

# Of War, Humanity and Justice: International Law After Kosovo

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## I. Introduction

When, in 1945, the founding fathers of the United Nations laid down the Charter rules governing the use of force, their paramount concern was the prevention of inter-state violence, acts of aggression and armed invasions which had been the cause of World War II. This is made clear in the language of Article 2 para. 4 (“All Members shall refrain in their international relations from the threat or use of force ...”), by the focus on self-defence as the sole exception to the unilateral use of force, and, more cogently, by the collective security system embodied in Chapter VII of the Charter. This system is controlled by the veto power of the five permanent members of the Security Council.

Whether or not today this system is adequate for maintaining order in a world that has undergone profound transformations since 1945. It is clear that at its inception it was not intended for it to cope with crisis involving large scale violations for human rights within a given state's boundaries. For this type of situation, the Charter does not provide an explicit exception to the general prohibition of armed force. It recognizes “domestic jurisdiction” (Article 2 para. 7) as a shield against intervention in internal affairs by the Organization, with the sole exception of Chapter VII enforcement measures. It also recognizes the obligation to promote human rights (Arts 1 para. 3 and 55 lit.(c)) as a matter of duty to cooperate individually or collectively with the Organization

(Article 56) and not as a counter norm authorizing military intervention.

Much water has passed under the bridge since the adoption of these Charter provisions. Human rights have now become a fundamental concern of the international community and the source of inspiration for a wide range of United Nations operations including peace-keeping. The state-friendly shield of domestic jurisdiction has undergone severe erosion as a consequence of the general consolidation of the power of international institutions to investigate, supervise and condemn grave violations of human rights committed by a state against its own subjects. The right of self-determination of peoples has led to a radical change in the composition of the world community by permitting access to self-government for a myriad of peoples formerly under colonial rule or foreign domination. International criminal justice has taken great strides toward a system of individual accountability for international crimes, whose prosecution is now possible before international criminal tribunals.

But are these transformations capable of altering the balance between the two sets of fundamental Charter values: maintenance of peace — recognized by the IJC as the object of a fundamental norm of customary law<sup>1</sup> — and the protection of human rights? More precisely, has such balance been tilted in favour of the latter value so as to permit unilateral military action to prevent or stop grave violations of human rights even at the risk of breaking the peace and regardless of Security Council authorization?

## II. The Epistemology of Legal Assessment

These questions have divided international lawyers as well as political commentators in the wake of the NATO armed intervention in order to stop persecution of ethnic Albanians by Yugoslavia in Kosovo<sup>2</sup>. This intervention was decided by NATO countries after the failure to reach a negotiated settlement on the long standing questions of Kosovo's autonomy. By the end of 1998, the issue had become dramatically ur-

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<sup>1</sup> Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq.

<sup>2</sup> See for further details of the conflict, N. Krisch, "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council", *Max Planck UNYB* 3 (1999), 59 et seq.

gent because of the extent and brutality of the violations of human rights committed by the Yugoslav military and para-military forces against ethnic Albanians, who, in turn, had rapidly increased control over a substantial part of the territory of Kosovo. Today, the reality of such violations is well documented by the Organization for Security and Cooperation in Europe (OSCE). The OSCE reports covering the period before and after the 1999 war<sup>3</sup> present a grim picture of mass deportation, sexual abuses, house-burning, expulsion and killings. All this leaves little doubt that these acts amounted to crimes against humanity since they were systematic acts of repression conducted by the Serb and armed forces against the Kosovo population. Also beyond doubt is that acts of intimidation, expulsion, discrimination and murder, although on a smaller scale, have been committed before and after the war by elements of the Kosovar Albanian population against Kosovo Serbs, Romas and Muslim Slavs<sup>4</sup>, thus perpetuating a vicious spiral of ethnic hatred.

If the commission of extensive violations of international human rights is beyond question, the problem that remains with us after the Balkan war in 1999 is whether such violations of human rights justify resort to armed attack of the scale and intensity of the NATO aerial bombardments of March–June 1999. The problem is made more complex because of the lack of specific Security Council authorisation of the use of force and because of the “collateral” effects that the armed attack produced on the civilian population of the target country.

This problem is now pending before the ICJ as a consequence of Yugoslavia filing a complaint against ten of the NATO countries which participated in the armed intervention. Unless the case ends with a finding of lack of jurisdiction, the Court will have, with this dispute, an opportunity to provide clarification and development of the law in this area. In fact, although the court dismissed the suit for lack of *prima facie* jurisdiction with respect to the United States and Spain, nevertheless in all the other cases it reserved the subsequent procedure for adjudication of the issue of jurisdiction. Moreover in all the ten orders issued on the request for provisional measures, the Court did not miss the opportunity to express its concern with the use of force. With identical

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<sup>3</sup> OSCE Report, *Kosovo/Kosova — As Seen, As Told*, issued by the OSCE Secretariat, Vienna, 6 December 1999, circulated on internet website: <http://www.osce.org>

<sup>4</sup> See Part II of the OSCE Report covering the period 14 June – 31 October 1999.

language used in the pre-ambular paragraphs of the orders, the Court stated that it is "profoundly concerned with the use of force in Yugoslavia ... under the present circumstances such use raises serious issues of international law"<sup>5</sup>. The Court went on to suggest that the action of all parties to the dispute were bound to be scrutinized under the law of the Charter, international law, including humanitarian law. In legal doctrine, on the other hand, an intense debate has already taken place among international lawyers and, basically, it has led to four different positions.

