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1 Watching East Timor

The era of humanitarian intervention

As I began writing this book during the early days of September 1999, hundreds of thousands of Australians were taking to the streets, marching under banners proclaiming 'Indonesia out, peacekeepers in'. These protesters were calling for the introduction of an international peace-keeping force into East Timor to protect the East Timorese from the Indonesian army-backed militia who were rampaging through Dili and the countryside – killing, wounding, raping and implementing a scorched-earth policy. These acts of destruction and violence were a response to the announcement on 4 September that an overwhelming majority of East Timorese people had voted for independence from Indonesia in a United Nations (UN) sponsored referendum held on 30 August. The Australian Opposition Leader, Kim Beazley, was to call the swell of community protests the strangest and most inspiring event he had witnessed in Australian political life.

The voices of the protestors joined with the chorus pleading for an armed UN intervention in East Timor. Timorese leaders such as Xanana Gusmao and Jose Ramos Horta were calling for such action. Australian international lawyers were speaking on the radio and television, arguing that such intervention could be legally justified – as a measure for restoring international peace and security if authorised by a UN Security Council resolution, or as an act of humanitarian intervention by a 'coalition of the willing' if no such resolution was forthcoming. As Australians watched images of Dili burning on their television screens, and read of women and children seeking protection from likely slaughter in the sanctuary of the UN compound in Dili, it felt like a strange time to be

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Excerpt
More information

writing a reflexive and theoretical piece about the power effects of the post-Cold War enthusiasm for humanitarian intervention.

This new interventionism, or willingness to use force in the name of humanitarian values, played a major role in shaping international relations during the 1990s. As a result of actions such as that undertaken by NATO in response to the Kosovo crisis, or the authorisation of the use of force in East Timor by the Security Council, issues about the legality and morality of humanitarian intervention again began to dominate the international legal and political agenda. One of the most significant changes in international politics to emerge during that period was the growth of support, within mainstream international law and international relations circles, for the idea that force can legitimately be used as a response to humanitarian challenges such as those facing the people of East Timor. The justifications for these actions are illustrative of the transformation undergone by the narratives that underpin the discipline of international law with the ending of the Cold War.[1] A new kind of international law and internationalist spirit seemed to have been made possible in the changed conditions of a world no longer structured around the old certainties of a struggle between communism and capitalism.

This shift in support for the notion of humanitarian intervention resulted in part from the post-Cold War revitalisation of the Security Council and the corresponding expansion of its role in maintaining international peace and security.[2] Under Article 24 of the UN Charter, the Security Council is the organ of the UN charged with the authority to maintain peace and security. Unlike most other international bodies or organs, the Security Council is invested with coercive power. Under Chapters VI and VII of the UN Charter, the Security Council is granted powers to facilitate the pacific settlement of disputes, and to decide what means should be taken to maintain or restore international peace and security. For many years the coercive powers vested by the UN Charter in the Security Council seemed irrelevant. During the Cold War, the Security Council was effectively paralysed by reciprocal use of the veto exercisable

[1] For the argument that international law is subject to serial rewritings and attempts to reinvent the international community, see David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 *New York University Journal of International Law and Policy* 335.

[2] The Gulf War was the first sign of what has since been hailed by some as the 'revitalisation' of the Security Council. See Boutros Boutros-Ghali, *An Agenda for Peace* (New York, 1992), pp. 7, 28.

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Excerpt
More information

by the five permanent members – China, France, the United Kingdom (UK), the USA and, since December 1991, the Russian Federation (formerly the Soviet Union).[3] From the time of the creation of the UN in 1945 until 31 May 1990, the veto was exercised 279 times in the Security Council, rendering it powerless to deal with many conflicts. The permanent members used that veto power to ensure that no actions that threatened their spheres of interest would be taken. The ending of the Cold War meant an end to the automatic use of the veto power. The changed conditions of the post-Soviet era meant that the Security Council was suddenly capable of exercising great power, in a manner that appeared largely unrestrained.[4]

Although the jurisdiction of the Security Council under Chapter VII is only triggered by the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has, since 1989, proved itself increasingly willing to interpret the phrase 'threats to the peace' broadly.[5] The range and nature of resolutions passed by the Security Council since the Gulf War, relating *inter alia* to the former Yugoslavia, Somalia, Rwanda, Haiti and East Timor, have been interpreted as suggesting that the Council is willing to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuses, as either a symptom, or a cause, of threats to peace and security.[6] In this climate, some international lawyers began to argue in favour of Security Council action based on the doctrine of 'collective humanitarian intervention'.[7]

[3] Article 23 of the Charter of the United Nations (UN Charter), San Francisco, 26 June 1945, in force 24 October 1945, Cmd 7015, provides that the Security Council comprises ten non-permanent members elected for two year terms, and five permanent members.

