



VOLUME 13, No. 1
SPRING 2001

*Working for Peace
Through Law*

*"Nuclear weapons
diminish the security of
all states. Indeed, states
which possess them
become themselves targets
of nuclear weapons."*

*—The Canberra
Commission
August, 1996*

IN THIS ISSUE

On the Cover:

*Scottish High Court Ducks
Lord Advocates Challenge*

~

*Humanitarian Intervention:
A Review of Literature*

Page 5:

*NMD in the House
and Senate*

~

*DU Ordinance is Already
Illegal*

Page 6:

Honoring Bill Epstein

www.peacelawyers.ca

LAWYERS FOR SOCIAL RESPONSIBILITY NEWSLETTER

Scottish High Court Ducks Lord Advocate's Challenge

On March 30, 2001 the Scottish High Court rendered its judgment on four questions of law referred by the Lord Advocate with respect to the decision of magistrate, Margaret Gimblett, in which the "Trident Three" were acquitted of criminal charges for willfully causing £80,000 of damage to a Trident support barge at the Faslane naval base in Scotland. The High Court found that:

1. In a trial under Scottish criminal procedure, it is not competent to lead evidence as to the content of customary international law as it applies to the United Kingdom.
2. No rule of customary international law justifies a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its

policies in relation to such weapons.

3. The belief of an accused person that his or her actions are justified in law does not constitute a defence to a charge of malicious mischief or theft.
4. It is not a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person.

In conclusion the Court stated that it had "grave misgivings as to the justiciability of the issues which [it had] been asked to deal with, in relation to defence policy and the deployment of Trident". The Court also stated that "even ignoring the issue of justiciability" it was not "persuaded that the facts of what the respondents did, or anything in the nature or purposes of the deployment of Trident, indicate any foundation at all, in Scots or in international law, for a defence of justification".

Humanitarian Intervention: A Review of Literature

By Penelope Simons

THE FOLLOWING IS AN EXCERPT FROM A paper prepared for the Ploughshares Roundtable on Humanitarian Intervention.

1. Introduction

The North Atlantic Treaty Organization's 'humanitarian war' in Kosovo last year has once again brought to the fore the long-

standing legal, political and moral debate surrounding the doctrine of humanitarian intervention¹ and in particular the right of states to intervene militarily in another state, without Security Council authorisation, in order to prevent gross violations of fundamental human rights and international humanitarian law.

(over)

Humanitarian Intervention

from cover

2.1 The Charter Regime on the Prohibition Against the Use of Force

Forcible intervention in another state is prohibited in international law under Article 2(4) of the United Nations Charter which states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This general prohibition on the use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case*² and the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*³ and is considered to be a rule of *jus cogens* — that is, a peremptory norm of international law from which no subject of international law may derogate.⁴ The two main exceptions⁵ to this general prohibition are: the right of a state to use force in self defence or collective self defence under Article 51 of the Charter; and the right of the Security Council under Article 42

to authorise the use of force “to maintain or restore international peace and security”.

In legal terms, “international peace and security” has traditionally been narrowly defined as the maintenance of inter-state order. However, the practice of the Security Council can be seen to have modified this concept to include grave humanitarian crises and it is generally recognized among Western legal scholars that the Security Council now has an exclusive *right* to authorise the use of force for the purpose of preventing or stopping gross and widespread violations of fundamental rights.

Whether or not there is an *obligation* on the part of the Security Council to take such action is another question. According to Bruno Simma, acts of genocide as defined in the *Genocide Convention* may trigger an obligation to act to prevent or stop such actions.⁶ However, Sean Murphy argues that ‘[t]o date ... the notion of a ‘duty to intervene’ by the United Nations, regional organizations, or states does not appear present in international law.’⁷ The Secretary-General of the United Nations has suggested that where crimes against humanity are being committed “and peaceful attempts to halt them have been exhausted, the Security Council has a *moral* duty to act on behalf of the international community”.⁸

2.2 Unilateral or Unauthorised Humanitarian Intervention

Military action taken with the authorisation of the Security Council by a state or group of states against another state to prevent gross and widespread violations of fundamental rights is referred to as *collective intervention*. *Unilateral intervention* involving the threat or use of

force refers to military action taken by a state without the authorisation of the Security Council. The term *unilateral intervention* can also refer to unauthorised military intervention by more than one state and, for the purposes of this paper, will be used interchangeably with the term “unauthorised intervention”.

