

Reading Humanitarian Intervention

*Human Rights and the Use of Force in
International Law*

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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 protesters 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

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.

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,

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

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.

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.

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.

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.

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.

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 peace-keeping 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.

way in which international law was narrated in fact served to confine any revolutionary potential inherent in human rights discourse, such that the right of intervention in the name of human rights became profoundly conservative in its meaning and effects. Any potentially revolutionary interpretations of humanitarian intervention as heralding a commitment to human rights over state interests had been constrained by the meanings that were made of international intervention in legal texts. I felt that in quite complicated ways, these legal intervention narratives served to preserve an unjust and exploitative status quo.³¹

Second, the way in which humanitarian intervention was narrated had other less obviously 'international' effects.³² For example, the way in which international law portrayed the need to intervene in order to protect and look after the people of 'failed states', and the forms of dependence set up in post-conflict 'peace-building' situations, seemed to rehearse colonial fantasies about the need for benevolent tutelage of uncivilised people who were as yet unable to govern themselves. The focus in international law's intervention narratives on the ways in which violence could be used by good and righteous men to achieve the best for those against whom that violence was directed seemed to me to reinforce many of the stories of masculinity against which feminists had been writing for decades. So, intervention narratives had a domestic or personal effect, despite their overtly international focus. These representations of international intervention help to shape the identities and world-view of all those who engage with them. Intervention stories work 'by calling an audience into the story'.³³ Their appeal is premised upon learned assumptions about value based on old stereotypes of gender, race and class – assumptions that inform the way those who live inside such stories experience the world.

In the work that I published over that period, I had argued that the enthusiasm for the new interventionism of the post-Cold War period was dangerous. The image of military action being conducted by the 'international community' in the name of peace, security, human rights and democracy had meant that many inhabitants of industrialised states were increasingly willing to support militaristic solutions to

³¹ Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443. See further the arguments developed in Chapters 3 to 6 below.

³² See generally Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679.

³³ Donna J. Haraway, *Modest.Witness@Second_Millennium* (New York, 1997), p. 169.

international conflicts. The choice of high-violence options which continued to threaten the security of many people was now once again marketable to citizens of the USA and other democracies, in ways rendered unimaginable in the immediate aftermath of the Vietnam War. As Cynthia Enloe has noted, the construction of the US military as a global police force in the post-Cold War period has meant that it is now 'more thoroughly integrated into the social structure than it has been in the last two centuries'.³⁴ The increasing militarisation of the cultures and economies of industrialised states was also a matter of concern for those living within those states, particularly those who suffer when there are cutbacks to civilian spending in order to fund increased spending on the defence budget.³⁵ There was evidence that violence against women increases in militarised cultures generally, and in military families in particular.³⁶

Experience had shown that armed intervention had not necessarily been humanitarian in effect. Those active in humanitarian organisations had argued that armed intervention, particularly aerial bombardment, often impeded humanitarian relief and was indiscriminate in its targets, generally proving counterproductive to the tasks of democratisation and peace-building.³⁷ The disproportionate targeting of essential infrastructure and deaths of civilians through such air campaigns had itself been questioned as a breach of international humanitarian law.³⁸ In addition, the introduction of large numbers of militarised men as

³⁴ Cynthia Enloe, *The Morning after: Sexual Politics at the End of the Cold War* (Berkeley, 1993), p. 184.

³⁵ J. Ann Tickner argues that 'when military spending is high and social welfare programs are cut back, women, who are disproportionately clustered at the bottom of the socioeconomic scale, are usually the first to suffer. Women also assume most of the unremunerated caregiving activities that states relinquish when budgets are tight.' J. Ann Tickner, 'Inadequate Providers? A Gendered Analysis of States and Security' in Joseph A. Camilleri, Anthony P. Jarvis and Albert J. Paolini (eds.), *The State in Transition: Reimagining Political Space* (Boulder, 1995), pp. 125–37 at p. 130.

³⁶ *Ibid.*

³⁷ For a report of criticisms of NATO actions by aid workers in Northern Albania, see Jonathon Steele, 'Aid Workers Protest at Nato's Role', *Guardian Weekly*, 6 June 1999, p. 23. See also the arguments canvassed in Thomas Weiss, 'On the Brink of a New Era? Humanitarian Interventions, 1991–94' in D. C. F. Daniel and B. C. Hayes (eds.), *Beyond Traditional Peacekeeping* (New York, 1995), pp. 3–19 at p. 8.