[4] With the revitalisation of the Security Council came the realisation that there are very few formal or constitutional restrictions on the exercise of its power. This has led some international lawyers to claim that there is a constitutional crisis in the UN, due not only to the inability of the General Assembly, where all member states are represented, to control the Security Council, but also to the relatively powerless position of the International Court of Justice as revealed by the Lockerbie incident. See further José E. Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1; W. Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 *American Journal of International Law* 83.

[5] Under Article 39 of the UN Charter, where the Security Council determines that there is a threat to the peace, a breach of the peace, or an act of aggression, it may decide what measures shall be taken to maintain or restore international peace and security, including the use of force or of economic sanctions.

[6] See further Chapters 3 and 4 below.

[7] For the argument that a doctrine of 'collective humanitarian intervention' had emerged in the aftermath of operations authorised by the Security Council in Iraq,

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For these commentators, military intervention has achieved a new respectability and has come to represent, amongst other things, a means for the liberal alliance of democratic states to bring human rights, democracy and humanitarian principles to those in undemocratic, authoritarian or failed states. Such liberal internationalists argue that collective humanitarian intervention has become necessary to address the problems of local dictators, tribalism, ethnic tension and religious fundamentalism thrown up in the post-Cold War era. While the Gulf War was generally justified in traditional collective security terms, as a measure that was necessary to restore security to the region and to punish aggression, later actions in Bosnia, Somalia, Rwanda, Haiti and East Timor have been supported by a very different interpretation of the legitimate role of the Security Council. There is now a significant and influential literature arguing that, in light of the post-Cold War practice of the Security Council, norms governing intervention should be, or have been, altered to allow collective humanitarian intervention, or intervention by the Security Council to uphold democracy and human rights.

The enthusiastic embrace of multilateral intervention has extended in some quarters to support for military action undertaken by regional organisations without Security Council authorisation, most notably in the case of NATO action over Kosovo during 1999.[8] Arguments in favour of NATO intervention in Kosovo represent a new phase in the progression of international legal arguments in favour of humanitarian intervention. In the case of Kosovo, international lawyers argue that there are situations in which the international community is justified in undertaking military intervention even where such action is not authorised by the Security Council and is thus (arguably) outside the law.[9] According to this argument, a commitment to justice required the

Somalia, Haiti, Rwanda and Bosnia, see Fernando R. Tesón, 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 323.

[8] See also the discussion of humanitarian intervention as a possible basis for the regional intervention undertaken by the Economic Community of West African States (ECOWAS) in Sierra Leone, in Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *American University International Law Review* 321.

[9] It should be noted that not all NATO members have agreed that a doctrine of humanitarian intervention formed the legal basis for the military action undertaken in Kosovo. According to Michael J. Matheson, then Acting Legal Adviser to the US State Department, many NATO states, including the USA, had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action at the time of the intervention in Kosovo. As a result, NATO decided that the legal justification for action in Kosovo was based on 'the unique combination of a number

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international community to support the NATO intervention in Kosovo, despite its illegality.[10] While earlier literature about international intervention saw the Security Council as the guarantor of humanitarian values, literature about the Kosovo intervention has begun to locate those values in a more amorphous 'international community'. Legal literature discussing the legitimacy of the actions undertaken by NATO appears to indicate a loss of faith in international law as a repository of the values that should underpin the actions of international organisations. Yet while the bases upon which commentators justify international intervention have shifted since the days when a 'revitalised' Security Council was hailed as the guarantor of a new world order, the arguments made by international lawyers supporting intervention share a certainty about the moral, ethical, political and humanitarian imperatives justifying military action.

