to other causes of violence such as economic intervention.[29] The West assumes that its wealth, power and assurance bestow a normative authority that discounts alternative views.[30] Accordingly, it is hard to envisage that other states would be able to undertake such a campaign, either unilaterally or together, against the wishes of permanent members of the Security Council and without being challenged by them.

At the same time, the commitment to human rights that humanitarian intervention supposedly entails does not mean equality of rights worldwide. The human rights of some people are more worth protecting than those of others. Military intervention on behalf of the victims of human rights abuses has not occurred in, inter alia, Sudan, Afghanistan or Ethiopia. It was woefully inadequate and delayed in Rwanda. The security of the East Timorese was affirmed as the responsibility of the Government of Indonesia by the agreements of May 5, 1999, between Portugal, Indonesia and the United Nations. Even when it became apparent that this obligation was not preventing the violence that followed the announcement of the referendum result in favor of East Timorese independence, the Security Council delayed authorizing intervention until Indonesian consent was obtained. It is better to be a refugee in Europe (where "they look like us") than in Africa,[31] although greater efforts are also made to ensure that there is no expectation of long-term shelter from us. "Money for peace" is more likely to be found for some areas than for others.[32] Such selectivity undermines moral authority. It is also reflected in legal scholarship, where, for example, interstate conflict in Central Africa has remained largely unremarked.

All these incidents serve to undermine the Charter on an ad hoc selective basis without providing clear articulation of the underlying principles, or even assurance of future acceptance by those who currently espouse them. The case of Kosovo may have highlighted the continuing chasm between human rights rhetoric and reality. It does not resolve the way this can be bridged.

CHRISTINE M. CHINKIN

KOSOVO, WORLD ORDER, AND THE FUTURE OF INTERNATIONAL LAW

I. A POINT OF DEPARTURE

Perhaps more fundamentally than any recent international occurrence, the NATO initiative on behalf of the Kosovars has provoked extremely divergent interpretations of what was truly at stake, the prudence of what was undertaken, and the bearing of law and morality on this course of events. This divergence of perspectives can be suggestively framed by reference to the positions adopted by two highly respected and morally engaged international figures: Vaclav Havel, President of the Czech Republic, and Robert Fisk, correspondent and feature writer for the British newspaper *The Independent.*

Acknowledging that the tactics adopted by NATO had given rise to controversy, Havel, in an address to the Canadian Senate and House of Commons on April 29, 1999, affirmed what was for him beyond controversy about the Kosovo undertaking:

[29] *See* Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

[30] *See* Stark, *supra* note 4, at 99.

[31] "UNHCR is spending about 11 cents a day per refugee in Africa. In the Balkans, the figure is $1.23, more than 11 times greater." T. Christian Miller & Ann M. Simmons, *Relief Camps for Africans, Kosovars Worlds Apart*, L.A. TIMES, May 21, 1999, at A1.

[32] "The UN's consolidated humanitarian appeal for Kosovo is $690 million, of which 58% has been met, while $2.1 billion has just been pledged for regional construction. A UN appeal for $25 million for Sierra Leone met profound international indifference and a mere 32% of the appeal has been covered." Victoria Brittain, *Unrealistic humanitarians*, GUARDIAN, Aug. 4, 1999, at 16.

> But there is one thing no reasonable person can deny: this is probably the first war that has not been waged in the name of "national interests," but rather in the name of principles and values. If one can say of any war that it is ethical, or that it is being waged for ethical reasons, then it is true of this war. Kosovo has no oil fields to be coveted; no member nation in the alliance has any territorial demands on Kosovo; Milosevic does not threaten the territorial integrity of any member of the alliance. And yet the alliance is at war. It is fighting out of a concern for the fate of others. It is fighting because no decent person can stand by and watch the systematic, state-directed murder of other people. It cannot tolerate such a thing. It cannot fail to provide assistance if it is within its power to do so.[1]

Robert Fisk wrote with equal fervor in criticism of NATO's action:

> How much longer do we have to endure the folly of NATO's war in the Balkans? In its first fifty days, the Atlantic alliance failed in everything it set out to do. It failed to protect the Kosovo Albanians from Serbian war crimes. It failed to cow Slobodan Milosevic. It failed to force the withdrawal of Serb troops from Kosovo. It broke international law in attacking a sovereign state without seeking a U.N. mandate. It killed hundreds of innocent Serb civilians—in our name, of course—while being too cowardly to risk a single NATO life in defense of the poor and weak for whom it meretriciously claimed to be fighting. NATO's war cannot even be regarded as a mistake; it is a criminal act.[2]

Although written in the midst of the war, the essential lines of Fisk's critical analysis remain untouched by subsequent events, except that President Milošević did eventually submit to NATO bombing, although only after wresting several important political concessions from the Russian negotiators. This "diplomatic solution" has produced the withdrawal of Serbian military and police forces and the safeguarding of Kosovo through the presence of a strong NATO-led international peacekeeping force.

A difficulty of assessment arises because in crucial respects *both* of these seemingly contradictory positions are persuasive. The Western mind, especially in its legal dimensions, tends toward an either/or resolution of adversary lines of interpretation, as modeled through judicial litigation. However arbitrary the decision in a particular case, there is always a winner and a loser. It is jurisprudentially problematic *both* to regard "ethnic cleansing" as intolerable to the international community and to condemn the form and substance of the NATO interventionary response designed to prevent it. And yet just such a doctrinal tension seems to follow from the perspectives of international law and world order. My attempt here is to defend such a double condemnation as posing the essential normative challenge for the future: *genocidal behavior cannot be shielded by claims of sovereignty, but neither can these claims be overridden by unauthorized uses of force delivered in an excessive and inappropriate manner.*

The main line of argument can be anticipated. So long as a purely textual analysis of the relevant norms is relied upon, the divergences between humanitarian imperatives and the prohibition of forcible intervention unauthorized by the United Nations cannot be satisfactorily reconciled. The only mode of assessment that can achieve a limited reconciliation depends on a contextual analysis along the lines of "configurative jurisprudence," or closely related "incidents jurisprudence." Of course, contextual complexity creates ample opportunity for sharply divergent lines of factual and legal interpretation, as is illustrated by the sharp controversies about the legality of the American intervention in Vietnam among those who regarded themselves as adherents of a configurative approach. Nevertheless, what the configurative approach enables, indeed entails, is a comprehensive assessment that includes an embrace of complementary norms, as well as an appraisal of

[1] Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. BOOKS, June 10, 1999, at 4, 6 (reprinting address to Canadian Senate and House of Commons, Apr. 29, 1999).

[2] Robert Fisk, *Who Needs NATO?* PROGRESSIVE, July 22, 1999, at 22, 22.

what has been done in the name of law and an evaluation of whether preferable policy alternatives were available to those with the authority to make decisions. For these reasons, the configurative orientation enhances the quality of legal debate even if it is generally unable to resolve the underlying legal controversy. Enhancing debate is particularly important for a democratic society, whose essence arguably lies in the core societal commitment to resolve controversy by nonviolent communicative discourse.

In the setting of Kosovo, such a style of contextual assessment alone allows the double condemnation, and yet helps disclose a course of action that might have avoided ethnic cleansing, as well as resulted in warfare and its conduct in a morally and legally dubious fashion. In this light, the Kosovo precedent is critically examined to enable a more constructive line of response in the event of a comparable future challenge, or at a minimum to encourage a more promising line of discussion and reflection. Admittedly, a retrospective contention that an alternative course of action might have produced a preferable outcome is necessarily highly speculative. Such uncertainty is unavoidable if the position taken is, as here, one that is critical of what was done under NATO auspices but does not endorse the view that, in this event, nothing effective should or could have been done about meeting the challenge of ethnic cleansing. Attempting to find a preferable path of action for future responses to genocidal behavior inevitably involves accepting such hypothetical reasoning. Depending on the integrity and skill of its presentation of facts and legal considerations, this reasoning may itself be more or less convincing.