³⁸ Amnesty International, 'Collateral Damage' or Unlawful Killings? *Violations of the Laws of War by NATO during Operation Allied Force* (2000); Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (2000); 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* (New York, 1991).

peace-keepers had repeatedly led to increased exploitation, rape, prostitution and abuse of women and children.³⁹

The new enthusiasm for military intervention as a weapon of human rights enforcement also had systemic effects. The resort to *ad hoc* interventionist responses to human rights crises by major powers allowed them to avoid funding, supporting and strengthening the existing multilateral mechanisms for promoting and protecting human rights.⁴⁰ The use of force as a response to security and humanitarian crises continued to mean that insufficient attention was paid to the extent to which the policies of international institutions themselves contribute to creating the conditions that lead to such crises.⁴¹ For example, the representation of the interventions in Bosnia and Kosovo as the actions of an international community interested in protecting human rights and humanitarian values served to obscure the extent to which the international community had itself contributed to the humanitarian crises that had emerged in those places.⁴² While ancient hatreds and ethnic tensions continue to be represented as the cause of the violence that erupted in the former Yugoslavia, critics have suggested that the crisis was equally a product of modern capitalist international relations.⁴³ In the former Yugoslavia as elsewhere, the project of economic restructuring and liberalisation which remains central to the new world order contributed to creating the conditions in which such hatreds were inflamed.⁴⁴ For these and other reasons, I had argued that the desire to use violence and to take 'action' by sending armed forces to create security had to be interrogated. As Edward Said has shown, the belief that 'certain territories and people *require* and beseech domination' was at the heart of making colonialism palatable.⁴⁵ Given that it was so difficult for people

³⁹ Anne Orford, 'The Politics of Collective Security' (1996) 17 *Michigan Journal of International Law* 373–411

⁴⁰ Alston, 'The Security Council'.

⁴¹ See the arguments made in Orford, 'Locating the International', and see further Chapter 3 below.

⁴² *Ibid.*; Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, 1995).

⁴³ Peter Gowan, 'The NATO Powers and the Balkan Tragedy' (1999) 234 *New Left Review* 83.

⁴⁴ Woodward, *Balkan Tragedy*; Orford, 'Locating the International' (arguing that the economic policies that were designed to refinance and repay Yugoslavia's foreign debt played a role in the rise of republican nationalism and the sense that the federal government lacked legitimacy. Nationalist leaders, including Slobodan Milosevic, came to power as the IMF's 'shock therapy' stabilisation programme radically altered the nature of Yugoslav constitutional and political arrangements, causing significant and unstable new alliances in the region).

⁴⁵ Edward W. Said, *Culture and Imperialism* (London, 1993), p. 9 (emphasis in original).

to stand back from the culture that produced and legitimised imperialism, it seemed necessary to be cautious about any arguments that made the use of force appear benevolent to us today.

Action and inaction

In light of these concerns, I began to attempt to think through the conditions that were producing my desire for intervention and such a uniform plea for peace-keepers in the case of East Timor. To begin with, I was moved by the idea that there was a need to take action immediately, to *do something* to support victimised people, especially children. The East Timorese had done no more than express their wish to be free from oppression, brutality and exploitation at the hands of Indonesian invaders. The only way to take action to end that violence seemed to be to produce a stronger, disabling force – to persuade the men and women whose profession it is to kill in the name of my country to take action. I felt anger on behalf of the innocent people caught up in these power plays, particularly the babies and children targeted by rampant, ruthless militias, and the mothers of those children who seemed powerless to protect them. I had seen the posturing machismo of the militia leaders in newspaper photographs, and it seemed appalling that they could simply assert their dominance through aggression, violence and the ownership of weapons that they were willing to use. I was also moved by the image evoked by the student addressing my class, conjuring up a picture of ‘hysterical’ Timorese people in Australia. The language painted a picture of people who were crazed by despair, confusion and disbelief at what was happening in their homeland. Inaction seemed impossible to contemplate in such a situation.