The *first* considers the intervention as lawful because of the overarching importance of human rights in contemporary international law and of the obsolescence of the United Nations monopoly on the authorization of force with the attendant blocking power of the veto by one of the five permanent members<sup>6</sup>. The *second*, view is that the armed intervention is destitute of any legal justification in the law of the Charter and in customary international law, thus amounting to an act of aggression<sup>7</sup>. The *third* view is more equivocal. While it recognizes that the Kosovo armed intervention constituted a breach of international law, particularly the law of the Charter, it concludes that compelling moral and humanitarian justifications make it a case of only "minor" use of force involving no breach of *jus cogens* and, certainly, no case of aggression<sup>8</sup>. Finally, a *fourth* view holds that the NATO air campaign in Kosovo was an international wrongful act under traditional rules of in-

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<sup>5</sup> Documents pertaining to this dispute, including the ICJ Orders denying interim measures are reprinted in: *ILM* 38 (1999), 950 et seq.

<sup>6</sup> E.g. M. Glennon, "The New Interventionism. The search for a Just International Law", *Foreign Aff.* 78 (1999), 2-7; R. Wedgwood, "NATO's Campaign in Yugoslavia", *AJIL* 93 (1999), 828 et seq. The same issue of the *AJIL* contains other contributions on the Kosovo intervention by Henkin, Charney, Chinkin, Falk, Franck, Reisman.

<sup>7</sup> A. Bernardini, "Una guerra contro i popoli e contro il diritto", *I diritti dell'uomo* 9 (1998), 33 et seq.; U. Villani, *La guerra del Kosovo: una guerra umanitaria o un crimine internazionale?*, *Volontari e terzo mondo*, 1999, 26 et seq.; V. Starace, "L'intervento della NATO in Jugoslavia", *Sud IN-EUROPA*, No. 3, 1999, 1 et seq.; N. Chomsky, *The New Military Humanism: Lessons from Kosovo*, 1999. For a nuanced and balanced critique of the justification for NATO's intervention, C. Chinkin, "A 'Good' or 'Bad' War", *AJIL* 93 (1999), 841 et seq.

<sup>8</sup> B. Simma, "NATO, the UN and the Use of Force", *EJIL* 10 (1999), 1 et seq.; N. Ronzitti, "Raids aerei contro la Repubblica Federale di Jugoslavia e Carta delle Nazioni Unite", *Riv. Dir. Int.* 82 (1999), 476 et seq.

ternational law on the use of force, but maintains that such traditional rules are undergoing progressive erosion in order to accommodate the emerging view requiring "positive" action to stop extensive violations of human rights that shock the conscience of humankind<sup>9</sup>.

All these views contain some truth but, at the same time, are unsatisfactory in view of a long term response to the complex transformations occurring in this area of international law and relations. The first view, in declaring the obsolescence of the Charter scheme on control of military force, would open the flood gates to unilateral interventions, thus making the well intended objective of justice and human rights depend on the policy decision of a handful of powerful states. The second view, although technically correct, rests too much on the *status quo* and on the comfortable cold war notion that non-defensive use of force is always impermissible without Security Council authorization. It does not matter how arbitrary and blind to ongoing atrocities the withholding of such authorization might be owing to possible use of the veto power. The third view, based on a reductionist approach to the gravity of the breach caused by the humanitarian intervention, presents the advantage of separating the Kosovo case from the case of aggression, thus delinking "necessitated" humanitarian intervention from the possible breach of *jus cogens*. However, can one reasonably maintain that the NATO onslaught on Yugoslavia was a "minor" breach of the norm prohibiting the use of force? Certainly it was not a case of a swift raid to save the life of hostages, of the kind we have seen in the past, as the celebrated Israeli Entebbe rescue or the failed US mission in Iran in 1980<sup>10</sup>. Kosovo was a full scale war that lasted more than two months. It was carried out with relentless aerial bombardment not seen in Europe since World War II. It was intended to continue until the capitulation of the Belgrade government and its withdrawal from Kosovo in order to permit the deployment of an international military force. If words still have a function in identifying legal concepts, frankly, I do not see how we can use the term "minor" to describe such massive use of force and its impact on the law of the Charter and customary international law.

