of pressure from other nations. The influence of powerful states in the international law-making process cannot be understated in that they can pressurize the weaker states to sign the international convention.

External pressure can force states to act in a specific way. External pressure works because states are operating in a social environment; all have a social identity. Reus-Smit (1999: 29) elaborates upon the function of a social identity, saying that social identity enables states "to operate in a world of complex social processes and practices". This identity is shaped by the cultural-institutional context within which states operate, and that identity shapes a state's behaviour. When enough leading states endorse the new norm, appropriate behaviours for states will be redefined. When many leading countries adopts new norms, this creates an external pressure for other states. External pressure works in three different ways: legitimation, conformity and esteem. First, legitimation is important for states. The norm serves as an identifier of a particular identity. When states do not recognize or comply with the norm, they will be perceived as an outsider, or a rogue state. This status entails consequences, including the loss of reputation, trust and credibility. Second, conformity is a psychological need to be a part of the group. The state adopts and complies with norms, to demonstrate that they belong to this social group. Third, esteem refers to the desire of the leaders of the state; they want others to "think well of them" (Finnemore and Sikkink 1998: 903). External pressure can compel states to offer purely formal endorsement of international norms by signing the international agreements that are advocated by international leading states, although they do not embrace (or they have doubts about) the underlying norms of the international agreement.

The pressure from the leading Western nations in signing the law of Geneva should not be overlooked. There was evidence that non-Western states were indeed under pressure

to sign the Geneva Conventions. Japan was a case in point. The Japanese government was under external pressure to be a signatory state of the GC III. Japan had aspired to be a great power, to be regarded as a civilized nation, and to be seen as an equal in international politics since the mid-nineteenth century (Kibata 2000: 144). All the powerful and "civilized" nations including the US, France and the UK at that time had signed the GC III. Under pressure from these nations in the Geneva Diplomatic Conference of 1929, the Japanese government signed the GC III (Arsenault 2017: 45). Despite the giving its consent to the convention, Japan did not fully accept the notion of giving protection to POWs. Bugnion (2003: 190) explains that the concept of captivity in wartime being a consequence of misfortune rather than cowardice was largely a Western idea, and this idea never took root in Japan. "Defeat, for a Japanese soldier, meant unbearable dishonour, and captivity a lasting shame which reflected on the whole family … death was preferable to the indelible stain of disgrace". Such view was confirmed by former Japanese Prime Minister Hideki Tojo, who said that "there is a fundamental difference between the western and Japanese appraisal of captivity … it is shameful for Japanese to surrender … all soldiers are ordered not to surrender under whatsoever circumstance" (cited in Dahler 2003: 287). The negative view of POWs provided a plausible explanation as to why Japan never ratified the GC III at the domestic level and why it treated the Allied POWs cruelly and inhumanely in the Second World War. The case of Japan demonstrated that the powerful nations could pressure weaker states to sign the international treaty.

Having said that, this chapter also argues that international humanitarian law can be internalized and become part of the domestic norms. Internalization is "the process by which nations incorporate international law concepts into domestic practice". Japan internalized the GC III into the fabric of domestic law after the Second World War. Japan passed an Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations in 2004, which requires Japan's Self-Defence Force (hereinafter JSDF) "to ensure adequate implementation of international humanitarian law on the treatment of prisoners, etc. in armed attack situations, such as the Geneva Convention Relative to the

Treatment of Prisoners of War of 12 August 1949"[75]. Passing the Act at the domestic level demonstrated that Japanese society had changed its view of POWs and recognized the importance of protecting them. This is because domestic law is grounded in culturally relevant norms. If the law is not recognized or has no general support from the public, there is a greater likelihood that the rule would not be passed in the legislative body.

-- No Participation and Lacking Meaningful Participation from Non-Western States

The law of Geneva is described as universal in the sense that regulating the conduct of hostilities transcends cultures and civilizations. Yollande Diallo studies international humanitarian law and African traditions; he (1976: 59) finds that the Fulani culture shared a lot of similarities with modern international humanitarian law. For instance, the Fulani culture forbade the attack upon a woman, child or an old man in the event of conflict; killing these people would be dishonourable. The ICRC (1997) studied Somali conventions of warfare, and pointed out that a group of people, including women, children, the aged, the sick, the unarmed and the war wounded, were spared from violence in Somali culture. Any persons or groups that committed acts against this code during warfare would risk later being shunned and ostracised (ICRC 1997). The protection that was given by these cultures is compatible with the GCs and their APs[76]. This chapter does not question whether the concept of protecting war victims transcends different cultures, but points out that non-Western countries had little meaningful participation in shaping the GCs. Gus Waschefort (2016: 597) states: "we know through the travaux préparatoires of the Geneva Conventions that such Somali conventions of warfare (and other non-western traditions) played no role in formulating the norms of the Geneva Conventions" and "there is no direct causal relationship between the Geneva Conventions and these various

[75] Article 1 of the Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations.

[76] For instance, children are specially protected against warfare by the law of Geneva. Article 77 of Protocol I states that "Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason"; and Article 4 of Protocol II states that "Children shall be provided with the care and aid they require".

(non-western) traditional customs". The reason behind this was colonialism. Many African states could not participate in the conferences. European empires such as Britain, France, Belgium, Germany, Portugal, Spain and Italy basically absorbed the entire territory of Africa into their domain of power, with only two states (i.e. Ethiopia and Liberia) in the entire African continent being considered independent. Since many African states were not independent, their international personality was denied; therefore, they could not participate in international law-making. Their view was excluded. The situation only changed when colonialization ended in the 1970s, which contributed to the wide participation of African states in the Geneva Conference of 1977.

Western states were a driving force in the codification of international humanitarian law for a significant period of time, despite the fact that some non-Western nations had been invited to participate in the codification of international humanitarian law since the early twentieth century. Non-Western countries were invited to participate in the Hague Conference of 1907, which showed that some non-Western nations were beginning to meet the Western "standard of civilization"; therefore, these countries began to be regarded as a member of the international society of states. Despite being invited to the conference and accepted as a member of the international society of states, non-Western nations were discriminated against and marginalized. Their voices were regarded as less important in the conference. John Westlake (1910: 623) observes that even though non-Western states like Persia, Siam and China had been allowed to participate in the Hague Conferences of 1907, their voices were not regarded "as of importance with those of the European and American powers", because Western nations deemed these countries as backward. For a long period of time, non-European countries had little influence in the codification of humanitarian law; they were considered only as rules takers, instead of rule makers. Their views were ignored by the American and European powers.

Western powers dominated the process of codifying the GCs for a significant period of time. Less powerful countries were marginalized in the creation of international law. Their

ideas about how to treat war victims was overlooked. But the situation changed. By the end of colonialization in 1970s, the number of non-Western nations participating in negotiation and dialogue in terms of international humanitarian law had increased. Their influence in relation to shaping international humanitarian law had also grown. For instance, Protocol I addressed the concerns of African states. Mutoy Mubiala (2002: 41-2) explains that the status of wars of national liberation was the main concern for the African states, which reflected the distinctive situation in Africa. One of the main features was the "unfinished decolonization". African nations desired to complete the decolonization of the continent and intended to reclassify the "wars of liberation" as "international armed conflicts". Their struggles against colonial powers contributed to the global recognition of the legitimacy of the armed struggle of colonial peoples. This resulted in including the national liberation movements into the scope of the international armed conflict. Article 4 of Protocol I explicitly identifies international armed conflicts as a situation which "include armed conflicts in which peoples are fighting against colonial domination and alien occupation … in the exercise of their rights of self-determination". Because of the work of African states, many victims of the liberation wars against colonial domination and alien occupation were protected by international humanitarian law. The codification of Protocol I reflected a recognition of the principle of sovereign equality of all states in the law-making process. The level of civilization would not be a justification for overlooking, and not hearing, the concerns of weaker states.

Conclusion

Ideas in the Enlightenment period constitute a new applied understanding of humanitarianism. Humanitarianism no longer applied to saving people's soul by converting them and preventing them from violating natural law; it now refers to alleviating people's physical suffering, particularly in the time of armed conflict. The constitutive norm of individualism shaped the international order and informed a norm of procedural justice. It conditioned the way that a common objective can be achieved among nation states. It can only be achieved through multilateralism and contractual

international law. The objective of protecting those who are not or are no longer engaged in armed conflict was achieved through multilateralism. GCs and the APs were codified in a multilateral conference, at which all recognized states participated in the process. The constitutive norm of individualism essentially shaped the way that humanitarianism has developed since the mid-nineteenth century.

The development of the Geneva law was driven by a different type of conflict: international wars, internal armed conflicts and decolonization. Prior to the Second World War, the development of the GCs was conditioned by the understanding of international law, which could only be used to regulate the relations between states. The specific understanding of international law contributed to the law of Geneva, which only covered the victims of international armed conflicts for almost a century. In the post-war period, the scope of protection of the Geneva law was no longer limited to the victims of international war but extended to internal armed conflict. Such change arose from the idea that the relations between a government and its people was a matter of international concern. The codification of various international human rights conventions which dictate how a government ought to treat its citizens was the evidence of ideational change. This ideational change motivated international actors to push for the codification of CA 3 and Protocol I. Another significant development in international politics in the post-war period was the delegitimization of colonialism. This provided favourable social conditions in which to codify the new international legal instrument and protect freedom fighters who participated in anti-colonial struggles. These fighters were given the status of combatant. Despite the fact that GCs and APs were shaped by different ideas, the construction of the international humanitarian legal order does not deviate from the constitute norm of the modern-day international order. The order was constructed during a series of international diplomatic conferences, in which all recognized states participated in the negotiation process.

The chapter also argues that the humanitarian legal order is a hegemonic order, shaped by the dominant powers. Hegemony sits uncomfortably with the liberal international order, as the bedrock of this order is the equalitarian regime, which rests on the principle

that all sovereigns are legally and socially equal. But there is a reality of political and material inequality in international politics. The powerful nations have more influence in the process of codifying international law. Western nations had dominated the process in codifying the law of Geneva, and non-Western nations had been side-lined in the process for a significant period of time. At the same time, weaker nations were under pressure from powerful nations to accept the GCs. Despite sitting uncomfortably with the equalitarian regime, hegemony does not fundamentally contradict the regime, because the equalitarian regime focuses on legal equality, this equality does not guarantee that all states have the same influence on the law-making process and in developing international law.

The law of Geneva remains a significant part of humanitarianism in the post-cold war period, but there is also a new development. Rather than focusing on reaching international agreement (an indication of consensus among states), humanitarianism in the post-cold war period has become more intrusive; intervening in the domestic affairs of other states is now a major feature of humanitarianism. The new feature of humanitarianism has fundamentally contradicted the foundation of the liberal international order. Humanitarianism becomes highly contested in the post-cold war era. These issues will be fully elaborated upon in the next chapter.

Intervening Humanitarianism

Introduction

The previous chapter argues that humanitarianism has been applied to the alleviation of physical suffering of victims in armed conflicts. Multilateralism and contractual international law limit how states can protect war victims. Rules through multilateralism are established to regulate how armed conflicts are conducted. GCs and the APs were codified to reduce and relieve the suffering caused by armed conflicts. International humanitarian law remains a significant part of humanitarianism in the post-cold war period. Having said that, humanitarianism becomes coercive and intrusive in the post-cold war period; its application now transgresses the sovereign rights of a nation, which are guaranteed by the UN Charter. The legitimacy of how humanitarianism is applied is questioned[77]. This chapter is going to examine military intervention, the International Criminal Court and the responsibility to prevent (which is deeply connected to foreign aid).

In the previous period, humanitarian impulses were expressed within the constraints of the background norm of the international order. However, humanitarian activities are increasingly conducted beyond the parameters of current international order in the post-cold war period. There is a divergence of humanitarianism from the background norms of the post-cold war international order, including the respect of sovereign rights. As demonstrated in the previous chapter, the humanitarian impulse is constituted by the constitutive norm of that particular timeframe, like the Roman Catholic faith in the early modern period, which understood the humanitarian impulse as converting heathens to save their souls and stopping the violation of natural law. These actions did not deviate from the European international order of the time. This chapter identifies the guarantee of basic human rights protection to all members of society as the constitutive norm, which

[77] Legitimacy is a "social concept in the deepest sense". When a norm, principle or rule is legitimate, that it is socially endorsed (Reus-Smit 2007: 158).

shapes the moral purpose of the state in the post-cold war era. This is different from the modern state, which lies in the "augmentation of individuals' purposes and potentialities, in the cultivation of a social, economic and political order that enables individuals to engage in the self-directed pursuit of their interests" (Reus-Smit 1999: 123). Individualism constitutes the present international order, which determines the prevailing mode of differentiation: "units are differentiated according to the principle of sovereignty" that entails the exclusive territorial jurisdiction (Reus-Smit 2013d: 1063). What is happening is that there is a change in the values that are used to justify the organization of political life into a centralized, autonomous political unit (Reus-Smit 2008: 137). However, the current international order is not designed for the realization of the protection of basic human rights and has not caught up with this change. There is a disjuncture between international order and human rights protection. When humanitarian impulses motivate political actors to act, humanitarian activities may transgress the line of differentiation, and become an affront to the background norm of international order (Reus-Smit 2013d: 1075). The transgression has brought the legitimacy of the applied understanding of humanitarianism into question.

This chapter intends to demonstrate how constitutive norms shaped humanitarianism through justification. The arguments of this chapter unfold in a number of stages. First, this chapter defines the notions of sovereignty and human rights and addresses their relations, arguing that human rights have shaped the meaning of sovereignty. Second, this chapter proceeds to discuss three main features of humanitarianism in the post-cold war period: military intervention, the ICC and the responsibility to prevent. The notion of human rights enables and provides justification for these developments. Post-cold war humanitarianism challenges the equalitarian regime and elicits huge controversy among members of the international society of states.

Sovereignty and Human Rights

Sovereignty is said to "enjoy supreme decision-making authority within their territorial boundaries, while being under no political or legal obligation to observe any overarching

authority outside those boundaries" (Reus-Smit 2001: 521). Reus-Smit (2001: 521–2) questions the way that realists understand the concept of sovereignty, as an absolute and empirical fact. In his words, realists treat sovereignty "as an empirical attribute of the state, an assertion that states make about their territorial authority backed by military power, economic resources and perhaps the consent of the people." However, he holds a different perspective on sovereignty, and regards sovereignty as an "organizing principle". The meaning of sovereignty is not fixed but evolves in a way that reflects the prevailing "norms concerning the legitimate organization of political authority", and "the content and implications of which vary from one historical and practical context to another" (Reus-Smit 2001: 526).

Communicative action provides an insight into how the contents of sovereignty are socially constructed. Like other norms, rules and principles, the principle of sovereignty is a social artefact and subject to constitutive processes. The contents of the principle of sovereignty are "the normative products of moral debates and dialogue between states (even non-state actors) about legitimate statehood and rightful domestic and international conducts" and are the "products that are reproduced through routinized communication and social practice". Therefore, all norms, rules and principles have histories and emerge out of complex processes of communicative action. They are "maintained through the conscious, and at times unconscious, application of taken-for-granted canons and repertoires of appropriate state conduct" (Reus-Smit 2001: 526). Reus-Smit (2001: 526–7) stresses that states need to justify their moral claim when they seek to create a new norm, rule and principle or to give a new meaning to the existing norm. Actors who engage in the project of constructing a new norm or giving a new meaning to an existing norm usually associate their prescriptions with values that are accepted within the relevant community. They all try to justify their values as right and true by resorting to values higher than those which they intend to justify, and they try to prove that the new norm and new meaning are an interpretation of higher values or related to higher values without logical contradiction. As Kathryn Sikkink (1991: 26) put it,

“new ideas are more likely to be influential if they ‘fit’ well with existing ideas and ideologies in a particular historical setting”. According to Reus-Smit (1999: 527), not all higher values have the same justificatory power; values carry the greatest weight if they are “consistent with intersubjective belief about the behavior and goals of ideal states” or “fostering the development of such values”. These insights into the communicative action and norm formation are important in order to understand the relations between human rights and sovereignty in the post-cold war period, which will be addressed further.

Reus-Smit (1999: 159 and 2001: 527) recognizes that sovereignty is “an intersubjective organizing principle, no more and no less”, it is “a principle that specifies how power and authority will be organized” and “that mandates territorially-demarcated, autonomous centres of political authority”. There is “nothing in the principle that specifies why power and authority should be organized in such a fashion”. The only way to justify this form of political arrangement is to appeal to a set of higher-order values that sovereign states are thought to realize. And sovereignty is a social norm. Like other norms, sovereignty has history and has been subject to communicative process. Sovereignty is not a “self-referential value” and is grafted to pre-existing social values. Norms cannot be upheld without referencing other social values because no norm can emerge in a moral vacuum; norms have to be justified and justification is an appeal to a higher-order value that defines the identity of the state or its raison d’être. The notion of sovereignty needs to be grounded in more fundamental existential values. From Reus-Smit’s perspective, it is the hegemonic belief about the “moral purpose”. The moral purpose explains “the reason that historical agents hold for organizing their political life into centralized, autonomous political units”. It provides a “raison d'être of the sovereign state” and specifies “the terms of legitimate statehood and rightful state action” (Reus-Smit 2001: 528). The moral purpose varies between one historical and cultural context and another. Reus-Smit (1999) identifies that the meaning of sovereignty for the Ancient Greeks was the cultivation of bios politikos; while sovereignty in the age of absolutism in Europe referred to the preservation of a divinely ordained and rigidly hierarchical social order. The chapter is going to argue that the notion of sovereignty has become connected to the notion of

human rights in the post-Second World War period. Protection of human rights has become the "moral purpose" of a state. However, this close tie has been questioned and has been seen as a form of domination. This will be further elaborated upon in this chapter. The new understanding of the relationship between human rights and sovereignty essentially provides the justification and moral ground for a more intervening form of humanitarianism.

Human rights are general individual rights. Reus-Smit (2013: 36) divides rights into two categories – individual rights and collective rights. Individual rights are the right of sole persons while collective rights are the rights of groups. Reus-Smit further divides individual rights into two categories: special rights and general rights. Special rights are rights that "individuals have because of special transactions or because of special relations in which they stand". General rights are rights that individuals have "simply because they constitute a particular kind of moral being". From a naturalistic perspective, individuals have such rights because they are "human beings"; they are a "normative agent with the capacity to form pictures of what a good life would be and to try to realize these pictures" (Reus-Smit 2013a: 37). Reus-Smit (2013a: 32) identifies that general individual rights have varied in two respects throughout the course of history. First, general individual rights are substantively different in each historical moment. Reus-Smit identifies that the general individual right was the right to liberty of religious conscience that was crucial in the Westphalian period, while it was the right to equal political representation in eighteenth-century Latin America and a set of civil and political rights in the post-Second World War period. Second, the perceived "zone of application" also varied in each historical moment. From Reus-Smit's perspective, the zone of application is a "community of individuals who, at a given historical moment, were thought to constitute integral moral beings entitled to these rights", but at the same time, these individuals could deny that other human beings constituted such moral beings. Throughout history, women, unpropertied classes, non-Europeans, non-Christians, slaves, indigenous peoples and many others have been excluded from "the zone of application" on the ground that these people were not rational, moral beings. For instance, only

individuals of particular Christian denominations were believed to have the right to liberty of religious conscience in the Westphalian period, while others like Muslims, Jews and heretics were excluded (Reus-Smit 2013a: 38). The zone of application of general individual rights has been expanded. Only in the post-Second World War period with the codification of International Bill of Rights, the general individual rights come to be seen as entitlement of all human beings (Reus-Smit 2011: 1210). The zone of application encompasses all human beings regardless of their race, religion, gender, civilization and colour. Therefore, it is only recently that general individual rights have been understood as human rights.

In the post-Second World War, all individuals have been gradually considered to be fully developed moral beings. Therefore, in today's world, where there are general individual rights, these rights must be held by all humans without distinction (Reus-Smit 2013a: 37). For instance, the right to life and security of person have been considered as general individual rights in the international society of states, and are acknowledged in various international conventions[78]. These rights apply to all persons of all cultures and all creeds. These rights ought not to be violated and exist to protect people against abuse by individuals or groups that are more powerful. In holding such rights, "all humans are entitled to make claims against other individuals, national communities, and humanity as a whole for the respect and satisfaction of certain civil and political freedoms and social and economic needs" (Reus-Smit 2001: 521). These rights can be used to challenge the abusive practices of a government, and provide justification for carrying out humanitarian activities.

[78] These conventions include Article 3 of the UDHR; Article 6 (1) and Article 9 (1) of the ICCPR; and Article 5 (b) of the International Convention on the Elimination of All Forms of Racial Discrimination.

--Relations between Sovereignty and Human Rights

Relations between human rights and sovereignty is conventionally described as mutually incompatible. Under the common perception, states are granted a supreme authority within their territorial borders and are subject to no higher authority. Meanwhile, human rights place limits on how states treat their citizens (or non-citizens) within their territorial borders. The supreme authority is compromised in the name of the universal standard of legitimate state conduct (Reus-Smit 2001: 519). Therefore, human rights and sovereignty are considered two separate regimes that stand in a zero-sum relationship – the stronger the norms of human rights, the weaker the principle of sovereignty and vice versa (Reus-Smit 2001: 519). Human rights are deemed to be a challenge to the principle of sovereignty. For instance, Stanley Hoffmann (1983: 24) observes that international human rights norms have "become so much more demanding and so much less accommodating of national sovereignty" than before. The core of sovereignty (i.e. the right to wage war and the right for a state to treat its subjects as it sees fit) has been restricted by these international agreements and by conventions like the UN Charter and the International Covenant on Civil and Political Rights (ICCPR). Sikkink (1993: 411) holds a similar view, that the two regimes are irreconcilable, saying that "the doctrine of internationally protected human rights offers one of the most powerful critiques of sovereignty as currently constituted". Both authors see the contents of sovereignty as fixed. The concept of universal human rights erodes the principle of sovereignty. Instead of treating these two normative elements as irreconcilable, this chapter conceives the principle of sovereignty and human rights norms as "two normative elements of a single, distinctly modern discourse about legitimate statehood and rightful state action" (Reus-Smit 2001: 520).

This chapter identifies human rights as a constitutive norm in the post-cold war era which shapes the meaning of the moral purpose of a state. Reus-Smit (1999: 31) explains that all political arrangements have a purpose, which refers to the reasons that political agents arranged their power and authority in a certain way. The purpose usually entails a

conception of individual or social good. The "moral purpose" constitutes the prevailing, socially endorsed justification for the sovereign right. The concept of sovereignty in the post-cold war period has been increasingly justified with reference to the guarantee of basic human rights. Legitimate statehood is more explicitly tied to the protection of basic human rights.

