

2011 DEAKIN LAW ORATION

THE LEGAL BASIS FOR US MILITARY ACTION IN THE INTERNATIONAL REALM

28 JULY 2011, MELBOURNE

**JEFFREY L BLEICH
US AMBASSADOR TO AUSTRALIA**

OPENING

Thank you for the kind introduction. And thank you to Professor Rees, to Vice Chancellor den Hollander and to the Deakin University School of Law for inviting me to speak with you this evening. It's an honour to join you tonight and to deliver the 2011 Law School Oration.

As Professor Rees mentioned, I'm a recovering lawyer myself. I would tell some lawyer jokes to start out, but it turns out that lawyers don't think they're funny, and the rest of the world doesn't think that they are jokes. So instead, in keeping with the sombre business of law school orations, I'd like to address a sombre but important topic.

I want to talk to you tonight about the legal and factual basis for United States military actions in Libya, as a means of illustrating some of the challenges the United States and other countries must confront when determining whether to use force to achieve humanitarian objectives. An international force currently seeks to protect the Libyan people from Moammar Qaddafi. Qaddafi, confronted by the fact that he had lost the confidence of his own people, responded with a threat to use his nation's weapons — weapons that were there to protect the Libyan people — to slaughter his own citizens. United

Nations Security Resolution 1973 sent a clear message to Qaddafi that there must be a ceasefire. The military intervention begun by US forces on March 19 in Libya is part of an international effort to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.

Lawyers sometimes struggle to explain when and why the nations of the world undertake this type of humanitarian military intervention. Part of this is because most of our codes of law, and most of our training as lawyers, are to prevent violence; so we are not trained to defend the use of force. Indeed, I often credit this as the great gift of our profession. There will always be conflicts among people, but the challenge for societies — and indeed one of the very reasons societies need legal systems — is to resolve those disagreements peacefully and without violence. This is how we as lawyers think. Our domestic laws and our international commitments, our lawyers, and our institutions, all tend to focus on controlling violence within groups.

But we should not forget that our systems also allow for violence in just circumstances. For example, both Australian and US laws forbid murder. But they allow people to use violence in self-defence; they allow police officers to use force to protect others.

And so the nations of the world have wrestled with the international equivalent — when is the use of force permitted to achieve humanitarian objectives? The use of force between nations is generally prohibited by Article 2(4) of the UN Charter, but there are some circumstances where it is permitted. For example, Article 51 of the Charter recognises the customary international law right to self-defence.

The concept of self-defence is in ways easier for people to understand. Every child (and I say this as a father, so I know) immediately understands the ‘but he started it’ defence. And so, for example, when Germany invaded Poland, or when Iraq invaded Kuwait, the international community came together to help defend these nations against aggression. In general, we have come to accept that — just as self-defence justifies violence in the schoolyard or in a murder trial — self-defence also justifies using force against an invading nation. Indeed, Article 51 expressly recognises the right to use force in self-defence against ‘armed attack’.

But, as our world changes, we have discovered that self-defence does not encompass all situations in which the international use of force might be justified. In the wake of World War II, the Stalinist and Maoist purges, the killing fields of Kampuchea, and other atrocities, world leaders began to

debate whether there was a need for other international actions under a UN mandate that could help prevent slaughters within nations as well as between nations.

The United States, a nation that I represent and a nation that I love, must confront these issues every day. Our nation is at war in Afghanistan and is in a wind-down phase in Iraq. As President Obama stated upon receiving a Nobel Prize in 2009, this global engagement imposes special responsibilities on us. ‘All nations — strong and weak alike — must adhere to standards that govern the use of force.’ He said

I — like any head of state — reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don’t.

As a nation, we understand that we cannot insist that others follow the rules of the road if we fail to follow them ourselves. That is why the United States and Australia and other responsible nations support the rule of law.

More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region, such as in Rwanda or the Balkans. When action is authorised under a UN mandate, our challenge is to act in concert as a unified international community. As President Obama said in Oslo: ‘the closer we stand together, the less likely that we will be faced with the choice between armed intervention and complicity in oppression.’

In March 2011, the situation in Libya presented such a challenge — a humanitarian catastrophe that posed a threat to international peace and security. In a national address on March 28, President Obama laid out the case for humanitarian intervention in Libya. He said that, ‘Gaddafi chose to escalate his attacks, launching a military campaign against the Libyan people. Innocent people were targeted for killing. Hospitals and ambulances were attacked. Journalists were arrested, sexually assaulted, and killed.’ President Obama said that, ‘supplies of food and fuel were choked off. The water for hundreds of thousands of people in Misratah was shut off. Cities and towns were shelled, mosques destroyed, and apartment buildings reduced to rubble.’ Finally, he noted that, ‘military jets and helicopter gunships were unleashed upon people who had no means to defend themselves against assault from the air.’

It was clear that, without the application of international force, Qaddafi would slaughter his own people. And, as a result, thousands of innocent lives would be lost. As President Obama stated on March 18, 'The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.' It was clear that the international community needed to act.

Faced with the stark reality of Qaddafi's murderous intentions in Libya, Australia, the United States, and the international community moved quickly. Prior to applying international force, diplomatic and economic efforts were exhausted. Sanctions put in place by the international community, an arms embargo, and the spectre of international accountability did not stop Qaddafi. Australia, the United States, and other countries provided humanitarian assistance to the victims of violence inside Libya. But in the weeks that followed, Qaddafi made clear that lesser measures than the use of international force would not prevent him from slaughtering the Libyan people.

Qaddafi was warned that he needed to stop his campaign of repression. The international community called for an end to the violence. Qaddafi was given every opportunity to pursue an immediate cease-fire. However, he refused this offer.

