Is Peace Possible Through an International Rule of Law?

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THE HON ROBERT McCLELLAND MP*

Introduction

The international landscape today is very different from that of two decades ago. The Cold War has ended, removing many serious threats to international peace and security. However, the international order that has replaced it has presented many new challenges.

The most serious challenge is an upsurge in human rights abuses and casualties among civilians. While only one in ten casualties from conflict was a civilian at the start of the 20th century, nine in ten casualties were civilians by its end. The trend continued with the breakdown of the two Cold War power blocs which has seen renewed nationalist movements competing for recognition. Long-suppressed ethnic and religious rivalries have also re-surfaced.

Throughout the last two decades, the world has been horrified by events in the former Yugoslavia, Rwanda, Kosovo, Darfur and elsewhere. The international community has been frustrated at the inadequacy and delay in effective international intervention.

One of the most fundamental questions to arise from these events is how the new international order should deal with oppressive and violent conduct inflicted on a population by their country's rulers. In this context, much criticism has been levelled at the inability of the international system, in particular the international legal system, to effectively contribute to the prevention and resolution of humanitarian crises and imminent conflicts. Some frustrated critics argue that institutions like the United Nations have made themselves irrelevant. As a result it has been argued that ad-hoc coalitions acting unilaterally are the only practical method of meaningful intervention.

These criticisms ignore encouraging developments. In reality, the incredible speeds with which international dynamics have changed presents an enormous challenge but also an important opportunity. The international legal system has been renewing and reforming itself to better deal with the post-Cold War pressure points.

I would like to speak briefly about the changes that the legal system has already undergone in respect to humanitarian intervention. I will endeavour to provide at least a cursory evaluation of successes and limitations. I would then like to identify the numerous challenges that are yet to be met, with some suggestions for a way forward.

* Attorney-General of Australia.

I will conclude that Australia can and should play a vital role in the still embryonic international criminal legal system. I will argue that constructive engagement with the international community to develop this important jurisdiction has the potential to save countless lives and contribute to global peace and security.

1. Multilateral Humanitarian Intervention

Increased threats to civilians, a breakdown in established international order and growing public pressure for action to avert humanitarian crises have precipitated a change in the fundamental bedrock of international law.

Historically, there has naturally been great resistance to any multilateral intervention by States against a fellow State particularly when it is based on internal events within that state that do not directly affect those nations seeking to intervene. This principle was based on the concept of sovereignty that has existed since the Treaty of Westphalia in the 1640s; namely that States are the sole sovereign of their own territory and that other States do not have a right to intervene. The principle formed the basis of the *United Nations Charter* ('the *Charter*') after World War II, which was mainly concerned with preventing conflict *between* States rather than *inside* them.

Article 2.1 of the *Charter* establishes that the Organisation is based on the principle of the sovereign equality of all Member States.[1] Article 2.4 provides that Member States shall refrain from the threat or use of force against the territorial integrity or political independence of another country. Article 2.7 makes it even clearer that nothing in the *Charter* authorises the UN to intervene in matters which are essentially within domestic jurisdiction of a State. The exception is where the intervention is under Chapter VII of the *Charter*.

The principle of non-intervention has also been strongly defended, particularly by countries that experienced the full force of the European 'civilising mission' during the colonial era and now prize their hard-fought independence. Most of the genocides and other humanitarian disasters in the post Cold-War era have been committed internally during civil war or the complete collapse of a government. An uncomfortable tension exists between the foundational principle of State sovereignty and the need to establish international humanitarian intervention as a recurring normative feature of international affairs.

Nonetheless, progress is being made to overcome some of these obstacles. Firstly, the Security Council clarified a controversial principle by beginning to authorise peacekeeping operations, initially, between nation States. Although not mentioned in the *Charter*, the constitutionality of such action was confirmed by the International Court of Justice ('ICJ') in the *Certain Expenses Case* (1962).[2] The case has provided the basis for many UN peacekeeping missions. Over the years the principle has been responsible for saving countless lives and preventing rape and other atrocities.

1 *Charter of the United Nations*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945).

2 *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* [1962] ICJ Rep 151.

However, the greater challenge for the international community has been to move from only intervening in disputes between States to becoming involved in domestic crisis situations.