II. Depicting the Fearful Policy Dilemma

There is no reasonable doubt that the Albanian majority population of Kosovo was placed in severe jeopardy by actions taken under the authority of the Milošević Government in Belgrade during the 1990s. These policies involved fundamental denials of human rights, including the right to self-determination of "a people." The essence of these denials involved the incitement to and toleration of Serbian atrocities designed to intimidate Albanian Kosovars or to coerce their mass exit, clearing the way for unobstructed Serb dominance. This factual one-sidedness is itself not entirely accurate, as the formation of the Kosovo Liberation Army (KLA) dedicated to waging an armed struggle to achieve an independent Kosovo involved a variety of violent provocations that provided an ongoing pretext and rationale for harsh Serb security measures. Considering the demographic balance in Kosovo, nine-to-one in favor of the Albanians, the Serbian pressure to intimidate was undoubtedly intense, but the result was one of unmistakable repression of the majority population.

It was also reasonable in light of earlier Serb tactics in Bosnia, as epitomized by concentration camps, numerous massacres and crimes against humanity, and the brutal annihilation in 1996 of some seven thousand Bosnian Muslims sheltered by the UN safe haven of Srebenica, that international action of significant magnitude was needed in short order if full-scale ethnic cleansing in Kosovo was to be avoided. The Serb massacre of forty alleged civilians in the Kosovo town of Racak, eighteen miles southwest of Pristina, was widely perceived in Europe and Washington as the final warning bell, and was so portrayed by the media. The dominant perception was that something had to be done, and quickly, or else the Bosnian ordeal would be catastrophically reproduced with damaging consequences for the future of Europe and the credibility of the transatlantic alliance with the United States.

Moreover, it was evident to many influential leaders and advisers, particularly in the United States, that the United Nations was ill-suited for this mission. It was seen as having failed in Bosnia, in part because of the absence of political will by those who were committed to its peacekeeping mission there and in part because of friction within the Security

Council as to the proper course of action to be adopted, whether that of neutrality and impartiality, or of supporting the victimized ethnic group. In the context of Kosovo, these problems seem even more formidable than they were in Bosnia. In the months before the war, China and Russia appeared ready to veto any call for UN intervention, as well as any mandate that conferred upon NATO or any other entity such a right. In this respect, the only prospect for an effective humanitarian intervention *appeared* to depend on acting outside the United Nations, and in violation of the basic letter and spirit of its Charter. This "appearance" was reinforced, but also undermined, by strong independent pressures to endow NATO with renewed credibility in the emergent post–Cold War setting of a Europe unthreatened by an *external* adversary. Without archival access, the impact of these pressures on shaping the response to ethnic cleansing and human rights abuse in Kosovo is impossible to evaluate, as their very existence is officially denied.

The prointervention side also maintained that diplomatic remedies had been exhausted. Richard Holbrooke had visited Belgrade repeatedly in 1998 and early 1999 to induce Milošević to accept a diplomatic solution. The elements of this solution consisted of the deployment of a NATO peacekeeping force in Kosovo, substantial interim autonomy for the province, and a commitment to hold a referendum on its future in three years. This diplomatic package was presented as a non-negotiable set of demands to former Yugoslavia at Rambouillet and, when rejected by Belgrade and reluctantly accepted by the KLA, provided the political and legal basis for NATO military action. In essence, recourse to military intervention arguably occurred after all reasonable opportunities for peaceful settlement had been sufficiently explored. Under these circumstances, it was alleged that waiting any longer would have exposed the endangered Kosovar population to grave risks and irreversible harm, and would have made a successful humanitarian intervention impossible.