Broadly speaking there are two schools of thought on the legality of unilateral or unauthorised humanitarian intervention.⁹ Those who argue in favour of the right to unilateral humanitarian intervention maintain that the evolution of international human rights law and the Charter have had a revolutionary effect on the international legal system. From a “deontological” moral perspective,¹⁰ it is the individual, and not the state, that lies at the centre of international law. States receive their legitimacy from the will of the people. Hence, sovereignty is not an inherent right of states but, rather, derives from individual rights. Thus, when sovereignty comes into conflict with human rights, the latter must prevail. Fernando Tesón, a leading proponent of the legal right to unilateral humanitarian intervention, argues as follows:

The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a *necessary* primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore *not* a use of force inconsistent with the purposes of the United Nations.¹¹

This Newsletter is published
twice a year by

Lawyers for Social Responsibility
5120 Carney Road, N.W.
Calgary, AB, T2L 1G2

Editorial Board:

Penelope Simons
email: penelope.simons@agra.com
Tara Ashtakala
email: tashtaka@redcross.ca
David Wright
email: wright@bc.sympatico.ca

Typesetting, Design & Layout:

Chameleon Publishing & Graphics Ltd.
(403) 931-4896; Fax: 931-4897
email: chameleon@telusplanet.net

The underlying assumption is that human rights constitute self-evident truth, and a natural law which has primacy over any notion of state sovereignty or positive international law.

On the other hand, those who argue against the right of unilateral humanitarian intervention do so from a positivist perspective. These writers maintain that, based on the accepted rules of treaty interpretation — textual analysis and an examination of the *travaux préparatoires* of the Charter — Article 2(4) was meant to be a watertight prohibition against the use of force,¹² and any customary right of unilateral intervention which may have existed was extinguished by the United Nations Charter.

These writers argue that certain fundamental human rights¹³ are obligations *erga omnes*, that is, obligations every state is bound to observe *vis-à-vis* all other states. However, although each state has the right to take action to ensure respect for these fundamental rights, this does not entail a right to use force¹⁴ without Security Council authorisation for such a purpose. Although the purposes of the Charter are to maintain international peace and security, to develop friendly relations among nations based on respect for equal rights and self-determination and to promote and encourage respect for human rights, some of these writers suggest that “any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor”.¹⁵ Thus while respect for human rights is considered important to a just international legal order, it is argued that neither the Charter, current state practice nor scholarly opinion conclusively support the view that there is a right of unilateral, unauthorised intervention to stop or prevent gross and widespread violations of fundamental rights.¹⁶

2.3 Kosovo and the question of the legality of NATO's unauthorised use of force

Following NATO's intervention in Kosovo, a survey of many of the legal scholars writing on the subject suggests that a majority of these writers adhere to the positivist argument which rejects the right of unilateral or unauthorised humanitarian intervention. Thus, while there is an obligation on the part of states to ensure respect for fundamental human rights, there is no legal right to threaten to use or to use force to compel such compliance. Yet, while these writers maintain that the NATO intervention was formally “illegal” — because NATO did not obtain the required Security Council authorisation before or after the campaign¹⁷ — most also suggest that a purely legal analysis is inadequate to assess the *legitimacy* of the NATO intervention.¹⁸

According to the Danish Institute Report, the question of legitimacy is determined primarily based on moral or politi-

(cont'd over)

CALL TO ACTION

The government of Canada has not yet made a decision about whether it will participate in the proposed U.S. National Missile Defence system. Please write to the Prime Minister and the Ministers of Foreign Affairs and Defence and let them know your concerns about NMD. Or visit the Bombs Away website at www.bombsaway.ca and send a fax automatically to Minister Manley.

Sample Letter:

The Right Honourable Jean Chretien, PC, MP
Prime Minister of Canada
House of Commons
Ottawa, Ontario KIA 0A6

Dear Prime Minister Chretien,

I am writing to express my deep concern about the National Missile Defence (NMD) system proposed by the U.S. and to urge you to reject U.S. pressures to support or join in the deployment of such a system.

The proposed U.S. NMD system would undo what was achieved this year at the NPT Conference, deal a severe blow to efforts to reduce the huge Russian and U.S. nuclear arsenals, undermine or destroy the ABM Treaty and other arms control treaties, and drastically harm the U.S.-Russian strategic relationship. NMD will encourage all states with ballistic missiles and nuclear weapons to always maintain enough of such weapons to overcome any NMD system. Russia and China, at a minimum, would feel constrained to maintain significant nuclear arsenals, which for Russia will mean not going below certain numbers, and for China would mean having to build up its arsenal.

Canada should reject NMD and call for intensified and concrete measures to pursue the disarmament obligations acknowledged at the NPT Review Conference. I urge you and the Canadian government to work with like-minded countries to promote the active pursuit of alternative approaches to managing the ballistic missile defence problem. Canada should neither join nor remain silent in the face of U.S. plans to deploy a missile defence system, which will endanger Canadian and global security and undermine Canada's nuclear disarmament objectives.