This has arisen substantially from the exponential growth in internal crises as nation States have gone through various forms and degrees of instability after gaining their independence from colonial rulers. It is a development that has required a change in attitude on behalf of the international community including, most significantly, members of the United Nations Security Council. While it was originally intended that 'breaches of the peace' which allow Security Council action under Chapter VII of the *Charter* would only apply to interstate conflict, this has changed. The change in attitude became particularly profound during the 1990s.

Perhaps the most significant starting point was the UN authorisation for intervention in Somalia, paving the way for such missions as East Timor, which Australia led in 1999. As a result of these interventions it is now firmly established that any internal conflict of a considerable scale can constitute a threat to international peace and security.

Above and beyond this paradigm shift, significant precedent has also been set for the proposition that violations of human rights and humanitarian law can constitute a Chapter VII threat. The Somalia, Bosnia, Rwanda and Eastern Zaire cases were all based on such violations.

A third important factor in the development of multilateral intervention has been the use of article 42 of the *Charter* to go beyond peace*keeping* into the realms of peace *enforcement*. In many cases such intervention is critical to provide military and policing stability to enable humanitarian assistance to occur at the same time as the vulnerable are protected. Article 42 authorisations have increased dramatically since 1990. Examples include Iraq (in 1991), Bosnia, Somalia, Haiti, Sierra Leone, East Timor, the Democratic Republic of Congo and Afghanistan.

It is also important to note that multilateral efforts to become more proactive with non-military solutions have become more pronounced over the same period. For instance, despite hardly being used during the Cold War, fourteen different sanctions regimes were initiated under article 41 of the *Charter* between 1990 and mid-1992.

Significantly, there is an increasing tendency to target individuals and organisations. One example is Security Council resolutions that have requested nation states 'to freeze without delay funds and other financial assets of Osama bin Laden and individuals and entities associated with him'. These resolutions have formed the basis of a significant number of countries implementing domestic law to do just that. Additional resolutions of the United Nations have also formed the basis upon which Australia and other countries have introduced legislation that enables the proscription of terrorist organisations.

The 1990s and the first years of this century have been a huge learning curve on the best way to deploy targeted or 'smart' sanctions. This has occurred as a result of the acknowledgement that the original, comprehensive approach can be a blunt instrument. The most well-known case was Iraq, where Saddam Hussein's regime exploited poorly

targeted sanctions to continue benefiting whilst the population suffered. It has subsequently been revealed that the Australian Government bore a degree of responsibility for the failure of those sanctions, through poor administration that enabled the now infamous 'Wheat for Weapons' scandal to unfold.

Given his role as minister responsible for issuing export licences to the Australian Wheat Board it is perhaps little wonder that Australia's current Foreign Minister, Alexander Downer, holds a somewhat cynical view regarding the effectiveness of international sanctions. For instance, he said in respect to proposed targeted sanctions against the current leadership of Burma, '[t]he Europeans, the Americans have a whole series of measures against Burma. I don't think the Burmese… leadership is going to be influenced one way or another by those sorts of measures, unfortunately. And history's taught us that.'[3]

Nevertheless, evidence suggests that Mr Downer's cynicism is overly pessimistic. It seems that sanctions regimes that have increasingly been honed to the specific institutions and individuals who are most involved with the State transgressions can be quite effective.

This represents a welcome and important focus on the individual rather than the State, which is another hallmark of the growing framework of international legal responsibility. Recent imposition of smart sanctions on bank accounts held by the leadership of North Korea is a good example. Another worthy example is the targeted sanctions against the Iranian leadership and military institutions. These sanctions can be quite effective and Labor supports them strongly.

2. Intervention without Security Council Authorisation

Despite the upsurge in multilateral willingness to deal with humanitarian and other crises, there have clearly been a number of situations which have not reached a consensus in the Security Council. The often-cited case of Rwanda has been used to criticise the inaction of the UN to prevent what quickly became a full-scale genocide.

This presents a difficult question to governments — when does a humanitarian situation become so grave that it requires intervention to prevent massive loss of life? To what extent does such intervention compromise the international system?