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<sup>9</sup> A. Cassese, "Ex iniuria ius oritur: Are We Moving toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *EJIL* 10 (1999), 23 et seq.

<sup>10</sup> For extensive analysis of these cases, see N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, 1985.

Finally, the fourth view has the merit of focusing on the dynamic trends of international law. It recognizes that even norms of the highest order, such as the prohibition of the use of force<sup>11</sup>, may undergo a process of transformation as a consequence of their breach in order to uphold a competing or even higher value such as the prevention of extensive killings and atrocities. However, I believe that this opinion too quickly translates the exigencies of justice into positive exceptions to the UN Charter system of collective enforcement and too readily relies on the *ex post* legalization by the community of states of the otherwise unlawful act of armed intervention in breach of the UN Charter<sup>12</sup>. It may be risky to re-invent an idea of international justice that is opposed to the Charter and to anchor its future development to such a shaky spot as the Kosovo crisis. In any case it is too early to draw conclusions in terms of *ex post* legalization of the intervention. There is no evidence yet of a widespread acceptance of its legality by the international community as a whole<sup>13</sup>.

### III. Rethinking the Paradigm

A different way to look at the NATO war for Kosovo is to separate the issue of its legality under existing international law from the issue of its

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<sup>11</sup> T. Bruha, "Use of Force, Prohibition of", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995, 1387 et seq.

<sup>12</sup> Also in legal doctrine the admissibility of the use of military force for intervention on grounds of humanity is far from being accepted uniformly. For an early debate on the subject, see the exchange between Lillich and Brownlie in: J. Moore, *Law and Civil War in the Modern World*, 1974.

<sup>13</sup> Besides the unambiguous *dictum* of the ICJ contrary to humanitarian intervention in the Nicaragua Case (see note 1, 134–135, paras 268, 269) and opposition of countries such as China, India, and Russia, which make up a large portion of the world population, the debates going on in the General Assembly at the time of this writing show an extremely cautious attitude of the great majority of the UN members with regard to the admissibility of military force on humanitarian grounds and without UN mandate. Even countries that have participated in the NATO bombing have underscored the exceptional character of the Kosovo situation (Germany) and warned against the risks of abuses and of delegitimation of the UN System. For a timely review of this practise, see N. Ronzitti, *Uso della forza e intervento di umanità*, unpublished paper presented at a workshop in Rome on NATO, the Kosovo Conflict and the Italian Constitution, University LUISS Guido Carli, 13 December 1999.

possible legitimacy in the context of broader notions of international public policy and justice. This dual perspective makes it possible to avoid confusion between *lex lata* and *lex ferenda*. Also, it spares us the risk of strained interpretations of the law in order to reach a subjectively desired outcome, an attitude that today generates so much cynicism about the law, both international and national.

## 1. The Charter Scheme

The UN Charter provides a wide variety of norms and institutions to cope with crises that endanger international peace and security. First and foremost it proscribes “the threat or use of force against the territorial integrity or political independence of any state” (Article 2 para. 4). This prohibition is unqualified and unconditional. It has been held to reflect a norm of customary international law by the ICJ in the Nicaragua Case (1986)<sup>14</sup> and is considered as a norm of *jus cogens* by authoritative commentators.<sup>15</sup> The exceptions to this fundamental norm are very narrow and consist of – a.) self-defence against armed attack, as provided in Article 51 of the Charter; b.) use of force or authorization of the use of force by the Security Council under the Chapter VII centralized security system for the maintenance of peace; c.) decentralized “enforcement action” by regional organizations as contemplated by Article 53.

If we leave out the case of self-defence, for which no plausible argument can be made to justify the Kosovo intervention, the grounds on which the NATO use of force could be justified remain exceptions b.) and c.).

With regard to exception b.) the fact that Kosovo was an “internal” situation within the Federal Republic of Yugoslavia in principle would not prevent the United Nations from taking action with respect to such situation. Article 2 para. 7, which contains the notorious clause on “domestic jurisdiction”, does not apply to enforcement action under Chapter VII. Even outside the scope of the Chapter VII exception, the weight of authority and the practise of the United Nations recognizes that the Organization has a competence to deal with “domestic” situations involving extensive violations of human rights in violation of the

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<sup>14</sup> See note 1.

<sup>15</sup> B. Conforti, *Diritto Internazionale*, 1997, 185; I. Brownlie, *Principles of Public International Law*, 5th edition, 1998, 517.

