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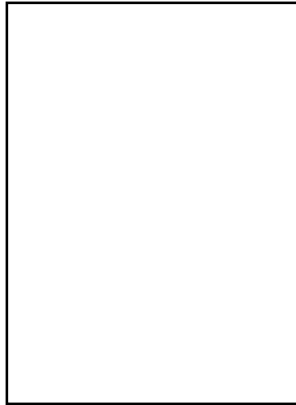
Details of Europaeum activities are given in Annex A at the back of this pamphlet.

**A EUROPAEUM LECTURE**  
**DELIVERED AT THE**  
**GRADUATE INSTITUTE OF INTERNATIONAL**  
**STUDIES, GENEVA,**  
**ON**  
**FEBRUARY 1<sup>ST</sup>, 2001**

**International Law**  
**and the**  
**Use of Force**  
**by States**  
**- *revisited***

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*“We conclude that, at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable”.*

**House of Commons Foreign Affairs  
Committee, Forth Report: Kosovo,  
Vol. I, paragraph 132 (23 May 2000)**

## **International Law and the Use of Force by States - *revisited***

The book to which this title refers was published in 1963 by the Oxford University Press, has been reprinted six times, and remains in print.

The Institute of Graduate Studies has given me the task of revisiting this work. It would be preferable to carry out such a task without making assumptions, but it is even more preferable to accept that assumptions have been made and to state what they are.

The first assumption is that, whilst there have been obvious changes in the political configuration of the world, especially in 1990, these changes have not had any particular effects on the law. The reason for this is quite simple: the interests of individual States have remained the same and the majority of States continue to have a fairly conservative view of the law. And yet some academics are beginning to believe that there is a right to use force for humanitarian purposes.

Any discussion of this question must take account of the Ministerial Declaration produced by the meeting of Foreign Ministers of the Group of 77 held in New York on 24 September 1999, three months after the NATO action against Yugoslavia.<sup>1</sup>

Paragraph 69 reads:

‘The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law.’

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This represents the opinion of 132 States. This total includes 23 Asian States, 51 African States, 22 Latin American States, and 13 Arab States.

The second assumption to be made is the continuing role of customary international law relating to the use of force. The customary law played a key role in the leading case of *Nicaragua v. United States*, both in the context of the issues of jurisdiction and in relation to the Merits. It was invoked both by the twelve judges in the majority and by the leading dissenter, Judge Schwebel.

At this point it will be helpful if I give notice of the topics which it will not be possible to discuss. The list is as follows:

- (a) The legality of the use or possession of nuclear weapons.
- (b) The constitutional power of the Security Council to authorise the threat or use of force by individual States or groups of States.
- (c) The full range of issues of State responsibility which may be generated by the use of force by States in the context of incidents on boundaries and the attendant questions of circumstances precluding wrongfulness.

After these preliminaries, it is necessary to move into the main current.

The book begins with an investigation of the status of war in ancient civilizations and in early Christian doctrine. In the sixteenth century the concept of just war is replaced by probabilism and the stage is set for the appearance of the classical doctrine of war and neutrality. No distinction was to be drawn between belligerents.

In the practice of States in nineteenth-century Europe, war was often represented as a last resort, that is, as a form of dispute settlement. However, the prevailing view was that resort to war was an attribute of statehood and it was accepted that conquest produced title. Thus, the conquest of Alsace-Lorraine by the German Empire was not the object of a policy of non-recognition either by third States or by France.

Certain other aspects of nineteenth-century practice are worth recalling. In the first place, there was a somewhat nebulous doctrine of intervention, which was used, to a certain extent, in conjunction with coercive measures short of a formal 'State of war'. This evasion was useful both diplomatically and to avoid constitutional constraints.

The nineteenth-century practice, contradictory as it was, is relevant to an understanding of the approach adopted by the League of Nations Covenant, the provisions of which essentially reflected nineteenth-century thinking. There were innovations, of course, and these took the form of procedural constraints on resort to war. But, provided the procedures foreseen in Articles 11 to 17 were exhausted, resort to war was permissible.

This appeared to be the intention of the draftsmen in spite of the provisions of Article 10, according to which there was an obligation by members to respect and preserve as against external aggression the territorial integrity and existing independence of all members of the League.<sup>2</sup>

Independently of the League Covenant, groups of States were concerned to establish the illegality of conquest. A recommendation of the International Conference of American States at Washington in 1890 contained the principle that cessions of territory made under threats of war or in the presence of an armed force should be void.<sup>3</sup> Unfortunately, the provisions were conditional upon the continuance of a treaty of arbitration which was not ratified.

The Sixth Assembly of the League adopted a resolution on 25 September 1925 which stated that a 'war of aggression' constituted 'an international crime', in accordance with a proposal of the Spanish delegation which had been studied in the First Commission. The report of the First Commission had noted that unhappily the principle that a war of aggression was an international crime had not yet entered positive

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law. At the Eighth Assembly a Polish proposal for a resolution prohibiting wars of aggression was adopted unanimously on 24 September 1927. Sokal of Poland stated that the proposal did not constitute a juridical instrument properly so called but that it had 'moral and educational' significance.

By the resolution the Assembly declared:

- (1) That all wars of aggression are, and shall always be, prohibited.
- (2) That every pacific means must be employed to settle disputes of every description, which may arise between States.

'The Assembly declares that the States Members of the League are under an obligation to conform to these principles.'

