

A final lesson of Kosovo is that, in the end, the United Nations—albeit disdained and circumvented—again became an essential facilitator in ending the conflict. It is not the only forum for the exercise of creative, sustained multilateral diplomacy, but it remains a resilient and irreplaceable one. That, in the end, may be the clearest lesson.

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### KOSOVO'S ANTINOMIES

The insistence on the integrity of procedures is not arid formalism. Lawyers know that however noble the impulse, action in the common interest that is taken without formal authority may have incalculable public costs. Group security and individual liberty depend, in no small part, on orderly decision preceded by due deliberation; actions inconsistent with the procedures of the law erode their authority and increase the probability of abuse. But lawyers also know that legal procedures do not always work and that sometimes decisions have to be taken without regard to them. As Justice Holmes said, "a constitution is not a suicide pact."

Faced with such antinomies, no lawyer, whatever his or her conclusion as to the lawfulness of NATO's action in Kosovo, can look back at the incident without disquiet. While some in our profession will strain to weave strands from various resolutions and *ex cathedra* statements of UN officials into a retrospective tapestry of authority (unintentionally contributing to bases for other claims and actions), all appreciate that NATO's action in Kosovo did not accord with the design of the United Nations Charter. The question is whether Kosovo comes under the "suicide pact" rule, the *exceptio* for that very small group of events that warrant or even require unilateral action when the legally designated institution or procedure proves unable to operate. That is a judgment that must be made in light of the law at stake, the facts and feasible alternatives at the moment of decision.

One can reasonably criticize many of the international actions and inactions during and after the dissolution of Yugoslavia and deplore the fact that some of those earlier international choices may have actually exacerbated ethnic tensions and conflicts. But decision makers must act on current facts, not on wishful if-onlys and wistful might-have-beens. The facts were alarming. As always, information was imperfect, but enough was available to indicate that bad things were happening, things chillingly reminiscent of some earlier as well as, lamentably, more recent events in this century; and it was reasonable to assume (and, to some, irresponsibly naive not to assume) that, given the people involved, worse things were in store. Economic sanctions and diplomacy were failing to dissuade the officials ordering and carrying out the bad things. In the post-Cold War world, responsible leaders properly turn to the Security Council. But the Security Council was paralyzed. Hence, the feasible options were to forgo formally lawful action under the Charter or to forgo the lives and human rights of the Kosovars. NATO states chose the first.

Military action is a blunt instrument and, no matter how careful operators are, some innocent people get killed or hurt. But the other instruments of strategy had failed, so it was either military action or self-righteous public hand-wringing with improbable (and, to most of the victims, probably irrelevant) assurances—even as the crimes continued to be committed—that someday their killers and rapists would be put on trial. When military force was brought into play, the ensemble of strategies that until then had failed, finally worked. That is not to say that NATO's action transformed Kosovo into a paradise. No reasonable person expected that it would. But it achieved its objective: Kosovars are back in their homes. Serb oppression has ceased and there is now an opportunity, which one hopes will not be squandered, to plan and implement a reconstruction program. Skilled diplomacy has incorporated Russia in the solution and in the peace-maintenance operation. There are,

inevitably, new problems, some arguably created by the NATO action itself—that is the dialectical nature and continuous challenge of politics at every level—but what would the situation now be in Kosovo, and in human rights law, if the NATO states had concluded that, without Security Council authorization, they could not act?

Yet it is appropriate, indeed incumbent on international lawyers, to ask whether these events come under the “suicide pact” *exceptio* that would warrant action outside the UN procedure, with the costs to international law that such action often incurs. The answers to those questions all have a desperate inevitability to them.