Charter.<sup>16</sup> Although such competence is primarily vested in the Security Council when violations of human rights amount to a threat to the peace, it may be exercised also by the General Assembly within the general scope of Article 10 and subject only to the “primacy” clause of Article 12 para. 1.<sup>17</sup> Within this general framework, the practise developed in the United Nation with regard to enforcement action for the maintenance of peace has departed from the letter of Arts 42 and following. From the Korean war in 1950 to the Gulf war of 1991, and other interventions in Somalia, Bosnia, Haiti, East-Timor — to mention only the most important cases — the Security Council, rather than to undertake military operations under Chapter VII directly, has delegated or “authorized” the use force by coalitions of “willing” states. In the case of Kosovo, there was no express authorization of force by the Security Council to NATO because of the clear opposition of China and Russia. However, the issue has been raised as to whether recognition by the Security Council of the Kosovo situation in 1998 as a threat to the peace would amount to implied authorization of the use of military force. I shall address this issue in the following section of this article and in light of the specific content of Security Council Resolutions.

If we consider exception c.), concerning enforcement action by regional arrangements or agencies under Chapter VIII, in principle there is no reason for denying NATO a role as an agent for regional security in cooperation with the United Nations. NATO is an alliance almost entirely of democratic countries with a record of defensive policy and respect for the rule of law. The 1999 Report by the Secretary-General to the 54th Sess. of the General Assembly stresses the importance of decentralized enforcement action by regional organizations.<sup>18</sup> Further, the NATO Treaty itself contemplates links with the UN System. However, even if, in principle, one could conceive a legitimate role for NATO in Kosovo, in practise, the issue remains as to whether such role may be independent of a UN mandate and whether it is consistent with the purely defensive nature of the constitutive instrument.

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<sup>16</sup> For extensive review of the practise, see B. Conforti, *The Law and Practice of the United Nations*, 1996, 133–151.

<sup>17</sup> Article 12 para. 1 reads: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

<sup>18</sup> Report of the Secretary-General on the work of the Organization, 54th Sess., Doc.A/54/1.



In the following, I shall address only the former question, since the latter raises delicate issues of constitutional law which, understandably, fall outside the scope of this paper.

## **2. The Legality of NATO's Intervention under the Law of the Charter**

Given the above Charter framework, let us now address the question as to whether the use of force by NATO has any legal basis in the Charter. At the outset, the answer would appear to be a negative one. The aerial bombardment was not in self-defence and it was not authorized by the Security Council within the framework of Article 42. As to whether the use of force was justified under the narrow exceptions described in Section III.1., the answer depends on a careful examination of the specific circumstances of the case as well as of the context in which the evolving humanitarian situation in Kosovo in 1998 and 1999 came to interact with the UN initiatives aimed at coping with the crisis. As early as 31 March 1998 the Security Council had addressed the escalation of violence between Serbs and ethnic Albanians in Kosovo by adopting Resolution 1160. The most important features of this resolution were 1.) the Security Council's declaration that it was acting under Chapter VII; 2.) the condemnation of acts of violence by Yugoslav forces and by the Albanian liberation army as well; 3.) the decision to impose an arms embargo on Yugoslavia, "including Kosovo". The Security Council adopted other resolutions, very similar in content to Resolution 1160, respectively on 23 September and on 24 October 1998. Although these resolutions declare that the situation in Kosovo constitutes a threat to peace and security in the region. However, in no way did they authorize either explicitly or implicitly recourse to military force as a means to bring an end to the humanitarian crisis<sup>19</sup>.

The only reference to possible coercive action is the one contained in Resolution 1203 of 24 October 1998 which was adopted in the wake of the acceptance by Yugoslavia of the ultimatum issued by NATO in order to compel Yugoslavia to permit the deployment in Kosovo of an OSCE monitoring mission of 2000 unarmed observers and to consent to a NATO overflight of Kosovo to monitor compliance with the mission's mandate. Para. 9 of the Resolution makes reference to possible

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<sup>19</sup> S/RES/1160 (1998) of 31 March 1998; S/RES/1199 (1998) of 23 September 1998; S/RES/1203 (1998) of 24 October 1998.

“action” in order to evacuate the members of the mission in case of emergency. The very careful language used to contemplate such limited use of force, consisting of an eventual rescue mission to transfer the OSCE observers out of the territory of Yugoslavia, further proves that in no way can we read in the above mentioned Security Council resolutions a general mandate to resort to force to settle the overall Kosovo crisis.

As for the role of the General Assembly, Resolution 53/164, in which the Assembly condemned the violent repression by Serbian forces as well as the acts of violence and terrorism committed by Albanian military and paramilitary groups, was adopted on 9 December 1998. However, also in this resolution there is nothing that can be interpreted as a recommendation to resort to military force to resolve the conflict in Kosovo.

On 10 June 1999, the Security Council passed Resolution 1244, defining the Council’s stance in the aftermath of the NATO intervention.<sup>20</sup> The resolution initially chastises the Member States for not being in “full compliance with the requirements of these resolutions” (i.e. the lack of authorization to use force). The Security Council accepts the current situation and purports to contribute to the peaceful settlement of the conflict. In no way does this Resolution legitimize *ex post* the actions of NATO, at least not directly. By accepting the current situation, including the negotiated cease fire agreement with the Serbs, the Security Council is simply acknowledging the *fait accompli* which was put before it following NATO’s unilateral bombing initiative, which in the very words of the Security Council are not in compliance with its prior resolutions.

