Crimes against Humanity: Who has the Right to Intervene?

> "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated."
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> Justice Jackson, 1945.

Despite the words of the Chief Prosecutor for the US at the Nuremberg Tribunals, crimes against humanity have been repeated. Defined in Article 6 of the Nuremberg Charter to include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, such crimes are now universally prohibited under customary international law. But that has not prevented the deaths of many men, women, and children. Tribunals such as those set up to try crimes committed in Rwanda and the former Yugoslavia can deal with the perpetrators after the event, but the question remains as to the International Community's right, or indeed, obligation, to help the victims at the time.

States, either individually or under the collective mantle of the United Nations, cannot forcibly intervene in the affairs of another state. The 1945 UN Charter includes a prohibition on the use of force at article 2(4). Developed from the 1928 Pact of Paris in which war was outlawed, and another example of universally binding *jus cogens,* the article proscribes the use of force, except in self-defence or when action is authorised under Chapter VII of the Charter.

The difficulty in utilising the self-defence exception to help victims is that it is designed to be invoked by governments when the state is subject to an armed attack

by another state, and crimes against humanity are often committed by or on behalf of the state, against their own citizens. The people are attacked by the government they assumed would protect them. Intervention without governmental invitation could rightly be regarded as an armed attack on the state, and therefore would be unlawful.

Yet a UN resolution authorising intervention into Haiti resulted in the institution of a new (democratic) government, justified on the ground that it was the only way to ensure the observance of human rights.

This action is defensible when we consider that a government's legitimacy is based upon the fact that it represents the people, and when it no longer does that, it loses the right to claim sovereign immunities. This principle is consistent with Rousseau's Social Contract, where government is the expression of the general will of the people, and it is clearly articulated in the American Declaration of Independence. The right to self-defence is really a right of the people.

In less extreme situations, whilst it would be unrealistic and undesirable to say that every minority group has the right to its own state, we can say that human rights should be afforded to all individuals, and when the state fails to observe them it acts unlawfully. Human Rights matters do not fall solely within the domestic jurisdiction of the state, so the state cannot rely on article 2(7) of the UN Charter: the principle of non-intervention, and it should not expect to go unchallenged.

Intervention can be authorised under Chapter VII of the UN Charter, in order to deal with threats to "international peace and security". Again, the difficulty lies in the fact that crimes against humanity are committed intrastate, and the threat is to internal peace and security. In Kosovo, the UN established an international element by reference to the destabilising effect of the movement of refugees. Once the threat

is determined under article 39 of the Charter, the UN can authorise action ranging from economic sanctions (article 41) to the use of force (article 42). It is then up to the members of the UN to apply these measures.

When an armed force is required, the UN relies on a "posse" system – it is up to member states to volunteer their own military forces. States who have a greater interest in the situation are more likely to volunteer such a force, which fosters allegations of abuse and self-serving interventions. Equally, it may be difficult to raise a force to intervene in a situation that will not ultimately be of benefit to the intevenor. One solution to this would be the establishment of a dedicated "blue-helmet" force, but although the Charter allows for such a force it has not materialised. The force would raise issues about funding, and questions of neutrality would still arise: the five permanent and most influential seats on the Security Council are hardly a democratic representation of all states.

In any event, the possibility of abuse is not a reason to withhold assistance. Whilst it is possible that India would not have intervened in East Pakistan if she was not aiming to serve her own purposes, is it really relevant as long as the net result is beneficial? When the primary aim is the reinstatement of human rights the motive should be a secondary consideration. That is not to say we should take the victims out of the frying pan and put them into the fire: just that a difficult choice is still a choice.

The UN, however, is under no obligation to take any action at all. If states do not have the right to intervene, and the UN do not act, the human rights afforded to individuals are worthless. Unenforceable, they exist only on paper. This cannot have been the intention at Nuremburg. The Second World War was a definitive act of

humanitarian intervention: a war fought for human rights. Surely if there is ever a good reason to use force, that is it.

As we approach the twenty-first century we should be looking to impose a duty to intervene, rather than scratching around trying to find ways to justify it. The law is always reluctant to impose positive obligations, but some situations demand just that. In civil law, liability in respect of a failure to act, an omission, depends upon the existence of a special relationship. It is not difficult to draw an analogy in this case, and find that special relationship. We call it humanity.

Donna Eccott