

The Use of Force to Prevent a

HUMAN



MILITARIAN DISASTER

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By Group Captain Bill Boothby (RAF) Legal Branch

What follows is an extract from a presentation I gave to the British Red Cross Summer School at the University of Cambridge on 12 July 1999. My theme was the protection of civilians in armed conflict, tracing the origins of the modern law, examining the legal code set out in the Fourth Geneva Convention and the developments to be found in Additional Protocols 1 and 2, which were ratified by the UK on 28 January 1998.

As I was preparing this presentation, events were unfolding on the continent of Europe which may, in my view, have momentous implications for the development of international law. Armed forces and/or internal security personnel from Serbia were apparently terrorising the civil population in Kosovo. Villages were being attacked by the armed forces of the state, for example Gorajaklina and Srbica, summary executions were evidently taking place and the world's media were transmitting into our living rooms images of carnage, destruction and misery such as are guaranteed to stimulate revulsion in the viewer. It became obvious that mass population movements with all the attendant potential for disaster were imminent. That "something had to be done" was the obvious conclusion. Opinion polls suggested that there was widespread support for military action to restrain

the "evil aggressor", but that support for such an enterprise might well prove very fragile in the event of any significant casualties among our own forces.

Given these political realities it is unsurprising that consensus soon developed among the NATO democracies in favour of the use of military force, in particular air power, for the specific purpose of averting a humanitarian catastrophe. Speaking on 24 March 1999, the US President, Bill Clinton, said "If we do not act, clearly it will get even worse. Only firmness now can prevent greater catastrophe later".

It therefore became clear that I should expand my talk beyond the confines of Geneva and Hague law to consider the legal basis for the use of coercive force in order to prevent a humanitarian disaster. This does, of course, move the focus of the discussions from "Ius in Bello", or a law applicable during a conflict, to "Ius ad Bellum", or the law governing the use of force. The use of such terminology would not, I suppose, pass the Woolf test. Perhaps, however, we can agree to keep Lord Justice Woolf "at the door" and conduct the rest of this discussion "ex parte" him!

So when can force lawfully be used by states? I should at this point stress that what follows represents a personal view and is not attributable to HMG, MOD or the RAF. Well, let us start by looking at article 2(4) of the UN Charter.

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of the state, or in any manner inconsistent with the purposes of the UN".

So this provides the background general rule that use of force, aggression, as a means of securing foreign policy goals is unlawful. But there are exceptions, three exceptions. **The first exception** is that force may be authorised by the Security Council of the United Nations by the passing of a suitable resolution. Article 42 of the UN Charter is the authority for that proposition. It states "the Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security". Clearly such a resolution might, in appropriate circumstances, be adopted for the purpose of protecting a designated group of civilians where risks to them have been identified and the Security Council determines that such a resolution is required. Resolution 678-1990, which was the original Gulf War authorisation, is an example of very specific authority for the use of force. It "authorises member states co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph one above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660(1990) and all subsequent relevant resolutions and to restore international peace and security in the area."

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The second exception is that force may be used under Article 51 of the UN Charter in individual or collective self defence. Specifically, that article talks about nothing impairing the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations, such a member being of course, a sovereign country. I shall mention this article again a little later.

The third exception is one that has been discussed extensively of late in the context of operations in or over Serbia. It is a principle of intervention to prevent a humanitarian disaster which, in a 1992 memorandum to the Foreign Affairs Committee the



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FCO described in the following terms: "We believe that international intervention without the invitation of the Government of the country concerned can be justified in cases of extreme humanitarian need. This is why we were prepared to commit British Forces to Operation Haven, mounted by the coalition in response to the refugee crisis involving the Iraqi Kurds. The development of these forces was entirely consistent with the objectives of SCR688". That resolution consisted of expressions of grave concern, condemnation, demands addressed to Iraq and so on, but did not provide in terms for the use of force.