Sincerely,

Humanitarian Intervention

from page 3

cal considerations but may also involve legal considerations which may have important political consequences. Determining whether or not a particular intervention is or was justifiable involves the application of criteria such as:

... the overall respectability and legitimacy of the countries involved in a given action, the procedures and the modalities of the action, whether the action enjoys the explicit or implicit support of a considerable number of countries and international organisations, whether the action is deemed necessary and proportionate etc.¹⁹

On this view, any assessment of a particular instance of humanitarian intervention the legal analysis is only one part. Thus, with respect to NATO's intervention in Kosovo, Richard Falk observes:

It is correct that normal textual readings are on their side, and that the Charter system cannot be legally bypassed in the manner attempted by NATO. Yet it is equally true that to regard textual barriers to humanitarian intervention as decisive in the face of genocidal behavior is politically and morally unacceptable, especially in view of the qualifications imposed on the unconditional claims of sovereignty by the expanded conception of international human rights.²⁰

The current recognition of international humanitarian and human rights law as international concerns then, while not providing a legal right to forcefully intervene without Security Council authorisation to prevent gross violations of human rights, may provide a moral right and perhaps even a moral obligation to do so.

In a similar vein, other writers have argued that the legality of an incidence of humanitarian intervention would have to be weighed against a state or group of states

compliance with international law in all other aspects during its conduct of the particular humanitarian campaign. As Bruno Simma states:

'humanitarian interventions' involving the threat or use of armed force and undertaken without the mandate of the authorization of the Security Council will, as a matter of principle, remain in breach of international law. But such a general statement cannot be the last word. Rather, in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get 'as close to the law' as possible. Such analyses will influence not only the moral but also the legal judgment in such cases.²¹

With respect to NATO's intervention in Kosovo, Simma argued that at the time of writing (the initiation of the bombing campaign), the Alliance made every effort to remain "close to the law" by closely following and linking its efforts to the resolutions of the Security Council and by stating that the action taken was an urgent measure to prevent a larger humanitarian crisis.²²

However, certain writers have suggested that the requirement of staying "as close to the law as possible" means more than tying actions to Security Council resolutions. First, international law requires that states settle their disputes by peaceful means and that recourse to the use of force be a last resort, once all avenues of peaceful resolution of a situation have been explored.²³ Except in circumstances of self-defence, the threat or use of force is the domain of the Security Council. According to Falk, NATO did not pursue what he refers to as "flexible diplomacy" which he argues may have allowed the situation in Kosovo to be resolved without recourse to war.²⁴ For Falk, the fact that NATO

failed to exhaust the peaceful means to resolve the situation in Kosovo further undermines the legitimacy of its initiative. He writes:

... a recourse to force should be clearly presented as the consequence of an energetic, good faith attempt via flexible diplomacy to find a peaceful solution. The failure to make this attempt severely compromises the normative status of the NATO initiative, and does so regardless of the legal rationale selected to justify the action. NATO's way of proceeding also weakens the argument for bypassing the United Nations and the restrictive constraints of international law.²⁵

Second, where force is used for humanitarian reasons the legal requirements of necessity and proportionality with respect to that use of force are even more important.²⁶ As Ruth Gordon states, "a humanitarian operation must be executed at a level commensurate to the evil it seeks to curtail".²⁷ Thus, a use of force for humanitarian purposes whether it is authorised or unauthorised by the Security Council must comply with the principles of international law applicable in armed conflict and in particular the rules of international humanitarian law.

Under international humanitarian law, civilians and civilian objects may not be directly targeted and all feasible precaution must be taken to prevent civilian deaths.²⁸ Incidental injuries caused to civilians or civilian objects are required to be proportionate to the purpose of the attack.²⁹ Moreover, an attack is deemed indiscriminate which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".³⁰ In addition to strict

(cont'd page 7)

NMD in the House and Senate

ON FEBRUARY 13, 2001, THE HON. Svend Robinson made the following motion:

“in the opinion of this House, the government should: (a) express Canada’s firm opposition to the proposed American National Missile Defense (NMD) System as it represents a threat to international arms-control agreements and raises the possibility of a new nuclear arms race; (b) refuse Canadian participation in the research, development, or production of components for use in the NMD; and (c) work with other governments to strengthen and deepen existing arms-control agreements toward the goal of eliminating all nuclear weapons.”

On March 20, 2001, the Hon. Fernand Robichaud made this response to a question raised by Senator Pierre Claude Nolin on National Missile Defence:

“Canada has not yet taken a position on US plans for National Missile Defence. The US has not yet taken a decision to deploy a National Missile Defence System nor has the US invited Canada, or any other ally, to participate in NMD. We are encouraging the new Administration to deepen its dialogue with allies and other concerned countries—including Russia and China—and are urging them to take those views into account.

We are also urging the US to take all the time needed to fully explore the implications of a decision on NMD deployment and to find a way forward that maintains global strategic stability and that advances the security of the US, as well as of all of its allies. We will further engage the US on how best to

address current security threats and will continue to assess the proposed NMD system.

We remain concerned about the implications of the proposed NMD system for strategic stability and the potential for it to spark a new arms race and undermine the existing non-proliferation, arms control and disarmament regime.

We share US concerns about new threats to both national and global security, including threats from intra-state conflict, from terrorist attack and from the proliferation of weapons of mass destruction. We will need to know more about the approach that the US will take before we can take a firm position on this issue. In Brussels, Minister Manley emphasized the need for dialogue with the US in order to influence US thinking on NMD.”