The more important development was the conclusion in 1928 of a legally binding multilateral treaty, the General Treaty for the Renunciation of War. The provisions are expressed as follows:

'Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.'

This instrument has been ratified or adhered to by sixty-three States and is still in force. It contains no provision for renunciation or lapse. The treaty was of almost universal obligation since only four States in international society as it existed before the Second World War were

not bound by its provisions.

The book entitled *Use of Force*<sup>4</sup> gives considerable importance to the General Treaty, often referred to as the Kellogg-Briand Pact. There are two elements in the treatment accorded to the Pact and to other developments of the period 1920 to 1945.

It is these two elements which, it might be thought, constitute the particular contribution which the book makes to understanding the evolution of the law and practice.

The first such element has as its background the fact that much of the literature sponsoring an ambitious doctrine of self-defence, including anticipatory self-defence, relies upon two propositions which are linked together.

The first proposition is that Article 51 of the Charter reserves a right of self-defence which exists in customary law: this view is reasonable in itself.

The second proposition is that the customary law concerned was formed in the nineteenth century and, in particular, as a result of the correspondence concerning the *Caroline* incident, correspondence exchanged in the period 1838 to 1842.

In this correspondence the U.S. Secretary of State Webster required the British Government to show the existence of:

‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’

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The analysis in the book is as follows:

‘Lord Ashburton (for the British Government) in his letter of 28 July 1842 did not dispute Webster’s statement of principle. The formula used by Webster has proved valuable in recent years but the correspondence made no difference to the legal doctrine, such as it was, of the time. Self-defence was regarded either as synonymous with self-preservation or as a particular instance of it. Webster’s Note was an attempt to describe its limits in relation to the particular facts of the incident.

The statesmen of the period used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms and the diplomatic correspondence was not intended to restrict the right of self-preservation which was in fact reaffirmed. Many works on international law both before and after the *Caroline* case regarded self-defence as an instance of self-preservation and subsequently discussed the *Caroline* under that rubric.’<sup>5</sup>

The reference to the period 1838 to 1842 as the critical date for the customary law said to lie behind the Charter, drafted in 1945, is anachronistic and indefensible. Thus, in the book the gap in the temporal development was attended to and the state practice in the period 1920 to 1945 was examined.<sup>6</sup> It is surely more appropriate to know the state of customary law in 1945 rather than 1842.

Thus, the first element at the centre of the book is the presentation of a view of the state of customary law at the date the Charter entered into force.

It is in this context that the Kellogg-Briand Pact comes into prominence, because it is the foundation of the State practice in the period 1928 to 1945, including the prosecution case in the International Military

Tribunals in Nuremberg and Tokyo. And the Kellogg-Briand Pact, as interpreted by the parties, prefigures the legal regime of the Charter. It is this transition from 1928 to 1945 which is neglected by the partisans of a right of self-defence based upon the *Caroline* principle. Thus the second element which is characteristic of the book is the degree of continuity which is discerned between the practice of the period 1928 to 1945 and the legal regime of the Charter.<sup>7</sup>

The principal parties to the Kellogg-Briand Pact made reservations, which were accepted by the other parties, relating to self-defence.<sup>8</sup> The regime which clearly emerged includes the following elements:

- First: the obligation not to have recourse to war for the solution of international controversies.
- Secondly: the obligation to settle disputes exclusively by peaceful means.
- Thirdly: the reservation of the right of self-defence and also of collective self-defence.
- Fourthly: the reservation of the obligations of the League Covenant.

Thus, the Kellogg-Briand Pact, seen in its context and in relation to the practice of the parties, constituted a realistic and comprehensive legal regime.

In the period following the conclusion of the Pact, it played a considerable role in the practice of States. Thus, the United States invoked the Pact in relation to hostilities between China and the Soviet Union in 1929, again in 1931 in relation to the conflict between China and Japan, and also in the context of the *Leticia* dispute between Peru and Ecuador. The Pact continued to play a role until 1939, when, for example, the Pact was cited in the condemnation by the League Assembly of Soviet action against Finland.<sup>9</sup> The practice of the parties was not in all respects consistent, however, and the Italian conquest of

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Ethiopia was accorded recognition by a number of States, this recognition being rescinded in 1941.

This was the legal regime which was the actual precursor of the United Nations Charter, not the correspondence relating to the *Caroline* incident.

The essentials of the legal regime just outlined reappear in the United Nations Charter brought into force on 24 October 1945. Article 2 thereof formulates certain principles which bind both the Organization and its Members. Article 2, paragraphs 3 and 4, provide as follows:

‘3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.’

Article 51 reserves the right of individual or collective self-defence ‘if an armed attack occurs against a Member of the United Nations’, and this is described as ‘the inherent right’. At the Merits phase of the *Nicaragua* case it was recognised that this formulation refers to pre-existing customary law. In the words of the Court:

‘As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this

reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.’<sup>10</sup>

It is reasonable to assume that the Court was referring in principle to the customary law existing in 1945, together with any subsequent developments, and not to the law existing in 1842. This is compatible with the position adopted in the book, although the view preferred there is that the Charter provisions and customary law were one and the same.<sup>11</sup>

The Charter regime presents some questions of interpretation. The first question concerns the formulation ‘against the territorial integrity or political independence of any State’. Some writers have relied on this language to produce substantial qualifications of the prohibition of the use of force, and the United Kingdom employed this type of argument to defend the minesweeping operation in the *Corfu Channel* case.