Instead Qaddafi announced that he intended to send troops door-to-door killing everyone in the City of Benghazi who had defied him. He called the protestors 'rats' and promised to slaughter them all. Many in the international community felt at that point that Qaddafi left the international community no choice.

When it was clear that lesser measures than military intervention would fail, the UN Security Council adopted Resolution 1973. This Resolution sent a clear message to Qaddafi that the international community was prepared to act to prevent the slaughter of the Libyan people.

As Foreign Minister Kevin Rudd later commented, 'Had the Security Council not reached its decision at the end of last week, about now we would have been witnessing the butchery of Benghazi by the Libyan regime.'

Qaddafi's defiance of the Arab League as well as the broader international community represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. And so the United

States, with NATO and other allies, acted to prevent the slaughter of the Libyan people. And it did so with just cause.

As legal advisor to the US Department of State, Harold Koh said in March, ‘at President Obama’s direction, US military forces began a series of strikes in the national security and foreign policy interests of the United States to enforce UN Security Council Resolution 1973’ on March 19. He explained that, ‘their explicit purpose was to support an international coalition as it takes all necessary measures to enforce the terms of Resolution 1973’ and that we acted

as part of an international effort authorized by the United Nations Security Council and undertaken with the support of European allies and Arab partners to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.

According to Koh, US forces have been conducting a limited and well-defined mission in support of international efforts to protect civilians, to prevent a humanitarian disaster, and to set the stage for further action by other coalition partners. US military efforts have been discrete and focused on employing unique US military capabilities to set the conditions for our European Allies and Arab partners to continue to carry out the measures authorised by Resolution 1973. The United States has not deployed ground forces into Libya and will not do so. US forces have targeted the Qaddafi regime’s air defence systems, command and control structures, and other capabilities of Qaddafi’s armed forces used to attack civilians and civilian populated areas.

However, the US role has been limited; we focused our unique capabilities on the front end of the operation and then transferred responsibility to our allies and partners. NATO took command of the enforcement of the arms embargo, the no-fly zone, and the additional responsibility of protecting Libyan civilians. The United States now plays a supporting role to the broader, NATO-based coalition — including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications. In addition to our NATO responsibilities, we are working with the international community to provide assistance to the people of Libya, who need food for the hungry and medical care for the wounded.

The need for a common mandate is never more important than in a case like Libya. Outlining the legal basis for United States participation in the coalition efforts in Libya, Koh said that

military action in Libya rests on ample international legal authority. Chapter VII of the United Nations Charter grants authority to the Security Council to decide what measures shall be taken to maintain or restore international peace and security where it determines the existence of any threat to the peace, breach of the peace or act of aggression. Articles 41 and 42 further specify that the Security Council may take such action by air, sea, and land forces as may be necessary to maintain or restore international peace and security.

Acting under Chapter VII, in Resolution 1973 the Security Council determined on March 17 that the situation in Libya constitutes a threat to international peace and security, imposed a No-Fly Zone in order to help protect civilians, and authorised states to take ‘all necessary measures’ to enforce that No-Fly Zone in accordance with the Resolution.

This resolution authorised Member States to take all necessary measures to protect civilians and civilian populated areas under threat of attack, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory. Member States were authorised to use all measures commensurate to the specific circumstances to carry out inspections aimed at the enforcement of the arms embargo. Under the Security Council authorisations, Member States may also work through regional organisations or arrangements and with local partners who share the goal of preventing attacks on civilians or civilian populated areas.

In Libya, Qaddafi’s intentions were clear and the United States military action was authorised both by the United Nations Security Council and domestic law. The international community also acted in Libya to take all necessary measures to enforce the terms of Resolution 1973. The United States, Australia, and dozens of nations around the world agreed that we could not wait for the images of slaughter and mass graves before taking action in Libya. As President Obama stated in late March, ‘In this particular country, at this particular moment, we were faced with the prospect of violence on a horrific scale.’

President Obama said, ‘I firmly believe that when innocent people are being brutalized; when someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save thousands of lives — then it’s in our national interest to act. And, it’s our responsibility. This is one of those times.’

Not every case will be as obvious. It would be unrealistic to expect that the international community will be in a position to intervene every time and in

every instance where a humanitarian issue arises. While intervention was warranted in Libya and supported by the Security Council, it is unrealistic to suggest there is a one-size-fits-all approach for different situations that may arise, in different nations, with different histories and leaders. Secretary Clinton put it well, that there is no magic formula that can prevent horrors in every nation. As she said: ‘... there’s no magic wand. If there were, we’d be waving it like crazy.’

CONCLUSION

The decision of when to apply international force for humanitarian purposes will always be a difficult one. It will be second-guessed and subject to complaints. This contentious issue provides a promising field for further inquiry and a challenge to the next generation of lawyers in the audience tonight.

As lawyers, we abhor violence. We support universal values of human rights and protection of life. Throughout the Arab Spring our mantra in the US and in Australia has not changed: that the will of the people should be respected and that governments should respond with reforms and with elections, and not with violence. We do not seek to impose change on these nations, nor do we even believe we really could. There, as here, lasting change can come only from the people themselves.

So as a lawyer I understand why war is not popular. But we must also recognise that the belief that peace is desirable is rarely enough to achieve it. That’s why we need more, not fewer, regional peacekeepers. And that’s why we honour those who return from Libya, or from peacekeeping and training abroad, men and women who go back home to Sydney and San Francisco, to Ottawa and to Amsterdam; to Dhaka and Kigali. As President Obama said – ‘we honour them not as makers of war, but as wagers of peace.’

Thank you.