DU Ordinance is already illegal

ACCORDING TO PUBLIC ADVOCACY attorney Karen Parker, the use of depleted uranium weaponry is already contrary to international law. Parker, who practices human rights and humanitarian law and reports regularly at the U.N. Commission on Human Rights in Geneva argues that “in evaluating whether a particular weapon is legal or illegal when there is not a specific treaty, the whole of humanitarian law must be consulted”. Parker delivered a summary of her argument at the International Conference Campaign Against Depleted Uranium held in Manchester, U.K. November 4-5 of last year:

“There are four rules derived from the whole of humanitarian law regarding weapons:

1. Weapons may only be used in the legal field of battle, defined as legal military targets of the enemy in the war. Weapons may not have an adverse effect off the legal field of battle. (The “territorial” test).
2. Weapons can only be used for the duration of an armed conflict. A weapon that is used or continues to act after the war is over violates this criteria. (The “temporal” test).
3. Weapons may not be unduly inhumane. (The “humaneness” test).
4. Weapons may not have an unduly negative effect on the natural environment. (The “environmental” test).

DU weaponry fails all four tests. (1) It cannot be “contained” to legal fields of battle and thus fails the territorial test. (2) It continues to act after hostilities are over and thus fails the temporal test. (3) It is inhumane and thus fails the humaneness test. DU is inhumane because of how it can kill — by cancer, kidney disease, etc. long after the hostilities are over. DU is inhumane because it causes birth (genetic) defects thus effecting children (who may never be a military target) and who are born after the war is over. The use of DU weapons may be characterized as genocidal by burdening gene pools of future generations. (4) DU cannot be used without unduly damaging the natural environment and thus fails the environment test.”

For further information see
<<http://www.prop1.org/2000/du/00du/0002duun.htm>>

Honouring Bill Epstein

We grieve the loss of Bill Epstein who died February 29th, 2001. In the past, I had been the recipient of phone calls often starting something like “What are you people going to do about.....?”. It was Bill Epstein on the phone ready to encourage and advise.

Bill was quite an incredible Canadian, present at the drafting of the UN Charter and representative for the UN Secretary General during the negotiations for the Non-Proliferation Treaty and the Treaty of Tlatolco (the Latin American Nuclear-Weapon-Free Zone). He was involved also in the negotiations for the Biological Weapons Convention, the Partial Test Ban Treaty, and the Seabed Arms Control Treaty. Unlike others involved in these negotiations, Bill tenaciously explained and monitored the life of these treaties. Few people, if any, have reached Bill's level of understanding of their diplomatic history and language.

In a recent comment, Bill highlighted his career as “the longest-serving Canadian at the U.N.” and noted these achievements. He served as a UN official, including over 20 years as Director of Disarmament, as an adviser on disarmament to the Canadian Delegation to six sessions of the UN General Assembly, and for some years as a representative of the Pugwash Conference. He was actively associated with Disarmament Times since its founding in 1978. He was editor of “The UN and Disarmament 1945 – 1970” and authored over 300 articles and seven books including “The Last Chance: Nuclear Proliferation and Arms Control” and “The Prevention of Nuclear War: a UN Perspective.”

Bill worked in constant hope that the “struggle will go on, and even intensify, as it must if our civ-

ilization is to survive.” In the April 1999 Nuclear Disarmament commentary, he talked about the ups and downs of disarmament negotiations over the years and of the need for civil society to build its influence. He commented:

“I have never been able to understand why the nuclear powers don't seem to comprehend that the very existence of nuclear weapons, why they believe are the best means for enhancing their security, is really the only threat to their continued existence. Surely, if the only function of these deadly weapons is to deter any nuclear attack by the fear of mutual assured destruction, all of the nuclear powers would be infinitely more secure if they all just got rid of them ...”

“... If the Herculean efforts required to eliminate nuclear weapons are to succeed, we must find a way to mobilize the information media and the people of the world to undertake a sort of moral crusade against the weapons that the President of the World Court in the advisory opinion of the court, called ‘the ultimate evil.’

“If the nations can agree, as they have, to the elimination of the other two weapons of mass destruction — chemical and biological weapons — and to end all nuclear test explosions and the deployment of anti-personnel mines, they should be able to get rid of the most dangerous and evil weapon of all. But we must all work very much harder if we are ever to achieve that goal.”

As Senator Roche has said, “The world of nuclear disarmament has lost a giant ... Highly-informed, indefatigable and tenacious, Bill Epstein never wavered in his commitment and work for a nuclear weapons-free world.”

May our work over the coming years honour the spirit and memory of Bill Epstein.

— Bev Tollefson Delong

Humanitarian Intervention

from page 4

compliance with the requirements of international humanitarian law, Christine Chinkin argues that human rights law imposes an obligation on the part of the intervenors:

Human rights give rise to responsibilities in states (acting individually and collectively) and in people. These must encompass a duty not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians.³¹

Thus, the means of enforcement chosen must be effective to protect the vulnerable civilian population and must not endanger them or their way of life further.