In my submission the preparatory work of the Charter is sufficiently clear and this phrasing was introduced precisely to provide guarantees to small States and was not intended to have a restrictive effect.<sup>12</sup>

A further and particularly difficult issue of interpretation relates to the phrase ‘armed attack’ in Article 51. The author’s general position on the use of force is sometimes caricatured as the ‘restrictive view’,

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chiefly because the book is unfavourable to anticipatory self-defence. In this respect the author remains unrepentant.<sup>13</sup>

However, the book does not take a narrow view of the general concept of armed attack. There are two passages in the book dealing with the question. The first reads as follows:

‘Since the phrase ‘armed attack’ strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of ‘armed attack’. However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an ‘armed attack’, more especially if the object were the forcible settlement of a dispute or the acquisition of territory.’<sup>14</sup>

The second passage introduced the principle of agency and I shall read it in full:

‘The present work contains many references to ‘resort to force’ or ‘the use of force’, and such terms have been employed in Article 2, paragraph 4, of the United Nations Charter and in other important instruments. The use of force is implicit in the terms ‘war of aggression’, ‘invasion’, ‘attack’, and, at least until 1945, ‘aggression’. Although the terms ‘use of force’ and ‘resort to force’ are frequently employed by writers they have not been the subject of detailed consideration. There can be little doubt that ‘use of force’ is commonly understood to imply a military attack, an ‘armed attack’ by the organised military, naval, or air

forces of a state; but the concept in practice and principle has a wider significance. The agency concerned cannot be confined to the military and other forces under the control of a ministry of defence or war, since the responsibility will be the same if a government acts through 'militia', 'security forces', or 'police forces' which may be quite heavily armed and may employ armoured vehicles. Moreover, governments may act by means of completely 'unofficial' agents, including armed bands, and 'volunteers', or may give aid to groups of insurgents on the territory of another state.<sup>15</sup>

Both these passages were invoked by Judge Schwebel in his Dissenting Opinion in the Merits phase of the *Nicaragua* case.<sup>16</sup>

The definition of armed attack had obvious importance in the *Nicaragua* case and is also relevant to the proceedings brought by the Congo against Burundi, Rwanda and Uganda. The proceedings against Burundi and Rwanda have recently been discontinued.

At this point, it is useful to break off the discussion of the main elements of the legal regime and to look briefly at the crystallisation of corollaries to that legal regime. By corollaries I mean the following legal principles:

First: The principle of non-recognition of territorial acquisitions obtained by the use or threat of force.

Second: The principle that any treaty the conclusion of which was procured by the threat or use of force in violation of the Charter of the United Nations shall be void.

The question of corollaries is studied in the book (pp. 402-23) and these two principles are identified as the most significant. There can be no doubt that the conclusion of the Kellogg-Briand Pact gave an

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impetus to the development of corollaries, particularly in the form of the Stimson doctrine of non-recognition formulated in 1932. The appearance of such corollaries is both significant in itself and provides evidence of the maturity and internal consistency of the legal regime.

The emergence of corollaries can be seen in the Vienna Convention on the Law of Treaties, Article 52, dealing with the invalidity of treaties procured by coercion, and in the draft articles on State Responsibility produced by the International Law Commission in the present quinquennium.

It is now time to return to the examination of the general structure of the legal regime. In the period from 1945 until 1990 there were four significant sources of turbulence in the rather tidy legal regime presented in my book.

In no particular order, those sources of turbulence were as follows:

- (a) The alleged right of intervention to protect nationals;
- (b) Hegemonial intervention on the basis of regional arrangements in the absence of Security Council authorization;
- (c) Intervention on the basis of consent of the territorial sovereign;  
and
- (d) Intervention in the form of assistance to national liberation movements.

The first of these issues, protection of nationals, is examined in the book, principally at pp. 255-6, 265, 269, 289-301. This justification was one of several invoked by the United States in relation to the use of force against Panama in 1989. In her recent examination of the practice Dr. Christine Gray observes that few States accept a legal right to protect nationals abroad.

The second of the sources of turbulence involved resort to hegemonial intervention on the basis of regional arrangements in the absence of

the authorisation of the Security Council in accordance with Articles 52 to 54 of the Charter. The abuse of regional arrangements post-dated the writing of the book. Three episodes may be recalled, starting with the action taken by the OAS in the Cuban Missile crisis. On 22 October 1962 President Kennedy announced that the OAS would be asked to invoke Articles 6 and 8 of the Rio Treaty of 1947.

Article 6 provides as follows:

‘If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.’

Thus, the action taken was not related to Article 3 of the Rio Treaty which is predicated upon the existence of an armed attack and the provisions of Article 51 of the Charter. The point to be observed is that the *casus foederis* of regional arrangements extends to mere threats to the peace of the region, and is not limited to the concept of self-defence.

In the second place there was the crisis in the Dominican Republic in 1965 and the dispatch of an Inter-American Peace Force. In this case the jurisdiction of the Security Council was recognised in principle at least.

Lastly, there was the Soviet-led Warsaw Pact invasion of Czechoslovakia in 1968. In this instance the practice of the parties to the Warsaw Pact treated it as a regional arrangement.

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The problem presented by this type of action by regional arrangements is that it gives rise to a second-hand and low-level legitimacy without the more objective constraints of the provisions of Article 51.