In subsequent evidence before the Foreign Affairs Committee, the FCO legal Counsel stated that the intervention in Northern Iraq "Provide Comfort" was, in fact, not specifically mandated by the United Nations, but the states taking action in Northern Iraq did so in exercise of the customary international law principle of humanitarian intervention. Other examples of humanitarian intervention include operations in Bosnia, Rwanda and Somalia. In these three cases, however, the interventions by the international community were authorised by Security Council resolutions, which specifically sanctioned "the use of all necessary means" to secure the relevant humanitarian objectives.

Lauterpacht in his authoritative treatise on International Law notes the essential right of a state to treat its own nationals according to its own discretion, but notes a substantial body of opinion and practice suggesting that there are limits to that discretion. He considers that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as

to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible. "Great Britain, France and Russia intervened in 1872 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle. Intervention was often resorted to in order to put a stop to the persecution of Christians in Turkey". He notes that when intervention was used by individual states there were often selfish purposes also involved which weakened its standing as a principle of international law. That objection, he considers, does not apply to collective intervention. The decisive difference is therefore between intervention by an individual state in the internal affairs of another, and collective action by a group of states. Specifically, he notes the general rule that intervention in the internal affairs of another state is now lawful, but says that that general rule does not extend to collective action in the general interest of states or for the collective enforcement of international law.

Against this background, it seems to me that the support and active participation by the countries of NATO in a humanitarian intervention type of operation for which, as a question of fact, no "all necessary means" resolution exists constitutes powerful endorsement of the FCO evidence that customary international law permits such an intervention. In his evidence, Mr Aust did suggest that before intervening.

"a state would have to ask itself several questions, first of all, whether there was a compelling and an urgent situation of extreme humanitarian distress which demanded immediate relief. It would have to ask itself whether the other state was itself able or willing to meet that distress and deal with it. Also whether there was any other practical alternative to intervening in order to relieve the stress, and also whether the action could be limited in time and scope".

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I should, at this point, mention that some writers dispute this right of humanitarian intervention.

Professor Brownlie, writing in the early 1960s (post Suez) takes a very conservative view on state use of force. His basic line is that it is always for the Security Council to determine issues on the use of force. For example he quotes an argument put forward at the Nuremberg trials that when the collective security

system had failed, states were free to resort to war. This argument fails, Brownlie quotes Resolution A of General Assembly resolutions 3 November 1950:

"Conscious that failure of the Security Council to discharge its responsibilities to member States does not relieve Member States of their obligations or the UN of its responsibility under the Chapter to maintain international peace and security."

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Brownlie has a separate section on chronic disorder on the territory of a neighbouring state which he relates closely to humanitarian intervention justification and it fits again with the present European situation. In the distant past some states have justified intervention in a neighbouring state to put an end to chaotic conditions and disorder which were threatening the interest of the intervening state (eg US in Cuba 1898).

The justification for the above was that "state has sovereignty on condition that it maintains certain standards of administration or its territory." Brownlie states that modern (ie up to 1963!) state practice is unfavourable to such claims. He quotes Article 3 of the 1933 Convention for the Definition of Aggression which provided that no action of aggression could be justified in:

"the internal condition of a state eg alleged defects in its administration, disturbances due to strikes, revolutions civil war."

Consistent with that approach, Brownlie believes that any use of force in these circumstances must be confined to:

"lawful measures of self-defence to maintain the integrity of their frontiers but any other action can only occur with the authorisation of an organ of the UN."

It is interesting to read such a conservative approach in the light of what some commentators are arguing in relation to the Balkans.

I suggest that as an instrument for the protection of minority groups which are being subjected to genocide, or other mass human rights abuses, military intervention will clearly always be regarded as the very last resort, not least because of political and financial considerations. It is an instrument which is likely to be used very sparingly indeed, not least because one man's "prevention of humanitarian disaster" may well be another man's "meddling in internal affairs". In my view, the general rule of international law is, and will remain, that set out in article 2(4) of the UN Charter, but when tyrants who may or may not have democratic authority at home perpetrate crimes against humanity within their own borders, thereby threatening large numbers of people with death, rape, forced expulsion from their homelands and so on, and as a consequence imperil peace in the region, the international community clearly has an interest to seek to restore peace and security to those people. Obtaining a UN Security Council resolution is not possible, for example because the incidents in question are taking place close to the borders of a permanent member which operates the veto the international community should not, you may feel, be prevented thereby from taking action.