Legally, the overwhelming majority of opinion comes down against the concept of unilateral intervention. The *Charter* and modern international law do not specifically incorporate the principle in any form, and State practice provides only a handful of successful precedents. Moreover, the scope for the abuse of such a principle would be large.

However, the post-Cold War environment has thrown up situations that cannot morally be ignored. Despite a lack of consensus, there has been a growing view that intervention is a moral imperative. One example would be in Iraq after the first Gulf War,

3 'Interview with Alexander Downer' *Lateline* (25 September 2007) <http://www.abc.net.au/lateline/content/2007/s2043367.htm> accessed 12 September 2008.

where UN Security Council Resolution 688 of 5 April 1991 recognised the plight of Iraqi refugees, described the situation as a threat to international peace and security but did *not* authorise intervention. Despite this, a Coalition of countries that had participated in the first Iraq conflict proceeded to establish safe zones for the Kurds in the north and no-fly zones for the Shi'ites in the south. This action undoubtedly saved many thousands of lives.

The same problem arose during the Kosovo war, where a mixture of humanitarian arguments and UN resolutions describing the gravity of the situation were used to justify the intervention by NATO despite that intervention not being authorised by the UN. A subsequent case brought by Serbia in the International Court of Justice did not issue a final determination of the issue. But there remains doubt as to whether the intervention was in accordance with the orthodox view of international law as to when intervention is justified.

There have been attempts to bring together the political reality of such events with the international legal framework. Former British Foreign Secretary Robin Cook set out six principles to bridge the gap between the humanitarian imperative and legal authority. His proposals included use of military force but only as a last resort. Essentially, he proposed intervention only when there was an overwhelming humanitarian catastrophe that the local government had shown itself unwilling or unable to prevent, or actively promoted. Even then, it was necessary to determine that there was no other practicable alternative to the use of force. If force was justified, proportionality of response was essential. He also stated that intervention should be collective and to obtain Security Council authority where possible.

However, any doctrine of unilateral intervention will always be open to criticism. As mentioned earlier, in past times, it was often used as a fig leaf for colonialism. Unilateral intervention can also raise issues regarding ulterior motives. This was particularly clear in the case of the Iraq war, which was initially justified in terms of searching for weapons of mass destruction. When it became apparent that Iraq possessed no such weapons, only then was humanitarian intervention cited by the invaders as a justification.

When the justification of humanitarian intervention was itself questioned, confusion among government ministers broke out. The controversy arose when Australia's Defence Minister Dr Brendan Nelson suggested the intervention may have been in part motivated by issues of energy security — specifically oil. Fearing that Dr Nelson had belled the cat, he was rapidly stomped upon by the Prime Minister and other government ministers.

Controversy in respect to the invasion of Iraq has further undermined the case for intervening in a humanitarian crisis as a legitimate avenue for unilateral action. A multilateral approach is likely to be the better approach. This is due to its benefits for achieving wider support and legitimacy. These factors are vital for a successful mission.

For this reason, Labor believes that it is critical for Australia to lobby for global acceptance of the comprehensive doctrine of humanitarian intervention spelled out through the *Responsibility to Protect*.

3. The Way Forward — *Responsibility to Protect* Enforced through Individual Accountability

The rapid development of the law surrounding multilateral intervention and continued tension on the right to intervene gave birth to a critical piece of thinking in December 2001. An international commission of experts co-chaired by former Labor Foreign Minister Gareth Evans and supported by the Government of Canada published a document which sought to continue the development of international practice on humanitarian intervention and to resolve the remaining inconsistencies.

The fundamental premise of the *Responsibility to Protect* doctrine that was developed is that:

> sovereignty implies a dual responsibility: externally — to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state… Sovereignty as responsibility has become the minimum content of good international citizenship.[4]

This reframing of sovereignty recognises not only the traditional concept of non-interference but also what is slowly becoming the even more important principle of protecting the rights of the individual when they are most under threat.

Since the report was published, the response from the international community has been encouraging. The UN 60th Anniversary World Summit in 2005 adopted a statement which strongly supported the principle. Encouragingly, it was actively lobbied for not only by Western countries, but also a group of States in Sub-Saharan Africa and Latin America. Since then, the Security Council adopted a thematic resolution on Protection of Civilians in Armed Conflict and the concept was invoked in Resolution 1706 relating to the conflict in Darfur.