Those critical or anxious about expanding the legal bases for military action have also shifted ground in the years since the Gulf War. Many legal scholars working in the areas of human rights and international humanitarian law were highly critical of the actions undertaken in the Gulf. Criticisms ranged from analyses of the merely rhetorical nature of the Security Council's commitment to human rights, to criticism of the effects of the bombing and sanctions on the Iraqi people, to concern about the apparent domination of the revitalised Council by the United

of factors, without enunciating a new doctrine or theory. These particular factors included: the failure of the Former Republic of Yugoslavia to comply with Security Council demands under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to make a clear decision adequate to deal with that disaster; and the serious threat to peace and security in the region posed by Serb actions.' Michael J. Matheson, 'Justification for the NATO Air Campaign in Kosovo' (2000) 94 *American Society of International Law Proceedings* 301. While the Security Council did not authorise the NATO action in Kosovo, the Security Council subsequently defeated a Russian resolution condemning the air campaign by a vote of twelve to three on 26 March 1999, and later authorised member states and international organisations to establish a security presence in Kosovo under UN auspices with Security Council Resolution 1244, S/RES/1244 (1999), adopted on 10 June 1999.

[10] For arguments that the use of armed force employed by NATO in the Kosovo crisis was illegal due to the lack of Security Council authorisation, but that the intervention is nonetheless legitimate, see Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1; Michael J. Glennon, 'The New Interventionism: the Search for a Just International Law' (1999) 78 *Foreign Affairs* 2. For the argument that the NATO action is illegal although justified from an ethical viewpoint, see Antonio Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23.

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States.[11] The response to later interventions, however, has been more ambivalent. There are certainly some legal commentators who have continued to express concern about the apparent willingness of a largely unrestrained Security Council to expand its mandate to include authorising the use of force to remedy human rights abuses or 'to make every State a democratic one'.[12] Many legal scholars, however, seem haunted by the fear that opposing military intervention in Bosnia, Haiti, Kosovo or East Timor means opposing the only realistic possibility of international engagement to end the horrific human suffering witnessed in such conflicts. The need to halt the horrors of genocide or to address the effects of civil war and internal armed conflict on civilians has been accepted as sufficient justification for intervention, even if other motives may be involved.

Perhaps the most interesting place in the debate about the legality of humanitarian intervention is occupied by the new human rights warriors. In the popular scholarship of human rights lawyer Geoffrey Robertson, for example, humanitarian intervention demonstrates the possibility, too often deferred, of an international rule of law.[13] Robertson suggests that the world is entering a 'third age of human rights', that of human rights enforcement.[14] His vision of this age of enforcement is a potent blend of faith in the power of media images of suffering to mobilise public sentiment or the 'indignant pity of the civilised world', and belief in the emergence of an international criminal justice system. According to Robertson, in future the basis of human rights enforcement will be a combination of judicial remedies such as ad hoc tribunals, domestic prosecutions for crimes against humanity

[11] Philip Alston, 'The Security Council and Human Rights: Lessons to Be Learned from the Iraq–Kuwait Crisis and its Aftermath' (1992) 13 *Australian Year Book of International Law* 107; René Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait' (1992) 30 *Columbia Journal of Transnational Law* 577; Henry J. Richardson III, 'The Gulf Crisis and African-American Interests under International Law' (1993) 87 *American Journal of International Law* 42; Oscar Schachter, 'United Nations Law in the Gulf Conflict' (1991) 85 *American Journal of International Law* 452; David D. Caron, 'Iraq and the Force of Law: Why Give a Shield of Immunity?' (1991) 85 *American Journal of International Law* 89; Judith Gail Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391; Middle East Watch, *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (1991).

[12] Martti Koskenniemi, 'The Police in the Temple. Order, Justice and the United Nations: a Dialectical View' (1995) 6 *European Journal of International Law* 325 at 343.

[13] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (Ringwood, 1999).

[14] *Ibid*., p. 450.