The anti-intervention argument is comparably coherent. It takes the fundamental view that NATO's recourse to war was legally unacceptable without explicit authorization by the UN Security Council, and that NATO could not validly act on its own in this setting. It rejects as legalistic the textual claims that the NATO use of force was not directed at "the territorial integrity or political independence" of the former Yugoslavia, and therefore was not prohibited by the Charter. It also rejects the parallel contention that NATO was not bound by Article 53 of the Charter since as an alliance it was not formally a Chapter VIII "regional organization" and its undertaking was not strictly "an enforcement action." In this reading of the Charter, all uses of nondefensive force are strictly controlled by the UN Security Council, and that to bypass its authority on the basis of a self-serving evasion of prospective vetoes is to take law into one's own hands unacceptably. Indeed, the function of the veto is precisely to prevent uses of force in the absence of a political consensus among the permanent members. And here, with the initiative being one of collective action by the Western powers within NATO, the bypassing of UN authority is seen as a devastating constitutional blow to the authority of the Organization, and to the most basic prohibition inscribed in the international law governing recourse to force. It is likely to be regarded with particular alarm by China and Russia, which view their veto power as a shield against threats of "a tyranny of the majority" and as a measure of protection against U.S. "hegemonic" claims.

In addition, the anti-interventionists do not accept the argument that diplomatic means were properly used or exhausted. They point to the exclusion of Russian diplomatic participation prior to NATO's recourse to war, the rigidity of the Holbrooke/Rambouillet formula, the absence of any evident diplomatic effort to induce China and Russia to accommodate the Security Council majority by shifting their veto to an abstention. Critics of the NATO intervention compare this pattern of prewar negotiation with the success of the war-ending diplomacy, which was based on a major Russian role and face-saving gestures

toward Belgrade that included willingness to "conceal" the NATO-led peacekeeping force beneath a UN cover story. It is notable in this regard that the war-ending diplomatic text, Security Council Resolution 1244, barely mentions NATO, and if "innocently" read would suggest that Kosovo is fundamentally subject to UN peacekeeping authority.[3] The contention is that flexible diplomacy might have achieved an acceptable result along the lines of Resolution 1244 and that, had it been tried without success, then recourse to force under NATO auspices would have seemed far more reasonable. Still, such reasonableness with respect to recourse to war would not have met the objections relating to the modalities of force relied upon by NATO.

These objections fueled a parallel debate on the actual conduct of the war. Those who defend NATO point to the outcome, which is viewed as submission by Belgrade, and in effect an acceptance of the essential features of the Rambouillet framework. They also point to the political constraints that precluded other interventionary options, such as reliance on ground troops or a more focused bombing strategy involving greater exposure to anti-aircraft defenses. In the NATO countries, public support for intervention was conditioned on the prospect of minimal casualties, making recourse to higher-risk options politically unavailable to their leaders, who felt themselves accountable to their respective electorates.

Also, as President Clinton acknowledged shortly after the suspension of the bombing, he had expected that Milošević would submit after a few days of bombing, which was in fact generally confined to military targets, its accuracy reinforced by primary reliance upon "smart" weaponry. In light of expert military advice, it was arguable that such an expectation by the NATO political leadership was reasonable, and that when proved wrong, it was then reasonable to carry on with the military effort, intensifying the attack until it reached its goals. To have abandoned the effort midway, it is maintained, would have wrecked NATO's credibility in relation to the future of European security. It would also have given a green light to the accelerated ethnic cleansing undertaken in Kosovo as soon as the war commenced, a response furnished with guidance and direction by Belgrade. This latter assessment of complicity at the highest level of the Yugoslav Government is reinforced by the indictment of Milošević, and his close aides, on various criminal charges by the United Nations International Criminal Tribunal for the former Yugoslavia.

Critics of the manner in which the NATO intervention was carried out see the situation very differently. They perceive alternative lines of action as having been available and far preferable on humanitarian grounds to a high-altitude bombing campaign. In this regard they favored either helping the KLA to secure an independent Kosovo or insisting on a NATO strategy that combined ground assault with air attacks. They also rejected the extension of NATO bombing after its initial failure to induce Milošević to submit, especially the decision to target key components of the civilian infrastructure of Serbia. The expansion of the bombing campaign resulted in heavy damage to the water supply and electricity systems; caused severe pollution through the destruction of chemical factories and oil refineries; and broadened the means of attack to include B–52s, cluster bombs, and depleted uranium ordnance, weaponry of questionable lawfulness.