The third source of turbulence is the incidence of intervention based upon the consent of the territorial sovereign. This is examined in Chapter XVI of *Use of Force*. The title of such intervention is clear: the consent of States. The problem is, of course, the fact that in many cases the status of the consenting government is problematical. The worst-case scenario is the situation in which competing *de facto* governments sponsor foreign intervention.

The fourth source of turbulence in the period 1945 to 1990 was the existence of recognised national liberation movements and the legality of external assistance to such movements. This subject is not included in the book and the explanation for this is, quite simply, that the key developments began after its publication in 1963. In 1974 the General Assembly admitted as Observers those liberation movements which were recognised by regional organizations at that time. Such recognition was accorded to the Angolan, Mozambican, Palestinian, and Rhodesian movements.

So much for the sources of turbulence in the period 1945 to 1990, although there is no doubt that these factors continue to have relevance today.

I can now move on to review the sources of turbulence which have become prominent in the period since 1990.

The first particular source of turbulence in this period is the authorisation of the use of force by individual States, or a group of States, by the Security Council by way of delegated enforcement action. This topic obviously does not feature in the book, although the action in Korea in 1950 was a precursor of this phenomenon. The recent practice is helpfully analysed by Niels Blokker.<sup>17</sup> Important as this

practice is, as I indicated at the outset, it belongs to the category of Charter interpretation and will not be examined further here.

And so I come to the second and third sources of turbulence. These both relate to the category of humanitarian intervention and call for careful formulation. For the present the legal status of such intervention will be left in abeyance. The first task is, so to speak, to identify the candidates. There appear to be two models. The first of these models is the subject of examination in the book.<sup>18</sup> This is the nineteenth-century doctrine of humanitarian intervention which is described in the book as follows:

‘By the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention (*l’intervention d’humanité*) existed. A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene. The action was thus in the nature of a police measure, and no change of sovereignty could result.

The doctrine was inherently vague and its protagonists gave it a variety of forms. Some writers restricted it to action to free a nation oppressed by another; some considered its object to be to put an end to crimes and slaughter; some referred to ‘tyranny’, others to extreme cruelty; some to religious persecution, and, lastly, some confused the issue by considering as lawful intervention in case of feeble government or ‘misrule’ leading to anarchy.’<sup>19</sup>

At the time the book was published very few experts believed that humanitarian intervention had survived the legal regime created by the United Nations Charter, and it was not considered to be a significant issue.

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The second model is connected with the NATO bombing of targets throughout Yugoslavia for a period of seventy-eight days, commencing on 24 March 1999. There is a preliminary and major difficulty in classifying the action. This is because the authenticity of the subsequent claims that the action had humanitarian motives is substantially undermined by the fact that, beginning in October 1998, the threats of force were linked directly to a political agenda, that is, the acceptance by Yugoslavia of various political ‘demands’ concerning the status of Kosovo under threat of a massive bombing campaign. This background has been ignored by many commentators.

In any event, it is necessary to examine the justifications offered by the United Kingdom and other members of NATO. First of all, there were statements in the House of Commons. The primary characteristic of the statements is the relative absence of reference to specific considerations of public international law.

The statements by Ministers fall into three general categories. The first was the assertion of a legal right to take action “to prevent humanitarian catastrophe”. Thus on 1 February 1999, the Foreign Secretary, in reply to a question, made the following statement:

‘My Hon. Friend asked also about the legal base for any action. We are clear that we have legal authority for action to prevent humanitarian catastrophe and we are all deeply worried that we shall be looking at just such a catastrophe unless we are able to get a political settlement under way. I stress to my Hon. Friend and to the House that the proposal that I have outlined this afternoon was welcomed unanimously by the Security Council and that no permanent member disagreed with it.’<sup>20</sup>

Similar statements were made on other occasions.

The second category of statements involves the assertion that military action, or the threat thereof, would be undertaken “in the event of Belgrade not complying with the Contact Group’s demands”. This is a reference to the peace talks at Rambouillet.

The third category of statements involves reliance upon Security Council resolutions 1199 and 1203, neither of which legitimates the use of force.

The extent to which international law is being relied upon in these various statements (of all three categories) is difficult to assess. The statement made on 1 February (*supra*) by Mr. Cook refers in clear terms to “the legal base for any action”. On the other hand, the Prime Minister’s major statement on 25 March (the day after the bombing commenced) makes no single reference to legal considerations, and, also on 25 March, Mr. Lloyd, the Minister of State, referred only to “a moral obligation”.

The position is complicated further by a continuing tendency to combine the humanitarian theme with the use of force to implement “the Rambouillet Accords”: as in the Prime Minister’s statements on 23 March and also on 13 April, while the bombing continued.

The official position of the United Kingdom was set forth in a statement by the Permanent Representative to the United Nations, Sir Jeremy Greenstock, on 24 March. The key passages are as follows:

‘Mr. President,

In defiance of the international community, President Milosevic has refused to accept the interim political settlement negotiated at Rambouillet; to observe the limits on security force levels agreed on 25 October; and to end the excessive and disproportionate use of force in Kosovo.

Because of his failure to meet these demands, we face a humanitarian catastrophe. NATO has been forced to take

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military action because all other means of preventing a humanitarian catastrophe have been frustrated by Serb behaviour.’

‘Mr. President,

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.

Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.’

This statement makes the clear assertion that the action is legal but no specific international law source is invoked and, in particular, no reference is made to the United Nations Charter.