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Anne Orford
Excerpt
More information

and an international criminal court. An important part of that system will be the willingness of states to use armed force to create this new world of enforceable human rights. Such force should ideally be authorised by the Security Council, according to the dictates of the UN Charter, but where Security Council approval is not politically feasible, international intervention should nonetheless go ahead, carried out by regional organisations or even a democratic 'coalition of the willing'.[15] As he concludes, 'there is as yet no court to stop a state which murders and extirpates its own people: for them, if the Security Council fails to reach superpower agreement, the only salvation can come through other states exercising the right of humanitarian intervention'.[16]

The muscular nature of this new breed of humanitarianism is illustrated well by the terms in which Robertson welcomes the shift in human rights activism away from a reliance on strategies of persuasion or shaming, towards enforcement through more direct forms of international intervention:

> The most significant change in the human rights movement as it goes into the twenty-first century is that it will go on the offensive. The past has been a matter of pleading with tyrants, writing letters and sending missions to *beg* them not to act cruelly. That will not be necessary if there is a possibility that they can be deterred, by threats of humanitarian or UN intervention or with nemesis in the form of the International Criminal Court. Human rights discourse will in the future be less pious and less 'politically correct'. We will call a savage a savage, whether or not he or she is black.[17]

Thus Robertson has no doubt that the new right of humanitarian intervention, represented by NATO's action in Kosovo and the multilateral intervention in East Timor, is to be welcomed because it allows for more effective enforcement of human rights. The human rights movement will no longer be reduced to humiliating acts of begging and pleading with tyrants. Lawyers can now take a more active and forceful role in promoting and protecting human rights globally, offering salvation to those threatened by state-sponsored murder and genocide.

For Robertson, the test of whether such intervention is justified should not be whether it is lawful, or authorised by the Security Council, but rather 'the dimension of the evil' to be addressed by the intervention.[18] The extent of this evil can partly be ascertained through global media, where 'television pictures of corpses in Racak, Kosovo, put such obscure

[15] *Ibid*., pp. 446–7. [16] *Ibid*., p. 420. [17] *Ibid*., p. 453. [18] *Ibid*., p. 444.

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places on the map of everyone's mind and galvanize the West to war'.[19] Today's human rights activists are motivated by 'revulsion against atrocities brought into their homes through a billion television sets and twice as many radios', leading them to exert pressure on democratic governments to impel international and UN responses – 'modern media coverage of human rights blackspots is rekindling the potent mix of anger and compassion which produced the Universal Declaration and now produces a democratic demand not merely for something to be done, but for the laws and courts and prosecutors to do it'.[20]

This new support for humanitarian intervention is also evident in the work of NGOs such as Human Rights Watch.[21] In its *World Report 2000*, Human Rights Watch treats the deployment of multinational troops in East Timor and the NATO bombing campaign in Kosovo as examples of a new willingness on behalf of the international community to deploy troops to stop crimes against humanity or to halt genocide or 'massive slaughter'.[22] Like Robertson, Human Rights Watch welcomes these developments as marking 'a new era for the human rights movement', one in which human rights organisations can 'count on governments to use their police powers to enforce human rights law'.[23] It sees the 'growing willingness to transcend sovereignty in the face of crimes against humanity' as a positive development, one which promises that 'victims of atrocities' will receive 'effective assistance wherever they cry out for help'.[24] Any problems of selectivity or dangers that humanitarian intervention 'might become a pretext for military adventures in pursuit of ulterior motives' can be met by ensuring that criteria are developed for when such intervention should occur, and by ensuring that no regions are 'neglected' when it comes to the willingness to use force.[25]

The conviction about the need for intervention expressed in post-Cold War legal and human rights literature mirrored the arguments made by European, US and Australian political leaders justifying international intervention during the 1990s. To give one example, British Prime Minister Tony Blair portrayed the NATO intervention in Kosovo as a 'just war,

[19] *Ibid*., p. 438. [20] *Ibid*.
[21] To some extent these human rights activists and lawyers are now more in favour of using force in such situations than are many military leaders. For a discussion of historical precedents to their arguments in the work of de Vitoria and other early international lawyers, see Chapter 6 below.
[22] Human Rights Watch, *World Report 2000*, p. 1.
[23] *Ibid*. [24] *Ibid*., p. 5. [25] *Ibid*., pp. 1, 4–5.