In the context of Kosovo, NATO's actions were subject to strong criticism in the face of several widely publicized bombings of non-military targets, such as urban telecommunications towers, major and minor bridges, heating plants, electric power stations, water supplies, and, mistakenly, civilian convoys. Reports published by Amnesty International³² and Human Rights Watch³³, which investigated these bombings, note that according to Yugoslavian figures, some 400-600 civilians were killed. The reports suggest, respectively, that these killings of civilians could constitute violations of the laws of war or violations of humanitarian law. In addition, the Amnesty Report suggests that NATO's "means and methods of attack" including its high altitude bombing policy caused unlawful civilian deaths and that its use of certain weapons such as cluster bombs and depleted uranium ordinance may also "have contributed to causing unlawful deaths".³⁴

Thus, where a state or group of states acts without the authorisation of the Security Council, the legitimacy of its actions will likely be judged on how closely its conduct follows the principles of international law in every other aspect, as well as whether or not it has moral or political justifications for its actions (although such justifications will affect the determination of legitimacy). A NATO campaign which had adopted a method of warfare which would have protected the vulnerable population (i.e. using ground troops, setting up safe havens and safe corridors) and which, among other things, had not targeted civilian infrastructure may have been seen by its critics as more legitimate although technically illegal.

2.4 Is there an Emerging Legal Right of Unauthorised Intervention?

As discussed above there appears to be agreement among the legal scholars surveyed that the Security Council has the legal right to authorise the use of force to prevent widespread deprivations of internationally recognised human rights. In addition, a majority of writers surveyed appear to agree that unilateral or unauthorised intervention by a state or group of states for such a purpose is currently illegal. However, it is not impossible that a customary rule permitting unauthorised intervention could develop in the future.

Customary laws derive from a general and consistent practice of states which is accompanied by a belief in, and sense of, legal obligation (*opinio juris*). The requirement of general and consistent practice is not absolute. There are examples of customary law emerging from a single action where there is widespread

support for that action. However, as Mary Ellen O'Connell points out such instances are rare.³⁵ "Whatever the arguments, international legal rules are not easily changed. One act not in conformity with the rules does not eliminate a legal regime, unless one finds overwhelming support for the change."³⁶

Antonio Cassese has argued that the NATO action in Kosovo could lead to the development of a customary rule allowing unilateral humanitarian intervention. Writing at the initiation of NATO's bombing campaign, Cassese states:

... this particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace.³⁷

However, writing at a later date, Cassese finds that while "it is premature to maintain that a customary rule has emerged",³⁸ there was a strong and widespread sense among governments that NATO's unauthorised use of force was morally necessary. He argues that this sense of moral obligation or *opinio necessitatis* would constitute the required psychological element for the formation of a customary law except that it did not yet possess "the requisite elements of generality and non-opposition".³⁹ It is not clear however, on a positivist analysis whether a sense of moral obligation can be equated with a sense of legal obligation (*opinio juris*).

While there is a sense that NATO's unauthorised use of force in Kosovo has to varying extents undermined the Charter regime on the use of force with respect to intervention,⁴⁰ NATO's campaign

(cont'd over)

Humanitarian Intervention

from page 7

in Kosovo has been described among other things as a “study in failed diplomacy”⁴¹ and a “badly flawed precedent for evaluating future claims to undertake humanitarian intervention without proper UN authorization”.⁴² Many of the legal scholars surveyed argue that the NATO intervention should be treated as a single incident which constitutes an illegal intervention and does not lay the ground for an emerging legal right of unilateral intervention in international law.⁴³

With respect to state practice and *opinio juris*, it is significant that both Russia and China openly criticised the fact that NATO acted without authorisation of the Security Council.⁴⁴ In addition, most of the NATO member states who participated in the intervention have maintained that the unauthorised use of force in Kosovo was a singular incident and should not be seen as modifying the use of force regime.⁴⁵ This is reflected in statements made by several NATO member states, including the U.S., France, Germany and Belgium where they insisted

... that they had never stopped attaching crucial importance to the central role of the Security Council. The armed attack was initiated only as an exceptional measure justified by the failure of that body to act. However, as soon as the Security Council was in a position to take the issue into its own hands, they would discontinue any military action.²¹

The German government, in particular, was strongly opposed to the idea that NATO’s use of force without Security Council authorisation would lead to the development of a right to unilateral intervention.⁴⁷ In addition, it is significant that neither NATO nor its member states

(with the exception of Belgium⁴⁸) justified the use of force in Kosovo in legal terms.⁵⁰

With respect to the question of a moral right of states to intervene in such situations where the Security Council is unable to act, both the legal literature and the statements of NATO governments reveal a high level of agreement that there was moral and political justification for taking military action.⁵⁰ As Cassese observes, “There is a widespread sense that [fundamental human rights] cannot and should not be trampled upon with impunity in any part of the world”.⁵¹