Protection of basic human rights are grafted onto the principle of sovereignty by political actors. The UN Charter and the Universal Declaration of Human Rights (hereinafter UDHR) stress that states have an obligation to protect and promote basic individual rights. The UN Charter commits the member states to "tak[ing] joint and separate action" to provide and promote "higher standards of living, full employment, and conditions of economic and social progress and development" and "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion"[79]. The UDHR further articulates a list of rights that states have an obligation to provide and to protect. The declaration commits the member states to protecting basic individual rights, such as social and economic rights (like the right to social security, the right to work and the right to rest and leisure)[80], as well as civil and political rights (like the right to freedom of opinion and expression, the right to freedom of peaceful assembly, and the right to take part in government)[81]. Since the UN Charter and the UDHR were adopted, there was a growing number of international and regional conventions on human rights, which covers almost all aspects of human life. The International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) were adopted in 1966 and were enforced in 1976. Regional treaties are also designed to protect human rights such as the European Convention on Human Rights of 1950 and the American Conventions on Human Rights of 1969. By the end of the cold war period, a rich body of multilateral treaties on protecting human rights had been developed. The

[79] Articles 55 and 56 of the UN Charter.
[80] Articles 22, 23, and 24 of the UDHR.
[81] Articles 19, 20, and 21 of the UDHR.

obligation to protect and promote human rights are given formal legal status by these international and regional conventions (Reus-Smit 2001: 531). These conventions enshrine the modern ideal of legitimate statehood. Sovereignty has been "increasingly justified in terms of the state's role as guarantor of certain basic human rights and freedoms" (Reus-Smit 2001: 520).

The new understanding of sovereignty shapes how actors in the international community respond to massive rights abuse on foreign soil. Reus-Smit (2005a: 198) explains that ideas affect actors' imaginations, including what they see as ethical, and provide justification for their behaviours. Since the protection and the promotion of human rights are deemed to be the moral purpose of the state, legitimate statehood means that states have to act as guarantor of certain basic rights. The legitimacy of sovereignty heavily relies on the states' willingness and capability to protect the basic rights of its people. When a state commits a massive violation of human rights against its people or is unable (or unwilling) to protect its people's basic rights, the legitimacy of statehood becomes fragile. The new meaning of sovereignty provides a moral ground for countries to transgress the line of differentiation in order to save strangers from violence and mass atrocities. It also provides the justification for, and enables, political actors to develop an intervening form of humanitarianism to prevent mass atrocities from happening. Without the reinterpretation of sovereignty, it is difficult to imagine that new developments in humanitarianism can happen. However, the human rights-oriented principle of sovereignty has been heavily criticized by the developing countries.

-- A Response to the Critique of Human Rights

One of the main criticisms of human rights is that human rights is not a universal concept but a Western one. It emerged/was created in a Western social and political context. There is little point in disputing that the concept of rights has a Western inheritance. For instance, Jack Donnelly (2003: 61) noted that these ideas and practices first emerge in the West "as a matter of historical fact". Due to cultural specificity, human rights have been

regarded by some critics as having limited applicability to non-Western culture. For instance, Adamantia Pollis and Peters Schwab (1979: 1 and 13) state that human rights are a "western construct of limited ability", because this construct is based on the rights traditions of the US, UK and France; therefore it is "inapplicable" and "irrelevant" to countries that do not share the notion of liberal individualism. Samuel Huntington (1996) shares a similar view, arguing that the concept of human rights originated from the Western experience, and cannot (or it is very difficult to) be applied outside of the cultural and geographic boundaries that they belong to. From the perspective of these scholars, the fact that human rights are globalized is a reflection of Western domination, not a global moral consensus (Reus-Smit 2011: 1207).

Despite the western origin of the concept of human rights, this chapter holds that some rights have been universally accepted in the post-cold war period, in the sense all individuals hold these rights simply because they constitute integral moral beings. No nation could possibly deny rights like the right to security, the protection against slavery and inhumane or degrading treatment to its citizens in the twenty-first century. It is difficult to imagine any cultural arguments that a government could come up with against the recognition of these basic personal rights that are connected to our most basic needs and human nature (Donnelly 2003: 94). Since these rights attract international consensus, the origin of the rights should bear little relevance to the universal applicability of these rights. It is these basic rights that are embedded into the notions of legitimate statehood. Violation of these rights becomes indefensible in the international society of states.

At the same time, the universality of these basic rights comes from a communicative procedure – including participation, dialogue and negotiation. Reus-Smit (2018: 232) claims that international consensus among diverse states can be generated from the "unforced dialogue between all affected", which gives an empirical foundation for claiming some moral values as universal. This can undercut the argument that there is no moral consensus on human rights. For instance, the right to life and the prohibition of

inhumane or degrading treatment in times of conflict are recognized in the international law. Wilful killing and torture or inhuman treatment are prohibited by GCs of 1949 and considered as grave breaches[82]. The important point is that the GCs of 1949 were codified in a series of multilateral diplomatic conferences and are ratified by all recognized sovereign states, meaning that there is an international consensus on the necessity to protect people's basic rights in times of conflict. The universal ratification of the GCs of 1949 gives universality to these moral values. These violations in the name of culture become indefensible.

Humanitarian Intervention

Intervention is "an intentional act of one state or group of states or an international agency which aims to exercise overriding authority on what are normally internal policies or practices of another states or group of states" where the target states does not consent to the intervention (Coady 2002: 10). The term humanitarian refers to the motive and the purpose of the intervention, which is to "prevent or put a halt to serious violation of fundamental human rights" (Ramsbotham and Woodhouse 1996: 23). Some are sceptical about the motive of intervention and argue that self-interest has played a primary role in deciding whether to intervene in events. This section acknowledges that states usually have mixed motivations for an intervention. Even if states are motivated by different reasons, intervention can still be humanitarian as long as it produces a positive humanitarian outcome – saving life (Wheeler 2000: 39). Humanitarian intervention can be defined very broadly, including various forms of diplomatic activities and humanitarian assistance, and different types of military activities ranging from the UN peacekeeping mission to full-scale military warfare on behalf of the repressed population (Ramsbotham and Woodhouse 106–13). Another definition is limited to the military activities untaken by the international community as a whole, by a regional organization or by individual states and groups of states in places where the basic rights of people are being violated

[82] Article 174 of GC IV of 1949

or threated (Gill 2005). This section adopts a narrow understanding of humanitarian intervention, focusing on military activities.

International orders are configurations of political authority in international systems[83]. In each of these various international orders, units of political authority have been differentiated from one another in a distinctive way, and these lines of differentiation have been institutionalized and established as normative (Reus-Smit 2013d: 1075). The modern-day international order is on the basis of sovereignty. In a sovereign order, the units are "sovereign states, collectivities of such or multilateral organizations constructed and licensed by states" (Reus-Smit 2013d: 1066). The sovereign order entails the principle of non-intervention and the prohibition of threats against "the territorial integrity and political independence of one state by another" [84]. These principles sustain the modern-day configuration of political authority. Intervention is "to enter as something extraneous" and "to cross a boundary delimiting exclusive, territorially-demarcated jurisdictional realm" [85]. Intervention is an act of transgression as it crosses the established lines of jurisdictional differentiation; it is an action that contradicts how the order is organized,

[83] Reus-Smit (1999: 164 and 2013a: 1999) points out that there is system change and systemic change in the international order. System change occurs "when there is a shift in organizing principles, from heteronomy to sovereignty, for example, or sovereignty to hierarchy". When such change occurs, it is a move from one kind of international system to another. Systemic change "occurs within a system and is generally thought to involve a shift in polarity, from multipolarity to bipolarity, or bipolarity to unipolarity". System change was further broken down into two different forms by Reus-Smit: configurative change and purposive change. Purposive change takes place "when there is a change in prevailing conceptions of legitimate statehood, when one set of understanding of moral purpose of state is displaced by another" like moving from an absolutist conception of statehood to a liberal constitutional one in the nineteenth century. Configurative change occurs "when there is a shift in organizing principles, when there is a transformation in the deep norms governing how power and authority are distributed among a system's diverse polities", like transforming from heteronomy to sovereignty in the sixteenth and seventeenth centuries.

[84] Article 2(4) of the UN Charter.

[85] In another order such as heteronomous order, intervention can be understood completely differently. Reus-Smit (2013d: 1066) points out that the units of political authority are various entities, like popes, emperors, princes, monarchs, local lords and so on. These units are not defined by their exclusive territorial authority but by their particular and distinctive functional authority. The authority of these units overlaps spatially. For instance, medieval Europeans were simultaneously subjected to various authorities like papal and imperial, but each was in a different realm of social life. Intervention in heteronomous order means to "encroach on a functional realm of jurisdiction", rather than "crossing a boundary between exclusive, territorially-demarcated authorities". For example, the pope intervenes in the emperor's claim realm of temporal authority or the emperor trespasses the pope's sacral authority.

and therefore it is inherently controversial. “If controversy is to be contained – rendered politically manageable – interventions require justification: norm violation demands a normative defence” (Reus-Smit 2013d: 1067). Those that conduct the intervention needed to legitimate their behaviour.

Justification takes place within the context of pre-existing values that define legitimate agency and behaviours. Parties need to justify the action that they advocate with reasons. Justification usually takes the form of an appeal to higher-order values that define the raison d’être of the state (Reus-Smit 1999: 28). The moral purpose of the state in the post-cold war era is deeply connected to the constitutive norm of human rights; the legitimate statehood involves a government with a will and an ability to protect the people within their own borders from the massive violation of rights that manifest as crimes against humanity, genocide and ethnic cleansing. Sovereignty has been increasingly justified in terms of “the state’s role as guarantor of certain basic human rights and freedoms” in the post-cold war era (Reus-Smit 2001: 520). This understanding of legitimate statehood provides the moral resource for the delegitimization of a state that commits massive violation of the basic rights upon its soil. By connecting these rights to legitimate statehood, intervention in the name of banishing tyranny and stopping atrocities gains legitimacy. States now can appeal to the idea of human rights protection in order to intervene when massive violation of these rights takes place. However, this is not always the case, and the following pages demonstrate that justification of humanitarian intervention changed during and after the cold war. This change indicates that there is growing acceptance that a sovereign right means more than control of territory and freedom from external intervention: it entails the responsibility to secure the basic rights of the people living in that territory. Despite humanitarian intervention gaining legitimacy in the international society of states, military intervention fundamentally contradicts the liberal international order, which will also be addressed in the coming section.

-- From the Cold War Era to the Post-Cold War Era

This section draws heavily from Nicholas Wheeler's *Saving Strangers* (2000). His work demonstrates that there is a changing understanding of legitimate statehood. The concept is redefined, from the self-determination of peoples to the protection from massive violation of rights. This change of understanding was indicated in the justification of the use of force. Justifications are employed by actors carefully, because successful justification legitimizes the action (Reus-Smit 2013a: 176). Therefore, actors use the widely recognized value to justify their behaviour and appeal to the values that carry most weight, as only those justifications that resonate with pre-existing and mutually recognized values are considered valid and can legitimate behaviours (Reus-Smit 1999: 28). Justifications for intervention reflect the values that are prevailing and are perceived as legitimate by the international community. Protection against crimes against humanity has been widely used to justify military intervention in the post-cold war era. Crimes against humanity encompass crimes such as murder, extermination, rape, enslavement, torture, persecution and all other inhumane acts of a similar character (intentionally causing great suffering, or serious injury to body or to mental or physical health). These crimes are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[86]. The use of force has not always been justified on the ground of protecting people from serious violation of basic rights.

During the cold war period, many states justified their use of force as self-defence, rather than protecting people from harm. For instance, India's military intervention brought an end to the Pakistani government's repression of the Bengali people living in East Pakistan in 1971. A million Bengalis died because of the repression. Despite the massive violation of people's basic rights, the primary justification of the use of force was the aggression and military aggression of Pakistan's refugees. India also invoked human rights protection to justify the use of force, but the members of the UNSC, such as China and the US, insisted that the situation in East Pakistan was a domestic issue; India's intervention was

[86] Article 7 of the Rome Statute.

an act of aggression and a clear violation of the UN Charter (Wheeler 2000: 57–77). Another case is Vietnam's use of force against Khmer Rouge in 1979. Pol Pot's regime was reportedly responsible for killing at least 200,000 political prisoners in 1975–7 and another 100,000 deaths in 1978. Pol Pot was toppled. Like the case of India, Vietnam had a strong case against Khmer Rouge on the ground of massive violation of basic rights. However, Vietnam appealed to the right of self-defence to legitimate its action in Cambodia (Wheeler 2000: 78–110). Similarly, Tanzania's use of force to overthrow Idi Amin, who was responsible for killing up to 300,000 people, was also justified on the basis of maintaining national security (Wheeler 2000: 111–36). As mentioned above, justifications are carefully crafted; all political actors hope that their justifications will be persuasive, because it will enhance the legitimacy of their action and will reduce the risk of facing sanctions and other political consequences. The most persuasive justifications are those that resonate with the constitutive norm, particularly those that determine what constitutes a legitimate social agent (Reus-Smit 1999: 28). Looking at these cases, it is clear that protecting people from harm was not considered the most important constitutive norm in international politics at that time; the legitimacy of a nation did not depend on protecting its people from massive violation of rights.

The situation changed after the end of the cold war. Many nations increasingly justified their use of force on the ground of protecting people from massive rights violation. For instance, during the Rwandan genocide of 1994, it was estimated that about a million Rwandans were killed. The justification given by France for the use of force in the Rwandan crisis was to protect the civilians from harm and to save lives. French Foreign Minister Alain Juppe wrote that France "had a duty to intervene in Rwanda … to put an end to the massacres and protect the population threatened with extermination". Although some countries were sceptical about the French intention, no country in the UNSC vetoed the French request for authorization or felt able to challenge the rationale of protecting people from harm (Wheeler 1999: 208–41). In the Kosovo crisis of 1999, NATO's intervention was explicitly justified on the ground of saving Kosovan Albanians from the ethnic cleansing that was being committed by Serbian forces. Netherlands

Ambassador Peter van Walsum justified their support of the use of force by arguing that "we cannot sit back and simply let the humanitarian catastrophe occur". Similarly minister of state in the German Foreign Ministry Gunter Verheguen argued that the killing in Kosovo was reaching a level at which "every decent person would say something had to be done to end the killing"; in other words, the situation in Kosovo shocked the conscience of humanity. A veto should not be used to halt such military intervention (Wheeler 2000: 242–84). In more recent cases, NATO's intervention in Libya in 2011 was justified on the ground of protecting civilians (Tzeng 2017: 439), and the UK also justified the missile strike against the Syrian government on the ground of alleviating the overwhelming humanitarian suffering (The Times 2018). This change of justification demonstrates that human rights protection became an important constitutive norm in the international order and a significant part of legitimate statehood in the post-cold war period. Although there is a consensus on human rights protection, not all nations agree that the use of force is the best way to handle these crises. China is the case in point, which will be demonstrated in the next chapter.

-- Intervention and the Liberal International Order

Humanitarian intervention challenges the existing liberal international order, which is based on the liberal ideas at the domestic level, such as "legal equality of the individual before the law"; "the individual's right to liberty and self-determination"; and "the inviolability of the individual's physical person". These ideas were transposed to international level. The state was seen as the "individual writ large", bearing rights within the international society of states, just as individuals have a right to liberty in a society (Reus-Smit 2005b: 76 and 2013b: 179). Based on these liberal ideas, a set of principles evolved in the international society of states to govern their interaction. Reus-Smit (2005b: 71) identities three principles. First, sovereign states are held to be socially and legally equal even if the capability among these states is profoundly different. Second, all sovereign states are entitled to a basket of governance rights internationally including the

general principle of “one state one vote” (even if not in all cases), and the rights of autonomy (i.e. the right of self-determination and the principle of non-interference). Third, the use of force is severely circumscribed; force can only be legally used under two conditions: self-defence and authorization from the UNSC. These principles constitute the equalitarian regime. On top of the equalitarian regime, the liberal order is rule based. These rules, which determine what a state can and cannot do, must be based on multilateralism and contractual international law. Rule formation must involve “participation, negotiation and dialogue”, and it is the sole basis of legal obligation. These rules must be mutually binding and should be equally applicable to all subjects, in all like cases (Reus-Smit 1999: 132–3). For instance, the UN Charter was produced by 50 nations, which represented over 80 per cent of the world’s population at that time, and people of every race, religion and continent, at the San Francisco Conference of 1945. All signatories must be bound to the rules of the UN Charter. The remaining section argues that humanitarian intervention contradicts and violates two fundamental aspects of the liberal international order – the equalitarian regime and the rule-based order.

The equalitarian regime recognizes that all sovereign states are entitled to a basket of rights. One of these rights is the right of autonomy, meaning that people have a collective right to determine their own affairs; because individuals have the right to liberty, the right to autonomy must be respected. The principle of non-interference was designed to protect this right. Non-intervention requires that other states will not intervene (i.e. in coercive form) in the internal affairs of other states with the purpose of securing a change in the policies (Kunig 2008). The principle of non-interference allows people in that particular community to pursue their own conception of good and development and guarantees that “their success will not be impeded or their failure prevented by the intrusion of an alien power” (Reus-Smit 2005b: 89). Intervention breaks this protective shield. The problem is that intervention in some cases comes with regime change. Regime change here refers to “the forcible replacement by external actors of the elite and/or governance structure of a state so that the successor regime approximates some purported international standards of governance” (Reisman 2004: 516). Libya was a case

in point. Muammar Gaddafi's forces shot at protestors and intended to commit a massacre in the city of Benghazi, which could have amounted to crimes against humanity[87]; the NATO's military intervention was justified on the ground of protecting civilians. The intervention increasingly signified the end Gaddafi's regime[88]. Forcible regime change by external actors (whether by supporting the rebels or the government) essentially conflicts with the right of self-determination of Libyan people, because the political life of the Libyan people should have been decided by the people of the state, not determined by external forces.

Humanitarian interventions, particularly those without authorization from the UNSC, breaks the rules of the international order, which was established in the UN Charter. Although only 50 nations participated in the San Francisco Conference in 1945 when the UN Charter was produced, an impressive number of states from all regions of the world have joined the UN, meaning that they accepted the general principles of the UN, one of them being the principle of non-intervention (Corten 2010: 505). Julie Mertus (2000: 1751) argues that humanitarian intervention is in line with the Charter, because Article 2(4) prohibits any members of the UN from acting in a manner that is "inconsistent with the purpose of the UN". One of the purposes of the UN is to "promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[89]. The Charter states that "all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purpose" of "universal respect for, and observance of, human rights and fundamental freedoms for all"[90]. However, the article does not specify which methods should be used to achieve the protection. For Mertus, if intervention is designed to protect human rights, it conforms with the purpose of the UN and is therefore permitted and legal. However, alignment with the Charter does not necessarily confer legality upon the intervention.

[87] ICC, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, Doc. No. ICC -01/11, dated 27 June 2011.
[88] US President Barack Obama called on Muammar Gaddafi to step down (Reuters 2011) and French President Nicholas Sarkozy demanded that "Mr. Gaddafi must leave" (The Telegraph 2011).
[89] Article 55 of the UN Charter also stresses the protection of human rights.
[90] Articles 55 and 56 of UN Charter.

Massive human rights violation may fall within the premise of using military force and use of force must be authorized by the UNSC in order to be legal, which is explicitly mentioned in Article 2(4) of the UN Charter. In addition, no international agreement has explicitly indicated that the use of force without authorization from the UNSC is permissible. Genocide or ethnic cleansing has been the most common reason that powerful nations have used to justify intervention, an example being Darfur. However, the Genocide Convention of 1948, which attempts to punish and prevent these acts, does not explicitly permit the use of force in resolving crises. Brian Lepard (2002: 362) argues that the Genocide Convention does not specify support of military intervention in stopping genocide, as there is no text in the convention that says the parties' obligation under the Genocide Convention contradicts their obligation under the UN Charter, which explicitly prohibits the use of force among states. An exception to this prohibition is acts carried out in self-defence and with UNSC authorization[91]. The codification of these treaties involves participation, negotiation and dialogue, and these treaties constitute a mutually binding agreement. All member states have an obligation to comply with these agreements, meaning that even if genocide were to happen, no military action should be allowed until permission is given by the UNSC. If the dominant powers do not comply with the conditions of exercising military might, the credibility of the rule-based international liberal order is undermined. Yet various military interventions, such as NATO's intervention in Kosovo and the US-led airstrikes against Syria, took place without explicit authorization from the UNSC.

The right to autonomy and the respect of the rule of law remain the bedrock of the international order in the post-cold war period. These principles organize the international life that regulates and restrains interaction among sovereign states; they stabilize international relations (Reus-Smit 2017: 854). The use of force in the name of protecting human life might have legitimacy. However, intervention without authorization from the UNSC nevertheless challenges these fundamental principles that

[91] Articles 51 and 42 of UN Charter.

underpin the current international order. The unauthorized use of force essentially undermines the international order. Since the intervention challenges the fundamental principles of the current international order, the legitimacy of the applied understanding of humanitarianism in the post-cold war period has become questionable. China has questioned how humanitarianism is applied in the post-cold war era. It insists that humanitarian activities must be carried out within the parameters of the international order, meaning that humanitarian intervention must be authorized by the UNSC. From this perspective, China's rejection of "unauthorized" humanitarian intervention should not be deemed as pariah behaviour or a violation of international justice, but rather a concern about the erosion of the existing international order.

International Criminal Court

The establishment of a permanent international criminal court was another significant development of humanitarianism in the post-cold war era. The ICC seeks to protect people's basic rights by prosecuting individuals responsible for the most serious crimes under international law, such as crimes against humanity, genocide and ethnic cleansing. Punishment is seen as the best way to deter future atrocities, because the impunity of the perpetrators encourages others to do the same[92]. Prior to the establishment of the ICC, the international ad hoc criminal tribunal was established to punish those responsible for crimes like genocide and ethnic cleansing, including the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR). These tribunals were established in the 1990s by the UNSC, and were the first international criminal tribunals since the International Military Tribunal (also known as the Nuremberg Trials) and the International Military Tribunal for the Far East (also known as the Tokyo Trials), in response to the atrocities committed during the armed conflicts in the former Yugoslavia and the genocide in Rwanda. Since then, various

[92] Antonio Cassese (1998: 2) draws a connection between the Armenian genocide and the Holocaust, arguing that by letting the perpetrators of that genocide get away, the international community encouraged the Holocaust in WWII: "the impunity of the leaders and organizers of the Armenian genocide … gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later".

special courts have been established by the UN, including the Special Court for Sierra Leone in 2002; the Extraordinary Chambers in the Courts of Cambodia in 1997; and the Special Panels of the Dili District Court in 2000. The establishment of these tribunals demonstrated that there was a sufficient political will to hold those people that were responsible for the atrocities accountable in the post-cold war era. Although the ICTY and ICTR were problematic[93], the experience set a precedent for the ICC.