In May 1999 Yugoslavia sued 10 Member States of NATO before the International Court of Justice in respect of the bombing campaign and its consequences, including civilian deaths, injuries and privations, the effect on navigation on the Danube, and damage to the environment. The first procedural development involved a request by Yugoslavia for interim measures of protection. For present purposes the proceedings constitute a further source for official indications as to the legal justification for the air strikes against Yugoslavia.

The Belgian delegation produced the most elaborate essay in justification, presenting the justification in the form of four elements.

First: reference is made to Security Council resolutions 1160 (1998), 1199 (1998) and 1203 (1998).

Second: it is asserted that armed humanitarian intervention is compatible with Article 2, paragraph 4, of the United Nations Charter.

In this context the Belgian argument is that Article 2, paragraph 4, only applies to interventions directed against the territorial integrity or political independence of the State in question.

Third: certain historical episodes are invoked as precedents: the intervention of India in East Pakistan, the intervention of Tanzania in Uganda, and the intervention of West African States in Liberia and Sierra Leone.

Fourth: the state of necessity is invoked.

Four delegations failed to offer any clear *legal* justification. Five delegations used the formula relating to the existence of a humanitarian catastrophe, though without giving the formula any distinct *legal* underpinnings. Two delegations placed emphasis upon certain Security Council resolutions.

What conclusions are to be drawn from all this?

The Governments of the NATO States have been generally consistent in their assertions that the action taken against Yugoslavia was legal. However, the various statements avoid giving any particulars relating to the legal framework. A further source of difficulty is the emphasis in some of the key ministerial statements in the House of Commons and in the NATO statement of 24 March on the purpose of forcing the Yugoslav Government to accept the political “demands” of the Contact Group. It is not easy to reconcile the enforcement of the Rambouillet

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“Proposals” with the humanitarian motivation stressed in other statements.

The phrase “humanitarian catastrophe” is anomalous: why was the more normal phraseology - “humanitarian intervention” - generally avoided? The probable antecedent appears to be the reference to “extreme humanitarian need” and “risk of a serious humanitarian emergency” in statements by Mr. Hurd, the Foreign Secretary, in 1992, concerning the air exclusion zone established by the Allies in southern Iraq with the stated purpose of protecting the Shiite population from aerial attacks.

It will be noted that the Government is here espousing a “customary international law principle of humanitarian intervention”. It is very difficult indeed to envisage what practice of States the Government had in mind or which authorities supported this assessment. It may be recalled that it was stated on behalf of the Government (on 16 November 1998) that “There is no general doctrine of humanitarian necessity in international law”.

The proponents of humanitarian intervention are distinctly in a minority. More significant, however, is the position in customary international law, which depends upon the practice of States based upon *opinio juris*, that is to say, a belief that the action is in accordance with international law. There can be no doubt that the United Nations Charter can be modified by the congruent practice of the Member States crystallising as a new principle of customary law. But there is a burden of proof upon proponents of a change in the customary law. The central point is the absence of evidence of a change of view by a majority of States. The assertions of legality made by the British and other Governments in relation to the military operations against Yugoslavia were unaccompanied by any convincing particulars of supporting State practice.

The experts who support the legality of humanitarian intervention do not provide even incipiently convincing evidence of State practice in support. Professor Franck refers to the customary law “beginning to take form” (in 1993). Judge Higgins refers to three episodes. The first is the Belgian and French interventions in Stanleyville in 1963. The difficulty with this episode is that the Government in Zaïre gave its consent. The second episode invoked is the United States’ intervention in Grenada in 1983. This is an odd precedent. Various States, including Canada, had nationals on the island but they were not consulted. The reasons publicly advanced by the United Kingdom Government in relation to Grenada did not include a reference to humanitarian intervention. The Entebbe rescue operation of 1976 is rarely invoked as a precedent. Professor Dinstein places it within the category of self-defence. The attitude of States generally, as revealed in the Security Council debate at the time, either took the form of criticism on legal grounds or, in some cases, a waiver of the illegality.

In conclusion, there is very little evidence to support assertions that a new principle of customary law legitimating humanitarian intervention has crystallised. And I would refer again to the position taken by 132 States in the New York declaration of 24 September 1999.

Various lawyers, including myself, were invited to make submissions to the Foreign Affairs Committee of the House of Commons on the Kosovo crisis and its conclusion must be recorded. After summarising the opinions of Professor Greenwood, who argued that the right of humanitarian intervention had evolved in the previous ten years, the Committee continued:

‘An entirely contrary view is taken by Professor Brownlie, who provided the Committee with an exhaustive review of the authorities, including jurists of twelve nationalities, three of whom had been President of the International Court of Justice. He concluded that “there is very little evidence to

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support assertions that a new principle of customary law legitimating humanitarian intervention has crystallised". Professor Brownlie's view that the right of humanitarian intervention was at least doubtful was also held by Professor Lowe (who told us that "few lawyers would claim that the 'right' is at present clearly established in international law") and Professor Chinkin (who wrote that she did "not think that state practice is sufficient to conclude definitively that the right to use force for humanitarian reasons has become part of customary international law". We are persuaded that Professor Greenwood was too ambitious in saying that a new customary right has developed. We conclude that, at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable.<sup>21</sup>

It is time to move to my concluding observations. There is no use in offering a general summary, but some questions of special sensitivity can be identified.

There are three such questions. It is helpful if I point out that the sensitivity resides in the risks entailed in certain types of action, whatever high-flown language is used in order to seek to confer some level of legitimacy on the action concerned.