In addition, it is significant to note the language used by then Secretary-General of NATO, Javier Solana, in justifying the intervention. At the time the bombing began, Solana stated that “[t]his military action is intended to support the political aims of the international community... We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo... We have a moral duty to do so. The responsibility is on our shoulders and we will fulfil it.”⁵²

However, as Chinkin rightly points out, the moral justifications for use of force in Kosovo are undermined by the fact that ethnic cleansing and other gross violations of fundamental human rights are occurring in many other countries such as Sudan, Afghanistan or Ethiopia, to name a few. Thus,

... the commitment to human rights that humanitarian intervention supposedly entails does not mean equality of rights worldwide. The human rights of some people are more worth protecting than those of others.⁵³

The issue of the selectivity of the intervention, notwithstanding, the *opinio necessitatis* described by

Cassese may be evidence of a moral right and perhaps even a moral obligation to act. However, it would appear that the NATO campaign in Kosovo does not reflect the emergence of a customary legal right of unilateral humanitarian intervention. This suggests that a state or group of states is still legally obliged to gain Security Council authorisation for any use of force that is not for the purpose of collective self-defense.⁵⁴

A copy of the complete paper is available at <http://www.ploughshares.ca/content/WORKING%20PAPERS/wp012.html>

1 The debate about humanitarian intervention can be traced as far back as the seventeenth century to the works of Alberico Gentili and Hugo Grotius. See for example Theodor Meron, (1991), “Common Rights of Mankind in Gentili, Grotius and Suarez”. *AJIL* 85, 110-116; See also Oliver Ramsbotham (1997), “Humanitarian Intervention 1990-1995: A Need to Reconceptualize?”, *Review of International Studies* 23, 445-468, at 446.

2 *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Merits).

3 *Military and Paramilitary Activities* (Nic. V. U.S.), 1986 I.C.J. 14, (Merits). In this case, article 2(4) was regarded as a codification of customary international law.

4 Mary Ellen O’Connell, (2000) “The UN, NATO, and International Law After Kosovo”, *22 Human Rights Quarterly*, 57-89 at 58.

5 See Sean D. Murphy (1996) *Humanitarian Intervention: The United Nations in an Evolving World Order*, (Philadelphia: University of Pennsylvania Press), pp. 361-2, for a discussion of possible exceptions with respect to rescue of nationals and humanitarian aid drops.

6 Bruno Simma (1999), “NATO, the UN and the Use of Force: Legal Aspects”, *EJIL* 10, 1-22, at 2.

7 Murphy (1996), p. 295.

8 Kofi Annan (2000), “‘We the Peoples’: The Role of the United Nations in the 21st Century”, *Millennium Report of the Secretary-General of the United Nations*, para. 219 (emphasis added).

9 Simon Duke takes a slightly different approach by arguing that there are “three broad approaches to the issue of the legality of humanitarian intervention: the restrictionists, who argue that humanitarian intervention is a violation of territorial integrity and political independence of the state; those closer to the natural law tradition, who argue that such action is permissible under the UN Charter since the UN has made an explicit commitment to the protection of human rights and

(Notes cont’d right)

Not guilty verdict for trident Ploughshares Activists

SYLVA BOYES, A FORMER LOLLYPOP lady and Keith Wright, a lecturer with a Masters in nuclear physics were acquitted of charges of conspiracy to cause criminal damage to the HSM Vengeance. The two were apprehended near the Trident submarine which docked at Barrow-in-Furness, Cumbria, in November, 1999. They were wearing wetsuits and carrying an axe, hammers and aerosol cans of varnish.

Poll Shows Canadians Oppose Nuclear Power

ON APRIL 2, 2001 THE SIERRA CLUB of Canada issued a press release stating that the crown corporation, Atomic Energy of Canada Ltd. (AECL) and the Canadian Nuclear Association (CNA), a lobby group were preparing to launch a major advertising and public relations campaign to promote nuclear power. According to two polls conducted last fall which were co-sponsored by AECL and CNA, 50% of Canadians oppose nuclear power while only 40% support it. The results show a significant decline in support for nuclear power over the last ten years.

The press release also noted that AECL which designs and sells nuclear reactors has received taxpayer subsidies of \$16.6 billion since 1952 and a subsidy of \$156.5 million in 1999-2000. In addition, AECL has suffered a series of major setbacks in international sales over the last few years. Last year Turkey decided not to build two reactors and last week it was revealed that South Korea would not be purchasing two CANDU reactors.

Humanitarian Intervention

from left

such use of force falls below any threat to the territorial integrity of the state; and finally, those who accept humanitarian intervention provided it is conducted in a collective manner that expresses the will of the international community (Simon Duke (1994), "The State and Human Rights: Sovereignty Versus Humanitarian Intervention", *International Relations*, XII(2), 25-48, at 33).