The fundamental institutions of the modern international society of states conditioned how a legitimate international criminal court should be established, which must be through multilateralism, involving multilateral participation, dialogue and negotiation, and it must be participated in by those that are governed by the court. Through a multilateral diplomatic conference in Rome in July 1998, the Statute for the International Criminal Court (also known as the Rome Statute) was adopted and it entered into force in 2002. The Statute gives the ICC jurisdiction over "the most serious crimes of concern to the international community as a whole", namely genocide, war crimes, crimes against humanity and crimes of aggression (ICC 2002: 13). The Statute codifies customary law on the use of force [94]. These crimes have been prohibited by a series of international

[93] The ad hoc tribunals are problematic. It is because forming an ad hoc tribunal were extremely time-consuming process. The UN took two years of preparation and negotiation in order to establish the ICTY. For each incident, new tribunal is needed and the process of negotiation and preparation for their establishment repeated. Limited human resources and time will be wasted. Therefore, ad hoc tribunals cannot be an answer for all conflicts, which inevitably lead to the exercise of selective justice (Marler 1999: 829-830 and Suikkari 1995: 205).

[94] Malanczuk (1997: 39-40) explains the customary law, stating that general state practice is an element to establish a legally binding custom. State practice includes any act and statement by a state, "a rough idea of a state's practices can be gathered from published material – from newspaper reports of actions taken by states, and from statements made by government spokesmen to parliament, to the press, at meetings of international organizations; and also from a state's laws and juridical decisions, because the legislature and judiciary form part of a state just as much as the executive does". For the customary international law to develop, general and consistent state practice is required. Traditionally, a number of decades is required to pass before a practice can be seen to have evolved into a rule of customary law but now the process take a relatively short period of time. And generality of state practice depends on the number of states following a particular practice and the reaction of other states to new practice. These criteria are determinative of whether that practice evolves into a rule of customary international law (Barket 2000: 56-61). In addition to the state practice, opinion juris is another element to establish customary international law. Opinio juris (opinion of law) refers to the belief that practice is obligatory. It occurs "when States act out of a belief that they are either forbidden from doing something or compelled to do it by international law", which "differentiates what a State does out of a legal obligation and what a State does out of regular courtesy or comity" (The Fletcher School of Law and Diplomacy 2017: 6).

conventions, which have been ratified by the majority of states, and these conventions have become an essential part of customary international law. The UN Secretary General's 1993 Report affirms that:

> the part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945[95].

The Rome Statute provides the means to punish those who breach customary international law and the international humanitarian law, which brings an end to impunity (ICRC 2010b).

The idea of protecting basic rights contributes to the advancement of the international justice system in the post-cold war period in two ways. First, the mentalities of the political actors are shaped by constitutive norm, which affects what these political actors see as within the realm of possibility, and at the same time constrains the imaginations of these actors. Since the end of Second World War, there has been a growing recognition that sovereignty entails human rights protection, and that states on one hand have an obligation to respect human rights and refrain from any violation, and on the other hand they have an obligation to protect individuals and groups against human rights abuse, which includes investigation and prosecution of abuses (Kaul 2001: 10). The project of an international criminal court had come to a long-term halt in the 1950s[96]. Under this new

[95] UN Security Council, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3rd May 1993 (S/25740).

[96] During discussions about the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, the need to have those charged with genocide tried by a competent international tribunal was raised. Subsequently, the International Law Commission (ILC) was invited by the UNGA to study "the desirability and possibility" of establishing an international judicial organ for the trial of certain crimes under international law. Commissioned by the UNGA, the ILC carried out the study and concluded that the establishment of an international judicial organ was desirable and possible. Following this conclusion, the

interpretation of sovereignty in the post-cold war period, political actors began to imagine and entertain the idea of having an international criminal court, in case of the failure of a domestic court to investigate and prosecute those criminals. It gave a new momentum to the project and motivated political actors to advocate for the establishment of an international permanent court. Second, the creation of the ICC is the political outcome of a communicative action process that took place within the context of pre-existing values and norms. Political actors, including both state and non-state actors, whether they supported or rejected the establishment of the ICC, had to justify the positions that they took with reasons. Strong reasons are those that resonate with the pre-existing, prevailing and intersubjective values that define what constitutes a legitimate agent and that do not contradict these higher values. The constitutive norm of human rights protection provides justification for the establishment of the ICC. This will be addressed in the following section. Here it must be emphasized that history is complex and is constituted by a multitude of factors. The history of the establishment of the ICC is no different. This section does not claim that the emergence of new understanding of legitimate statehood in the post-Second World War era alone leads to the adoption of the Rome Statute and its coming into force on 1 July 2002. But without the new meaning of sovereignty, the history of the ICC would have been different.

-- Justification for the Establishment of the ICC

Justification for the establishment of the ICC is required. The exercise of legislative and adjudicative jurisdiction has been regarded as an important part of national sovereignty, but the proposed agreement on the International Criminal Court requires states parties to submit their judicial processes to external oversight (Cryer 2006: 987). Having a permanent international criminal court is a new idea and challenges an established

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General Assembly set up the Committee on International Criminal Jurisdiction, whose assignment was to prepare preliminary draft conventions and proposals on the establishment and statute of an international criminal court. The draft statute for an international criminal court was submitted in 1951 and was subject to revision. After numerous attempts, the draft remained unsatisfactory and the General Assembly decided to postpone its consideration.

principle, which is the juridical power of a nation state. The ICC emerged out of complex processes of communicative action. The communicative process began in 1994 when the UN General Assembly established an ad hoc committee open to all member states of the UN and to NGOs in related areas, to review the draft statutes for a permanent international criminal court, which were produced by the International Law Commission. The ad hoc committee submitted a report and persuaded the UN General Assembly to call for the convening of a UN Preparatory Committee on the Establishment of an International Criminal Court to prepare the conference which ultimately became the Rome Conference in 1998. The committee was also open to all member states and NGOs of an appropriate nature[97]. The ICC is a product of debate and dialogue among states (including non-state-actors in this case) at the Rome Conference. These actors entered into the conference with different values and all tried to justify their value as right and true. The value which has a higher justificatory power is usually "consistent with intersubjective beliefs about the behaviours and goals of ideal states or to foster the development of such states" (Reus-Smit 2001: 527). The constitutive norm of human rights protection which has been regarded as legitimate statehood and rightful state action in the post-cold war era carries heavier weight in terms of justification. Supporters and oppositions of the establishment of ICC have appealed to the idea of human rights protection to justify their positions.

Both states and non-state actors drew on human rights protection to justify their support of the establishment of ICC. European countries were strong advocates for the establishment of an international tribunal. German Foreign Minister Hans-Dietrich Genscher advocated the strengthening of international protection of human rights by establishing an international tribunal. His successor Klaus Kinkel continued to advocate for the establishment of an international law regime and to believe that people who commit massive human rights violations need to face prosecution at the international level, if the domestic court fails to take up this responsibility. The establishment of an

[97] UN General Assembly Resolution 50/46, 18th Dec 1995.

international criminal court "would deal with the prosecution of crimes against human rights around the world" (cited in Eikel 2018: 4). Similarly, Ambassador Ivan Simonovic of Croatia stated, "What Croatia wanted to show with the ratification of the Rome statute is that we are willing to reduce our own sovereignty for the sake of international protection of the most basic human rights" (cited in Griffin and Bookman 2002). In addition to European countries, non-European countries also supported the establishment of the ICC by arguing for the protection of human rights. Ambassador Arnoldo Listre of Argentina justified their support of the establishment of the ICC, by arguing that the ICC is "a necessary tool to ensure the effective universal application of basic human rights"[98]. Similarly, Ambassador Alfonso Valdivieso Sarmiento of Colombia also stated that their support of the ICC was motivated by the belief that the court could "put an end to impunity for the gravest violations of human rights"[99].

Interestingly, countries that did not ratify and sign the Rome Statutes also justified their rejections in the name of human rights protection. The US is one of the countries that did not ratify the statute. The US government asserts that the Rome Statute undermines the US role in defending freedom and advancing the cause of humanity (Prosper 2001). As David Scheffer, Head of the US Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, put it, the statute "could inhibit the ability of the United States to use its military to … participate in multinational operations, including humanitarian interventions to save civilian lives" (Committee on Foreign Relations 1998: 13). The arguments on both sides demonstrate that human rights protection has gradually become embedded into the understanding of legitimate statehood.

Non-state actors also used human rights protection to justify their support of the establishment of the ICC. NGOs encouraged (or pressured) states to sign, ratify and implement the Rome Statute. The ICRC was one of the prominent NGOs that played an active role in encouraging states to sign and ratify the Rome Statute. Prior to the

[98] UN Security Council Official Record, 4772nd Meeting, 12th Jun 2003
[99] UN General Assembly Official Record, 83rd Plenary Meeting, 8th Dec 1998

establishment of the ICC, the implementation of international humanitarian law largely depended on the high contracting parties[100]. States constantly ignored those duties and few trials for war crimes took place before the 1990s (Dormann and Maresca 2004: 225). The ICRC justified its support for the ICC in that the court would be a deterrent of massive human rights violation, as it would bring an end to impunity (ICRC 2010a). Other than the ICRC, NGOs like Amnesty International, Human Rights First, Human Rights Watch and Asia Forum for Human Rights and Development have supported the codification of the Rome Statute. These NGOs created the Coalition for an International Criminal Court (hereinafter CICC) in 1995, which was to coordinate these NGOs to "advocate for permanent international criminal court" (CICC 2017). Various activities were carried out by the members of the CICC to support the establishment of the ICC. These members engaged with a wide range of audiences ranging from government departments and civil society groups to media and academic institutions in various regions and countries. They distributed information, including producing newspapers, media releases, reviews and papers, promoted public awareness such as street demonstrations and other events in favour of the ICC, and lobbied the government to sign and ratify the Rome Statute as soon as possible (Pearson 2006: 274–6). Amnesty International (2002) explained its support of the establishment of ICC by arguing that people who are planning "human rights violation can no longer do so secure in the knowledge that they won't be held accountable", because countries that ratified the statute would have a legal obligation to investigate and prosecute people accused of horrendous crimes, and if they were unable or unwilling to do so, the ICC may step in. Human rights protection mechanism is strengthened.

The Rome Statute was adopted at the Rome Conference in 1998 with 120 votes in favour, seven against and 21 abstentions. Today, over 100 countries are party states to the Rome Statute. The Court achieves almost universal jurisdiction on crimes, including genocide, war crimes, and crimes against humanity[101]. Despite the significant number of nations

[100] For instance, Article 146 of Convention (IV) of GCs of 1949 and Article 86 of Protocol I call for the high contracting parties to provide effective penal sanctions for those who commit any grave breaches and to bring them before the national court to face trial.
[101] Article 5 of the Rome Statute.

that have ratified the statute, influential countries like China and the USA are not member states. Both nations are dissatisfied with the structure of the ICC, for example, elements such as the power of the prosecutor and the role of the Security Council in the ICC. These nations question whether the current structure of the ICC is effective in protecting human rights, not whether basic human rights should be protected[102]. This demonstrates that the international community widely accepts the idea that basic human rights need to be protected.

-- ICC and the Liberal International Order

The liberal international order is based on the notion of equality among recognized sovereign states. Instead of addressing the inequality that persists in the current international order (i.e. the veto power of UN SC), the ICC reproduces and widens the inequality. At the same time, the ICC can potentially obtain jurisdiction over nationals without the consent of the person's state of nationality, which undermines the fundamental principle of international law-making, that is the notion that consent is the sole base of legal obligation (Reus-Smit 1999: 125 & 130).

The Rome Statute widens the inequality of the current international order. Referral and deferral powers are given to the UNSC under Articles 13 (b) and 16 of the statute. Under the current international order, the permanent members of the UNSC (hereinafter P-5) are already given additional power – specifically the power of veto, which allows them to deny the passage of any resolution even if there is a majority to support the resolution. The UN SC has been given the referral power via the Article 13 (b) of Rome Statute. With the veto power, the P-5 could influence the referral decision. As a result, P-5 and their close allies could be protected from the referral (Tranhan 2008). A situation that would

[102] For instance, Xiao Jingren and Zhang Xin (2013: 2) explain China's position: the ICC can prosecute without authorization, potentially worsening the already fragile political situation in a war-torn countries and failed states, because a political deal like exchanging individual immunity for peace may be required. Therefore, intervention from the ICC may not be well suited in terms of these sensitive issues and could prolong the conflict and massive human rights violation. The human rights situation in these places could further deteriorate.

involve the interests of these states or their allies would not be refer to the ICC. For instance, Russia, which widely participated in the ongoing war in Syria, vetoed the draft resolution that would have referred the case to the Court[103]. At the same time, the deferral power is granted to the UN SC under the Article 16 of Rome Statute. The investigation and the prosecution of ICC could be halted by the UN SC for twelve months; the deferral period can be renewed for a period of twelve months if a resolution is adopted by the UN SC. The problem is that three of the P-5, including China, the US and Russia, are not member states of the Statute; they have not subjected themselves to the Court, but they can refer other non-parties states for investigation and defer any investigations and prosecutions of ICC (Moss 2012: 4). These non-member states can influence the operation of the ICC. This structural arrangement has been regarded as problematic by many nations, including India. Dilip Lahiri, the Indian representative at the Rome Conference, stated that "the anomaly of the composition and veto power of the Council could not be reproduced in an international criminal court"[104]. This structural arrangement deters India from ratifying the statute, which it believes reproduces the inequality of current international order.

Another problem is that nationals of non-party states could theoretically be prosecuted before the ICC. According to Article 12 of the statute, the ICC can exercise its jurisdiction under three conditions if an investigation is triggered by either the prosecutor or a state party. First, a state can accept the Court's jurisdiction by becoming a party state. Second, either the territorial state or the nationality state must be a member of the statute. Third, territorial and nationality non-party states can accept the ICC's jurisdiction over certain crimes. The first and third conditions are not seriously contested as these conditions indicate state consensus, which are in line with the law of treaties. The main issue lies in the second condition. Diane Orentlicher (1999: 490) explains that "theoretically, then, a national of a non-State Party alleged to have committed a crime within the territorial

[103] UN Security Council Official Record, 7180th Meeting, 22nd May 2014.
[104] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records Volume II.

jurisdiction of a State Party could be prosecuted before the Court". The ICC is a treaty-based institution. Therefore, technically speaking, the ICC is governed by the norm of international law. Reus-Smit (1999: 130) states that international law can only apply if it has the consent from the state. Such principle is recognized in the Vienna Convention on the Law of Treaties of 1969[105]. The institution created through the international treaty is subjected to the same condition. As Luis Henkin (1989: 27) argues, "a state is not subject to any external authority unless it has voluntarily consented to such authority". Giving consent can be done by signing and ratifying the treaty. By ratifying the Rome Statute, party states give the ICC permission to exercise its jurisdiction over their nationals. However, non-party states do not give consent to the ICC. The ICC should not be allowed to jurisdiction over nationals of non-party states. That is to say, the current arrangement of ICC challenges the core of the liberal international order – "a treaty may not impose obligations upon a non-State Party without its consent" (Orentlicher 1999: 490).

In short, the ICC is an attempt to protect human rights by prosecuting individuals responsible for violation of basic human rights. It intends to end impunity, which hopefully can prevent massive violation of basic human rights from taking place. Despite the good intention, the ICC reproduces the inequality of the current international order and violates the notion that consent is the sole base of observing the rules of international law.

Responsibility to Protect

The idea of R2P, which emerges in the new millennium, is another development of humanitarianism in the post-cold war era. Its emergence was a result of the increasing incidence of internal armed conflicts and massive violation of human rights in places like Rwanda, Bosnia, Kosovo and elsewhere and the international community's failure to respond to these tragedies effectively. There was a growing consensus that these kinds of massive violations of human rights could no longer continue and that there needed to

[105] Articles 34, 35 and 37 of the Vienna Convention

be intervention in a decisive and timely manner by the international community. The problem was that the principle of sovereignty is deeply enshrined in international law, i.e. the UN Charter, and remains a central ordering principle of the current international order (Badescu 2011: 1–2). The Secretary General of the UN at that time Kofi Atta Annan (2000: 48) articulated this dilemma: "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?". It essentially elicits the question of the relationship between sovereignty and human rights. The Canadian government established the International Commission on Intervention and State Sovereignty (hereinafter ICISS) to respond to the question posed by Annan, and the Responsibility to Protect report was produced after a year-long consultation. The report addresses the tension between the principle of sovereignty and the obligation to protect basic human rights and aims to reconcile these two principles (Paras 2010: 130). The report gives rise to the idea of R2P, which reframes sovereignty. Sovereign no longer refers to control alone, but also entails responsibility (Evans and Shanoun 2002). Sovereign states have a responsibility to protect their citizens "from avoidable catastrophe – from mass murder and rape, from starvation" but "when they are unwilling or unable to do so, that responsibility must be borne by the broader community of state" (ICISS 2001a: VIII).

The understanding of legitimate statehood and rightful state behaviour in the post-cold war period had a causal effect on the development of R2P. Reus-Smit (2001: 526) recognizes that sovereignty is a socially constructed concept, and its empirical contents are not fixed but evolve in a way that reflects the constitutive norm of that timeframe. Securing basic rights has been understood as an important function of sovereignty and regarded as a rightful state action since the post-cold war era. These new understandings of legitimate statehood and rightful state behaviours help the development of R2P in two ways. First, the human rights-oriented understanding of legitimate statehood and rightful state action provided justificatory resources to debate the role of the state in a society (Reus-Smit 2013a: 50). Shaped by this new understanding, sovereignty no longer only

meant a state's control over a piece of land, but also meant respecting dignity and the basic rights of all people within a state. This understanding of sovereignty shaped the mind of the architects of R2P and was reflected in the ICISS reports, which explicitly connected the principle of sovereignty to human rights protection. ICISS (2001a: 13) stressed that sovereignty needed to be re-conceptualized: "from sovereignty as control to sovereignty as responsibility" and outlined the new understanding of sovereignty. Sovereignty means that states "are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare". Second, legitimate statehood has also shaped the actor's social identity and its interests. It provides actors with a reason for acting and allows the action to be rationalized (Reus-Smit 1999: 29). Since the legitimacy of a state is tied to its capability and willingness to protect the basic rights of its people, civilized states are defined as those that respect human rights (Risse 2000: 5). States increasingly define their identities as champions of human rights. By extension, it is in their interest to advocate human rights, which shapes a wide range of their behaviours. The identity motives countries to support R2P as it intends to promote human rights protection. The constitutive norm of human rights protection facilitates the emergence of R2P.

Advocacy for R2P proved difficult, because of its implications for the principles of non-interference, territorial integrity and sovereign rights. Under the current international order, "a sovereign state is empowered by international law to exercise exclusive and total jurisdiction within its territorial borders, and other states have the corresponding duty not to intervene its internal affairs" (Evans and Shanoun 2002: 102). The stability of the current international order depends heavily on compliance with these principles. Based on the notion of R2P, the international community is given a "responsibility" to intervene in a sovereign state through coercive measures, including the use of force as a last resort. R2P offends these principles and the laws that the international order is currently based on. The implementation of R2P can potentially disrupt the international order. The fear of infringement of sovereignty emerged in the negotiations that led up to the incorporation of R2P into the World Summit Outcome Document (hereinafter WSO

document) in 2005. This fear was expressed by many developing countries. Indonesia criticized the R2P, stating that "reservations concerning the concept of 'responsibility to protect.' Indeed, we share the view that it is uncomfortably similar to the so-called concept of 'humanitarian intervention', which lacks basis in the Charter and in international law" (cited in Paras 2010:145). Similar criticisms were voiced by Egypt, India, China, Malaysia and others (Paras 2010: 145). Due to the criticism, the WSO document adopted a watered-down version of R2P[106]. Despite this scaling-down, the document which was endorsed by the UN General Assembly still dictated that states had a responsibility to protect their people and recognized that the international community had a responsibility to protect threatened populations whose own nation would not and could not do so. The endorsement represented an international consensus that human rights protection was an integral part of legitimate statehood and rightful state action in the post-cold war period.

R2P has three pillars (ICISS 2001a: XI), and each represents a different phase of a conflict: pre-conflicts; conflict and post-conflict. These pillars are: "the responsibility to prevent", which is to address the root causes and direct causes of the crises that put populations at risk; "the responsibility to react", which is to respond to drastic situations with appropriate measures, including sanctions, international prosecutions and military intervention; and "the responsibility to rebuild", which is to provide full assistance with recovery, reconstruction and reconciliation, and to address the causes of the harm that intervention aims to halt or avert.

"Responsibility to react", particularly military intervention, has been the central focus of the report. Alex Bellamy (2008: 621) observes that the report dedicates 32 of its 82 pages

[106] In the face of the criticism, the concept of R2P was watered down in the 2005 World Summit. Thomas Weiss (2006: 750) dubbed it "R2P-Lite", because the approved version of R2P in the summit did not specify the criteria governing the use of force and insisted upon Security Council approval. In addition to these "modifications", Andrew Garwood-Gowers (2012: 378) also observes that the types of violence covered by R2P were limited to four mass atrocity crimes, the term "large-scale loss of life" was removed from the outcome document and the threshold for triggering intervention from the international community was raised from a host state being "unwilling or unable" to "manifestly failing". In other words, the summit restrained the scope of R2P.

to the use of force alone, and only 16 pages to responsibilities to prevent and rebuild. The report suggests that intervention can be legitimate if it meets the “just cause threshold” and “the precautionary principles”. The just cause exists when there is a “large scale loss of life” and a “large scale ethnic cleansing”, while the precautionary principles refer to “right intention”, “last resort”, “proportional means”, and “reasonable prospects” (ICISS 2001a: XII). The report believes that if states strictly adhere to these principles, consensus can be reached on how to react to humanitarian catastrophes (Bellamy 2008: 621). In addition to addressing the circumstances in which military intervention are considered legitimate, the report also addresses which institutions have the authority to intervene. The report has suggested that the most appropriate body to authorize the intervention is UNSC if the host state is unwilling and incapable of protecting its own people. In order to improve the decision-making of the UNSC and to respond more efficiently to a crisis, the report suggests that the permanent members of the UNSC should refrain from using the veto power if their vital state interests are not at stake. If the UNSC fails to discharge its responsibility in a reasonable timeframe, the concerned states should approach the UN General Assembly or the relevant regional organizations. Bellamy (2008: 621) puts it thus: the principle of responsibility to react outlines the hierarchy of responsibility, which begins from the host nation, then the UNSC and General Assembly to regional organization and the collation of the willing, and lastly the individual states.

Another pillar of R2P is the principle of “responsibility to rebuild”. The objective of military intervention should not end with stopping the current hostilities, but should “ensure that the conditions that prompted the military intervention do not repeat themselves or simply resurface”. Intervention should lay the ground for durable peace. The intervention forces should provide security to all members of society regardless of their differences and their relations with the previous government (ICISS 2001a: 41). The success of rebuilding a society after intervention requires the international community to “commit sufficient fund and resources”. A wide range of works need to be carried out. For instance, the international community should bring justice to the victims, which can help the reconciliation process; should encourage economic growth, which is vital to the recovery

of a country; should promote good governance, health, education and other basic services, which improve the lives of the people; and should help the demobilized combatants reintegrate into society (ICISS 2001a: 39–43). In acknowledging the importance of the principle of responsibility to rebuild, political leaders at the World Summit 2005 established a UN Peacebuilding Commission. The main purpose of the commission is "to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery"[107]. The burden of rebuilding the society falls to the international community, meaning that states, international organizations (such as the World Bank and IMF) and non-state actors (like non-governmental organizations and civil societies) need to work together to rebuild the social, economic and political order in the post-intervention situation.

