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Reading Humanitarian Intervention

Human Rights and the Use of Force in International Law

ANNE ORFORD

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During the 1990s, humanitarian intervention seemed to promise a world in which democracy, self-determination and human rights would be privileged over national interests or imperial ambitions. Orford provides critical readings of the narratives that accompanied such interventions and shaped legal justifications for the use of force by the international community. Through a close reading of legal texts and institutional practice, she argues that a far more circumscribed, exploitative and conservative interpretation of the ends of intervention was adopted during this period. The book draws on a wide range of sources, including critical legal theory, feminist and postcolonial theory, psychoanalytic theory and critical geography, to develop ways of reading directed at thinking through the cultural and economic effects of militarised humanitarianism. The book concludes by asking what, if anything, has been lost in the move from the era of humanitarian intervention to an international relations dominated by wars on terror.

ANNE ORFORD is Associate Professor in the Law School at the University of Melbourne. She researches and teaches in the areas of international human rights law, international economic law, psychoanalysis and law, postcolonial theory and feminist theory.

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Preface

I have been blessed with the support of many family, friends, colleagues and students during the writing of this book. The shape and direction of my thinking about humanitarian intervention owe a great deal to my good fortune in being offered my first academic position at the School of Law and Legal Studies at La Trobe University in 1993. At that time, La Trobe was home to a community of many of the most exciting and creative critical and feminist legal scholars in Australia. My inspiring colleagues, in particular Greta Bird, Sue Davies, Ian Duncanson, Judith Grbich, Adrian Howe, Rob McQueen, Andrea Rhodes-Little and Margaret Thornton, provided me with a constant source of friendship, and taught me the great pleasures and responsibilities of critical scholarship and of engaged and innovative teaching. I was encouraged and stimulated in the later stages of the work on this project by my friends, students and colleagues at the Australian National University and the University of Melbourne, particularly Philip Alston, Jenny Beard, Jennie Clarke, Belinda Fehlberg, Krysti Guest, David Kinley, Ian Malkin, Jenny Morgan, Dianne Otto, Sundhya Pahuja, Jindy Pettman, Martin Phillipson, Kim Rubenstein, Peter Rush, Gerry Simpson and Maureen Tehan. Michael Bryan and Michael Crommelin at the University of Melbourne have been supportive of the project in many ways, and have made it possible for me to combine academic life with the pleasurable demands of caring for young children. My thanks also to Dimity Kingsford-Smith, David Kinley and Stephen Parker for allowing me to spend a research semester finishing the book at the Castan Centre for Human Rights Law, Monash University. My thoughts on the future of human rights and economic globalisation have been profoundly influenced by the experience of teaching and engaging with students at the University of Melbourne,

the Australian National University, La Trobe University and the 1998 Academy of European Law at the European University Institute.

The book has also been shaped by ongoing conversations and careful readings that have informed my ideas about law, fantasy, human rights, feminism, economics, internationalism, bodies, the imaginary, militarism, colonialism, masculinity, and much more. My heartfelt thanks to: Judy Grbich for her insightful comments on draft chapters, for always asking the right question and for the example of her scholarship; Andrea Rhodes-Little who has helped me to make many of the connections in this book and to find 'the words to say it'; Ian Duncanson for being such a generous and thoughtful reader; Greta Bird and Adrian Howe, who reminded me at an important moment that it is possible to make meanings of human rights outside those deemed legitimate by the officials of the new world order; Peter Rush for coffee sessions and 'bibliographic digressions'; Karen Knop for her responses to earlier versions of this text and her assurances that one day I would submit the manuscript; Christine Chinkin and David Kennedy, for their helpful comments on an earlier version of this manuscript and their encouragement for the project; Philip Alston for his engagement with my ideas and support for my work over many years; Krysti Guest for her steady focus on the economic and our many Canberra conversations; Jenny Beard for her insightful comments on this text in its varied forms and the journeys we have taken together, and Ian Malkin for his friendship and generosity.

The ideas in this book have been presented at numerous conferences and workshops over the years, but those people involved in two such events in particular shaped my thinking and this text – I am grateful to the organisers and participants at the United Nations University Legitimacy Project Workshop held in Tokyo in 2002, and the Academic Council on the United Nations System/American Society of International Law Workshop on Global Governance held at Brown University, Rhode Island in 1996. My thanks also to Jenny Beard, Megan Donaldson, Simon Ellis, Jyoti Larke and Rowan McCrae for their invaluable research assistance and editorial skills. My commissioning editor at Cambridge, Finola O'Sullivan, has been a patient, steady and much-needed source of encouragement, while the comments of the anonymous referees and of the series editor, James Crawford, have contributed a great deal to clarifying and sharpening the connections and arguments made in these pages.

Parts of this book develop work that I have published elsewhere. Chapters 3 and 5 are substantially revised versions of articles published as 'Locating the International: Military and Monetary Interventions after

the Cold War' (1997) 38 *Harvard International Law Journal* 443 and 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679. Chapter 2 contains material included in 'Feminism, Imperialism and the Mission of International Law' (2002) *Nordic Journal of International Law* (forthcoming) and in 'Positivism and the Power of International Law' (2000) 24 *Melbourne University Law Review* 502.

I owe an enormous debt to the many people who have helped to care for my children during the period in which this book was written. In particular, my thanks to my parents Rolene and William Orford for all the many forms of support with which they provide me, not least being the intensive hours of baby-sitting they provided at key moments in the emergence of this text. The staff at the Queensberry Children's Centre at the University of Melbourne have made the work on this project possible. The extraordinary warmth, generosity, skill and dedication with which they have cared for my two young children during my working hours have allowed me to feel safe about taking the space and time necessary to complete this book. In particular, I would like to express my deep gratitude to Heidi Artmann, Gayle Babore, Georgina Coy, Amber Dwyer, Halayne Ford, Wendy Grace, Maria Hannah, Harmony Miller, Georgina Mitropoulos, Liz O'Brien, Effie Saganas, Cathy Simpson, Donna Taranto, Nancy Thewma, Averil Tweed, Remziye Urak and Emma Witham.

Finally, two people deserve particular thanks. I am extremely grateful to Hilary Charlesworth for her generous supervision of my doctoral thesis and her guidance and support while turning that thesis into a book. Her enthusiasm for the project from the outset and the gift of her friendship made the experience of writing this manuscript a wonderful and rewarding one. Her detailed and insightful comments on draft chapters were of enormous assistance in shaping my arguments, while the example of her scholarship guided and inspired my approach to writing about international law.

The constant encouragement and support of my dear friend and partner Andrew Robertson have helped make this book possible. My work has benefited enormously from our ongoing conversation about law, politics, life and critique, while his companionship and gentle faith in my ideas and aspirations have made all the difference. The book has been shaped by his close reading and valuable comments on many drafts over the years. The sweet company and small bodies of our beloved sons Hamish and Felix are a daily reminder to me of the wonder and fragility of life, and of all that is risked by careless power and wanton violence. This book, with its dreams of the future of human rights, is for them.

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

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,