10 On this view, the moral motives of the actor are relevant and acting on principle takes precedence over the consequences of the action. According to Thomas Donaldson, "it is common to define deontological theory as "agent-centred", i.e. as placing emphasis on an agent's moral motives, and as allowing principles and precepts to override the consideration of consequences", (Thomas Donaldson, "Kant's Global Rationalism" in *Traditions of International Ethics*, Terry Nardin and David Mapel eds., 136-157, at 137).

11 Fernando Tesón (1997), *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd Ed. (Irvington-on-Hudson, NY: Transnational Publishers Inc.) pp. 173-4.

12 Simma (1999) pp. 2-3. See also Murphy (1996), pp. 71-5 and Jonathan Charney (1999) "Anticipatory Humanitarian Intervention in Kosovo" *32Vanderbilt Journal of Transnational Law*, 1231-1248, at 1234-5. Tesón argues, on the other hand, that "conventional methods of treaty interpretation, when applied to article 2(4), are incapable of yielding a solution to the hard case of humanitarian intervention". Thus, neither a textual reading of Article 2(4) nor an examination of the *travaux préparatoires* of the Charter is determinative of whether or not there is a right to humanitarian intervention (Tesón (1997), p. 149ff).

13 These would include but not be limited to the right to life, the prohibitions against torture, genocide, slavery and the principle of non-discrimination.

14 Antonio Cassese (1999), "*Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*" *EJIL* 10, 23-30 at 26.

15 *Ibid.*, p. 24.

16 See Murphy, (1996), p. 356ff.; Ruth Gordon (1996) *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, *Texas International Law Journal* 31, 43-56, at 47; and Charney (1999), p. 1247. See also Richard B. Builder (1999), "Kosovo and the 'New Interventionism': Promise or Peril?", *Journal of Transnational Law & Policy* 9, 153-182, at 161.

17 See Simma (1999), p. 11. See also Cassese (1999), p. 23-4; Charney (1999), 1247; Christine Chinkin (1999), "Kosovo: A "Good" or "Bad" War?", *AJIL* 93, 841-847, at 842; Catherine Guicherd (1999) "International Law and the War in Kosovo", 41(2) *Survival*, 19-

34, at 19; and O'Connell (2000), pp. 88-9.

18 Simma (1999), p. 6; Cassese (1999), p. 25-6; Chinkin (1999), p. 842-3; Richard Falk (1999), "Kosovo, World Order, and the Future of International Law", *AJIL* 93, 847-857, at 853; Catherine Guicherd (1999), "International Law and the War in Kosovo", *Survival*, 41(2), 19-34 at 19.

19 Danish Institute of International Affairs (1999), *Humanitarian Intervention: Legal and Political Aspects*, Submitted to the Minister of Foreign Affairs, Denmark, December 7, 1999, p. 24 (hereinafter, the "Danish Institute Report")

20 Falk (1999), p. 853.

21 Simma (1999), p. 6.

22 *Ibid.*, p. 22. See also the UK House of Commons Select Committee on Foreign Affairs Fourth Report (printed May 23, 2000), (hereafter, the "UK Fourth Report") para. 134 <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmffaff/28/2813.htm#a34>>. The Committee comes to the very dubious conclusion "that, faced with the threat of veto in the Security Council by Russia and China, the NATO allies did all they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible".

23 See Articles 2(3) and 33, 36, 37, 39 and 42.

24 But see, for example, Cassese who argues that "peaceful means of settling disputes commensurate to the unfolding of the crisis had been tried and exhausted by the various countries concerned, through the negotiations promoted by states comprising the Contact Group for the Former Yugoslavia, and later Rambouillet and at Paris (Cassese (1999), p.28).

25 Falk (1999), p. 855.

26 See Falk (1999), pp. 855; and Chinkin (1999), p. 844.

27 Gordon (1996), p. 45.

28 See the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Articles 48, Article 51(2) and 57.

29 L.C. Green (1993), *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press), p. 120.

30 Protocol I, Article 51(5)(b).

31 Chinkin, (1999), p. 844.

32 See Amnesty International report "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force, or press release "NATO violations of the laws of war during Operation Allied Force must be investigated." 7 June, 2000, Document no. EUR 70/025/2000, available online: www.amnesty.org.

33 Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, vol. 12, no. 1 (D), February 2000. Available online:

(Notes concluded over)

**Humanitarian Intervention:
Notes (from p. 9)**

http://www.hrw.org/reports/2000/nato/
34 "Collateral Damage", Section 4.
35 O'Connell (2000), p. 82, note 150.
36 Ibid., p. 82.
37 Cassese (1999), p. 29.
38 Antonio Cassese (2000), "A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", EJIL 10, 791-800 at 796.
39 Ibid., p. 798.
40 See for example O'Connell (2000), p. 82.
41 Ibid., p. 80, note 136.
42 Falk (1999), p. 856.
43 See Simma (1999), pp. 14, 20; O'Connell (2000), p. 88; Charney (1999), pp. 1247. See also Guicherd who agrees that there is no legal right to unauthorised humanitarian intervention but argues that while "the political and moral consensus that intervention is sometimes necessary to prevent human rights violations on a major scale has not been formalised into a set of rule of international law. It is now urgent that this consensus should be transformed into law" (Guicherd (1999), p. 29).
44 Guicherd points out that both Russia's and China's voting statements on Resolution 1203 make it clear that "they opposed the use of force in Kosovo, whatever the scenario" (Ibid.).
45 O'Connell (2000), p. 83; Guicherd (1999), p. 20; Cassese (2000), p. 794; Builder (1999), p. 181.
46 Cassese (2000), p. 794.
47 See Simma (1999), p. 20.