Some weeks later at dinner with friends, the subject of East Timor again came up. One of our group had marched against Australian involvement in Vietnam in the 1960s, yet she had also marched in support of UN intervention in East Timor. Despite those things that worried me about what intervention can and has stood for, she argued that those people who had taken to the streets throughout Australia were not (necessarily) lining up in support of the US or Australian militaries, or any of the other conservative messages that might later be taken from the support for intervention. Rather, they were lining up in solidarity with the East Timorese people. She asked me – ‘What alternative can you offer at that moment when the choice is either intervention or genocide?’ Surely, she implied, law must be able to respond at that moment of crisis?

Her question is a compelling one. It raises a central theme underlying the debate about the legitimacy of humanitarian intervention – the idea that the choice facing the international community in security or humanitarian crises is one between action and inaction. In the case of East Timor, the story by which I was moved to advocate intervention was one in which slaughter, genocide and massive human rights abuses had to be met by action, specifically in the form of military intervention. Both those arguing for and those against the legitimacy of humanitarian intervention accept that the international community is faced with a choice as to whether or not to take action in states where conflicts arise. The argument made by those who support humanitarian intervention is based upon an assumption that post-Cold War crises are in part attributable to an absence of law, including international law, and a lack of sustained engagement by international organisations. Accordingly, a commitment to humanitarian ideals is seen to demand action from the international community, in the form of intervention. Thomas Weiss, for example, argues that, while humanitarian intervention may be counterproductive to the tasks of democratisation and peace-building, ruling out the option of such action will render the UN powerless to act, destroy its credibility and condemn it to the fate of the League of Nations.⁴⁶ Weiss presents a stark choice:

Too many pleas for consistency or against inevitable selectivity amount to arguing that the United Nations should not intervene anywhere unless it can intervene everywhere... But in light of genocide, misery, and massive human rights abuses in war zones around the world, should Pontius Pilate be the model for both the American and the international response? The fatalism and isolationism that flow from most objections to humanitarian intervention are as distressing as the situation in the countries suffering from ethnic conflict where such an action is required... A purely noninterventionist position amounts to abstention from the foreign policy debate.⁴⁷

Similarly, Fernando Tesón argues that it is better for states to take collective action to intervene in favour of the rights and interests of human beings, even if such action may do some harm, rather than to remain inactive and, as a result, incapable of providing either relief from brutality or assistance in the achievement of democratic government.⁴⁸

It is...surprising to be told that the very crimes that prompted the massive, cruel and costly struggle from which the United Nations was born, are now immune from action by the organ entrusted to preserving the fruits of the

⁴⁶ Weiss, 'On the Brink', p. 8. ⁴⁷ *Ibid.*, pp. 8, 15.

⁴⁸ Tesón, 'Collective Humanitarian Intervention', 342.

hard-won peace. The formalism of anti-interventionists thus not only rewards tyrants, but it betrays the purposes of the very international order that they claim to protect.⁴⁹

Even those who reject the legitimacy of collective humanitarian intervention appear haunted by the fear that failure to act under the auspices of the Security Council may represent a betrayal of our duty to be engaged in the world in the interests of humanity. Richard Falk's critical analysis of the precedent set by Security Council resolutions concerning Haiti provides a good illustration of that concern.⁵⁰ While Falk mounts a strong case against Security Council action in Haiti, he admits to a fear that advocating non-intervention may equal advocating inaction. 'Having mounted this case against intervention, a haunting question must be posed: with all of its deficiencies, isn't it better to have confronted and deposed Cedras, to have provided relief to the Haitian people from the widespread daily brutality and to have given them an opportunity to compose a more democratic government that addresses the poverty of the people?'⁵¹

For many commentators, Rwanda stands as the clearest example of the terrible consequences that result if the international community does not take action to prevent crimes against humanity, human rights abuses and acts of genocide.⁵² As the UN Secretary-General Kofi Annan states in his 1999 annual report to the opening meeting of the General Assembly, 'the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder'.⁵³ The message that he takes away from the failure to intervene militarily in Rwanda sums

⁴⁹ *Ibid.*

⁵⁰ Richard Falk, 'The Haiti Intervention: a Dangerous World Order Precedent for the United Nations' (1995) 36 *Harvard International Law Journal* 341. See also Security Council Resolution 940, S/RES/940 (1994), adopted on 31 July 1994 (authorising member states to impose economic sanctions and use force to 'facilitate the departure from Haiti of the military leadership' and to return it to democratic rule under President Jean-Bertrand Aristide).