The Foreign Office reportedly gave a written answer in November 1998 which noted that the prohibitions on the use of force in the UN Charter do not preclude the use of force by a state or group of states in self defence in accordance with Article 51 or under the authorisation of the Security Council acting under Chapter VII of the Charter. The written answer stated "There is no general doctrine of humanitarian necessity in International Law. Cases have nevertheless arisen "as in Northern Iraq in 1991 when, in the

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Death and forced expulsion: Kosovo 1999

light of all circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe".

For completeness, I should distinguish action under Article 51 of the UN Charter which preserves the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations, that is against a State. It is an open question whether Article 51 says all that can be said on the subject of self defence at international law. In particular, one might muse whether the inherent right of individual or collective self defence might, in the modern law, apply also in favour of a people, or a racial or ethnic group. In addressing the Human Rights Commission on 7 April 1999, the UN Sec Gen Kofi Annan said:

"Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty".

"It is a principle that protects minorities – and majorities – from gross violations and let me therefore be very clear, even though we are an organisation of Member States, the rights and ideals the United Nations exists to protect are those of peoples. As long as I am Secretary-General, the United Nations as an institution will always place human beings at the centre of everything we do. No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples. Whether a person belongs to the minority or the majority, that person's human rights and fundamental freedoms are sacred.

This developing international norm will pose fundamental challenges to the United Nations. Of this, there can be no doubt. But nor can there be any doubt that if we fail this challenge, if we allow the United Nations to become the refuge of "ethnic cleanser" or mass murderer, we will betray the very ideals that inspired the founding of the United Nations".

So tracing from the older authorities cited by Lauterpacht, through the FCO memo and evidence, to contemporary action by NATO and the remarks of Kofi Annan, we have a strong line of authority for humanitarian intervention. Certain subsidiary questions then arise, for example how large a group of individuals need to be affected by the actions of the evil aggressor for the use of force in response to become lawful and how grave do the human rights abuses need to be? Must the force used by the interveners be proportionate to that giving rise to the intervention. I think the better view is that the

force used must be proportionate to the circumstances giving rise to the intervention and that the force itself must be, to the extent reasonably possible, restricted to that required for the accomplishment of those humanitarian objectives. We should perhaps, bear in mind that President Clinton, speaking on 24 March 1999, cited 3 objectives underlining NATO action over Serbia and Kosovo. These were "First, to demonstrate the seriousness of NATO's opposition to aggression and its support for peace. Second, to deter President Milosevic from continuing and escalating his attacks on helpless civilians by imposing a price for those attacks. And third, if necessary, to damage Serbian capacity to wage war against Kosovo in the future by seriously diminishing its military capability."

I have some concluding thoughts. First, how soon can the world community intimately intervene to prevent a humanitarian disaster. Timing, I think, is crucial. If you intervene too late, the disaster has already happened. The ethnic cleansers have done their work, and thousands are dead and/or displaced. If you seek to act too early, developing an international consensus act will prove difficult and legal justification may well not exist. Secondly, we could I think argue that the very fact that international military intervention for the protection of civilians has become such a prominent subject clearly demonstrates the success of the ICRC in bringing humanitarian considerations to the attention of the world community. Its initiative in teaching and disseminating the laws of war has produced a growing level of consensus that what we have seen on our television screens in reports from Kosovo is abhorrent and that appropriate action should be taken to remedy the situation. The question that one might now pose is how (or whether) the taking of such measures in response itself ought to be regulated.

NOTES

- 1 Mail on Sunday, 28 March 1999
- 2 International Law by L Oppenheim, ed. H Lauterpacht & Ed, Longmans
- 3 International Law and the Use of Force by States, Brownlie 1963 OUP

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