Given the absence of either express or implied authorization by the Security Council, can the NATO intervention be justified as enforcement action by a regional organization under Article 53 of the Charter? Even admitting, as I have done above under Section III.1, that NATO may qualify as a “regional organization”, this question must be answered negatively. The text of Article 53 is clear: No enforcement action shall be undertaken pursuant to a regional agreement or by a regional agency without Security Council authorization. Further, the same article requires that the Security Council directs and supervises the enforcement action, thus contemplating the regional agreement or agency as a sort of agent of the United Nations for peace enforcement

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<sup>20</sup> S/RES/1244 (1999) of 10 June 1999.

purposes. These requirements have been confirmed by way of authoritative interpretation given by the General Assembly to Article 53<sup>21</sup>.

Since neither prior authorization nor effective supervision by the Security Council can be shown in the case of Kosovo, NATO armed intervention does not meet the essential requirements set by Article 53 for the use of military force. Short of these requirements, NATO's resort to force would have been lawful under the Charter only if it could be qualified as "collective self-defence" to respond to an armed attack. An author<sup>22</sup> has attempted to construe Kosovo's claim to autonomy as a ground for the exercise of collective self-defence. However, this thesis is manifestly unfounded since, despite the tragic plight of Kosovars, at no time in the unfolding of the situation was there an armed attack against NATO members, nor could a "collective" bond be construed between the ethnic Albanians of Kosovo and NATO countries for the purpose of triggering NATO intervention.

### 3. The Legality of NATO's Intervention under International Law

If NATO's military campaign in Yugoslavia does not find a credible legal basis in the UN Charter, can it be justified under other norms or principles of customary international law?

Today, as indicated above, the Article 2 para. 4 prohibition of the use of force has become a norm of customary international law. There is consensus that such norm prohibits not only acts of aggression and armed attacks against the territorial integrity and political independence of other states but also lesser instances of force such as armed reprisals or unilateral forms of armed intervention to induce compliance with international obligations.<sup>23</sup> In this context an argument has been put forward in legal literature<sup>24</sup> and in state practise<sup>25</sup> that the rule on the

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<sup>21</sup> A/RES/49/57 of 9 December 1994.

<sup>22</sup> F. Kirgis, American Society of International Law, *Insight*, March 1999.

<sup>23</sup> A. Randelzhofer, "On Article 2 (4)", in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994, 106 et seq.

<sup>24</sup> F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 1988; Lillich, see note 12; M. Reisman, *Unilateral Action and the Transformation of the World constitutive Process: The Special Problem of Humanitarian Intervention*, Paper presented at a Conference on "The Role and

prohibition of force should yield to the principle of humanitarian intervention in another state to save the lives of innocent victims of ruthless violence. In principle, I share the moral and philosophical concerns that underpin this thesis. In an increasingly interdependent world there should be no "privacy" privilege for states to carry out atrocities within their jurisdiction, especially in an epoch when such atrocities cannot be covered by the veil of ignorance because of global communications and the media. However, humanitarian intervention without authorization by the Security Council, no matter how well intended, does not yet rest on a general consensus of the international community. Only a few western powers have supported this doctrine but only in one direction, e.g. in the sense of claiming a right to intervene abroad but never accepting the symmetrical obligation to tolerate other states intervention in their own jurisdiction. At least one of the present supporters, the United Kingdom, has not too long ago theorised quite the opposite in official statements denying the legal basis of humanitarian intervention in international law<sup>26</sup>. Furthermore, the fundamental obstacle to the finding of a new customary norm permitting humanitarian intervention is represented by the lack of definitional contours of the concept of humanitarian intervention. Practise provides numerous examples in which professed humanitarian considerations were inextricably entangled with the pursuit of national interests and geopolitical motives. Suffice it to mention here India's 1970 intervention in what is now Bangladesh, the 1979 Vietnamese intervention in Cambodia, the US interventions in Grenada in 1983 and in Panama in 1989. Of course, NATO's intervention in Kosovo may be a case of a genuinely motivated humanitarian action for the unselfish reason only of saving lives of innocent victims of violence. But even if this was universally accepted, one such case would not make instant international law and, at best, it could be taken only as the beginning of a new practise that, in due course, could give rise to a new exception to the general prohibition of the use of force. But this leads us to the considerations *de lege ferenda* which belong to the following section of this article.

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*Limits of Unilateralism: A US-Europe Symposium*<sup>27</sup>, Ann Arbor, 23–25 September 1999.

<sup>25</sup> See the United Kingdom's statement in: *BYIL* 63 (1992), 827.

<sup>26</sup> Foreign and Commonwealth Office, Foreign Policy Document No. 148, in: *BYIL* 57 (1986), 614 et seq. See in this respect note 78 of the article of Neuhold in this Volume.