⁵¹ Falk, 'The Haiti Intervention', 357.

⁵² For analyses that unsettle the assumption that it was the international community's inactivity in Rwanda that should be criticised for enabling the genocide, rather than the impact of its activities prior to the genocide, see Peter Uvin, *Aiding Violence: the Development Enterprise in Rwanda* (Connecticut, 1998); Michel Chossudovsky, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (Penang, 1997), pp. 112–22. Both focus on the role of the development enterprise overseen by international economic institutions and international non-governmental organisations in contributing to the dynamics that fuelled the Rwandan genocide.

⁵³ UN, *Secretary-General Presents His Annual Report to General Assembly*, UN Press Release SG/SM/7136 GA/9596, 20 September 1999.

up well the choice that many commentators see facing the international community:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?⁵⁴

Similarly, Geoffrey Robertson treats Rwanda as representing the failure of the international community to take decisive and forceful action to prevent human rights abuses. Although he is committed to the notion of an international rule of law, Robertson echoes the notion that the law must not be hijacked by the approach of legal formalists immersed in technicalities and rules, but must be open to interpretation in the light of the demands of morality and the principles of justice.

If only, say, Kenya, Uganda and South Africa had invaded Rwanda in April 1994 to stop the genocide after the Security Council action had been vetoed by Britain and the US (as it undoubtedly would have been), who would now complain about its illegality?⁵⁵

Despite the power of this argument, the assumption that the international community faces a choice between military intervention and inaction limits the capacity of international law to develop adequate responses to post-Cold War security and humanitarian crises. In Chapter 3, I suggest a way forward for the debate that may enable international lawyers to move beyond the perceived opposition between action and inaction. To do so, I examine the ways in which international law and international institutions have been present and active in places such as the former Yugoslavia, Rwanda and East Timor prior to, and during, the humanitarian crises that arose there. The international community had already intervened on a large scale in each of the above cases before the security crisis erupted, particularly through the activities of international economic institutions. Inactivity, in other words, is not the alternative to intervention. The international community is already profoundly engaged in shaping the structure of political, social, economic and cultural life in many states through the activities of, *inter alia*, international economic institutions. Indeed, intervention in the name of

⁵⁴ *Ibid.* ⁵⁵ Robertson, *Crimes*, p. 408.

humanitarianism too readily provides an alibi for the continued involvement of those interested in exploiting and controlling the resources and people of target states. The 'myopia' of international lawyers about the effects of the new interventionism means that, in general, international legal debate fails to address the ways in which the destructive consequences of coercive economic restructuring contributes to instability, leading to further violence and denials of human rights.⁵⁶

The question my friend asked about the choices available when international law is confronted with genocide or mass human rights violations, like the discourse of humanitarian intervention more generally, adopts a particular temporal focus. International law is structured around a concern with serial security and humanitarian crises. The focus is always on the moment when military intervention is the only remaining credible foreign policy option. The question that is produced by law's focus on the moment of crisis is always 'What would you suggest we do if we are in that situation again?' The assertion that this is the only moment which can be considered renders it impossible to analyse any other involvement of the international community or to think reflexively about law's role in producing the meaning of intervention. At the moment of crisis, the demands on law are so immediate and important that they replace everything else in the field of analysis – it is the duty of lawyers only ever to focus on specific crises and 'facts' rather than studying the narrating of legal texts or law as fiction. This book attempts to resist that conservative pull of law's temporal focus.

Law and empire

Some of the appeal of the idea of humanitarian intervention lies in the moral authority of the notion of democracy. One of the promises made by those who speak on behalf of the international community is that intervention can bring people the opportunity to be governed democratically. For example, while still US Ambassador to the UN, Madeleine Albright argued that 'UN peacekeeping contributes to a world that is less violent, more stable, and more democratic than it would otherwise be.'⁵⁷ She uses as an example the intervention in Haiti, suggesting that

⁵⁶ On the myopia of international lawyers in the face of globalisation and its effects, see Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435.