The last pillar is the responsibility to prevent (hereinafter R2Prev), which is a breakthrough in humanitarianism. Unlike humanitarian intervention and the ICC, which deal with the aftermath of the humanitarian crises, R2Prev adopts a proactive approach. It attempts to remove the root causes and the direct causes of man-made crises and internal armed conflicts that put populations at risk. The following pages will outline the key contents of R2Prev.

-- Pillar Two: Responsibility to Prevent

ICISS (2001: X) identifies R2Prev as "the single most important dimension of the responsibility to protect". R2Prev drew on the ideas of Annan's report on the Prevention of Armed Conflict, which was published a few months earlier than the ICISS Report (Stamnes 2010: 9). In his report, Annan (2001: 7) pledged the international community to move "from a culture of reaction to a culture of prevention", as it is more cost-effective. The report emphasizes that conflict management is more expensive than the preventative approach. On the one hand, it means the human costs of war, which include death, injury, destruction and displacement. On the other hand, it means the financial

[107] UN General Assembly Sixtieth Session 2005 World Summit Outcome, 16th Sept 2005.

costs. And the logic of this principle of "responsibility to prevent" is very difficult to deny: "why wait to halt a massacre if early engagement might avert it entirely?" (Gerber 2011). There is no universal agreement on the precise causes of man-made disasters and internal armed conflicts. ICISS (2001a: xi) identifies that there are two types of causes: direct causes and root causes. Direct causes are those that spark the conflict (Haslett 2014: 183). Meanwhile, the root causes are those that underlie the conflicts. ICISS (2001b: 31) lists "poverty", "political repression", and "uneven distribution of resources" as examples of root causes, and stresses that ignoring these underlying factors means that only the symptoms rather than the causes of these conflicts are addressed. Similarly, Annan (2001: 8) suggests that the root causes of the outbreak of conflict and public disorder include socio-economic inequities and inequalities, systematic ethnic discrimination, denial of human rights, disputes over political participation or long-standing grievances over land and other resource allocations. These factors could lead one social group to act violently against another, particularly in the absence of effective institutional mechanisms to address them.

Addressing the direct and root causes of internal conflicts and other man-made disasters is first and foremost the responsibility of the states. However, the 2005 World Summit Outcome Document establishes the commitment to "help states build capacity to protect their populations" which allows the international community to engage and to partner with the state in question to address these causes (Stamnes 2010: 17). Helping states to build up capacity often required strong support from the international community (ICISS 2001a: 19), because of the amount of resources that are required. ICISS (2001a: 22–3) suggests that there are direct prevention and root cause prevention methods available when addressing these causes. Direct measures "deal with the immediate trigger of a conflict" while the root cause measures address "the underlying causes of deadly conflicts" (Stamnes 2010: 9). According to the ICISS (2001a: 23–5), the direct prevention measures can take the form of straightforward assistance, positive inducement or the negative form of "threatened" punishments. These measures include dialogue and mediation through

good offices; non-official second track dialogue; threats of application of political, economic, diplomatic sanctions; travel and asset restrictions of targeted persons; promise of new funding, investment or more favourable trade terms; and offers of mediation, arbitration or adjudication.

R2Prev focuses on the root cause prevention. ICISS (2001a 22–23) suggests that root cause prevention methods consist of addressing political needs and deficiencies, including democratic institutions and capacity building; constitutional power sharing, redistribution arrangements, confidence building measures between different communities or groups, press freedom and rule of law; tackling economic deprivation and the lack of economic opportunities that involve development assistance, addressing the inequalities in the distribution of resources and opportunities, promoting economic growth and encouraging economic structural reform; and strengthening legal protection and institutions, which include supporting the effort of strengthening the rule of law, promoting the integrity and independence of judiciary, and promoting honesty and accountability in law enforcement. These preventative measures cannot rely on the efforts from the international community alone. These preventative measures can achieve maximum effectiveness if there is the maximum possible cooperation between helpers and those helped because these measures are best implemented when based on detailed local knowledge and understanding (ICISS 2001a: 23).

Unlike the responsibility to react, which has been controversial, R2Prev has been well received in the international community. For instance, China has been cautious about the R2P concept, particularly the principle of responsibility to react. Chinese Ambassador Liu Zhenmin expressed his concern that this concept could be abused and turned into “another version of humanitarian intervention” (Permanent Mission of the People’s Republic of China to the UN 2009). However, China has been supportive of the principle of R2Prev. China justified its support of this principle by arguing that conflict prevention and capacity building are essential and most important for the protection of people’s

basic rights, as R2Prev prevents mass atrocities in the first instance (Teitt 2008: 9). Therefore, more attention should be on protecting civilians from atrocities (Permanent Mission of the People's Republic of China to the UN 2008). China maintains that creating "a secure environment for civilians" is the most effective protection (Teitt 2008: 9). It contends that the responsibility to prevent rests first with the government, but the UNSC also needs to strengthen its efforts to prevent conflicts and safeguard peace. China also urges other UN agencies and international agencies, like the UN Development programme and the World Bank, regional organizations like the African Union as well as non-governmental organizations, to play their part in assisting countries that are at risk of conflict in order to protect civilians[108]. Similarly, Japan suggests that the principle of responsibility to react was "somewhat overstretched", arguing that it is important to prioritize R2Prev and stresses that international assistance, building capacity in the rule of law, reform in military, police and judiciary sectors and protection of human rights are key to protecting civilians, and countries like Colombia, Nigeria and India shared a view that prevention rather than intervention should be the priority; therefore, these countries also called for capacity building (GCR2P 2009: 6). The principle of R2Prev is widely supported among states, which is a good indication that there is a general consensus on the need to protect people from being abused. The support is a good indication that the idea of the state carrying prime responsibility to protect its people from abuse is embedded in legitimate statehood, and the idea of assisting a state in protecting its people is understood as rightful state action.

-- Responsibility to Prevent and the Liberal International Order

The fundamental assumption of the liberal international order is that sovereign state is an independent entity in an international society of states. Sovereignty serves as protective barrier. Reus-Smit (2013b: 179) explains that sovereignty allows people living in that territory to develop their own forms of collective life and to pursue their own

[108] UN Security Council Official Record, 5898th Meeting, 27th May 2008.

purpose. The principle of non-interference with the internal affairs of other states therefore is honoured, as the principle connects to the core liberal idea – freedom. People should be able to decide their own way of life, including their own political system. All forms of governance should be of equal status, as they are chosen by the people living in that territory. However, R2Prev does not sit comfortably with this idea, in that donor states and international organizations tie their aid and assistance to democratic governance; this limits the choice of receiving countries and other forms of governance are belittled.

P2Prev intends to address the root causes of conflicts and crises. The advancement of good governance is regarded by the ICISS as a tool to address such root causes. Good governance usually incorporates democratic institutions. For instance, The World Bank's governance indicators include "voice and accountability", "political stability and absence of violence", "government effectiveness", "regulatory quality", "rule of law", and "control of corruption" (Kaufmann 2010). Daniel Kaufmann (2010) explains that voice and accountability refer to "the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media". This indicates that democratic institutions are regarded by the World Bank as indispensable components of good governance. Many international organizations also share the view of the World Bank. For instance, international organizations like the UN, European Union and The Organization for Economic Co-operation and Development also highlight that democracy is an integral part of good governance (Gisselquist 2012). Liberal democracy is deemed by these organizations as the best way of resolving the underlying causes of conflicts. To put this assumption into practice, a series of structural changes and reforms, such as the organization of multiparty elections, rule of law and judicial reform, are needed.

Many principal donors and international organizations incorporate good governance and democracy as a prerequisite for receiving aid, tying their aid to structural reforms. For instance, the objective of German development aid is to strengthen and spread democracy, which includes "improving the efficiency of the political system";

"strengthening democratically legitimated institutions at all levels" and "promoting institutionalized participation of civil society in policy making and executive process", and the rule of law, which involves "strengthening the organization of the courts and professionalization of relevant sector", "support for drafting, implementation and application of the law with due consideration being given to human rights" as well as "promoting access to the law and to mediation for all sections of the population" (Federal Ministry for Economic Cooperation and Development 2009: 13). Similarly, the UK government has said that it will use its aid money to support good governance, including democracy, the judiciary and the civil society (Department for International Development 2006:21). As a result, their aid has come attached with various conditions, including political conditions – internal change through liberal programmes. It includes "respect for human rights and governance; and 'partnership' policies involving intensive and extensive redesigning of policy formation and budgetary processes in recipient countries" (Brown 2013). For those countries needing aid or any other forms of assistance, they will have to accept these conditions by adopting liberal democratic principles and carrying out political and social reforms. Such practices curtail the right of autonomy.

The universalization of democratic governance raises the question of northern or Western bias. The understanding of good governance has been based on Western experiences and history of development. The assumption that democratic governance is relevant and valid in all parts of the world is questionable. Good governance is a historically and culturally contingent concept. Good governance means different things to different societies, and the meaning of good governance needs to take cultural and structural differences into account. The international community has posited democratic governance as the only form of good governance. It overlooks alternative models and meanings of good governance. Zhou Yingnan (2016: v) points out that China offers an alternative model of good governance – the authoritarian good governance. Good governance can occur when the government has the ability and the desire to govern well,

even without democratic institutions[109]. Similarly, Brendan Howe (2018: 7) points out that the understanding of good governance is different in East Asia, where good governance means economic development and growth, as economic prosperity is regarded as "the solution for all society's ills". Promotion of one form of good governance indicates that one form of governance is superior and more "civilized" than the other. It essentially creates a hierarchy among states in the international order; it defeats the purpose of the liberal international order.

In short, R2Prev promotes democratic governance. It is one of the forms of good governance. Attaching foreign aid to the promotion of democratic governance undermines the liberal idea that all people should be able to decide their own way of life. R2Prev essentially undermines the diversity of the international society of states and recreates a hierarchy in the international order.

Conclusion

This chapter identifies human rights protection as the constitutive norm, which has a causal effect on the applied understanding of humanitarianism. Human rights protection has changed the understanding of legitimate statehood and rightful state action. Protecting a state's people from massive human rights violations that manifest in genocides, crimes against humanity and ethnic cleansing has become an integral part of legitimate statehood and a rightful state behaviour since the post-cold war era. Since human rights are general individual rights that cannot be legitimately denied to any fully developed moral beings and all human species are deemed to be fully developed moral beings, their rights cannot be violated and should be protected. It becomes legitimate to make claims and take action against those people, states and organizations that commit

[109] Zhou's (2016: 30) essential argument is that democracy is not essential for good governance. For him, good governance is understood as what a government produces, not what it looks like it or what procedure it follows. As long as government can bring peace, order and affluence to the society, it should be considered as good governance.

acts against holders of these rights. Protecting these people from harm is deemed as rightful by many Western liberal nations. This belief facilities humanitarian intervention, the establishment of the ICC and the construction of R2P, which constitute the main components of humanitarianism in the post-cold war period.

Human rights protection constitutes the humanitarian impulse in the post-cold war period. The current international order does not set out to protect individuals from states' abuse. The result is that the order is ill-equipped to respond to the massive violation of basic rights. Due to the discordance between the humanitarian impulse and the international order, the international community ends up constantly questioning the legitimacy of the intrusive form of humanitarianism because this applied understanding of humanitarianism crosses the fundamental principles of the current international order, such as the rule of law and the right to autonomy. Humanitarian intervention violates the UN Charter, which limits the use of force against another state to self-defence and pursuant to a Security Council resolution; the ICC violates the idea that consent is the sole base of observing the rules of international law; and R2Prev undermines the right to autonomy through exploiting states that are in desperate need of foreign assistance by attaching foreign assistance to political conditions. The discordance has never been resolved. An intrusive form of humanitarianism is likely to remain problematic.

This thesis has so far demonstrated that humanitarianism is conditioned and shaped by the international constitutive norms of each historical period. These norms have usually acquired the "settled status" in that period of time. Mervyn Frost defines settled norms as "principles that are widely accepted as authoritative within the society of states" (cited in Donnelly 2003: 38), and any arguments that deny the norm require special justification (cited in Mears 2001: 109). For instance, human rights, identified as the constitutive norm in this thesis, are regarded as the settled norm in the post-cold war period. Donnelly (2003: 33) explains that human rights are a settled norm because human rights treaties are widely ratified and the concept of human rights has penetrated into diplomacy and most national societies. The settled norm of human rights has shaped the development of humanitarianism and its application in the post-cold war period. The problem is that the

concept of human rights is not the sole settled norm in current international politics. Few norms have acquired settled status, including state sovereignty, non-intervention and international law (Forst 1996: 111). The notions of promoting and protecting human rights overseas are in tension with other settled norms in international politics, which reflects the controversies surrounding intervening humanitarianism.

Confucian Humanitarianism

Introduction

As noted in the previous chapter, the legitimacy of humanitarianism in the post-cold war period has been questioned because of how humanitarianism is applied by states. It is significantly different from legal humanitarianism. Alleviation of suffering and saving lives was achieved through multilateral conferences and contractual international law, methods that are well within the parameters of the international order. The international order in the post-cold war period has remained firmly anchored in the organizing principle of sovereignty and entails the rights of autonomy, the principle of sovereign equality and the rule of law, all of which are highly valued by the majority of member states. The use of force, the establishment of the ICC and the codification of P2Prev have been used to protect people from crimes against humanity and to prevent massive violations from happening in the post-cold war period. Humanitarianism in the post-cold war period has crossed into the settled norms of the current international order, raising the question of legitimacy in terms of the applied understanding of humanitarianism. The legitimacy question has open up a space for an alternative way to address massive violation of human rights. China has proposed alternative ways to address and prevent the humanitarian crises from happening. This chapter is going to look at China's response to humanitarian emergencies.

Challenging the existing interpretation of humanitarianism is possible under the current international order because of two reasons. First, the current order is highly inclusive, and diversity is tolerated. Core ideas of liberalism at the domestic level, such as "the legal equality of the individual before the law, the individual's rights to liberty and self-determination, and the inviolability of the individual's physical person" are transposed onto the international level. The state is regarded as the "individual writ large, bearing the right of sovereignty (qua individual liberty) within a putative international society" (Reus-Smit 2005b: 76). These rights include the right to autonomy, which allows people

living in that specific territory to develop their own understanding of a good life and to be free from external interference (Clapton 2009: 31). Drawing from this perspective, people in that specific territory can develop their way of responding to massive violation of people's basic rights which manifest in crimes against humanity, genocide and ethnic cleansing. Second, multilateralism is a fundamental institution of the modern international society of states. A legitimate international norm is constructed through dialogue and negotiation among the related parties, particularly states. Political actors are constantly seeking legitimacy for their preferred interpretation of norms by justifying their practices in terms of pre-existing and mutually recognized values. When actors make a claim to legitimacy claim, it is essential to sustain the legitimacy of existing interpretations of the norm. These claims to legitimacy can be contested in a process of communicative action (Reus-Smit 2007: 159). Multilateralism is a platform for actors in the international society of states upon which to stage another interpretation of humanitarianism, in which they are considered more legitimate.

In the post-cold war era, a humanitarian crisis refers to physical suffering and is generally understood as "incidents or continuing problems threatening the health, safety, security, and well-being of many, usually in a distinct geographic area" (Shiraev and Zubok 2016: 332). A conflict causing massive numbers of civilian deaths, and political and ethnic violence leading to great suffering is a humanitarian crisis. There is international consensus that the damage of these crises needs to be minimized. For instance, the GCs of 1949 limit the way that armed conflicts are conducted, which is intended to protect people who are not participating in the hostilities and to minimize harm caused by the conflict. These conventions have been universally adopted by all nations in the world. There is also a consensus that the international community needs to respond to the humanitarian crises. For instance, concerning the protection of civilians in armed conflicts, UNSC Resolution 1674 was adopted unanimously, which reaffirms "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity", and commits the UNSC to taking action to protect the civilians

in armed conflicts. Yet, there is no universal (or majority) consensus on how international political actors should address the humanitarian crises, let alone a universal legally binding agreement. It is evident that there is a dilemma as to whether a military or political solution to the conflict should be adopted and whether democratic governance or poverty-eradication can resolve the root causes of humanitarian crises. Having no consensus and agreement provides a space for political actors to advocate different solutions to the humanitarian crises.

Due to these situations mentioned above, there is room for China to propose its solution to humanitarian crises. China is not enthusiastic about the intervention form of humanitarianism. China's humanitarian policies do not correspond to the applied understanding of humanitarianism in the post-cold war period. Instead they reflect the legitimacy problem of intervening humanitarianism. China has been criticized heavily for its responses to humanitarianism. Many liberal nations see China's humanitarian policies as rejecting the notion of helping people in exceptional distress and saving lives, rather than the alternative way to help these people and to alleviate their suffering. This thesis considers that China's responses are within the parameters of the current international order, that China should not be seen as a "pariah" and that its position is not an affront to international justice. In order to understand China's humanitarian responses, it is necessary to take the constitutive norm of Chinese domestic society into account. This chapter identifies traditional Confucianism as the constitutive norm in China. Confucianism shapes the humanitarian impulse and conditions how China understands legitimate statehood and rightful state action. It essentially shapes China's view on intervening humanitarianism.

This chapter intends to explain how domestic constitutive norms shape China's view on the intervening form of humanitarianism. The argument of this chapter unfolds in a number of stages. First, it begins with the common perception of China's humanitarian policies and stresses that materialistic explanations cannot provide a comprehensive overview of China's response to humanitarian crises. Then it proceeds to argue that China is a rising power. Following its economic growth, it has been increasingly active in the

humanitarian area, but it does not embrace intervening humanitarianism. At that point, this chapter turns to Confucianism and argues that Confucianism remains relevant to contemporary China despite having faced attacks and criticism for a significant part of the twentieth century. Then this chapter identifies the key pillars of Confucianism: “ren and yi”; “proper relations”; “differentiated concerns”; and “moral persuasion”. These Confucian notions essentially shaped the Chinese understanding of legitimate statehood and rightful state action, which has conditioned Chinese understanding of humanitarian crises. Finally, this chapter argues that Confucianism has motivated China to respond to humanitarian crises, and shaped its response to military intervention, the R2Prev and the international justice system.

Material Interest of China’s Humanitarian Policies

From a neorealist perspective, the ordering principle of the current international system is anarchy; this means that there is no world government or no higher authority above the state. No central power coordinates or regulates affairs among states. This form of international structure defines international politics. The outcome of an anarchic environment is mistrust and insecurity. All sovereign states are locked in a self-help system. Each state is in pursuit of personal gain and its action depends on its own personal interests. Survival is the primary goal. The view of neorealism is that the stronger the country, the less vulnerable it is in international politics. States can only guarantee their survival by maximizing their powers relative to other. Pursuit of power makes states develop their economy. Economic might is a major criterion for security and development. Despite the idea that all states are similar functionally, their powers vary significantly. Variation in power affects how a state behaves in the system (Waltz 1979). Many scholars like Sun Yun (2014) and Zhu Zhiqun (2009) have looked at China’s foreign policy through the lens of neorealism, arguing that economic interests have been the main driver of China’s foreign policy.

Sun (2014:6) argues that China’s engagement in Africa has been heavily influenced by its economic and business interests since its reform and opening up. Foreign policy is used

as a tool to support domestic economic development. Its African policy is in favour of "mutually beneficial economic cooperation" and promotion of "service, contracts, investment and trade". Beginning in the mid-1990s, the party congress began to promote the idea of fully utilizing "the two markets – international and domestic and the resources of them" as the core guidelines of China's foreign policy. This resulted in China's "Going Out" strategy in 1996, which was endorsed by the Politburo in 2000 as a national strategy. The "Going Out" strategy has shaped China's policy in Africa. The exhaustion of domestic energy and resources has become a growing constraint on China's economic growth. Africa is rich in energy reserves, minerals and raw materials that directly match China's quest for natural resources to boost its domestic economic growth. At the same time, China considers that Africa has great potential for China's industries. China's manufacturing industries produce textiles, electronics and other products at a relatively low price, which suits the market in Africa, and China seeks to upgrade its industrial economy and move to more capital-intensive and high-tech industries to improve its development, which means that Africa is an ideal location for China's labour-intensive industries, as it has vast and untapped labour resources. Zhu (2009: 167) shares a similar view to Sun, and argues that China's foreign policy is deeply connected to the domestic situation; its policy towards the Middle East has largely been driven by its need for economic modernization. A major pillar of China's Middle Eastern policy is to secure energy to fuel domestic growth. China's economy continues to grow at a high speed, and it became an oil importer in the early 1990s. It has become increasingly thirsty for energy from abroad. The thirst for oil has made China an active player in the oil-rich Middle East. In addition to viewing the Middle East as a source of oil, China views the region in the context of its huge potential as an oil service market and as trade partners. China signed a "Framework Agreement on Economic, Trade, Investment and Technological Cooperation" with the Gulf Cooperation Council and the Council agreed to negotiate a China-Gulf Cooperation Council Free trade zone in 2004.

Much literature has highlighted that prioritization of economic interests has also translated into China's humanitarian policies. Ian Campbell et al. (2012) argues that China

cherishes the principle of non-interference and maintains that national government should be the one to address matters related to domestic political, economic and social affairs, including humanitarian crises, because the principle of non-interference serves China's economic interests. This is evidenced by China's response to recent political crises in the Central African Republic (2003), Mauritania (2008), Guinea (2008), Madagascar (2009) and Niger (2010). The hands-off approach allows China to continue to consolidate its position under the new government, which ensures that economic cooperation continues unaffected by political change. Similarly, Lum et al. (2009) argue that the central aim of Chinese aid is to secure access to natural resources, substantiating this claim with data collected from news research. They conclude that China's aid to Africa is largely driven by its objective of securing access to oil and minerals for its growing economy, as their research finds that nearly 70 per cent of China's infrastructure financing on the continent is concentrated on the oil-rich nations like Angola, Nigeria and Sudan, and these countries pay for much of their loan and assistance from China with oil. Their report also concludes that China's aid to Latin America links to its objective of gaining access to natural resources and agricultural commodities, such as oil, ores and soya beans, as well as opening up an alternative market for Chinese goods and investment. Over two-thirds of China's aid and related investment projects or offers were in natural resources sectors. This chapter does not intend to deny the role of economic interests in shaping China's humanitarian policy. Drawing from the insight of constructivism, "real-life" behaviour is more complicated and is shaped by various factors. Taking only the pursuit of economic interests into account is too one-dimensional. Economic interests (and geopolitical interests) alone do not provide sufficient justification for China's engagement with places that have little economic (and political) significance, such as the South Pacific region[110]. In order to gain a comprehensive understanding of China's humanitarian policy,

[110] China pledged to aid eight Pacific island nations at the first China-Pacific Islands Countries Economic Development and Cooperation Forum and announced US$492 million of preferential loan from 2007–09 in 2006. China also vowed to increase assistance at the second China-Pacific Islands Countries Economic Development and Cooperation Forum in 2013 and announced up to US$1 billion in concessional finance over four years. The Chinese government announced that the fund would be used to fund big productive, infrastructure and public welfare projects. (Doran et al. 2013).

it needs to take other factors into account. This chapter stresses that the state's behaviour is shaped by both material factors and ideational factors. The attention of this chapter is focused on ideational factors, particularly the domestic constitutive norm of traditional Confucianism, which has a constitutive effect on how China responds to humanitarian crises.