The first, and surely the most significant, is intervention in civil strife, whether on the side of the lawful government, if that is identifiable, or otherwise. Such intervention may be classified as action based upon the request or consent of the State concerned, or may be described as humanitarian intervention, or if the United Nations is involved, as peace-keeping. Such intervention, whether it is lawful or not, almost always exacerbates internal tensions and conflicts, triggers new levels of hostility between groups, and makes the recovery of internal legitimacy more difficult. In the worst cases the result is a foreign

military occupation which, paradoxically, has the purpose of fostering democracy by the methods of dictatorship.

At this point it is necessary to examine the policy of humanitarian intervention based upon the NATO model. This model involves deliberate intervention in a state, on an ethnic basis, and accompanied by an intention to bring about the fall of the central government.

There are major considerations of policy and prudence which militate strongly against the practice of intervention on a unilateral or “allies” basis, in the absence of the authority of the Security Council. It is a practice only available to the strong States or other States acting alongside the powerful.

The principle of self-determination is always a possible source of destabilisation. If it is to be used as a lever to induce secession from outside, the result will be disastrous. This will be particularly the case when intervention takes place in favour of an ethnic group which is distributed across several boundaries. Intervention in one of the relevant States immediately creates a normative parallel for the elements of the group living in the other relevant States.

Intervention in an ethnic context is bound to create or exacerbate the very human rights abuses it is supposed to prevent or terminate. The NATO intervention in Kosovo was blatantly pro-Albanian. Non-Albanians were not seen as potential victims. After the removal of the Yugoslav administration the Albanian group expected the benefits of the victory achieved on their behalf. The victory was seen in exclusively ethnic terms, *but that had been the basis of the intervention*. This perception of the intervention as exclusively pro-Albanian has been reflected in Albanian conduct since June 1999 in respect of Serbs, Gypsies and other ethnic groups.

There is another dimension to the problem. Humanitarian intervention (as a matter of morality) should involve a short-term operation with

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the purpose of ending the human rights abuses and improving public order in co-ordination with the lawful Government. The Kosovo intervention was the culmination of a political agenda intended to *force* Yugoslavia into accepting a regime of autonomy in Kosovo imposed from outside, and also to change the lawful Government of Yugoslavia as a further political dividend. These aims have been stated publicly on numerous occasions.

In a general historical perspective, little has changed. With rare exceptions, humanitarian intervention forms part of a political agenda and there is no authenticity. That is why separatist movements in Russia, Turkey, Indonesia, and other States, do not receive the assistance of the U.S. Air Force.

The second area of special sensitivity involves the use of missile technology to target the infrastructure of terrorist groups attacking American targets.

After the missile attacks on the Sudan and Afghanistan in 1998 the United States sent the following letter to the President of the Security Council:

‘These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization. That organization has issued a series of blatant warnings that “strikes will continue from everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.

In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.’

At least three levels of difficulty present themselves. Firstly, there are the rule of law problems arising from unilateral fact-finding and from haste leading to error as in the case of the Sudanese target. Secondly, there is the extreme form of self-defence based on damaging infrastructure. And thirdly, there is the strong impression that reprisal and punishment constituted the real motivation.

The third area of sensitivity takes the form of use of the language of negotiation when, in fact, one side openly resorts to threats of force, which, according to the provisions of the Vienna Convention on the Law of Treaties, can only result in a voidable agreement. International diplomacy is developing a language of distortion worthy of the characters in Orwell’s *Nineteen-Eighty Four*.

## Notes

- 1 Available on the internet: <http://www.g77.org/Docs/Decl1999.html>
- 2 *International law and the use of force by states*, Ian Brownlie (Clarendon Press, Oxford, 1963), pp. 55-65
- 3 Moore, *Digest*, I, 292
- 4 *International law and the use of force by states*, Ian Brownlie (Clarendon Press, Oxford, 1963)
- 5 *Use of Force*, p. 43
- 6 *Use of Force*, pp. 66-111
- 7 *Use of Force*, pp. 66-111, 216-50
- 8 *Use of Force*, pp. 235-47.
- 9 *Use of Force*, pp. 75-111
- 10 I.C.J. Reports, 1986, p. 94, para. 176
- 11 *Use of Force*, pp. 272-5
- 12 *Use of Force*, pp. 265-8
- 13 *Use of Force*, pp. 275-8
- 14 *Use of Force*, pp. 278-9
- 15 *Use of Force*, p. 361
- 16 I.C.J. Reports, 1986, pp. 332-4
- 17 European Journal, Vol. II, p. 541
- 18 *Use of Force*, pp. 338-42.
- 19 *Use of Force*, pp. 338
- 20 HC 324, Col. 605
- 21 Forth Report (2000), HC 28-I, pp. xlvi - xlix, para. 132



## **The Europaeum Oxford-Geneva Link Programme**

Academics have been shuffling in greater numbers between Oxford University and Geneva's Graduate Institute for International Studies over the past year in pursuit of academic collaboration, thanks to a generous gift to the Europaeum from M. Pierre Keller to strengthen European academic links specifically between the two institutions.

Links between Oxford and Geneva of course go back a long time: Voltaire shuttled between Oxford and Geneva in the 18<sup>th</sup> Century, while another unusual link came in the original statutory duties of the holders of the Montague Burton Chair of International Relations at Oxford, currently Professor Adam Roberts, to spend some time each year in Geneva 'studying the latest workings of the League of Nations'. More recently, one can discern a dramatic link in the very invention of the Internet, carried out at the European Particle Physics Laboratory at CERN in Geneva by an Oxford graduate, Tim Berners-Lee.