⁵⁷ Ambassador Madeleine K. Albright, 'International Law Approaches the Twenty-First Century: a US Perspective on Enforcement' (1995) 18 *Fordham International Law Journal* 1595 at 1599.

it led to 'the effort to place the law on the side of the people of Haiti for perhaps the first time in that nation's history'.⁵⁸ Similarly, Geoffrey Robertson sees the UN intervention in East Timor as a case where the international community acted to protect the right of people to determine their own governance. Robertson argues that the UN 'got lucky' in its 'last humanitarian operation of the century'.⁵⁹ He believes that the future of East Timor 'is clear and optimistic: nation-building begins apace for a people the protection of whose post-plebiscite right to self-determination was the acknowledged reason for the intervention'.⁶⁰

In the human rights terms adopted by Robertson, the international community attempts to ensure through humanitarian intervention the creation of conditions for the exercise of the right to self-determination.⁶¹ According to the UN Charter, self-determination of peoples is a principle to be respected as a basis for the development of peaceful and friendly relations among nations.⁶² Self-determination was raised to the status of a right of peoples in the common Article 1 of the two major human rights covenants, which provided that all peoples have the right freely to determine their political status and freely pursue their economic, social and cultural development.⁶³ The idea that states were committed to respecting, protecting and promoting self-determination was a central component of the promise that the creation of the UN would usher in an age of decolonisation. In the post-Cold War era, some international lawyers came to argue international law guaranteed peoples not only the right to choose a form of political, economic and social organisation, but also the right to democratic governance as the ideal form of political organisation.⁶⁴ The concept that under international law all peoples have a right to self-determination reflects most perfectly law's self-image as a guarantor of peace, human rights and democracy.

Yet the tensions that beset the attempt to guarantee the right to self-determination or to democratic governance through the use of force

⁵⁸ *Ibid.*, 1603. ⁵⁹ Robertson, *Crimes*, p. 425. ⁶⁰ *Ibid.*, p. 434.

⁶¹ For an analysis that treats military intervention as a means of achieving self-determination, see Morton H. Halperin and David J. Scheffer with Patricia L. Small, *Self-Determination in the New World Order* (Washington, 1992).

⁶² Articles 1(2) and 55, UN Charter.

⁶³ Article 1, International Covenant on Civil and Political Rights, New York, 19 December 1966, in force 23 March 1974, 999 UNTS 171; Article 1, International Covenant on Economic, Social and Cultural Rights, New York, 19 December 1966, in force 3 January 1976, 993 UNTS 3.

⁶⁴ See particularly Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

reveal the limitations of those modernist legal claims. In his Grotius lecture on law and empire, Nathaniel Berman argues that there is a reformist tradition of international legal scholarship which treats law as a solution to the problem of imperialism.⁶⁵ International lawyers narrate the story of the rise of the state in Western Europe as a triumph of reason, order and sovereign equality over tribalism, religion and hierarchical relations.⁶⁶ The moment that figures the final break between law and empire, or between a society grounded on imperial legitimacy and one grounded on mutual recognition between European sovereigns, is the Peace of Westphalia of 1648. Much later, the modern law of decolonisation implemented under the UN Charter would be treated as extending this notion of sovereign equality in what is portrayed as a clean break between law and old-fashioned colonialism. Berman argues, however, that the 'claim of an historical break can only work if you treat imperialism as a single phenomenon that disappears with the death of specific players and legal forms. But decolonisation was only the end of a specific form of imperial domination.'⁶⁷ This book explores the possibility that the law of intervention can be read as a component of just such a new form of imperial domination.

Those international lawyers who support the new interventionism of the post-Cold War era have tended not to discuss the potential imperial character of multilateral intervention. Instead, they present an image of international institutions and international law as agents of democracy and human rights. That representation operates to reinforce the identity of international institutions and of major powers, particularly the USA, as in turn bearers of those progressive values. The UN and other post-World War II institutions have embodied the faith of many people in the ability of international institutions to protect ideals of universalism, humanitarianism, peace, security and human rights. Multilateralism has seemed to offer an escape from unrestrained self-interest and power politics. That faith, if anything, has grown stronger in the post-Soviet era, with commentators treating multilateral and regional institutions, particularly the UN and now NATO, as essentially benevolent and able to bring not only peace and security, but also human rights and democracy,

⁶⁵ Nathaniel Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1521 at 1523.

⁶⁶ David Kennedy, 'Images of Religion in International Legal Theory' in Mark Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht, 1991), pp. 137-46 at pp. 138-9.

⁶⁷ Berman, 'In the Wake', 1531.