Economic interests alone cannot provide a satisfactory account as to China's humanitarian policies. They do not explain why China's humanitarian policies are the way they are. Miwa Hirono (2013: 209) identifies that China's humanitarian policies are state-centric, as its participation in the humanitarian project is "on the basis of a request by, and agreement with, a recipient state", and its humanitarian assistance programmes are mostly conducted at a bilateral level (government to government), rather than multilaterally or through direct channels to local organizations. For instance, in comparison with Australia and China's international humanitarian assistance to Aceh in the aftermath of the Indian Ocean tsunami in December 2004, Hirono (2011: 89) finds that the Australian government usually channelled its assistance through intergovernmental multilateral agencies such as the UN and the World Bank, and given that these organizations tended to have close ties with the civil society organization, their aid would channel to the civil society organizations through these multilateral organizations. Australia participated in the World Bank's Multi Donor Trust Fund for Aceh and Nias Recovery Assistance and maintained a close relationship with the Aceh Provincial government's Agency for Rehabilitation and Reconstruction (hereinafter BBR) in post-disaster assistance. Meanwhile, China has taken a bilateral approach to coordination and project implementation processes. It formed a close relationship with BBR, but not a less close one with the UN agencies with respect to coordination, demonstrated by its limited funding towards multilateral agencies. Of its US$65.3 million of funding, only 8 million was allocated to the UN Children Fund, World Health Organization and the UN Population Fund. At the same time, Hirono (2013) points out that another characteristic of China's humanitarian policy is an infrastructure based-approach. China normally commits to the building of large-scale infrastructure, including road, hospitals, schools and airports.

These projects intend to aid economic development. This is different from the "inclusive and comprehensive approach to development" which is advocated by The Organization for Economic Co-operation and Development (herein after OECD). The OECD's approach emphasizes the political dimension of the development which addresses issues such as corruption, good governance and inequality. Even if the ability to gain access to natural resources and the market motivates China's humanitarian policy, economic interests alone cannot explain the way in which China addresses the humanitarian crises. There are multiple ways to resolve humanitarian crises and prevent them from happening. Preference is formed by the prevailing constitutive norm at the domestic level as domestic constitutive norm shapes the actor's perception of which policy is ethical and practical. That is to say, it is important to take ideational factors into account in order to understand China's humanitarian policies.

The previous chapters have demonstrated that constitutive norms can shape an actor's behaviour. For instance, the constitutive norm of human rights has shaped how humanitarianism is applied in the post-cold war period by redefining the understanding of legitimate statehood and rightful state's action. The new understanding of sovereignty facilitates the intervening form of humanitarianism, as it gives legitimacy to humanitarian intervention, has a constitutive effect on the codification of the Rome Statute and gives rise to the new idea of responsibility to protect. Following the holistic constructive approach, this chapter argues that Confucianism as the constitutive norm in Chinese society shapes how China understands legitimate statehood and rightful state behaviours, which have a constitutive effect on how China views intervening humanitarianism. However, this chapter does not claim that Confucianism is the sole ideational factor that shapes China's view on post-cold war humanitarianism. Other ideational factors such as China's historical experiences in the nineteenth and significant part of the twentieth centuries and Marxism also play a role in its view on intervening humanitarianism[111]. Not

[111] Mordechai Chaziza and Ogen Goldman (2014) point out that China's reluctance to support any intervention stems from its historical experiences at the hands of Western powers, which fostered an acute sensitivity to coercion by Western powers and an empathy with other nations that attempted to resist Western pressure. Ren Mu (2013: 31–2) shares a similar view. He argues that China's history matters in

agreeing with the intervening approach does not mean that China rejects the notion of humanitarianism – alleviating suffering and saving lives. Despite not being supportive of the intervening form of humanitarianism, China has increasingly engaged in the humanitarian realm, by providing foreign aid, supporting UN peacekeeping missions and mediating armed conflicts. This indicates that China takes a different approach when addressing humanitarian crises, one that does not correspond to the intervening form of humanitarianism. The claim that China rejects the notion of humanitarianism has no ground. China's humanitarian policies reflect its own moral and political ideals.

Engaging in Humanitarian Areas

Historically, core states had more influence in producing, reproducing and shaping principles and norms at the international level, and their domestic constitutive norms were more likely to infiltrate the international level, which is evident from the history of humanitarianism. Western powers and their ideas have played a significant role in shaping the applied understanding of humanitarianism and its history. The current international system is facing a systemic change – a shift towards a more multipolar world[112]. The rise of non-Western powers, like the BRICS countries in international politics[113], has led to these nations becoming more engaged in humanitarian affairs.

shaping its view of the international order and legitimacy. China's insistence on the notion of non-interference is derived from its historical experience. The legacy of history, particularly the exploitation by more economically developed nations in "the century of humiliation" has profoundly affected political thinking in China, which shaped its attitude towards non-interference. As for Marxism, Miwa Hirono (2013: 208) claims that Marxism has shaped the Chinese perception of humanitarianism, particularly in the early Communist period. Humanitarianism was perceived as "a tool of the bourgeoisie used hypocritically to blur class distinction and to cover up capitalism's merciless exploitation and oppression, to deceive the proletariat and the working people". The concept of humanitarianism has usually been connected to European and US imperialism. It resulted in China's refusal to attach political conditionalities like democratic governance to its international assistance, which contradicts the Western interpretation of R2Prev.

[112] Reus-Smit (2013a: 199) defines systemic change as a change that "occurs within a system, and is generally thought to involve a shift in polarity, from multipolarity to bipolarity, or bipolarity to unipolarity".

[113] Wang Zaibang (2009) observes that the domination by Western countries in the international order will gradually decline in the future. The world will become multipolar. The share of world GDP of the G7 countries had declined from around 65% in 1990 to around 45% in 2010, and this 20% share has shifted to developing countries like China and India (Wang 2017). According to *The World in 2050*, PricewaterhouseCoopers (2017) estimates that the G7's share of world GDP will continue to decline. Its

These countries have raised their concerns or even challenged the existing practices and principles of humanitarianism. This is not only because the legitimacy of intervening humanitarianism is questionable, but also because each nation has its own culture to which attaches different moral and political ideals that would shape their view on the current interpretation of humanitarianism.

China is a rising power. The rise began with China's opening up to the world in 1978. The material power of China has also been on the rise. China has experienced tremendous economic growth since its adoption of the "open-door policy". The Chinese economy was growing at an average of almost 10 per cent for three decades, three times the global average (Wearden 2010). Despite the slowdown since 2012, the annual average economic growth rate of China has been around 7 per cent, which remains significantly higher than the world average level of 2.5% (Zhang 2017). China moved from being one of the poorest countries in the world in the 1960s and 1970s to overtake Japan as the world's second largest economy in 2011 (BBC 2011). It is expected to become the largest economy in 2032 (O'Brien 2017). In addition to the economy, China's military budget has increased significantly. China's defence budget has had a close to double-digit increase almost every year since the early 1990s. The defence budget was US$175 billion in 2018 (Global Security 2018) and it is the second largest defence budget in the world behind the US (Financial Times 2018). As a result, China's military moderation and its projection capability have improved. With its increase in economic and military power, China is gaining confidence. The proof of this confidence came during the 19th National Congress of the Chinese Communist Party in 2017 when Chinese President Xi JingPing announced that China's goal to become a global leader in terms of international influence by 2049 (Xi 2017). It is becoming more assertive, which is reflected in its responses to humanitarian crises.

Following its growing economic and political power, China has also been increasingly active in humanitarian areas. For instance, it shied away from supporting all peacekeeping

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share would be just over 20% while the E7 (including Brazil, China, India, Indonesia, Mexico, Russia and Turkey) would comprise almost 50% of the world GDP by 2050.

missions including refusing to contribute to the peace budget in its early years in the UNSC, but there has been a real sea change in China's policy towards UN peacekeeping missions since the early 1990s. China's first group of peacekeepers was dispatched to serve in the UN Truce Supervision Organization in 1990, which monitors and reports violations of ceasefire agreements in the Middle East. Since then, China has been increasingly active in participating in UN peacekeeping operations. As of December 2015, China had 3,045 peacekeepers, including troops, UN Military Experts on Mission and police officers, in ten of the 16 ongoing UN peacekeeping operations. In addition to these personnel, China has increased its financial contribution. Its share of the UN peacekeeping budget increased from less than 1 per cent in 2000 to 10.5 percent in 2016 (Taylor 2008: 6; Ling 2007: 47; and He 2016: 20). As well as peacekeeping, China is also becoming a bigger player in humanitarian aid and emergency relief. China started to provide economic and other forms of assistance to other developing countries in the 1950s despite the economic difficulties at home. Following the growth in China's economy, China's annual aid figure had risen from USD 1.7 billion in 2001 to USD 189.3 billion in 2011 (Wolf 2013), averaging 29.4 per cent growth from 2004 to 2009 (Adugna et al., 2011: 48). However, increasing participation in humanitarian areas does not mean that China has embraced the notion of intervening humanitarianism.

China, in general, disagrees with the post-cold war humanitarianism. To be more specific, China holds reservations about military intervention and it has been quite constant in this position. In the case of Bosnia, China abstained from the vote on Resolution 770 which called on all member states to "take nationally or through regional agencies or arrangements all measures necessary", including the use of force, to facilitate the delivery of humanitarian assistance and supplies to Sarajevo and other parts of Bosnia and Herzegovina. Despite endorsing the objective, China disagreed with the notion of authorization of force to fulfil the mandate (Davis 2011: 240). In the case of Kosovo, China stated clearly that NATO's threats of military action constituted an unlawful interference in the internal affairs of the Former Republic of Yugoslavia and condemned NATO for

acting without consulting and seeking authorization from the UNSC, stating that NATO's action "violated the purposes, principles and relevant provisions of the United Nations Charter, as well as international law and widely acknowledged norms governing relations between States" (Davis 2011: 248). In the recent case of Syria, China also rejected the use of force to stop the violence between government forces and rebels. China's deputy permanent representative to the UN Wang Min was explicit about China's opposition to external armed intervention or forcing a "regime change" in Syria"; it would exercise its veto power and block any move towards military intervention in the UNSC (Chang 2013). As for R2Prev, China has been supportive of the notion, but it insists that any humanitarian aid and assistance should not have political conditionalities attached. It has been very critical about this, because it regards political conditionalities as an interference in domestic affairs. Therefore, China's Foreign Aid White Papers of 2011 and 2014 made clear that China adheres to the principle of not imposing any political conditions on recipient countries. Instead of political and structural reform, China's aid programmes focus on infrastructural, economic, educational and agricultural developments, which address the immediate needs of the population. As for the ICC, China does not oppose the establishment of an international court. China actively engaged in the negotiation process and provided specific suggestions on various legal issues, including jurisdiction of the court, definition of crimes and criminal responsibility of legal person and superiors, some of which were subsequently incorporated into the Rome Statute (Jia 2006; Xue 2014). Despite being supportive, China did not become a signatory to the Rome Statute. The Chinese government has declared a number of times that "China is not a party to the Rome Statute of the International Criminal Court … But we support an independent, just, efficient and universal international criminal court, so as to punish grave international crimes" (Permanent Mission of the People's Republic of China to the UN 2004).

Drawing from the insight of the constructivist approach, which places emphasis on how intersubjective ideas, including cultural legacy, affect actors' views and behaviour, this chapter argues that the domestic constitutive norm has shaped how China views and

responds to intervening humanitarianism. Traditional Confucianism is identified as the constitutive norm in China and its moral and political ideals remain significant to Chinese society. The following pages will outline some key ideas of traditional Confucianism and explain how Confucian ideas shape China's view on intervening humanitarianism.

Confucianism in Modern China

Confucianism had a turbulent time in the twentieth century. The Confucian teachings have been at the core of Chinese culture. These teachings have penetrated all levels of social life and shaped the standards for family, community and political behaviours. Confucianism has been a predominant ideology in China for almost two millennia since Emperor Wu of the Han Dynasty, who ruled 141–87 BC, decided to turn Confucianism into a state ideology (Hu 2007: 136). However, the twentieth century was a bad century for Confucianism, because its moral code and political ideology have been scapegoated as the reason for the country's backwardness, its failed modernization and its inability to respond to the challenges presented by the West. The civil service examination, which was based on the Confucian classics and recognized commentaries and existed as a way to propagate the Confucian worldview, ethics and values throughout society, was abandoned in 1905. The abandonment was an attempt to modernize China and reflected the decline of Confucianism in imperial China.

Following the collapse of the Qing dynasty, the influence of Confucianism continued to wane. In the era of the republic, Confucianism was in retreat. It became a subject that was heavily criticized in social movements as it represented tradition and was regarded as a repression of every aspect of society, including political, social and individual development. The New Cultural Movement of the mid-1910s and 1920s, the anti-Confucianism movement, sought to modernize China by bringing fundamental changes to Chinese society, such as the promotion and the adoption of Western political ideals. Chen DuXiu, one of the key leaders of the movement, believed that Confucianism addressed primary moral issues and could not address issues that China was facing such

as backwardness. Therefore, for him, Confucianism had little relevance to China's situation, and he called for a complete westernization of the country (Miller 2010). The May Fourth Movement of 1919, which was sparked by the government's weak response to the Paris Peace Conference that allowed Japan to take over Shandong province after the surrender of Germany in the First World War, continued to attack Confucianism. Students blamed Confucianism for obstructing individual freedom and causing China's weakness. Confucianism was regarded as the root of all China's problems. They advocated "smash[ing] the Confucian shop" and to "abandon[ing] the uncrowned king", and replacing Confucianism with democracy and scientific knowledge, in Chen DuXiu's words Mr. D and Mr. S (Miller 2010).

In addition, Confucianism as the state ideology came to an end in the era of the republic. The nationalist government adopted the "the three principles of the people" (*sanmin zhuyi* in Chinese) as state ideology. The three principles consist of "democracy" (*minquan* in Chinese), "nationality" (*minzu* in Chinese) and "people's welfare" (*minsheng* in Chinese). Although the concept has been heavily influenced by Western thought and ideas, the concept in part can be perceived as a continuation of Confucian values. Wang EnBao and Regina Titunik (2000: 77) observe that the principle of "minsheng" is a manifestation of Mencius's notion of "minben" (i.e. people as the foundation of the country). The concept of "minben" is associated with Mencius's interpretation of the duty of the ruler, which is to ensure there are provisions such as food and clothes for his people. The principle of people's welfare reflects the Confucian notion of duty of government, showing that Confucian idea of government remained rooted in Chinese society in the early twentieth century despite the criticism.

Mao was committed to removing Confucian influence from China. For Mao, Confucianism served "as the ideology of the exploitative class" as it supported social and political hierarchies which allowed one class to exploit other classes; and Confucianism also stressed "the notion of social harmony" which contradicted the Marxist idea of class struggle (Hu 2007: 142). The Communist heavily suppressed and condemned Confucianism. Anti-Confucianism reached its peak during the Cultural Revolution (1966–

76), which aimed to eradicate four "olds" (i.e. old ideas, old culture, old customs and old habits), and Confucianism was at the centre of the four olds. For Mao's supporters, Confucianism needed to be eliminated. The Red Guards raided the three Kong sites, namely the Confucius Temple, the Confucius Mansion and the Confucius Cemetery at the birthplace of Confucius, and then later attacked Mencius's tomb. The Confucian classics such as the analects and the book of Mencius were banned as these were regarded as reactionary heresy. The Confucian intellectuals were also persecuted and publicly humiliated (Zhou 2013). Mao launched another "Anti-Confucius Campaign" in 1974, which attempted "to make the Chinese people break completely with the past, to throw out the cultural heritage of China entirely" (Chen 1975). The enthusiastic attacks on Confucianism in Mao's era led authors like Joseph Levenson to believe that Confucianism was "ready for history" and could be "museumified" (Levenson 1962: 18).

Admittedly, the privileged status of Confucianism in China has suffered several major blows since the turn of the twentieth century. However, Levenson's comment on Confucianism was premature, because Confucianism is still deeply embedded into Chinese moral values and political ideals and thus cannot be easily and totally dislodged. Confucianism did not die out in China. Confucian values and ethics implicitly influence every corner of Chinese life. For instance, Daniel Bell (2008: 25) observes that Confucian values inform family ethics. Filial piety, for example, is still widely practised and endorsed in Chinese society. Few in Chinese society would object to the idea that adult children have an obligation to look after and spend time with elderly parents. Douglas Almond et al. (2010) argue that the son-preference in China is because of Confucianism, as Confucian values stress the importance of continuing the family line. Mencius states: "there are three forms of unfilial conduct, of which the worst is to have no descendants to continue the family line" (Mengzi IV A 26). Despite Mao's proclamation of "Women Hold up Half the Sky" in the Cultural Revolution, the patriarchal tradition remains rooted in Chinese society.

In addition to everyday life, Confucian values had shaped modern Chinese politics. This influence started from the very beginning of the establishment of the Chinese Communist

party. Marxism ideologies were re-cast into Confucian templates. Mao was clear that "we can put Marxism into practice only when it is integrated with the specific characteristics of our country and acquires a definite national form", and the "foreign stereotype of Marxism isolated from China's reality must be replaced by the fresh, lively Chinese style and spirit which the common people of China love" (cited in Gong 1989: 364). No other style and spirit in China could be more Chinese than Confucianism, as it moulded Chinese society throughout the long course of history (Gong 1989). Mao's version of political legitimacy is highly similar to Mencius's ideas. Mao stressed the importance of peasant support in establishing political legitimacy; this view is quite different from that of Marx, who regarded support from the urban proletariat as key. But Mao's view is rather similar to that of Mencius, who emphasized peasantry as a decisive political force (Perry 2008: 9–11). In the post-Mao era, Confucianism has continued to influence Chinese Communism, particularly the understanding of legitimate statehood and rightful state behaviour, which will be discussed later in this chapter.

Key Ideas of Classical Confucianism

Confucianism was developed in the late Zhou dynasty, during what is known as the Spring and Autumn Period and the Warring States Period. In that period, the king became only a symbolic figure and the feudal lords ruled like kings within their own territories. Ancient China was split de facto into a number of city-state kingdoms. The old order established by the Zhou dynasty fell apart, leaving China in chaos. Many thinkers tried to find a way to restore order in society, proposing a wide range of ideas. Confucianism was one of the most prominent schools of thought. Other schools included Legalism[114], Daoism[115] and

[114] Legalism (Fa jia 法家) stresses the importance of law in the governing of the state, rewarding people that obey the law and punishing those who disobey it. This school of thought was founded upon the ideas formulated by Xunzi, who assumed that human beings are evil, greedy and self-interested by nature. Therefore, government could only guide its people through law. The idea of government by law contrasts with Confucianism, which emphasizes morality (Yao 2000: 70).

[115] Daoism (Dao jia 道家) focuses on non-activity (wu wei 無為) and proposes that "all social conventions and institutions must be abolished in order to have a peaceful and harmonious life." (Yao 2000: 68). According to Lao Zi (老子), writer of Dao Dejing (道德經), chaos is caused by the things being done, not by

Mohism [116] . Teachings of Confucius and Mencius constituted the foundation of Confucianisms. Other than classical Confucianism, which is based on the teachings of Confucius and Mencius, various schools of Confucianism emerged in the past two millennia, such as neo-Confucianism, which arose in the Song and Ming dynasties, and New Confucianism in the twentieth century. This chapter focuses on classical Confucianism for three reasons. First of all, neo-Confucianism focused on developing the metaphysical and epistemological aspects of classical Confucianism and developing theories on the nature of the cosmos, which Confucius and Mencius never did; its core understanding of legitimate statehood and rightful state action did not depart from classical Confucianism (Zhang 2015). Second, new Confucianism is heavily influenced by Mencius's teachings. It attempts to demonstrate that classical Confucian values, particularly the teachings of Mencius, are compatible with modern Western values such as human rights, democracy and modernity, and can enrich Western philosophy (Goldin 2017). New Confucianism follows closely Mencius's view on how the government should operate and its duties. Third, a practical reason lies behind the use of Confucian and Mencian teachings to help understand China's view on the international humanitarian order. The Chinese government has constantly drawn on Confucius's and Mencius's words in explaining its perspective[117]. Therefore, this chapter posits that it is appropriate to draw from classical Confucianism in order to understand China's humanitarian practices. The following pages will first lay out the key ideas of classical Confucianism, which are "ren and yi"; "proper relations"; "differentiated concern"; and "moral

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the things that have not yet been done. Therefore, wise kings would govern through inaction. (Fung 1966: 102).

[116] Mohism (Mo jia 墨家) argues that the government should be run by capable people regardless of their social background. According to this school of thought, disorder in society comes from confusion of the standards of right and wrong. The unification of this standard becomes the reason for the existence of the state and its main function. If there is more than one standard, the state of nature will return, which will bring back chaos and disorder. To avoid that disorder, absolute obedience is required. Mohism also emphasized the concept of universal love, which is different from the Confucian idea of graded love (Fung 1966: 59).

[117] According to research conducted by a Chinese media in 2015, Chinese president Xi Jinping delivered 42 important speeches between 2012 and 2014, he cited the Book of Analects 36 times, the Book of Mencius 10 times; the Book of Rite 5 times (China Times 2015).

persuasion". These ideas shape the Chinese understanding of legitimate statehood and rightful state action as well as inform China's humanitarian policies.

-- Ren and Yi

"Ren" ("benevolence" in English) is the central moral value in Confucianism. Confucius placed a high value upon "ren". As he said: "for Gentlemen of purpose and men of benevolence while it is inconceivable that they should seek to stay alive at the expense of benevolence, it may happen that they have to accept death in order to have benevolence accomplished" (Analects XV 9). Despite the importance of "ren" in Confucius's moral philosophy, he does not give a clear definition of it (Guo 2002: 5), only explaining the way to achieve it. In one occasion, when Yen Yuan, one of Confucius's disciples, asked him about "ren", he replied that it meant the "return to the observance of the li" (Analects XII 1)[118] . "Li" ("rite" in English) is a set of socially agreed rules and behaviour. People with "ren" will not behave in a way that contradicts "li"[119]. On another occasion, Confucius said that "ren" can be achieved by helping others, stating that "a benevolent man helps others to take their stand in so far as he himself wishes to take his stand, and gets there in so far as he himself wishes to get there" (Analects VI 30). According to Confucius, "ren" can also be achieved through practising gravity, generosity of soul, sincerity, earnestness, and kindness (Analects XVII 6). These passages point to the idea that "ren" under Confucius has no concrete definition; it is a general moral concept. As Luo Shirong (2012) says, for Confucius, "ren" is "a general virtue in the sense that it includes many constituent virtues".