Australia has also supported the adoption of the *Responsibility to Protect* doctrine. In Mr Downer's words:

> Australia was proud to have supported that report and has been a strong supporter of "Responsibility to Protect" ever since … "Responsibility to protect" represents a momentous change in the way the world thinks about the relationship between government and citizen.[5]

A key question is whether a military response is the only option with which to exercise that responsibility. Labor believes that it is not.

The *Responsibility to Protect* Report itself recommended that a military response should only be considered in the event of no other alternative.

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4 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of ICISS* (December 2001) (the '*Responsibility to Protect* Report') at 8.

5 Alexander Downer MP, 'International Law: Developments and Challenges' (Speech to the Law Institute Victoria, 23 November 2005) <http://www.liv.asn.au/media/speeches/20051123_pldowner.html> accessed 12 September 2008.

For instance, a symposium of international experts including former Canadian Minister of Justice Irwin Cotler and Ruth Wedgwood, Professor of International Law and Diplomacy at Johns Hopkins University, has argued that two potential international legal mechanisms exist to call despots to account. This is the case even where their country is not a party to the relevant international instruments.

The first mechanism is a process through the International Court of Justice, which would involve a reference from the UN. The second is through use of the International Criminal Court through a personal indictment, if referred to the prosecutor by the Security Council.

It has been suggested that these two processes provide a way to hold national regimes and 'specific individuals' responsible for international crimes, including under the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*[6] and also in respect to political persecution under the *Rome Statute of the International Criminal Court.*[7]

A recent example occurred in April this year. The International Criminal Court issued a warrant for the arrest of Sudan's former Minister of State for the Interior, Ahmad Harun, for alleged crimes in Darfur. This prosecution has proceeded on reference from the Security Council.

It must be recognised that the International Criminal Jurisdiction is very much in its formative years. Nevertheless, Australia can play an important part in the development of a potentially significant mechanism to intervene against individuals in order to prevent or minimise a humanitarian crisis.

Conclusion

It is unrealistic to expect that international legal mechanisms will single-handedly bring about a world where our children will no longer witness genocide and mass killings.

Clearly, the pursuit of other options will continue to be necessary. These must include the promotion of democracy in a form that is more than simply rule by the elected majority. True democracy must include the rule of law, independent judiciaries, freedom of the press, respect for minorities and the protection of fundamental human rights.

As acknowledged by the *Responsibility to Protect* Report, capacity building in all its forms is vital. It must include political competence, engagement of a civil society, providing decent housing and health care. Developing infrastructure and economic activity are also vital. As always, access to universal education is a necessary foundation for this development. Also essential is the challenge of climate change because, as we have seen in respect to Darfur, scarcity of resources including water, food and land will inevitably lead to future conflict.

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6 Opened for signature on 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

7 Opened for signature on 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

It must be acknowledged that the increasingly effective body of international law to prevent violence and crimes against humanity is not matched by the international community's preparedness to take effective action.

Nevertheless, there are some interesting and innovative trends in respect to the application of international laws and institutions that may provide potentially valuable mechanisms to call to account the perpetrators of the worst human atrocities.

Taking appropriate action is something that the international community legitimately expects and feels a collective responsibility to address. In many ways the task before us is one of drawing together the concept of 'collective responsibility' with the emerging concept of 'individual accountability.'

Respected middle powers with sound democratic principles and a history of peaceful development, such as Australia, are well placed to contribute to the development of these trends. This process inevitably involves challenges. They are not straightforward, and effective implementation of international law will require resources.

On the other hand, ignoring the potential use of international law and institutions to hold international criminals to account leaves an unacceptable alternative. The choice between inaction or military action is ham-fisted, unsophisticated and unacceptable.

It is naive not to recognize that a situation may be such that there is no alternative to military intervention to prevent a human catastrophe. But, as we have seen in respect to the invasion of Iraq, military invasion inevitably leads to extensive loss of life, the displacement of citizens and massive cost.

Surely the time has come to encourage developments that will ensure military intervention becomes the last alternative.