The *Europaeum Oxford-Geneva Link Programme* has several facets – including a student bursary scheme, a Europaeum Lecture series, a new research project group stimulated by the Europaeum small grants scheme, and joint teaching links.

The programme was launched at an international Europaeum Conference on the *Limits to Europe* held at the Institute in 1996, examining relations between identity formation and various exclusion processes at work in the European context. The focus was on the apparent trade-off between exclusion and dilution. It is now proposed that a follow-up conference be held to explore the development of these issues over the past five years.

□ The *Student Bursary Exchange Scheme* provides a bursary for an Oxford graduate to spend time in Geneva, and a Geneva student to spend time in Oxford, was launched in October 2000. The first year

has enabled a student from Geneva to spend two terms in Oxford undertaking research towards his Ph.D on the effect of the media on national security decision-making. The Oxford student completed a semester of study at the Graduate Institute; interviewed staff at the nearby UNHCR Headquarters and made use of their documentation centre and library; and presented a paper to the *International Security Forum* in November.

□ The Oxford-Geneva *Europaem Lectures* were launched by this lecture from Ian Brownlie, delivered to a full house in Geneva on February 1<sup>st</sup>, while second in the series was given by Professor Philippe Burrin in Oxford on May 16<sup>th</sup> on the topic of *Aspects of Nazi Anti-Semitism* in the 1930s. Two further lecturers are due to in 2002 and 2003.

□ A *Research Project Group* has been established linking Geneva and Oxford specialists looking at unilateral interventions carried out without UN Security Council authorisation but within the framework of collective security.

□ A linked *Teaching Programme*, on International Protection of Refugees, has also proved extremely popular with more than 50 students participating. The Directors, Professors Guy Goodwin Gill and Vera Gowlland-Debbas, will continue this teaching collaboration in 2001-2002.

It is expected that over the coming years, ties will also deepen between historians, economists and social policy specialists, between the two institutions.

## **The Europaeum Record**

### **I. Academic Conferences**

**1993 Oxford** ‘Are European Elites Losing Touch with their Peoples?’

**1994 Oxford** ‘Europe and America after the Cold War: the end of the West’

**1995 Bonn** ‘The integration of East Central Europe into the European Union’

**1996 Geneva** ‘Defining the Projecting Europe’s Identity: Issues and Trade-Offs’

**1997 Paris I** ‘Europe and Money’

**1998 Leiden** ‘Human rights, with particular reference to plight of immigrants and immigration policy in Europe’

**2000 Bonn** ‘The Implications of the new Knowledge and Technology’

**2001 Berlin** (projected) ‘Borderless Education: Challenges for the new Europe’

### **II. Student Summer Schools**

**1994 Leiden** ‘Concepts of Europe’

**1995 Bologna** ‘The Problem of Political leadership between History and Social Science’

**1996 Bologna** ‘The Civic Nation and the Ethnic Nation’

**1998 Budapest** ‘Risk Policy Analysis’

**1998 Oxford** ‘Human Rights’

**1999 Paris I** ‘NATO and European Defence’

**2000 Bologna** ‘European Policy and Enlargement’

**2000 Oxford** ‘Church as Politeia: the political self-understanding of Christianity’

**2001 Oxford** ‘Human Rights and the movement of people: Meeting the Challenges of Racism, Migration and Displacement.’

### III. Joint Teaching, Courses and Programmes

- 1992- Oxford** *European Law Studies* involving joint teaching and study, and student exchanges linking Oxford, Leiden and Sienna.
- 1999- Paris** *Economics of European Integration* Europaeum module for undergraduates and graduates.
- 1999- Bologna** *European Political Cultures and Systems* joint programme linked to Oxford and Leiden. To be relaunched in 2001 as a Europaeum MA.
- 2000- Geneva** *International Refugee Law* joint teaching Programme linked to Oxford.
- 2001- Bonn** *Ecumenical Studies in Protestant Theology* joint programme to be linked to other Europaeum institutions, including Prague and Oxford.
- 2002- Leiden** *Leadership Programme in European Business Cultures* to be linked to Oxford and European industry.

□ In 1997 academics representing all the Europaeum partners in the fields of *European Political Thought, Economics of Integration, and European Modern History* met at Oxford, Paris and Bologna respectively, and agreed strategies to promote international academic collaborations.

□ New academic networks are being developed in Economics, History, Politics and Theology, to promote collaborative teaching and mobility of graduate research students. Other initiatives aim to link academic in the fields of Classics, History of Science and Environmental Science.

□ The Europaeum played the key role in the creation at Oxford of the Centre for European Politics and Society, and also in the creation of the Oxford Institute of European and Comparative Law, and a number of fellowships, most recently the Bertelsmann Europaeum Visiting Professorship in Jewish History and Politics.

## IV. Scholarship Programmes

❑ The **Europaeum Scholarships in Jewish Studies** provide up to six places each year for Europaeum graduate students to spend a year in Oxford studying for the Diploma in Jewish Studies at the Oxford Centre for Hebrew and Jewish Studies.

❑ The **Oxford-Geneva Bursary Scheme** provides bursaries for student exchanges between Oxford and the Graduate Institute of International Studies, together with other collaborative activities including joint teaching and Europaeum Lectures.