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More information

based not on territorial ambitions, but on values'.[26] According to Blair, British foreign policy decisions in the post-Cold War era 'are guided by a . . . subtle blend of mutual self-interest and moral purpose in defending the values we cherish . . . If we can establish and spread the values of liberty, the rule of law, human rights and an open society, then that is in our national interest.'[27] The war in Kosovo was fought precisely to defend such values:

> This war was not fought for Albanians against Serbs. It was not fought for territory. Still less for NATO aggrandisement. It was fought for a fundamental principle necessary for humanity's progress: that every human being, regardless of race, religion or birth, has the inalienable right to live free from persecution.[28]

This was the broad climate within which the argument for humanitarian intervention in the case of East Timor was made. My immediate response to these calls for intervention was that here was a case where the willingness to kill people in the name of the international community might be ethical. I was moved by the sense that urgent action was the only way to prevent a genocide. This fear was evident in many calls for military intervention. A student asked to address one of my classes, and announced that 'as we speak, people are being slaughtered in the streets of Dili. Timorese people in Australia are hysterical. Come and rally at Parliament House and demand intervention now.' A newspaper headline on the same day read 'Plea for peacekeepers as terror grips Timor'.[29] The story the news article told was that violent pro-Jakarta militia were rampaging through Dili in response to the UN's announcement on 5 September that the overwhelming majority of East Timorese had voted for independence in the UN-sponsored referendum. More than one hundred people had already been killed or wounded, and many including injured children were seeking sanctuary at the UN headquarters. An email message sent by the NGO network Focus on the Global South on 8 September was headed 'Act now for East Timor.' The message asked

[26] Tony Blair, 'Doctrine of the International Community', Speech given to the Economic Club of Chicago, Chicago, 22 April 1999, http://www.fco.gov.uk/news/speechtext.asp?2316 (accessed 2 May 2001).

[27] *Ibid*.

[28] Tony Blair, 'Statement on the Suspension of NATO Air Strikes against Yugoslavia', London, 10 June 1999, http://www.fco.gov.uk/news/newstext.asp?2536 (accessed 2 May 2001). In future, however, given the lack of support for humanitarian intervention expressed by members of the new Bush administration, it may be that human rights lawyers and activists will prove to be more enthusiastic supporters of the use of armed force to remedy human rights violations than are political and military leaders.

[29] *The Age*, 6 September 1999, p. 1.

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Excerpt
More information

me to sign on to a statement to be sent to the UN, ASEAN, the Government of Indonesia and Asia-Pacific Economic Cooperation (APEC) heads of state. The statement began with the words:

> The world failed East Timor once, in 1975, when it offered little protest to the bloody annexation of that country by Indonesia. Key international actors, including Australia, the United States, and ASEAN, either supported the takeover behind the scenes or tacitly approved of it . . . The world cannot afford to fail the people of East Timor again. As Indonesian troops and Indonesia-supported militiamen wreak mayhem on the people after the historic vote for independence last week, it is imperative that we act to prevent an act of ethnic cleansing on the scale of Bosnia and Kosovo.

As I walked down to feed my son at the university childcare centre that afternoon, I was handed a leaflet advertising a rally. The leaflet stated that 'the next few days will be critical in saving the lives of thousands of East Timorese' and urged that I 'demand an international peacekeeping force'. My desire for intervention was made more urgent by the repeated representation of the Timorese as defenceless, powerless, 'hysterical' and unprotected, and by the focus on threats to babies, women and children. As one eyewitness cried on the radio, 'The East Timorese are being slaughtered. There's no-one there to protect them.'[30] Hearing these reports left me feeling as unbearably and frustratingly powerless and helpless as the East Timorese. At the same time, if Australians and the international community were willing to use military force in response to this slaughter and devastation, we could be potential saviours of the East Timorese, agents of democracy and human rights able to overpower those bent on killing and destruction. It was up to us to offer protection to the people of East Timor.

Yet despite my growing sense that in this case intervention was necessary, I also had some doubts about my response. I had spent the last few years writing and thinking about how the desire for military intervention is produced. I had been interested in exploring the effects of the ways in which internationalists spoke and wrote about collective security and international intervention in the post-Cold War era. Two features of the knowledge practices of international lawyers had interested me. First, I had been concerned to think about the claim that a right or duty of humanitarian intervention was somehow revolutionary, fulfilling the promise of a world based on respect for human rights rather than merely respect for state interests. My sense was that the

[30] Radio National, 8 September 1999.

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