#### IV. The “Legitimacy” of NATO’s Intervention

During and after the Kosovo conflict, many voices have been heard which have denounced the rigidity of the Charter rules and the apparent impotence of international law when faced with humanitarian emergencies that cry for help to stop the murderous hand. Some of these voices belong to enlightened international lawyers whose distinguished careers has permitted them to deal with the law not only from the podium of the classroom but also from the bench of a tribunal called upon to judge some of the most heinous crimes against humanity. Cassese is one of them and, as mentioned above, he believes that the sense of legitimacy of the Kosovo intervention is so intense and vast as to signal a change already in progress with regard to the admissibility of humanitarian intervention as a measure of last resort<sup>27</sup>. Others, more radically, have put forward the view that international law should simply be ignored or set aside when it is an impediment to achieve the goals of justice and humanity. Glennon expresses this view in the following passage:

“The death of the restrictive old rules on peacekeeping and peace-making — under which most bloody conflicts were simply ignored as “domestic matters” — should not be mourned. Events since the end of the Cold War starkly show that the anti interventionist regime has fallen out of sync (*sic*) with modern notions of justice. The crisis in Kosovo illustrates this disjunction and America’s new willingness to do what it thinks right — international law notwithstanding”<sup>28</sup>.

Glennon’s view is that of a disillusioned international lawyer who, when faced with perceived inadequacies of the law, seems to prefer to replace established norms of law with *ad hoc* diplomacy and “justice” in the individual case. This view has the merit of avoiding the hypocrisy of just pretending to comply with the law by resorting to strained and often untenable interpretations of it. Such interpretations or re-interpretations often serve to give an improbable legal justification to clearly unlawful acts. Honesty is to be appreciated in this case. However, this type of approach ends up with linking the “legitimacy” of what is a technically unlawful armed intervention to the “subjective” instinct and sense of justice of those who are considering intervention in the instant case. But, is this sense of justice able to operate only in

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<sup>27</sup> See note 9.

<sup>28</sup> See note 6.

cases of extensive violations of human rights? How do we set the threshold? Could it legitimize transborder armed attacks to punish acts of terrorism on the grounds that terrorists are enemies of humankind? Should it lead to armed interventions against states which continue to practise the death penalty under the justification that a large segment of the civilized world today feels profound repugnance toward this method of crime control? These are only some of the questions troubling the approach based on the “instinct” of justice.

In our view, if we are prepared to free humanitarian intervention from the moorings of international law and base it on the idea of international justice, we must be sure that the intervention enjoys a widely shared sense of legitimacy. If it is not to become pure expression of power politics, the idea of international justice premised on the interventionist agenda, must be perceived as part of a sustainable system of justice that operates either centrally — through approved institutions — or informally through individual states acting *uti universi* in the interest of the overarching common value of human life and dignity.

Obviously, it is not easy to ascertain in every particular case whether humanitarian intervention rests on such notion of legitimacy. Nevertheless, it is the responsibility of any honest international lawyer to try to discern the situations in which forcible intervention is legitimized by compelling considerations of humanity from the situations in which power and “Realpolitik” are the controlling factors. Only such a discerning approach can guarantee that the transformation of international law in the field of humanitarian intervention, as advocated by Cassese, will eventually occur and will stay with us beyond the ephemeral support generated in a single episode.

In the case of Kosovo, I regret to say that, despite all the good intentions, the military intervention by NATO fails to meet the test of legitimacy. This is so because of the lack of some essential elements that on moral and political grounds are to be considered as conditions *sine qua non* for a valid claim of humanitarian use of force. Let us briefly examine these elements in the context of the available information about the Kosovo crisis.

Imperative Necessity: humanitarian intervention short of Security Council authorisation could possibly be considered legitimate only in the case of absolute necessity and in the absence of other non violent available options. Was the situation at the eve of the NATO attack such as to disclose a complete break down of diplomatic or political channels and thus legitimize the “last resort” remedy of unilateral use of force? To answer this question we must consider that the terms set in the no-