Other linked scholarship schemes include the Artal, Thyssen, Kravis and Scatchard awards, all tenable at Oxford.

## V. Research and Communications Network

The **Europaeum Research and Communications Network**, facilitating collaborative research and teaching over the internet, was established in autumn 2000.

The network allows continuous discussion through online forums and seminars. Each *Theme Group* within the forums will be led by an Academic Director and moderated by a Supervising Editor. Informal discussion outside, and between, the Theme Groups can also take place. New Theme Groups and discussions may be created on demand.

Those participating in the forum system benefit from the prodigious database capacities of the network, which can store personal files, and references, articles and notes on each academic theme, building up academic records and sources. Documents placed on the network may be accessed and worked upon remotely, and can be made 'public' for other participants to comment or discuss. Such international collaboration promotes Europe-wide awareness and encourages the development of new perspectives.

## VI. Joint Research Projects and Support

❑ A **Research Directory** of interests of staff involved in European Studies in partner institutions is accessible on the Europaeum internet site encouraging academic collaboration.

❑ The **Europaeum Project on the Future of European Universities**, supported by DaimlerChrysler Services AG, a three-year investigation into the impact of new technology and the “Knowledge Revolution” was initiated in autumn 2000, with a first international conference in Berlin in December 2001, followed by two further events in Paris and Bonn.

❑ **Joint Europaeum Research Projects** on ‘*Party System Change*’ involving members of several Europaeum universities, launched in Oxford in 1997, and ‘*Heterogeneities and Communalities in South-East Europe*’ an international research project linking all Europaeum partners to look at the origins and aftermath of the Kosovo crisis, launched in 2000.

❑ The **Europaeum Research Project Groups** scheme encourages collaborative research across the association. The following five groups received awards in 2000: The Churches and the Family; European Monetary Integration; The Kosovo Stability Pact; International Intervention; and European identity.

❑ The **Europaeum New Initiatives Scheme** provides seed funding for new, innovative and imaginative forms of academic collaboration within, but not exclusive to, the Europaeum academic community.

## VII. Mobility Programmes

❑ The **Europaeum Visiting Professors Scheme** supports the movement of academics from one partner institution to another, including the hosting of a Europaeum Visiting Professor each year at each institution.

❑ The Europaeum supports individual academics and students from member institutions participating in selected European events and activities, including conferences, seminars and summer schools.

## The Europaeum Members

### Oxford

The University of Oxford, comprising 39 Colleges and 6 Private Halls, dates its foundation officially to 1249, though teaching at Oxford is known to date back to 1096, and the first overseas scholar arrived in 1190.

**Vice-Chancellor:** Dr. Colin Lucas  
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### Leiden

Universiteit Leiden founded in 1575 by the States of Holland, as a reward for the town's brave resistance against the Spanish, at the behest of William of Orange.

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### Bonn

Rheinische Friedrich-Wilhelms-Universität Bonn founded in 1818 by Kaiser Friedrich Wilhelm III, preceded by an Academy established in 1777.

**Rector:** Professor Klaus Borchard,  
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## Bologna

Università degli studi di Bologna officially constituted in 1158 by Emperor Frederick I Barbarossa, though independent teaching dates back to 1088.

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## Geneva

The Graduate Institute of International Studies founded in 1927, associated to, but not part of, the University of Geneva.

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## Paris

Université Paris I Panthéon-Sorbonne founded in the 12th Century, and formally constituted by Papal Bull in 1215, was briefly suppressed by the French Revolution between 1793 and 1808, and reconstituted in 1890.

**Rector:** Professor Michel Kaplan  
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## Prague

Charles University, Prague, founded in 1348, was divided into Czech and German institutions by the Vienna government in 1882. These operated in parallel until 1939, when the Czech institution was closed by Nazi occupation. After 1945, the German institution was abolished and the Czech Charles University revived.

**Rector:** Professor Ivan Wilhelm,

**Management Committee representative:**

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## The Europaeum Lectures

Europaeum Lectures have been a part of the consortium's work since its foundation in 1992. The Europaeum now publishes key lectures in this series of pamphlets, examining the key issues confronting Europe today.

The series has recently included the following Lectures:

❑ **October 2000, Prague**

Dr. David Robertson of Oxford on "*A common Constitutional Law for Europe: Questions of National Autonomy versus Universal Rights*"

❑ **November 2000, Oxford**

Dr John Temple Lang of the European Commission on "*The Commission and the European Parliament – an uncertain relationship*"

❑ **February 2001, Geneva**

Professor Ian Brownlie CBE QC of Oxford on "*International Law and the Use of Force by States revisited*"

❑ **May 2001, Oxford**

Professor Philippe Burrin of Geneva on "*Strands on Nazi Anti-Semitism*", followed by a roundtable discussion involving Professor Wolfram Kinzig (Bonn), Professor Peter Longerich (Royal Holloway, London), Professor Mark Roseman (Southampton), and chaired by Dr Nick Stargardt (Magdalen College, Oxford).

❑ **June 2001, Paris**

Professor Raymond Barre of Paris I, and a former Premier of France, on "*L'Europe d'hier, d'aujourd'hui et de demain.*"

Future lectures are planned for Geneva and Oxford in 2002.

*To order further copies of this pamphlet, or request copies of others in the series, please contact the Europaeum Secretariat at the address on the back cover.*