Mencius, also known as the second sage of Confucianism, built on Confucius's understanding of "ren" and elaborated on the concept. Confucius is ambiguous about human nature, but Mencius begins by connecting human nature to virtues. Mencius believes in the goodness of human nature. In the debate between Mencius and Gaozi,

[118] The English translations of *The Analects of Confucius* (*Lunyu*) are adopted from *Confucius: the Analects*, trans. D.C. Lau, with some modifications (New York, 1979).

[119] As Confucius said, "people should not look, listen, speak or move (do) in a way that is contrary to li" (Analects XII 1).

Mencius asserted that "there are no men innately bad, just as there is no water that does not flow down" (Mengzi VI A 2). Innate goodness is possessed by all men, because the feeling of compassion belongs to all men; so does that of shame and dislike; and that of courtesy and modesty; and that of distinguishing right from wrong (Mengzi VI A 6). Without these feelings, one is not human (Mengzi II A 6). These feelings are the origin of the four virtues, ren, yi[120], li, and zhi[121] (Mengzi II A 6). Out of the four virtues, Mencius, like Confucius, highlights "ren". As Chen Chun says, "if one can practise ren, all virtues will follow (cited in Liu 2003: 275). Mencius believes that "ren" begins with compassion. However, there is a gap between compassion and "ren". To bridge the gap, one must act with compassion towards others. Only through acting and practising, can the feeling of compassion be properly nourished and turn into "ren". This method applies to the relations between other origins and virtues.

"Yi" is another important virtue in Confucianism. "Yi" is "the capacity to act correctly in all the complex circumstances of … human life" (Schwartz 1985: 264). It is an ability to do what is right and good in a difficult situation. There are two different interpretations of the relations between "ren" and "yi". The unconventional interpretation is that "ren" and "yi" are not related. Dong Zhongshu (2007), a Confucian scholar from the Han Dynasty (around 2nd century BC), highlights the difference between "ren" and "yi", stressing that "benevolent (ren) to others and righteous (yi) to oneself". Modern-day Confucian scholars like Shun KwongLoi also see "ren" and "yi" as two distinctive concepts. Like Dong, Shun posits that "ren" emphasizes "an affective concern for others both not wanting to harm others … and not being able to bear the suffering of others", while "yi" stresses "a strictness with oneself, a commitment to abide by certain ethical standards that involves both not acquiring things by improper means and not accepting others improper treatment of oneself" (cited in Liu 2003: 272). This interpretation has been challenged. This chapter puts forward the view that seeing "ren" and "yi" as two separate notions overlooks Mencius's central argument, which highlights that the proper path to pursuing

[120] Yi can be translated into English as righteousness.
[121] Zhi can be translated into English as wisdom.

“ren” is “yi” (Mengzi VI A 11). That is to say, “ren” and “yi” are interlocked with each other. This interrelated relationship between “ren” and “yi” has been generally accepted. Liu Xiusheng (2003: 273) states that “yi is the medium between ren and the practice of ren”. The practice of ren would require making moral judgements and deciding what is right and the best course of action for that specific situation. “Yi” is the moral judgement that allows “ren” to be applied to specific cases.

Confucian ideas of “ren” and “yi” serve as the foundation for Chinese ethics. “Ren” motivates people to help others in need or at risk, because people with “ren” could not bear to see suffering. In Mencius’s famous passage, he said:

> suppose someone suddenly saw a child about to fall into a well, everyone in such a situation would have a feeling of alarm and compassion – not because of one sought to get in good with the child’s parents, not because one wanted fame among their neighbours and friends, and not because one would dislike the sound of the child’s cries. (Mengzi II A 6)

It is compassion that motivates people to help this child that almost fell into the well. This compassion can extend to the entire populace and beyond the borders. “yi” determines the best course of action in order to achieve the overall interests of the society. For Mencius, the right action is not the action that maximizes overall profit, but the action that helps to achieve “ren” by exercising compassion. It is important to note that Mencius, or Confucius, never say that it is wrong or bad to profit; he only believes that benevolence and righteousness have a higher value than material profit (Van Norden 1997). “Ren” and “yi” motivate and constitute the moral justification for China to carry out humanitarian actions.

-- Proper Relations

A proper human relation is another important pillar of Confucianism, as it is the key to harmonizing society and maintaining social order. According to Confucianism, humans are fundamentally social and relational beings. Confucius said: “it is impossible to associate

with birds and beasts, as if they were the same with us. If I associate not with these people – with mankind – with whom shall I associate?" (Analects XVIII 6). Mencius identified Wulun (five fundamental relations in English) present in regulating human relations: sovereign and subjects; parents and son; husband and wife; older brother and younger brothers; and friend and friend. Among these five relations, three of them belong to the familial relations. However, as Joseph Chan (2008: 64) observes, although the relationships between sovereign and subjects and those between friends are not familial, they are conceived in analogous familial terms. The relationship between sovereign and subjects is parallel to that between father and son, while the relationship between friends is equivalent to that between younger and older brothers. These parallel relations demonstrate the importance of family, serving as a prototype of a larger social organization. In Chan's words (2008: 64), "society is the family writ large". More importantly, all interpersonal relations are arranged on a superior-inferior basis. The power and the right to rule belongs to the superior one. Thus, the father is more powerful than the son and older people take precedence over younger people. In other words, human relations in the Confucian social system are unequal. Although each person is expected to obey and respect their superiors, that obedience does not translate into domination and unconditional subordination. The superiors also have certain obligations towards the inferior ones and should not abuse their authority. Ranna Mitter (2003: 210) points out that those who have the privilege of being at the top of the hierarchy are not permitted to abuse their superior position with impunity and are required to exercise it reasonably. For example, Confucius states that the sovereign should treat his ministers in accordance with rite and in return ministers should serve the prince with faithfulness (Analects III 19). In other words, relations within the Confucian social system are reciprocal. All members of society are expected to perform their duties respectfully without overstepping the boundaries. These clearly defined relations create mutual expectations and obligations that regulate people's behaviours.

Within the hierarchical Confucian system, each member is required to act according to their respective roles. This expectation is expressed by Confucius: “let ruler be a ruler; minister a minister; father a father; son a son” (Analects XII 11). Mencius shares the same view, stressing that “if one wishes to be a ruler; one must fulfil the duties proper to a ruler; if one wishes to be a subject, one must fulfil the duties proper to a subject” (Mengzi IV A 2). Only when people act according to their role in society can social order be maintained and social harmony achieved. The relationship between sovereign and subjects indicates the duties of government towards the general population. According to Mencius, the ruler is appointed by Heaven and has a superior position in society; however, whether the ruler remains in power depends on the people, as “heaven sees with the eyes of its people. Heaven hears with the ears of its people” (Mengzi V A 5). To gain the support of Heaven and the people, the ruler has to put people’s welfare first. Mencius famously said that “the people are of supreme importance; the altar to the gods of earth and grain come next; last comes the ruler” (Mengzi VIII B 14) and “the business of the people must be attended to without delay” (Mengzi III A 3). Therefore, Mencius suggested that kings should implement “proper policies”, which include: “do not interfere with the busy seasons in the fields; then there will be more grain than people can eat”; “do not allow net with too fine a mesh to be used in larger ponds then there will be more fish and turtles than they can eat”; and “only allow hatchets and axes in the forests on the hills in the proper seasons, then there will be more timber than they can use”. (Mengzi I A 3). At the same time, Mencius also believed that a true king should take care of vulnerable group of people, including old men without wives, old women without husbands, old people without children and young children without parents (Mengzi I B: 5). All these benevolent policies would ensure people’s basic livelihoods. It informs the Chinese understanding of legitimate statehood and rightful state behaviour, placing the importance on economic development and people’s livelihoods. Such understandings remain significant in modern China.

-- Differentiated Concern

Another pillar of Confucianism is the notion of "differentiated concern". "Ren" is "to love all humans" (Analects XII 2) and starts with familial relations. For Confucianism, family is the most basic unit in society; it is the most important set of relations in a society. All human relations begin in the family. As Bai TongDong (2013: 185) explains, family is "the first step to go beyond one's personal self and toward others". Therefore, family is a crucial place in which to learn human relations. Learning how to behave in familial relations prepares young people to navigate relations in a society. Confucius's disciple Youzi argued that family relations have an impact on an individual's social behaviour. In his words, "they are few who, being filial and fraternal, are fond of offending against their superiors. There have been none, who, not liking to offend against their superiors, have been fond of stirring up confusion" (Analects I 2). In addition, family is also a place to cultivate "ren". Affection for one's own family is natural because of the natural bond. According to Mencius, "children carried in the arms all know to love their parents, and when they are grown a little, they all know to love their elder brothers" (Meng VII A 15). Admittedly, "ren" cannot simply rest on the concern for one's family. However, Confucianism regards affection towards one's own family as the first step of the development of "ren". This type of affection can extend to people who do not share the same blood ties. It can extend from family to community, from community to society, from society to state and from state to the world at large. To become one with the quality of ren, Mencius told people to "begin with what they love and proceed to what they are not required to love" (Mengzi VII B 1). Such affection to all people will then become "ren" (Tang 2015: 24). This occurs in the sense that a concern for other people's well-being can extend to all humans, regardless of who they are, where they come from and what their background is. In other words, help can be provided to all people in need.

To achieve "ren", affection needs to transcend the natural bond and extend to the wider community, the whole society and eventually the world. Affection should be extended to strangers because of the belief in natural equality. Confucius suggests that "by nature,

men are nearly alike" (Analects XVII 2). All men are alike, because all humans are born with four feelings: compassion; shame and dislike; courtesy and modesty; and right and wrong. All humans have the ability to develop these feelings and turn these feelings into "ren", "yi", "li" and "zhi" through practice and education (Mengzi II A 6). As long as one maintains this cultivation, one can become *junzi* ("people with high morality" in English). In Mencius's words, all men can be Yao and Shun (Mengzi VI B: 2)[122], model sage-kings who are glorified because of their virtues. At the same time, all people, regardless of their background, can lose these feelings when they do not practise this cultivation properly. That is to say, all men are equal because all individuals are endowed with innate goodness, which allows them the possibility of transforming into a sage, and everyone needs to cultivate these feelings in order to become *junzi*. Since the potential for moral development is the same despite social differences, all humans should be treated with "ren" and "yi".

Confucianism stresses the natural equality of everyone, and while "ren" can extend to everyone without outer limits, it is not an equal affection. It is "love with distinction and care with gradation" (Fan 2010: 31). In Confucian terms, this is called "differentiated concern" (or graded love). Differentiated concern is "the doctrine that one has a stronger moral obligation towards and should have stronger emotional attachment to those who are bound to oneself by ties such as community, friendship, and especially kinship" (Van Norden 2009: xviii). It requires individuals first to love and care for their parents and their own family members, and then extend this care and love to others according to the closeness of their relations (Doh 2012: 182). Love and care become weaker and weaker when they pass from family members to strangers. In other words, the amount of help depends on the closeness of the relationship. From the Confucian perspective, showing the same degree of affection towards strangers as towards those closer to oneself is unnatural. This view is clearly demonstrated in Mencius's criticism of Mozi's idea of love without discrimination. According to Mozi, love means showing equal affection to

[122] Yao and Shun were ancient Emperors of China. Shun was Yao's successor.

everyone and leaving familial bonds aside (Bloom 2011: 65). Mencius saw Mozi as a "non-human being", and said that "to love all equally does not acknowledge the peculiar affection due to a father … (is) in the state of a beast" (Mengzi III B 9). The differentiated concern informs how China should respond to humanitarian crises.

-- Moral Persuasion

Harmony is the "highest ideals for Confucianism as a whole" (Li 2006: 588). Drawing from ZhongYong, a Confucian Classic[123], Li ChenYang (2006: 588) explains that "without harmony, heaven would be out of their proper places, and nothing in the world would be able to flourish". Harmony can take place at various levels. It can occur between individuals at the level of family, the community, the nation and the world. It may also take place between societies and within a society with different ethnic groups or political parties. Harmony can also take place with the same ethnic group with different kin and the same political party with different political tribes (Li 2006: 588). The list is endless. Despite stressing the importance of harmony, Confucianism also recognizes that conflicts are unavoidable in the real world. The question is how human beings should settle the disputes. From the perspective of Confucianism, disputes should be settled in a non-coercive manner.

Confucianism upholds that moral persuasion, not coercion, is the best way to achieve harmony and settle disputes because moral persuasion is an attempt to change people's minds. Minds can be changed because, Confucianism believes, people are inherently good; they have "the rational and moral capacity to reflect on what they have done and to change their minds about themselves and about others after listening to others' view" (Chen 2003: 280). People's desire can be altered and be subject to moral and rational control. People can be persuaded to overcome their selfishness (Doh 2011: 401). Force and punishment are regarded as ineffective means to bring about change. According to

[123] ZhongYong states: "Centrality is the great foundation under heaven, and harmony is the great way under heaven. In achieving centrality and harmony, heaven and Earth maintain their appropriate positions, and the myriad thing flourish" (cited in Li 2006: 588).

Confucius, “a heavy handed approach that employs harsh coercive force may produce, at best, some short term gain, but it is short sighted and can be ineffective and dangerous in the long run”, and “physical force and punishment may stop people from doing wrong temporarily, they will not eradicate evil … it may even lead to more resentment and hatred on the part of the punished, which may in turn incite revenge” (Li 2012: 105). This is because the coercive approach cannot get to people’s hearts. The way to reach people is through persuasion (Mengzi IV A 9). Moral persuasion is the best possible way to achieve harmony and peace in society; force would only further damage the fragile situation. Such view has informed how China handles armed conflicts.

Chinese Understanding of Legitimate Statehood and Rightful State Action

Drawing from Aristotle, Reus-Smit (1999: 31) argues that every political association is formed with a view to achieving some good purpose, and these purposes are moral as they entail a conception of the individual and social good. State is a political association. Like other political associations, it is formed for a purpose. The culture and history of a country informs the understanding of the individual and social good. These understandings can be changed and vary from one country to another and from one historical period to another. For instance, Reus-Smit (1999: 123) suggests that the purpose of a state in absolutist Europe was to maintain the divinely ordained social order, while the purpose of modern liberal states is to realize the augmentation of individuals’ purpose and potentialities. This chapter argues that Confucianism has informed the Chinese understanding of the purpose of a state.

Confucianism does not agree with the modern liberal idea that the purpose of a state is to help individuals to realize individuals’ purpose and potentialities by allowing them to cultivate a social, economic and political order that enables such individuals to engage in self-directed pursuit of their interests. Confucianism does not believe that all individuals are suitable for participating in governing and making political decisions. From the Confucian perspective, only a few people have the required moral and intellectual capabilities, despite the notion that all people are morally equal. The impacts of political

decisions and policies are enormous; therefore, Confucians endorse the concept of meritocracy (Bai 2017). The prominent theme of Confucianism is to maintain social harmony, which can be achieved when all members of the society know his or her place in the social order and play his or her part well. However, the Confucian understanding of legitimate statehood is similar to that of the post-cold war understanding. As stressed in previous chapter, the post-war understanding of legitimate statehood places the emphasis on securing people from the threat of massive violations of people's basic rights, including right to food, right to life and right to security. From a Confucian perspective, the fundamental purpose of a ruler (or a government) is to provide all people's immediate material needs such as food, shelter and security. Only when people's material needs are satisfied can social harmony be achieved. Then, the state (or ruling party) will have the people's support and legitimacy. This Confucian notion has heavily shaped Chinese political leaders' understanding of legitimate statehood and rightful state action in the modern time, which is reflected in a series of government policies.

A series of Chinese political leaders in the post-Mao era have attached legitimate statehood to bringing socio-economic development to a society. Achieving economic prosperity and a better livelihood have become the overarching purpose of the Chinese state. XiaoKang society ("moderate prosperous society" in English) was proposed by Deng XiaoPing and drew from one of the classical Confucian classics – the *Book of LiJi*. The book calls for the building of a society with moderate wealth (LiJi VII: 2), allowing everyone economic comfort. From a Confucian perspective, XiaoKang society is not a perfect society, but it is an important step towards the perfect society – the great harmony (LiJi VII: 1). At the same time, focusing on economic development, rather than political struggles, which was the case in Mao's era, mirrors Mencius's idea of good governance. For Mencius, a country should seek economic development better the life of its people (Mengzi I A: 3). In 1980, Deng gave a concrete meaning to XiaoKang: to achieve US$1,000 GDP per capita by the end of the twentieth century (Perry 2008). To achieve XiaoKang society, Deng initiated an economic reform which opened up China to the world. Under Jiang Zemin, Deng's successor, GDP growth became the most important performance

indicator for local government officials (Zheng 2006). Jiang also announced the Xibu Da Kaifa ("Great Western Development Strategy" in English) in 2000. This was to adjust the uneven growth that had been seen in China since the economic reforms. Economic growth was concentrated in the coastal areas, while the growth in the central and western areas was much slower. Massive state investment, foreign loans and private capital were diverted from the coastal regions to the remote regions. Jiang explained that the strategy was "to increase the income of the population" that was living in remote areas and "to bring prosperity to all nationalities" (Perry 2008).

The concept of hexie society ("harmonious society" in English) was put forward by Hu Jintao, successor to Jiang Zemin. The goal of harmonious development is to sustain economic development while improving social welfare. Hu's idea of a harmonious society was drawn from Confucianism, as harmony had been the Confucian social ideal (Chen 2009: 821). Mencius commented that harmony (he) is the most important element in social relations (Mengzi II B 1), particularly in achieving order and stability. To achieve order and stability, Confucianism stresses the minimizing of social disparities (Chen 2009: 821). Therefore, Mencius stated that it was the government's responsibility to provide social security to the disadvantaged groups, including the old, the young and the widows. Hu's hexie society was to strive to achieve Mencius's notion of ideal government. The resolution of the Central Committee of the CCP in 2005 concerning the building of a harmonious socialist society made an exhaustive list of suggestions, which includes building a basic social safety net for rural residents, providing fuller employment, creating harmonious relations among people and improving basic public services like education and public health (Chen 2009: 821). All these suggestions aim to bring social stability and order by prioritizing the welfare of disadvantaged groups. These suggestions correspond with the Confucian notion of the moral purpose of a state, which is to improve the livelihood of its subjects. Providing these services to the disadvantaged areas constitutes rightful state action and increases the legitimacy of government among Chinese people.

The current Chinese president Xi JingPing announced the Zhongguo Meng ("China's dream" in English) as his governing philosophy in 2013. He frames the Chinese dream as

the rejuvenation of China through creating an economically prosperous society and improvement of people's livelihoods (Xi 2017). This arose because "128 million Chinese people still live in poverty" and "urban and rural gaps as well as social injustice are yet to be solved" (cited in Jash 2014: 9). Xi's social and economic policies are identical to Mencius's idea of benevolent governance, which aimed to promote economic and social security. Mencius stresses that a benevolent government will regulate the livelihood of the people, and make sure that people have sufficient opportunity to serve their parents and to support their wives and children, and that people will have sufficient means to survive in bad years (Mengzi I A 7). At the same time, Mencius says that a benevolent government needs to look after "the old and wifeless, or widowers; the old and husbandless, or widows; the old and childless, or solitaries; the young and fatherless, or orphans" (Mengzi I B 5). Because of these actions, the government will earn, in Mencius's words, the mandate of Heaven to govern. Such view is reflected in the Report to the 19th National Congress of the Communist Party of China. Xi (2017), which states that the political legitimacy of the Communist Party of China is based on competence and accomplishment. Xi is referring to delivering economic growth and prosperity as well as the improvement of people's livelihoods. Subsequently, various social welfare policies were proposed by Xi, including the improvements to "medical insurance", "the creation of better-quality jobs", "elimination of poverty" and "strengthening the social security system" (Xi 2017). If there is no economic growth or continuous improvement of livelihood, the party will lose its legitimacy. His thinking on ruling legitimacy is indistinguishable from Mencius's view on the "mandate of heaven", which links legitimate statehood with the government's ability to provide economic security to the people (Mengzi V A 5).

In addition to legitimate statehood, Confucianism also encapsulates the humanitarian impulse. For China, the humanitarian impulse may arise when the government fails to secure or deliberatively deprives the basic means of subsistence to its people. The violation of civil and political rights such as denial of the right to free speech and religious freedom or the suppression of political dissenters or separatists in the name of social

order would not be considered sufficiently serious to be seen as humanitarian crises[124]. The breach of political and civil rights could only be understood as a humanitarian crisis if the government systemically deprived the people of their basic livelihood (Bell 2006 and Kim 2010). This understanding of humanitarian impulse shape China's understanding of humanitarian crises and its responses to these crises.

China's View on Humanitarian Intervention, the International Criminal Court and Responsibility to Prevent

"Ren" is at the centre of Confucian virtue, which calls upon people to have compassion and to care about others. According to the five fundamental relationships of Confucianism, each member of society has a defined role and each role entails certain responsibilities. People are expected to live up to their respective roles and perform their tasks faithfully. From the perspective of Confucianism, a government's duty is to look after the welfare of its people (Mengzi I A 4 and V A 6). The legitimacy of the state depends on its ability to provide a basic livelihood for its people and to alleviate people's suffering in times of crisis. Although the prime responsibility to protect and take care of people lies with the state, Confucianism recognizes that other states should help when their counterparts fail to fulfil their responsibilities. Such view is reflected in Mencius praising of King Tang of Shang, who provided assistance, including sending people to help the state of Ge to grow grain as well as provided supplies such as oxen and sheep when the state of Ge had no means to observe the ritual of sacrifices (Mengzi III B 5). The concept of helping people who live beyond the territorial borders comes from the notion that "ren" does not stop within the national territorial boundary; compassion needs to extend beyond natural bonds and extend to all humans regardless of people's background or physical location. Confucian

[124] Some Western commentators like Michael Ignatieff (2004) and Thomas Friedman (2002) have argued that the systemic violation of civil and political rights are humanitarian crises and these violations are serious enough to launch a military intervention. Ignatieff supported the invasion of Iraq in 2003 because it meant overthrowing Saddam Hussein's police state and putting an end to alleged violations of civil and political rights. Similarly, Friedman (2002) argued that building a progressive government and bringing democracy to Iraqi society was enough to justify the invasion of Iraq.

ethics provide a moral justification for and motivates China in carrying out humanitarian actions.

In addition to informing China that it has a moral responsibility to address humanitarian crises, the key notions of Confucianism, including "yi", moral persuasion and differentiated concern, shape the way that China responds to military intervention, the R2Prev and the ICC. The result is that China does not fully comply with post-cold war humanitarianism, and pursues other methods to deal with the crises. It is important to note that this chapter does not deny that economic and political reasons may result in China approaching humanitarian crises differently from other states. However, Confucian ethics provide another insight into understanding why China behaves the way it does in terms of humanitarian areas. These insights have largely been ignored.