- Were the human rights violations in Kosovo “bad” enough to warrant international concern? Different people have different thresholds of tolerance for other people’s pain. Fortunately, an event on the scale of the Holocaust has not become the *minimum* requirement for the exercise of international concern.
- Why was the military instrument used to address the human rights violations in Kosovo? Because all the other instruments of policy had failed.
- Why was action undertaken without Security Council authorization? Because the authorization could not be secured.
- Why was there only an air campaign? Because it was the best of the feasible alternatives. The air campaign did not look chivalric and had its dramatic errors, but a ground campaign would have caused more collateral damage. Moreover, it would not have sustained the necessary domestic political support in the most critical NATO states. In any case, no rule requires a combatant otherwise in compliance with the law of armed conflict to choose a course of conduct that is more, rather than less, dangerous to itself.
- Why did the outcome not provide 100 percent improvements in the human rights situation? One might better ask whether it produced a significant improvement as compared to what would have happened if nothing had been done.
- Does the Kosovo intervention not set a bad precedent for the use of force without Security Council authorization? One may equally ask whether a better precedent would be that no one may do anything effective to stop the destruction or expulsion of the Kosovars of the future, if the Security Council proves unable to operate.
- Why was comparable action not taken in Rwanda?—to name only one recent case in which the world stood by and solemnly talked of future criminal prosecutions, while the criminals consummated their unspeakably wicked deeds. This would be a truly bizarre invocation of legal precedent. The proper question is whether Rwanda is to be taken as a precedent that limits future action or as a lesson of the type of international nonfeasance that should never again be allowed to occur.

None of us who are compelled to ask hard questions about the lawfulness of the Kosovo action is a consistent strict constructionist of the Charter. After all, who among us insists on a textual interpretation of Article 2(7)? But we all are stricter when it comes to reading Article 2(4), for no one wants a return to the world of classic international law in which states could resort to violence against each other at will.

Kosovo does not erode Article 2(4). Article 2(4) was changed by the contraction of Article 2(7), which, by effectively eliminating for serious human rights violations the defense of domestic jurisdiction, removed from the sphere of the “political independence” of a state the right to violate in grave fashion and with impunity the human rights of its inhabitants. But a treaty, such as the United Nations Charter, is an integrated conception; one cannot change part of it without making appropriate adjustments in other parts. Assigning a nearly exclusive right to use force to a Security Council, on which the five most powerful states of the world sit as permanent members, is a workable idea if the responsibility of that Council is restricted to resisting threats to and breaches of the peace and acts of aggression. These are fundamental and venerable postulates of international politics on which, for the time

being, the permanent members can usually agree. But the assignment of exclusive power to the Council ceases to be workable if the writ of the United Nations is also extended to the protection of human rights, the international control of the essential techniques by which governments manage and control their people internally. On these matters, there are profound, possibly unbridgeable divides between the permanent members.

It is the installation in international law of the code of human rights that has created the antinomies of the Kosovo action, for international law now sets as an imperative objective a peremptory standard by which the behavior of governments is to be tested and, where necessary, restrained and sanctioned. This mandate ultimately requires the use of force, yet the far-reaching innovation of human rights does not, at the same time, adjust the inclusive enforcement mechanism so that it can implement the new objectives. Hence the *legal* imperative for the Kosovo action, the virtual impossibility of accomplishing it through the Security Council, and the simultaneous sense of relief, anomie and anxiety that the apparently successful action has generated.

The procedures for deciding and appraising the lawfulness of the Kosovo action were not those contemplated by the Charter. That is not good and, no matter how noble and urgent the outcome, it will not be good when it happens in the future. Yet, if the circumstances require, it should—it must—be done again! The practical question is whether Kosovo-like decisions that come under the “suicide pact” rule will be essentially uncontrolled actions taken by one or more powerful states in their own special interest—and truly violate the spirit of Article 2(4)—or whether they will be subjected to the discipline of international law standards and contribute to the major purposes of the United Nations Charter.

The Kosovo experience shows that they can be controlled. In addition to governments, the modern international legal process incorporates intergovernmental organizations, private entities, the mass media, nongovernmental organizations and individuals; their members and representatives communicate through an international electronic nerve system and at all levels of international society, including the most formal diplomatic arenas. It is this modern, inclusive international process that promoted and demanded the international human rights code and, make no mistake, demanded and appraised every step of the Kosovo action as a necessary implementation of those rights. In this respect, Kosovo bears no likeness to previous examples of humanitarian intervention, which were, to varying degrees, for all their high rhetoric, instruments of policy of particular states, whose commitment to human rights was not always consistent or credible.

An unorganized decision process is neither as efficient nor as procedurally just as an organized and enlightened one. Hence law's ceaseless quest for organization and institutionalization. When human rights enforcement by military means is required, it should, indeed, be the responsibility of the Security Council acting under the Charter. But when the Council cannot act, the legal requirement continues to be to save lives, however one can and as quickly as one can, for each passing day, each passing hour, means more murders, rapes, mutilations and dismemberments—violations of human beings that no prosecution will expunge nor remedy repair.

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