torious Rambouillet Agreements were so harsh for Yugoslavia as to raise the question whether they were meant to meet certain rejection by the Belgrade Government. They called for complete military occupation of Kosovo by NATO and allowed access and occupation of other parts of Yugoslavia at NATO's will. They assigned final and binding power of interpretation of provisions relating to the implementation of the Agreements to the NATO commander. Furthermore, the Agreement provided that "three years after the entry into force ... an international meeting shall be convened to determine a mechanism for a final settlement of Kosovo" opening the way for an interpretation favorable to a referendum on independence. It is hard to imagine how any state could accede to such conditions outside of the hypothesis of total *debellatio* and unconditional surrender. This notwithstanding, the record shows that following the ultimatum and threat of bombing issued by NATO against Yugoslavia, the Serbian Parliament, although reiterating its opposition to foreign military occupation of Kosovo, adopted a Resolution on 23 March which condemned the withdrawal of the OSCE verification mission, ordered on 19 March in preparation of the NATO attack, and called for further negotiations in view of "a political agreement on a wide ranging autonomy for Kosovo". Even if one were to question the good will of the Yugoslav authorities, the Kosovo Peace Accord signed on 3 June at the end of the hostilities indicates that the parties were able to reach a compromise which largely follows the lines contained in the parliamentary Resolution of 23 March: NATO dropped the demand of unlimited access to Yugoslavia's territory outside of Kosovo; reference to referendum on self-determination contained in the Rambouillet wording was avoided; and the international force endorsed also by Security Council Resolution 1244<sup>29</sup> included forces outside NATO, notably the Russian contingent operating outside NATO command. Could such compromise have been reached before or without the bombing? The answer can only be speculative, but certainly the sequence of events and the final outcome of the crisis casts a cloud of uncertainty over the so-called unavoidable necessity of resorting to bombing.

Consistency: since the rationale for humanitarian intervention ultimately rests on the moral imperative of saving lives of innocent people, a good argument exists for holding the proponents of such a moral tenet to practise it consistently in different situations and different parts of the world. A quality of moral principles is that they should be prac-

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<sup>29</sup> S/RES/1244 (1999) of 10 June 1999.

tised also when they do not conveniently fit the interest of the actor and should be applied without arbitrary discrimination. Contrary to this view, a respectable argument has been made that, since it is impossible to resort to humanitarian intervention in all parts of the world where atrocities are committed, consistency should not discourage humanitarian action in those limited cases in which a state or a group of willing states is ready to extend a helping hand. President Clinton has been a proponent of this view. In his speech of 1 April at Norfolk Air Station he stated: "there are times when looking away simply is not an option ... we can't respond to every tragedy in every corner of the world" but that does not mean that "we should do nothing for no one"<sup>30</sup>. Clinton's view is correct, since even the most altruistic government could not even dream of taking care of all the tragedies of the world. Besides, we are discussing the foundation of the right to resort to humanitarian intervention and not an implausible obligation to undertake it. However, the requirement of consistency I refer to is not to be understood as uniformity of conduct at different times in different parts of the world. It refers rather to consistency in terms of non-self-contradiction of those who claim the moral authority of humanitarian necessity to resort to armed force. In this sense, consistency is absent when the interventionist state permits in its own territory, or facilitates or abets abroad, extensive violations of the same rights for whose defence armed force is advocated or practised somewhere else. In the case of NATO, despite the prevailing democratic nature of the Member States, it is impossible to hide that Turkey has committed for years documented violations of human rights of the Kurds on a scale and with methods that greatly exceed the gravity of the Yugoslav repression in Kosovo before the NATO bombing. Also, there is no hiding the fact that other NATO members, notably the United States and some European allies, have provided decisive political support and military supply essential to the enforcement of the policy of violent suppression of the claim to Kurdish autonomy, including the policy of forced eviction of innocent peoples from their villages and their homes. It is true that we cannot intervene everywhere to solve every tragedy of the world. But should not the moral imperative so loftily proclaimed by the new interventionists require at least abstention from benevolent support of the perpetrators of such tragedies?

Should not it also require active cooperation to provide minimal financial support to organize a contingent of peace-keepers under UN

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<sup>30</sup> Speech reprinted in: *New York Times* of 2 April 1999.



auspices when there is a coalition of the willing ready to act? The tragedies of Sierra Leone and the Republic of Congo, both the scene of huge atrocities in Africa in the nineteen-nineties, prove that preventive action by the United Nations was possible, but was opposed by the United States on financial grounds involving sometimes less than the annual salary of a UN employee<sup>31</sup>.

Reference to these precedents is not meant to put into question the prevailing humanitarian motivations of NATO in the case of Kosovo. In fact, different NATO members may have had different motivations and different degrees of humanitarian commitment, as it can be inferred from the variety of governmental positions and of national public opinions that have emerged during the conflict. What this reference is meant to reveal is that with the present record, it is difficult to build a new credible notion of humanitarian intervention when the overall pattern of intervention remains tainted by a double standard and by intentional ignorance of some of the worst humanitarian catastrophes in the world.