-- Non-interference Principle and Moral Persuasion

Military intervention is one of the most problematic approaches in dealing with humanitarian crises because it fundamentally challenges the foundation of the liberal international order – the sovereign state system, which recognizes the principles of self-determination, free from external interference. China has constantly rejected the notion of military intervention. Non-interference (or non-intervention) is a long-serving principle of China's foreign policy[125] and dates back to the 1950s. The notion was first encapsulated in the fifth Article of the Treaty of Friendship, Alliance and Mutual Assistance Between the People's Republic of China and the Union of Soviet Socialist Republics of 1950, stating that:

> each contracting party undertakes, in a spirit of friendship and co-operation and in conformity with the principles of equality, mutual benefit and mutual respect for the national sovereignty and territorial integrity and non-interference in the internal affairs of the other Contracting Part, to develop and consolidate economic

[125] The two terms "non-interference" and "non-intervention" are often used interchangeably in terms of China's foreign policy, because of the absence of a precise definition in Chinese government policy statements. The boundary between non-interference and diplomatic practice has never been clearly defined (Chen 2016).

> and cultural ties between China and the Soviet Union, to render the other all possible economic assistance and to carry out necessary economic co-operation.

Subsequently, the notion of non-interference was incorporated as part of the "Five Principles of Peaceful Co-existence" by Chinese Premier Zhou Enlai in guiding the relations between China and India in 1953[126]. The Five Principles was then incorporated into the "Ten Principles of Bandgung" in Asian-African Conference in 1955 (XinHuaNet 2015a) and formally written into China's constitution in 1982, as well as included in every bilateral treaty made by China (Ren 2013: 26). As a result, as part of the Five Principles, non-interference has become a doctrine of China's foreign policy, defended by Chinese diplomats[127].

As highlighted above, much literature emphasizes that material interests are the reason for China's insistence on the principle of non-interference. For instance, Eric Reeves (2007a) argued that China refused to intervene because of its own oil interests, investment and arms sales in Sudan: interfering in the situation would have done nothing but harm China's interests. However, the idea that non-interference is driven by material interests cannot be upheld in some cases, such as Kosovo. China did not have a huge economic interest in the Balkan state at that time, but it repeatedly said that it would veto any proposal for military action against the Former Republic of Yugoslavia in respect of Kosovo. In contrast to conventional wisdom, and it insists on peaceful methods like dialogue to resolve the conflict. This chapter argues that material interests are a factor, but not the sole factor, in China's insistence on upholding the principle of non-interference. Interference, particularly military interference, is generally inconsistent with Confucian ethics. Confucianism has a very negative view of the use of force[128].

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[126] "Five Principles of Peaceful Co-existence" are "mutual respect for sovereignty and territorial integrity"; "mutual-non-aggression"; "non-interference in each other's internal affairs"; "equality and mutual benefit"; and "peaceful co-existence".

[127] For instance, Chinese President Xi JingPing (2013) denunciated domestic interference and interventionism in his speech in Moscow.

[128] Despite having a negative view on the use of force, Confucianism recognizes that war may be necessarily in an extreme situation. Kim Sungmoon (2010) and Daniel Bell (2006) studied the conditions of humanitarian intervention from Mencius's point of view. Both agree that military intervention is permissible under very strict circumstances from the Confucian perspective, although their interpretations

Confucius and Mencius believed that war was a disaster for all people. War can lead cities and fields to be filled with bodies, so a benevolent king should avoid war and conflict (Mengzi IV A 14), therefore, Mencius accused those who say, "I am skilled in making war" as "criminal" (Mengzi VII B 3). War is completely in opposition to the benevolent government that Confucius and Mencius advocate. The Confucian negative view of war has shaped China's present view of the use of force. China's 1998 Defence White Paper wrote that "China is a country … with a peace-loving tradition … Chinese people have longed for peace in the world … this maxim means solving disputes by non-military means." (Information Office of the State Council 1998: 11). The peace-loving tradition referred to the Confucian negative view of war. Such tradition informs and motivates Chinese leaders to seek peaceful means rather than military force in resolving humanitarian crises like Kosovo and Darfur.

In line with its view on intervention, China also resists sanctions and embargoes. It prefers moral persuasion to settle conflicts. In studying the "Chinese Solution" in solving the crises in South Sudan, International Crisis Group (2017: 14) identified that China typically resists sanctions and embargoes, preferring moral persuasion rather than punishment. The report explains that China believes coercive methods rarely achieve the intended effects and often backfire. Therefore, China has consistently opposed the imposition of sanctions against the Sudanese government over Darfur. Wang Guanya, Chinese Ambassador to the UN, explained that "instead of helping solve the complicated problems, sanctions can only inflict more miseries on the Sudanese people and may make the

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differ slightly. According to Bell (2006: 38–51), Mencius thinks that humanitarian intervention can only take place under certain circumstances. First of all, when people are subjected to tyranny, particularly when their right to food is stripped away; second, people must demonstrate that they welcome the conquerors and the welcome must be long-lasting, not just immediate; third, the conquerors should not subject the people to more tyranny or make the situation worse; fourth, the intervention should have international support, at least morally. However, Kim disagrees with Bell's interpretation of tyranny and states that tyranny cannot be solely understood in material terms. Kim (2010:54–5) believes that "losing the heart of the people" can be a legitimate cause for intervention under Mencius's moral framework. Although he admits that Mencius does not elaborate on the meaning of "heart of the people", he does provide important clues as to where the essence of such heart lies. He argues that the essence lies in Confucian moral virtues like "ren" and "yi", which govern relations in society. Intervention can be triggered when the government breaks these moral codes.

situation even more complicated. So the Chinese government is firmly opposed to economic sanctions against Sudan" (Ministry of foreign Affairs of the People's Republic of China 2004).

Instead of coercive methods, China prefers dialogue and moral persuasion to settle political disputes and armed conflicts. Persuasion over coercion has always been the Confucian and Mencian philosophical traditions (Di Cosmo 2009: 2). From their perspective, disputes and conflicts can be resolved through persuasion, because moral persuasion can change people's minds and behaviour. This view has shaped how China deals with armed conflicts and adopted the concept of moral persuasion to change the Sudanese government's policy towards Darfur. China recognized that the situation in Darfur was a humanitarian crisis, but it could not agree with how western states handle the situation. It insisted moral persuasion. During his visit to Sudan, Chinese President Hu Jintao reminded the Sudanese president Omar al-Bashir that he, as a leader of a country, had the responsibility to resolve the four-year-old conflict in Darfur (Washington Post 2007)[129]. The moral persuasion by Chinese senior officials resulted in Sudan's acceptance of a deployment of 3,000 UN peacekeepers to Darfur and Al-Bashir's consent to the deployment of a hybrid UN-AU peacekeeping force in June (Davis 2011: 269-270). Testifying in front of the Foreign Relations Committee of the Senate, US Special Envoy to Darfur Andrew Natsios (2007) told the committee that China played a "vital and constructive role" in softening the stance of the Sudanese government on the deployment of a UN peacekeeping force to the Darfur region.

[129] Other efforts include sending special envoy Lu Guozeng to Khartoum to meet with Sudanese president Omar al-Bashir twice in August 2004 and February 2005, and Zhai Jun, the assistant Minister of Foreign Affairs visiting the Sudanese president and senior officials of the Sudanese Ministry of Foreign Affairs. These envoys urged the Sudanese government to improve the humanitarian situation in Darfur, stop the killings, and make a real effort to solve the crisis and not to confront the international community through a hard-line approach (Ahmed 2010: 7).

-- Development-Focused and Unevenly Distributed Aid

China and the Western countries have different interpretations of the root causes of and appropriate remedies for humanitarian crises. Politicians in Western countries tend to see large-scale humanitarian crises as a result of lack of democracy (Teitt 2016). Democratic governance is seen as an appropriate remedy. For example, Borge Brende, Minister for Foreign Affairs of Norway, and Isabella Lovin, Minister for International Development of Sweden, stressed that democracy is essential to prevent humanitarian crises from happening (cited in Moorhead and Clarke 2015). The UNDP (2009) also supports democratic governance as a way of preventing conflict. Daniel Byman (2003: 50–2) explains that democracy provides mutual hostile communities and contending interest groups with the opportunity to resolve their differences through the political system, rather than resorting to violent methods. Democratic governance is seen as a measure to prevent humanitarian crises from happening. Therefore, the aid programmes offered by many Western countries have political conditions attached, such as political and social reform, which attempt to democratize the nation, as they see aid as an effective tool to push recipient countries towards democratic governance.

The Chinese government generally sees underdevelopment and poverty as the root cause of the instability, a view shaped by Confucianism. When government fails to address these causes, humanitarian crises are likely to happen. Under Confucianism, social unrest is a direct result of poverty. Mencius claimed that the welfare of the people had to be guaranteed (Mengzi I A 3). When people have enough food to feed their families and escape starvation, the government will reach the heart of the people, who will naturally be loyal to the government (Mengzi IV A: 9). In other words, social order and stability can be achieved when people's basic livelihoods are satisfied. The Chinese government has constantly repeated that poverty and underdevelopment are the sources of conflict and economic development and prosperity are the solution to conflict. In addressing the Darfur crisis, the special representative of the Chinese government on Darfur Liu Guijin said, "the root cause of the Darfur issue is poverty and backwardness. Due to scarcity of

resources, local tribes fight for water and land. It is at the bottom an issue of development. If the international community sincerely hopes to settle the issue, in addition to the humanitarian aid it should provide more development assistance" (Consulate-General of the People's Republic of China in San Francisco 2007). In discussing the role of UN Security in conflict prevention, Liu Zhenmin, Chinese Ambassador to the UN, said that "all the armed conflicts on the African continent stem from a multitude of causes, most of which are related to poverty" and "only by addressing the deeply rooted causes of conflict can it be possible to gradually emerge from playing a reactive role as firefighters and gain more leverage in the endeavour to prevent conflict"[130]. In discussing the situation in the Middle East, Chinese Foreign Minister Wang Yi, in a joint meeting with the Minister of Foreign Affairs and Expatriates Ayman Safadi of Jordan, stated that "turmoil in the Middle East is rooted in development, and the way out ultimately lies in development" (Ministry of Foreign Affairs of the People's Republic of China 2017). Due to its alternative understanding of the root cause of conflict, China has questioned the Western approach. One Chinese diplomat in South Sudan said: "People don't have enough to eat. Most are illiterate. Does Western democracy really work (in South Sudan)?" Chinese analysts believe that Western countries put "too much emphasis on procedural legitimacy at the cost of stability" and it is not suitable for the early stage of nation-building (International Crisis Group 2017).

Due to China's understanding of the root causes of humanitarian crises, Chinese aid focuses on improving people's livelihoods. In China's 2014 White Paper on Foreign Aid, "helping to improve people's livelihoods" and "promoting economic and social development" are highlighted as the objectives of China's foreign assistance. The Chinese government prioritizes food security and building infrastructure (The State Council of the People's Republic of China 2014). To improve food security in Africa, Chinese experts have been deployed; demonstration centres have been set up to provide training to agricultural officials, technicians and local farmers; agricultural consultation centres have

[130] UN Security Council Official Record, 5735th Meeting, 28th August 2007.

been built and technical assistance on aspects like cage fishing, high-yielding seeds, irrigation facilities, water harvesting and preservation has also been provided (XinhuaNet 2015b). Although there is no report on the extent of China's contribution to food security in Africa, Food and Agriculture Organization of the United Nations (hereinafter FAO) officials are positive about the effects of China's assistance. For example, Sourakata Bangoura, South-South and Triangular Cooperation Officer at the FAO African Regional Office in Accra, said the technical support from China has helped "a great deal in ensuring increased yields in the production of food crops, including rice, millet, as well as horticultural products, aqua-culture, livestock farming, agriculture mechanization, food processing, marketing, storage and preservation" (cited in XinhuaNet 2015b). This increased yield in food production will contribute to the food security in the nation. In terms of infrastructure, China believes that this kind of project requires a huge workforce, which can provide employment to the local population. This, in return, can sustain people's livelihoods. Therefore, the majority of China's aid is allocated to infrastructure construction such as transport and energy supply projects. Although some have pointed out that Chinese companies are more willing to employ Chinese workers for their infrastructure projects in Africa, a study conducted by Tang XiaoYan has discredited such claim. Tang (2016) states that the local population make up at least 50 per cent of the entire workforce in Chinese projects. For example, the Chinese-funded Imboulou dam in Congo Brazzaville employed as many as 2,000 Congolese, as opposed to around 400 Chinese workers. Similarly, to build the Bui Dam in Ghana, the Chinese company in charge hired 560 locals and 110 Chinese. This shows that Chinese projects employ a large percentage of local population, thus boosting local employment. These projects have "a strong practical orientation" (Xue 2014), resolving the livelihood problem that the local population is facing.

Miwa Hirono (2013) argues that the pattern of China's foreign assistance is influenced by Confucianism. She identifies that China's international assistance is state-centric, as its assistance is provided mainly bilaterally rather than multilaterally or through direct

channels to local organizations. She argues that China's state-centric approach is an acknowledgement of the Confucian view of a well-order state that pursues the principle of unity between a state and its people. Strengthening the state's capability to provide assistance in disaster areas will enhance the harmony between the state and its people. In addition to Hirono's argument, this chapter argues that the state-centric approach is a result of the Confucian understanding of legitimate statehood, which stresses that each member of a society needs to act according to their respective roles. From the perspective of Confucianism, the state is created to look after people's livelihoods and economic security[131]. Guided by this interpretation, the Chinese government recognizes that government is an appropriate agent to receive help, as aid strengthens the legitimacy of recipient state because the state is fulfilling its role by improving the people's livelihoods and ensuring the economic security of the people. As a result, it stabilizes the country, as people have no legitimate ground to revolt against the government.

In relation to the aid, this chapter also argues that the way that China distributes its aid is also shaped by Confucianism. China tends to provide more aid to those countries that are considered a "friend". China's approach acknowledges the Confucian notion of differentiated concern, which requires individuals first to concern themselves with the one that is closer to them and then extend the concern to others according to the proximity of the relationships. North Korea is regarded by China as a traditional ally and an old friend; Chinese leaders have described the relations between China and North Korea "as close as lips to teeth" (Lee 2012: 121). As an "old friend of China", North Korea has been accepting China's aid since 1950, and although the actual amount of China's aid "remains a secret that cannot be revealed", there is a general consensus that North Korea received a high share of the entire Chinese Official Assistance in comparison with other nations (Reilly 2014: 1160)[132]. In addition, China is more willing to provide aid to countries

[131] Mencius, in explaining the king's duty to King Hui of Liang, made clear that the duties of a ruler were to secure his subjects' livelihoods in times of crisis (Mengzi I A: 4).

[132] For instance, Bonnie Glaser, Scott Snyder and John Park (2008: 11) estimate that North Korea received one-third of China's total foreign assistance in 2002 and up to approximately 40% in 2007. Dick Nanto and Mark Manyin (2010) make a similar estimation; their report to the US Congress estimates that "China's economic assistance to North Korea accounts for about half of all Chinese foreign aid". The whole African

with diplomatic relations. There is less moral obligation to help those countries that do not recognize the People's Republic of China. Zhang JunYi's (2016) survey showed that in the period between 2000 and 2012, China funded over 1,500 official assistance projects in 51 African countries, with four countries that did not have diplomatic relations – Gambia, Swaziland, Burkina Faso, and São Tomé and Príncipe – being left out. The aid pattern of China demonstrates that Chinese leaders feel that it has a stronger moral obligation to friends and allies than to those without official diplomatic recognition.

-- International Criminal Justice System

China, in a general sense, has long supported holding those that have committed serious international crimes accountable and the establishment of an international court, evidenced by the fact that China voted in favour of the UNSC Resolution 827, which established the International Criminal Tribunal for the Former Yugoslavia (ICTY) for "the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia". In addition to ICTY, the Chinese delegation did not oppose the UNSC Resolution 955, which approved the establishment of the International Criminal Tribunal for Rwanda. As well as voting in favour of the resolutions, China has supported the operation of an international court. Chinese jurist Li HaoPei served as a judge at the ICTY between 1993 and 1997, and was then succeeded by Wang Tieya (1997–2000). In addition, China took an active role in the discussion that led to the Rome Statute, in spite of eventually voting against the statute. Despite not being a signatory to the Rome Statute, China has also supported the referring of some humanitarian situations to the ICC. For instance, China voted in favour of the UNSC Resolution 1970, which was proposed by France, Germany, the UK and the US. The UNSC unanimously agreed to refer the situation in Liberia to the prosecutor of the ICC for investigation of crimes against humanity[133].

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continent has over 50 countries and most of them are developing countries; they comprised an estimated 47% of China's total foreign assistance in a similar period of time (Zhang 2016).

[133] The resolution also demands an end of violence and the Libyan government to address the legitimate demands of the population. It urges the Libyan authority to respect international humanitarian law and international human rights law and act with restraint.

However, China has adopted a flexible approach to dealing with the ongoing conflict, which reflects the Confucian notion of yi. China does not always support a referral of an ongoing crisis to the ICC, Darfur being a case in point[134]. It is beyond doubt that Confucianism agrees that there is a need to hold perpetrators accountable for their actions. Mencius was very clear about the need to punish tyranny, as tyranny results in massive physical sufferings for the people (Mengzi I B: 8). Yet referring a case to the ICC is not necessarily the right decision[135]. Drawing from the Confucian notion of "yi", the right decision refers to what is best for the general public and what benefits the most people. From the perspective of Confucianism, "the individual exists for the sake of the collective, be it family, society, or state, and not vice versa", therefore giving precedence to the collective interest over individual interests, because "the attainment of collective interests was a prerequisite for the attainment of individual interests" (Tan 2000: 560). Political leaders should choose an action that does not further jeopardize the security of the general public and risks inflicting more harm on the general public. Each humanitarian crisis is different, and political leaders ought to make their own judgement about whether to refer the crisis to the ICC. Investigation and prosecution of those that are suspected of committing genocide, crimes against humanity, war crimes should be decided on a case-by-case basis.

Conclusion

China has become an emergent power in international politics in the post-cold war era. With its economic growth, China has increasingly been involved in humanitarian areas.

[134] In the case of Darfur, the ICC issued a warrant for the arrest of Sudanese President Omar Hassan Ahmad Al Bashir for war crimes and crimes against humanity on 4 March 2009. The charge of genocide was later included in the warrant. China, along with the African Union and the Arab League of Nations, contested the decision of the ICC; they expressed great concern about the arrest warrant and its implications for the people in the Sudanese region, in the event that it may cause more harm than good. Liu Guijin, special envoy for Darfur, said that "it is important to realize the legal justice in Sudan, but it should not be at the expense of the peace process or worsening the situation in the region" (PEOPLE 2009).

[135] According to Lawrence Moss (2012:7), some UN officials believed that the peace negotiations in Darfur became more complicated when the ICC launched the investigation and issued the arrest warrant. More importantly, the Sudanese government expelled the international NGOs from the country, which left millions of internally displaced people without much-needed assistance, and brought more suffering to the people.

However, China does not fully embrace the intervening approach to humanitarian crises and presents an alternative view on military intervention, R2Prev and the international criminal justice system. China's response to these key features of intervening humanitarians reaffirms that the intervening approach has a problem with legitimacy and is not fully accepted in the international society of states. Since its responses do not correspond to the applied understanding of humanitarianism, China is seen as a pariah state and affront to international justice.

This chapter argues that China's approach to humanitarian crises has been shaped by Confucianism, particularly the teachings of Confucius and Mencius. Despite the heavy criticism and attacks in the twentieth century, Confucianism survives and remains deeply embedded in people's minds. It has shaped the Chinese understanding of legitimate statehood and rightful state action, which constitutes China's understanding of humanitarianism and its view on intervening humanitarianism. For China, humanitarian crises refer to the deprivation of the means of subsistence, rather than the lack of civil and political rights. The Confucian notion of "ren" has motivated Chinese leaders to show compassion to the people that are living beyond its territorial borders. Other key notions of Confucianism like "yi", "differentiated concerns" and "moral persuasion" have shaped China's preference of how to resolve humanitarian crises and its view on intervening humanitarianism. Confucianism has contributed to China's preference of moral persuasion as a method to resolve conflicts, its adoption of a flexible approach to the international justice system, its development focus and uneven distributed aid.

In comparison to intervening humanitarianism, China's response to humanitarian crises rather correspond to the liberal international order. As noted in previous chapters, the right of autonomy and the rule of law are the key to this order. China's rejection of the use of force is in line with the principles of the UN Charter, which are universally recognized and shared. Moral persuasion conforms to the spirit of the UN Charter, which requires member states to settle disputes peacefully[136]. China's aid focuses on helping

[136] Article 33 of the UN Charter.

the recipient economic development, rather than structural political reform. Its assistance recognizes the recipient state's right of autonomy and does not require the recipient state to conform with a particular type of political and social system. It respects the self-determination of recipient countries and allows the recipient countries to freely pursue their social and political development. By practising these principles, China is strengthening the existing order. Therefore, China should not be seen as a pariah and its behaviour should not be seen as an affront to international justice.

Conclusion

This thesis traces how humanitarianism has been understood and applied throughout history. The evolution of humanitarianism is divided into three stages: the early modern age; the period between the mid-nineteenth century and the late twentieth century; and the post-cold war period. The constitutive norms in international politics in each respective period have contributed to the humanitarian impulse and have conditioned the development of humanitarianism. In the early modern age, the late medieval legacies, particularly the Roman Catholic doctrine at that time, gave impetus to the humanitarian impulse, and violation of natural law, such as cannibalism, idolatry and human sacrifices, were seen as a humanitarian emergency. Converting these people into the Catholic faith and civilizing them according to European standards was deemed morally necessary. These activities were seen as "humanitarian". In the mid-nineteenth century, the focus in life shifted from the afterlife to the improvement and enjoyment of this life. Physical suffering of people constituted the humanitarian impulse. Henry Dunant's humanitarian impulse concerned war victims. The constitutive norm of international politics at that time was individualism, which manifested in multilateralism and contractual international law. These conditioned the way that war victims were protected at the international level, protection being reached by a series of multilateral international agreements, i.e. GCs and APs. In the post-cold war period, the constitutive norm in international politics has been human rights protection, particularly referring to protecting people from crimes against humanity, ethnic cleansing and genocide. The norm had shaped the organizing principle of sovereignty, which entailed protecting its population against the worst abuses. This new understanding of sovereignty facilitated the legitimacy of the use of force on the ground of human rights protection, the establishment of the ICC and the principle of R2Prev. The history of humanitarianism demonstrates that humanitarianism is not a universal value that transcends time and culture. The notion is heavily conditioned by the constitutive norms of the specific timeframe.