48 "As regards the intervention, the Kingdom of Belgium takes the view that the Security Council's resolutions which I have just cited provide an unchallengeable basis for the armed intervention.... But we need to go further and develop the idea of armed humanitarian intervention. NATO, and the Kingdom of Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe, acknowledged in Security Council resolutions. To safeguard what? To safeguard, Mr. President, essential values which also rank as jus cogens.... Thus, NATO intervened to protect fundamental values enshrined in the jus cogens and to prevent an impending catastrophe recognized as such by the Security Council." Legality of Use of Force (Yugo v. Belg.), Un-corrected Translation of Oral pleadings of Belgium (May 10, 1999) http://www.icj-cij.org/cijwww/cdoCKET/cyall/cyall_cr/cyall_cyb_e_ccr9915_19990510.html cited in O'Connell (2000) p. 81, note 144. See also Charney (1999) p. 1239 at note 28.
49 Charney (1999) p. 1238-9. See also Cassese (2000) p. 792 and See "Press Statement by Dr. Javier Solana, Secretary General of NATO", NATO Press Release No. (1999)040, 23 March 1999, http://www.nato.int/docu/pr/1999/p99-040e.htm. Cassese also points out that a few states have subsequently discussed the Kosovo intervention in legal terms. "In particular, the Netherlands, has pointed out that 'the Charter is not the only source of international law', thus implying that general norms may exist, or be in a nascent state, outside the Charter. The same state has noted in particular that 'a gradual shift [is] occurring in international law', whereby 'respect for human rights [is] more mandatory [than in the Charter] and respect

for sovereignty less absolute'. As a result there now exists a 'rule, now generally accepted in international law, that no sovereign state has the right to terrorise its citizens.'" Cassese notes that the statements of certain state delegates in the Security Council reveal this position may be shared by a few other states and in particular Canada (p. 795). However, Abraham Sofaer argues that the U.S. and NATO did not justify the intervention in legal terms because "they are uninterested in attempting to demonstrate that the circumstances satisfy particular artificial categories deemed exclusive despite overwhelming political consensus and international practice to the contrary" (Abraham Sofaer (2000), "International Law and Kosovo", Stanford Journal of International Law 36, 1-21, at 20).
50 See Falk (1999), p. 854; Cassese (1999), p. 25; Guicherd (1999), p. 19; See also the UK Fourth Report which states at para. 137, "we conclude that NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds".
51 Cassese (1999), p. 6
52 See the "Press Statement by Dr. Javier Solana", op. cit. note 49.
53 Chinkin (1999), p. 847.
54 O'Connell (2000) p. 88-9. See also Cassese (1999), p. 25; Charney (1999), p. 1247; Guicherd (1999) p. 29.

Note to Members:
The newsletter is now published twice a year. Please visit our web site at www.peacelawyers.ca

Yes, I would like to support this Newsletter and the valuable ongoing work of

Lawyers for Social Responsibility / Avocates en Faveur d'Une Conscience Sociale

for peace and security through the rule of law.

PLEASE PRINT CLEARLY

Name _____
Firm, Agency or Law School _____
Mailing Address _____
P/C _____
Office Phone _____ Home Phone _____ Fax # _____
EMail Address _____
I am a Lawyer _____ Judge _____ Law Professor _____
Law Librarian _____ Law Student _____ Legal Secretary _____
Paralegal _____ Other (please specify) _____
My area of specialization is _____

Enclosed please find my cheque payable to LAWYERS FOR SOCIAL RESPONSIBILITY. Please enroll me as a:

- _____ \$50 Sustaining Member (Judges, Professors, and Lawyers in practice more than 2 years).
_____ \$25 Member (Lawyers in practice less than 2 years, legal secretary, paralegal or law librarian).
_____ \$15 Law Student.
_____ \$1,000 Life Sustaining Member (may be paid in ten annual installments of \$100 each).
_____ Enclosed is my additional contribution of \$ _____ to support LSR's work.
_____ I prefer not to be a member of LSR but wish to receive its Newsletter. I enclose a subscription of \$15 for one year (4 issues).
_____ I would like to establish an LSR Chapter in my area. Please send me information.

Please remit this form and your cheque to the nearest LSR/AFCS Chapter or to LSR c/o Maia Veleva, #301, 1111 11th Ave SW, Calgary, AB T2R 0G6