Proportionality: even if we are to concede that in case of extreme necessity force is legitimate for superior humanitarian ends, then there is no doubt that its use must remain subject to the principle of proportionality. This principle entails that the method, intensity and duration of force be determined so as to cause no more harm than is strictly necessary to achieve the humanitarian end sought by the use of force. In the case of Kosovo, the articulated humanitarian end was to save the lives of Kosovo Albanians, preventing destruction of their homes and villages with the consequent flow of refugees fleeing from the violence of the Yugoslav army and police forces. Under the principle of proportionality, the first obligation incumbent upon the intervening NATO countries would have been to plan the military action so as to stop or minimize the humanitarian catastrophe unfolding in Kosovo. Another obligation would have been to foresee and mitigate the inevitable plight of refugees fleeing the double evil of Serb persecution and NATO bombing. Unfortunately the record shows that neither evil was adequately averted. The preparation of the bombing and the actual onslaught of the NATO air campaign triggered the vicious response of the Yugoslav armed forces against Kosovar Albanians. It exacerbated the inter-ethnic conflict thus accelerating mass expulsion of Kosovo Albanians and murderous violence against civilians. The Yugoslav army and

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<sup>31</sup> See report in: *Boston Globe* of 19 February 1999 and Chomsky, see note 7, 66.

police forces retain the sole responsibility for these crimes. However, we cannot hide that NATO could have better anticipated the reaction of the attacked country. A truly humanitarian commitment would have required a use of force primarily aimed at stopping slaughter and devastation rather than at crippling the military and logistic system of Serbia. It would have required prompt response action to assist the thousands of helpless refugees suddenly discharged on the neighbouring countries, especially Macedonia and Albania. Doubts about the proportionality of the NATO use of force arise also in connection with the excessive collateral casualties, deliberate destruction of bridges, bombing of television centers and other civilian objectives for which open dissent among NATO allies emerged during the air campaign.<sup>32</sup>

Another question related to proportionality is that of collateral damage caused by the bombing to the natural and human environment. When such damage reaches the level of "widespread, long term and severe damage to the natural environment", it constitutes a breach of humanitarian law as codified in the Geneva Protocol I.<sup>33</sup> During the conflict, NATO reports hardly covered the environmental impact of the bombing. A detailed account is given in the application presented by Yugoslavia to the ICJ, which of course may not be the most objective source of information. However, after the war, a comprehensive evaluation of the environmental impact of the bombing was carried out by an international task force headed by UNEP, the Balkan Task Force (BTF). The factual finding of BTF make clear that the bombing of industrial facilities, especially the large Pancevo Plant near Belgrade, the massive pollution of rivers and soil, including the adverse affects of the use of deplete uranium shells, constitute grave and long term damage to the natural and human environment.<sup>34</sup> Independently of whether such damage reaches the threshold of "widespread, long term, and severe" so as to constitute a breach of Protocol I, it seems highly questionable that

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<sup>32</sup> See, for instance, the condemnation by Italian foreign minister L. Dini of the NATO attack on the headquarters of the Yugoslav national television, reprinted in: *La Repubblica* of 24 April 1999.

<sup>33</sup> Arts. 35 para. 3 and 55 para. 1 of the Additional Protocol No. I to the Geneva Conventions of 1949, opened for signature 1977, *ILM* 16 (1977), 1391 et seq.

<sup>34</sup> The Report of the BTF is available at <http://www.grid.unep.ch/btf/> for a comprehensive discussion of the environmental implication of the Kosovo war, C.E. Bruch/J.E. Austin, "The Kosovo Conflict: unresolved issues in addressing the environmental consequences of war", *Envtl. L. Rep.* 30 (2000), 1 et seq.

the method and amount of force employed to cause such harm may be considered proportionate to the humanitarian goal of alleviating the plight of Kosovars.

## V. Conclusions

The above analysis is only a preliminary attempt at addressing two fundamental questions raised by the Kosovo war: whether that war was a lawful use of force under the UN Charter and under international law, and, if not, whether it could be considered a just or legitimate war constituting a precedent for a constructive transformation of the Charter-centered international order into a new order more flexible and responsive to human rights violations.

With regard to the first question, even if we are ready to accept the obsolescence of the centralized Charter system, and especially of the unchallengeable veto right of permanent members, it is impossible to find a legal basis in international law for the massive use of force by NATO countries against Yugoslavia.

The second question is more complex. Although in principle a breach of the law may be necessary and useful for the progressive development of new norms, the analysis of the facts, diplomatic record and international practise reveals many ambiguities that undermine the legitimacy of NATO's claim to be the enforcer of a new and more just international order. These ambiguities especially concern the unavoidable necessity to resort to force, the integrity and consistency of the commitment to humanitarian values, (often the object of intentional ignorance by some of the same NATO countries that were so fervently active in Kosovo), and, finally, the respect of proportionality in the actual conduct of military operations. When we look at the Kosovo situation at the end of 1999 beginning of 2000, doubts about the legitimacy of the NATO interventionist claim tend to increase. It is true that the persecuted Albanians were able to return to their land. However, now we witness a new wave of reverse ethnic cleansing, this time by violent elements of the Kosovar Albanians against Serbs and Romas, that cast doubts even on the long term effectiveness of the military intervention.

The most serious doubt, however, remains whether, in the final balance, the questionable advance marked by the Kosovo war in the quest for a more just and human order will be able to offset the unquestionable serious damage caused by the NATO unilateralism to the authority

and prestige of the United Nations, the only institution still truly representative of the international community as a whole.