This thesis demonstrates that the applied understanding of humanitarianism is not uncontroversial. It has been questioned in each historical period. Intervening humanitarianism has been controversial in the post-cold war era. There is a discordance between the fundamental principles of the current international order and intrusive humanitarian practices, including the use of force, the establishment of the ICC and the R2Prev. The use of force on the ground of human rights protection has been the most controversial one, as it violates international law, which forbids the use of force between states, except when such force is authorized by the UN SC or exercised under the right to self-defence. The ICC fosters the inequality of the current international order. Members of UN SC were granted referral and deferral powers under the Rome Statute, strengthening a substantial inequality between states who were members of UNSC and those who were not. Three of the P-5 have not joined the ICC and they can decide whether the court can investigate atrocities, including crimes against humanity committed by non-signatories to the Rome Statute. Giving an extra power to the P-5 does not sit comfortably with the current international order, which is based on the idea of legal and social equality among states. Like other features of intervening humanitarianism, the R2Prev undermines the fundamental principle of the current international order, and erodes the right to autonomy. Foreign aid is a significant part of R2Prev. Donor countries use aid as a means to promote their own understanding of good governance, including imposing a political and social structural reform upon recipient countries, undermining a nation's right to self-determination. The current international order does not support these practices. It gives rise to the question of legitimacy of the applied understanding of humanitarianism in the post-cold war period. Since intervening humanitarianism is not universally accepted, it is questionable whether intervening humanitarianism can be used as a standard to judge whether a nation is a pariah in the international order.

The problem of legitimacy is reflected in China's reaction to intervening humanitarianism. It is manifested in: its rejection of the humanitarian interventions, particularly those without the authorization from the UNSC and those that are not self-defensive; its refusal to become a signatory to the Rome Statute; and its alternative approach to foreign aid.

This thesis argues that China does not reject the notion of saving lives or alleviating suffering; it only questions how humanitarianism is applied in the post-cold war period. Its view on the intervening from of humanitarianism is shaped by domestic constitutive norms. This thesis identifies traditional Confucianism as the constitutive norm of modern Chinese society. This thesis does not claim that traditional Confucianism is the only source of understanding legitimate statehood and rightful state action, but that it is certainly an integral part of it. The key pillars of traditional Confucianism like "ren and yi", "differentiated concern", "proper relations", and "moral persuasion" constitute the Chinese humanitarian impulse to save lives, to help strangers in need and inform its understanding of legitimate statehood and rightful state behaviour. These ideas result in China prioritizing peaceful measures like moral persuasion over coercive methods such as the use of force in addressing internal conflicts. Confucianism has also shaped China's recognition of the root causes of humanitarian crises; China identifies the lack of livelihood and economic development, not the lack of democratic governance, as the root causes of social instability, which contributes to China's "no political strings attached" aid. Confucianism also constitutes China's adoption of a flexible approach in deciding whether to refer and defer humanitarian situations to the ICC, as referring all humanitarian situations to the ICC may jeopardize peace negotiation processes and bring more harm to the general public.

This concluding chapter considers some of the theoretical and conceptual implications of this thesis. The discussion is divided into three parts, dealing in turn with the constitutive norm in international politics; the relations between the international order and humanitarianism, and critical theory's emancipatory project. It will then proceed to the main question that this thesis attempts to address – whether China is a pariah state in the international society of states.

Role of Constitutive Norms in International Politics

This thesis holds that constitutive norms are important in international politics. Such view is different from that of neorealism, which suggests that only material factors have a

direct impact on political behaviours. Neorealism overlooks the importance of constitutive norms in international politics, because it attempts to analyse a state's behaviour in a "scientific way" and see tangible objects as the only reality. This means that constitutive norms have no place in neorealism because they cannot be directly observed and proved true or false (Halperin and Heath 2012: 33), while any non-observable processes and mechanisms are considered inadmissible (Kurki and Wight 2013: 22). As a result, neorealism does not assign much importance to constitutive norms. However, not all action or non-action can be explained by material interests alone. Martha Finnemore (2003: 55) argues that neorealists would expect material advantages such as geostrategic, political and economic benefits to be gained when humanitarian activities are carried out by states, but sometimes a humanitarian activity may "look odd from conventional perspectives on international politics, because it does not conform to the conceptions of the interests that they specify". In order to gain a comprehensive view of a state's behaviour, constitutive norms need to be taken into account, as they provide identities and interests to political actors, shaping the "broad orientations for behavior and policy" (Tannenwald 2005: 15).

By studying the evolution of humanitarianism, this thesis identifies that constitutive norms shape political behaviour through two mechanisms. The first one is imagination. Imagination implies that ideas affect how social agents think they should act; what the perceived limitations on their action are; and what strategies they can imagine in order to achieve their objectives. That is to say, constitutive norms condition what social agents consider possible in both ethical and practical terms (Reus-Smit 2005a: 198). In the case of humanitarianism, the constitutive norm of individualism informs the legislative norm of procedural justice, which constitutes multilateralism and contractual international law in the modern international society of states. These practices are regarded as the appropriate and legitimate way for achieving a common goal in the international society of states. They limit the imagination of policymakers as to the strategies that states can actually use in achieving their objectives. Due to these restrictions, reducing the suffering in armed conflict at the international level can only be legitimately achieved through

multilateral conferences and mutual international agreement, resulting in a series of multilateral diplomatic conferences that were held in order to negotiate a mutually binding agreement among states. The GCs and APs are the product of these multilateral negotiations, which aimed to regulate the conduct of armed conflicts and to protect those people that are not, or are no longer, taking part in hostilities.

The second constitutive norm is communication. When an individual or a state does not behave in accordance with the established principles and norms, they seek to justify their behaviour. They appeal to established intersubjective beliefs and ideas, and the beliefs that carry the greatest weight are those that define that which constitutes a legitimate social agent (Reus-Smit 1999: 28 and 2005a: 198). Constitutive norms can be used by these actors to justify their behaviour because constitutive norms define legitimate statehood and rightful state action. In the case of intervening humanitarianism, there is a discordance between humanitarian intervention and the fundamental principles of the international order. The use of force against another nation is generally forbidden by the UN Charter and violates the principle of non-interference which constitutes the current international order. Therefore, military intervention needs to be justified. In the post-cold war period, protecting a state's people from crimes against humanity has been regarded as the integral part of legitimate statehood. Human rights protection carries a lot of weight in public discourse. Political actors have appealed to "human rights protection" in justifying their use of force. For instance, the French Ambassador Bernard Mérimée argued that the establishment of multinational operations in Rwanda was to "protect these defenceless civilians and save these numerous endangered lives"[137]. When the justification is invoked, the subsequent behaviours must bear some resemblance to the justification. Incompatible behaviours would cost political actors' reputations (Reus-Smit 2013a: 176) and also limit the way that actors can behave.

Constitutive norms also shape the content of other norms. This thesis demonstrates that constitutive norms in international politics have shaped the applied understanding of

[137] UN Security Council Official Record, 3392th Meeting, 22nd Jun 1994.

humanitarianism in each historical period. A different interpretation of humanitarianism results in different international policies. For instance, late medieval Roman Catholic doctrine as the constitutive norm in the early modern period constitutes the specific understanding of the humanitarian impulse. The Catholic doctrine at that time placed importance on the respect for natural law. The violation of natural law, including human sacrifices and cannibalism, are considered as grievous crimes, since those who committed these crimes would face eternal damnation, which was seen as the worst suffering. The violation of natural law constitutes the humanitarian impulse, which motivated people to help. Due to a specific interpretation, humanitarianism meant that bringing salvation to the non-believers, propagation of the Catholic faith and catholicization of heretics were understood as humanitarian activities. These specific interpretations of humanitarianism shaped Spanish policies in the New World. When the constitutive norm in international politics changed, humanitarianism was reinterpreted. In the post-cold war period, human rights have been the constitutive norm in international politics. Humanitarianism is no longer interpreted as saving souls from eternal damnation and rather as protecting people from crimes against humanity. Inevitably, propagation of the Catholic faith is no longer seen as a humanitarian activity and has been replaced by other activities. In the post-cold war era, humanitarian intervention, foreign aid and ICC are seen as the key content of humanitarianism.

Constitutive norms have shaped the history of humanitarianism through imagination and justification and by providing content to humanitarianism. It has resulted in a different applied understanding of humanitarianism in each historical period. Having said that, this thesis does not argue that constitutive norms cause specific historical outcomes. This thesis sees ideas as one of the variable factors in shaping the history of humanitarianism. Constitutive norms make certain forms of action possible and limit certain actions. Without constitutive norms like the late medieval Roman Catholic doctrine, individualism and human rights, the trajectory of humanitarianism would not have been the same.

International Order and Humanitarianism

The International order is a configuration of political authority. The modern-day international order is a sovereign order in which political authority "is organized into multiple, territorially demarcated political units", and "within these units, authority is centralized, exclusive and bounded" (Reus-Smit 2013b: 169). There are other forms of international orders which existed in history, like the heteronomous order. International orders also develop "fundamental institutional practices" which allow cooperation and co-existence between loci of political authority. Multilateralism and contractual international law represent these institutional practices in the modern-day international order (Reus-Smit 2013b: 169). These institutional practices vary throughout history. Reus-Smit (1999 and 2013b) argues that different societies of sovereign states have developed different institutional practices, and identifies natural international law and old diplomacy as fundamental institutions in absolutist Europe, and oratorical diplomacy in Renaissance Italy. In addition to the configuration of political authority and the fundamental institutional practices, Reus-Smit (1999: 2013b) identifies a third element of international order: the constitutional structure that enables the configuration of political authority and fundamental institutional practices. In a sovereign state international order, the constitutional structure has three elements, including the "moral purpose of state", "organizing principle of sovereignty", and "systemic norms of procedural justice" (Reus-Smit 1999: 7).

Reus-Smit (1999 and 2013) argues that the current international order is inspired by liberal ideas, reflecting fundamental institutional practices and the universal sovereign state system. For fundamental institutions, the fundamental institutions in the modern international society of states are multilateralism and contractual international law (Reus-Smit 1999). These institutions are informed by the moral purpose of modern states – "augmentation of individuals' purposes and potentialities, in cultivation of a social, economic and political order that enables individual to engage in the self-directed pursuit of their interests" (Reus-Smit 1999: 123). The moral purpose of modern states has

informed the type of norm of procedural justice that is regarded as legitimate. It essentially contributes to the norm of legislative justice, which stresses that the legislative power belongs to the people, and participation in the formulation of the law is the sole basis of legal obligation (Reus-Smit 1999: 130). The norm of legislative procedure transposes onto the international level, which results in the need for participation, negotiation and dialogue in the codification of mutually binding international law. Multilateralism and contractual international law represent this process (Reus- Smit 1999: 132). In addition to the fundamental institutions, Reus-Smit (2014: 4) argues that the current international order is liberal because of the configuration of political authority, which is universal sovereignty. Reus-Smit (2014: 4–5) explains that universal sovereignty is liberal in three aspects. First of all, sovereignty translates the liberal principles of individual liberty into the international level, with the sovereignty of state parallel to individual liberty. Principles of sovereign equality, non-intervention and self-determination echo the liberal understanding of the individual and individual freedom. Second, these ideals inform the modern principles of institutional construction. As in liberal societies, laws are only legitimate when they are authorized by those who are subject to them (or by their representatives). This has been the case since the nineteenth century, which has been expressed in the practice of positive international law. Third, universal sovereignty is a result of liberal politics; liberal values like human equality and individual rights were used to delegitimize the imperial international order, which had dominated international politics for centuries.

The liberal international order has played a significant role in shaping the modern history of humanitarianism. Multilateralism and contractual international law limit the extent to which states can protect those who are not fighting, or who can no longer fight, in the armed conflicts. They have played a significant role in establishing the international humanitarian legal order. IHL and the Rome Statute are the key features of this order. All these international agreements are products of multilateral diplomatic conferences, and all sovereign states were invited to participate in the negotiation and dialogue. All these agreements are mutually binding. The Geneva Conventions and their Additional Protocols,

which are a significant part of the IHL, were achieved in an international conference through negotiation and dialogue and these conventions are mutually binding. They now cover both international and internal armed conflicts, and give protection to combatants, POWs and civilians. In addition, the Rome Statute, which established the ICC, was negotiated in a series of international meetings and conferences, the establishment of ICC intends to end the impunity of those guilty of international crimes of genocide, crimes against humanity and war crimes. Although the Rome Statute has been not universally ratified, over 100 countries have ratified it and become member states of the ICC. These conventions reflect how the liberal international order has shaped modern-day humanitarianism.

There is a discordance between the liberal international order and humanitarianism in the post-cold war period. The current order is not designed to protect people from crimes against humanity. The most prominent humanitarian activities in the post-cold war period, including humanitarian intervention, the ICC and the P2Prev, are seen as contravening or crossing the limits set by the current order. The threat and the use of force is generally prohibited in the UN Charter, and there are only two exceptions: the right to act in self-defence[138] and authorization from the UN Security Council[139]. In other words, saving people from exceptional distress does not give a legal ground for use of force. Since all sovereign states are members of the UN, they are obligated to observe the UN Charter. Initiating military intervention challenges the rule of law. As for the ICC, certain provisions of the Rome Statute contradict contractual international law, which places the emphasis on the notion that legal obligation comes from consent. According to the Rome Statute, the Court can exercise its jurisdiction over a non-party state when: a national of a non-party state commits genocide, war crimes or crimes against humanity on the territory of a state party; a national of a non-party state commits these crimes on the territory of a non-state party; or the UNSC refers a situation of a non-state party[140]. The ICC does not

[138] Article 51 of the UN Charter.
[139] Article 42 of the UN Charter.
[140] Articles 12 and 13 of the Rome Statute.

require consent from non-member states to prosecute their nationals. As for the R2Prev, the right of autonomy has been challenged. Under the liberal international order, being a sovereign state entails a basket of rights, including the right to develop their own form of collective life, such as a political system. The problem is that many donors in the international community consider that democratic governance can prevent humanitarian crises from happening, and therefore they tie their aid and assistance to political, social, economic and structural reforms. When there are no alternative donors, the recipient states that desperately need economic aid and assistance have little choice but to accept the conditions. Thus undermines the recipient countries' autonomy. Due to the limits set by the current order, intervening humanitarianism is seen as controversial, and its legitimacy has been questioned. At the same time, the international order has been maintained through repeated practices, with intervening humanitarianism being derailed from the fundamental principles that underpin the current order and the repeated practices. As a consequence, intervening humanitarianism could potentially weaken the stability of the current international order.

Intervening humanitarianism is facing a problem of legitimacy. It reflects how China views military intervention, the ICC and the R2Prev. China is not enthusiastic about these post-cold war humanitarian activities. It has constantly questioned the legitimacy and the legality of humanitarian intervention, particularly that without consent from the UNSC or host states; it is not a member state of the ICC; and has adopted a non-conditional aid approach. China has offered alternative ways to resolve the humanitarian crises and to address the root cause of humanitarian crises. Its approach intends to mitigate conflict and provide help without undermining some of the fundamental principles of the current order like the rule of law, the principle of non-intervention and the right to autonomy. China's approach to humanitarian crises is more in line with the limits set by the current international order.

Emancipatory Project

Like much of the holistic constructivist research such as Reus-Smit's *Moral Purpose of the State*, this thesis attempts to contribute to the project of critical theory. Critical theory is not only "concerned with the understanding and explaining the existing realities of world politics", but is also "an attempt to comprehend essential social process for the purpose of inaugurating change, or at least knowing whether change is possible" (Devetak 2005: 145). The theory "criticizes in order to transform" world politics and seeks an alternative order that is feasible in the existing world. The theory is in favour of breaking the social and political orders that are considered unjust, in order to foster conditions that are necessary for a more just and democratic order. The critical theory attempts to achieve what Andrew Linklater calls the "emancipatory project". He (1998: 5 & 115; 1992: 92–7) argues that an emancipatory project requires three interrelated tasks: the normative, the sociological and the praxeological. The normative task seeks to "explore how more inclusive and culturally sensitive dialogic communities may be fostered that give voice and representation to excluded groups". The sociological task is to "explore the nature and evolution of political community, focusing principally on states and the society of states and their potentials to develop in more inclusive ways". The praxeological task is to "explore the moral resources within the existing social arrangement that might be harnessed for emancipatory purpose" (Eckersley 2008: 350). These tasks help the exposure and dissolution of structures of domination, shedding light on existing political possibilities, which are essentially to build an alternative system (Linklater 1998: 5).

This thesis contributes to the sociological task of the emancipatory project. The sociological task attempts to explain and understand the forces that shape the international order. The essential focus of this task is to understand the formation process behind the international order. It studies how the world became that way. This corresponds to holistic constructivism, which attempts to understand the constitutive process that affects the rise, the development and the transformation of international politics (Reus-Smit 1999: 166). This thesis explains and illustrates the complexity and historical contingency of the normative foundations that underpin humanitarianism. It shows that constitutive norms shape the choices that institutional architects and political

actors make, and provides justification for these actors to defend and advocate their choices. Essentially the different constitutive norms in each historical period lead these actors to construct distinctive types of humanitarianism throughout history. As seen in previous chapters, the legacies of the medieval period enabled a religious form of humanitarianism in the early modern age, while the notion of universal human rights in the post-cold war era facilitated an intrusive form of humanitarianism. This thesis also demonstrates that change is possible, and explains how change can take place. This can occur when there is a shift in constitutive norms within international politics. When new constitutive norms emerge in international politics, the applied understanding of humanitarianism will be reinterpreted. Due to the change in a constitutive norm, humanitarianism was no longer associated with the conversion to Christianity and propagation of the Catholic faith in the modern era, and instead was associated with protecting people from crimes against humanity. The evolution shows that the current humanitarian order is not neutral or permanent, but emerged from and was conditioned by history and social environment. It is possible to have alternative understandings of humanitarianism and to transform the existing humanitarian order.

This thesis also identifies the potential elements within the existing order that allow a more inclusive political order. It contributes to the praxeological task of the project of critical theory. Andrew Linklater (1998: 115) explains that the praxeological task aims to search for moral resources within the existing social arrangement that can be used by political actors for emancipatory purposes (i.e. developing a more inclusive international society). This thesis identifies that the liberal international order has the potential to do more work in promoting emancipation. The fundamental assumption of the existing international order is that all recognized sovereign states are deemed legal and socially equal, which provides a basket of governance rights internationally, including the general principle of “one state, one vote” (Reus-Smit 2005b: 71). It separates political rights from material capability. The legal notion of equal sovereignty is aligned with the hierarchical society of states in which rights of membership and participation are granted according

to the development and capability of a society towards an end. However, the promise of equality is not entirely fulfilled. Powerful nations and their moral and political ideas remain dominant in international politics. Others remain marginalized. Through the genuine mechanism of multilateralism in the existing order, equal sovereignty has the potential to drive a more inclusive decision-making process, as multilateralism provides a platform for countries like China to participate, to have a dialogue and to contest the established order and the prevailing practices. China has used multilateral platforms, such as the UN Security Council meetings and the international diplomatic conferences, to contest the existing understanding of humanitarianism and humanitarian actions. This dialogue and contestation are essential to make the humanitarian order more inclusive.

In short, this thesis contributes to the sociological and praxeological tasks of a critical theory project. In studying the history of humanitarianism, this thesis demonstrates that change is possible in the international order. Change will take place when the constitutive norm in international politics has changed. This thesis does not argue that institutional practices will take place immediately; transformation takes time and happens gradually. This thesis also posits that multilateralism can make the current international order more diverse and inclusive. Multilateralism provides a platform for weaker states to voice their concerns and to engage in the construction of international order. China has utilized the multilateral dialogue in the UN to raise its concerns about the legality and the legitimacy of humanitarian intervention and other international issues.

Is China an Affront to International Justice?

As has been highlighted in the introduction, the main purpose of this thesis is to address the question of whether China is an affront to international justice. Such reputation has been contributed to by its humanitarian policies, which do not correspond to the applied understanding of humanitarianism in the post-cold war period. To answer this question, this thesis adopted an historical approach to understand the applied understanding of humanitarianism. It demonstrates that the way to save strangers from suffering has been

a controversial topic throughout history. The notion has been questioned and challenged in each timeframe. The applied understanding of humanitarianism in the post-cold war period has been challenged because of its intrusive nature. It breaks several key norms, like the principles of non-interference and non-intervention, as well as the notion that international law can only apply when it obtains consent from the state. Since the applied understanding of humanitarianism in the post-cold war period is not universally agreed, this thesis questions the appropriateness of using post-cold war humanitarianism as a standard by which to judge whether China's policy is an affront to international justice.

Justice is a moral concept, a concept of what is right and wrong. It only gains meaning when associated with other values. In other words, there is no such thing as an affront to international justice without referencing the social norms in the international society of states. As stressed in this thesis, the intrusive form of humanitarianism in the post-cold war period is too controversial and is not a universally agreed value. This thesis argues that humanitarianism is not suitable to be used as a standard by which to judge whether a state is a pariah. There are other social norms that are more fundamental and less controversial in the current international order. For instance, the principle of non-interference, which is derived from the moral idea that all nations are equally entitled to the right of self-determination, is the bedrock of the current international society of states and has been codified into international law. It limits the way that humanitarianism is conducted. Humanitarian activities should be conducted within the parameters of international law. Therefore, China, which insists on the principle of non-interference in resolving humanitarian crises, should not be seen as an affront to international justice.

China does not agree with the applied understanding of humanitarianism in the post-cold war period. Its humanitarian policies are more conform to legal humanitarianism. China seeks to protect the victims of armed conflict through the codification of international law. It is evident that China is a state party to the GCs and APs, and has actively participated in current processes in relation to the implementation and the development of IHL (ICRC 2017b). China in essence complies with legal humanitarianism by participating in the multilateral conferences that address suffering. IHL does not prescribe

specific actions that states, international organizations and other entities must take in the case of massive violation of IHL. States are free to choose the way in which they want to respond to humanitarian crises, meaning that China can formulate its humanitarian policies as it sees fit. However, all these actions must be within the framework of the UN Charter, as the existing IHL prohibits states or international organizations from taking action outside the framework of the UN Charter [141] (ICRC 2010c). In other words, humanitarian purpose does not constitute an exception to the principle of the non-use of force in the current international order, as forces can only be legally used under two circumstances: self-defence and authorization from the UNSC. China has constantly insisted on this principle and on peaceful means in response to humanitarian crises. Its humanitarian responses are more consistent with legal humanitarianism.

In short, humanitarianism is too controversial; it should not be a lone criterion to determine whether a state is a pariah, and it needs to take other fundamental norms of the current international order into account. China's humanitarian stance has largely been in line with the fundamental principles of the current order, which is enshrined in its insistence on the respect for sovereign right and the resolution of humanitarian crises in a peaceful manner. Therefore, this thesis concludes that China's policy is not an affront to international justice and it is not a pariah in spite of its refusal to support the intrusive form of humanitarianism.

[141] Article 89 of Protocol I of 1977 has been clear that "in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter".

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