These critics also highlight the severe damage to Kosovo and its inhabitants caused by the bombing, inducing a heavy flow of refugees that approached one million, as well as the

[3] For the text, see UN Doc. S/RES/1244 (June 10, 1999), containing the extraordinary dispositive language as follows: "*Decides*, on the deployment in Kosovo, under United Nations auspices, of international civil and security presences." Such terminology hardly accords with the media view that the United Nations merely ratified the NATO victory. This formulation should also be compared with the dictatorial language and tone of the Rambouillet agreement and its explicit empowerment of NATO, especially in its famous Annex B, which gave NATO extensive powers throughout the *whole* of former Yugoslavia. It is my view that it was "unreasonable" not to attempt to reach a "1244" solution prior to recourse to war.

destruction of many cities and towns, and the deaths of hundreds, if not thousands, of civilians. These critics are further inclined to regard the massive Serb resort to ethnic cleansing by the most brutal means as largely an *effect* of the bombing rather than as an urgent stimulus for a plan that would otherwise have been carried out more gradually. A related criticism is that the severity of NATO's strategy, combined with the Serb responses to it, produced a set of circumstances that has resulted in a reverse process of ethnic cleansing in Kosovo, which is carried forth under the supposedly protective gaze of the peacekeeping operation.

Putting these two major lines of interpretation together leaves one with the disturbing impression that humanitarian intervention on behalf of Albanian Kosovars was *necessary* but, under the circumstances, *impossible.* It was necessary to prevent a humanitarian catastrophe in the form of ethnic cleansing. It was impossible because of the political unavailability of an appropriate means. The selection of such a means was blocked by deep divisions between leading European states, and by the resolve to insist on a NATO solution. It also reflected the disinclination of the citizenry of the NATO countries, especially Germany and the United States, to bear the considerable human costs that might have followed from the adoption of a legally and morally more acceptable form of intervention. As this phrasing suggests, the most helpful form of legal appraisal is one of *degree,* conceiving of legality and illegality by reference to a spectrum. The more "reasonable" a response, the closer to the legality end of the spectrum. In relation to Kosovo, the contention here is that plausible options were available to give the action taken a higher degree of legality (without compromising the humanitarian mission), and thus to improve its status as a precedent for the future.

III. Rejecting Legalism

Although, admittedly, no jurisprudential approach to legal analysis leaves an entirely satisfied impression under the circumstances that existed in Kosovo, reliance on legalistic analysis is particularly unfortunate for the future of international law. It puts international lawyers in the uncomfortable role that Immanuel Kant accused them of in *Perpetual Peace,* namely, that of being "miserable consolers." There is no ultraliteralistic reading of the Charter provisions that does not strain credulity as to the intentions of the founders of the United Nations. The basic undertaking of the Charter was to assign exclusive control over nondefensive uses of force to the Security Council, and to accept the limits on response that this entailed as a result of vesting the five permanent members with a right of veto. In the setting of the Persian Gulf war, this Charter framework was reaffirmed in the form of China's agreeing to "abstain," as it was indirectly by the International Court of Justice in the *Nicaragua* case.

Furthermore, the idea that NATO can use force freely without the expected accountability of regional actors to the Charter system through the stratagem of refraining from denoting its undertaking as "an enforcement action" is to strain political and moral credulity to the breaking point. It would appear that a military alliance would be subject to greater constitutional constraints than a regional organization as understood by Chapter VIII. Indeed, if a military alliance's actions do not qualify as "collective self-defense" under the Charter, then the full weight of Article 2(4) would appear applicable. This analysis bears directly on NATO, whose purpose was stated as institutionalizing the defense of Europe against the threat of a Soviet attack, never as responding to intrastate strife even within the alliance area, much less beyond it.

Similarly, the legalistic contentions of those that point to domestic jurisdiction and veto powers as precluding humanitarian intervention occupy untenable ground. It is correct that normal textual readings are on their side, and that the Charter system cannot be legally bypassed in the manner attempted by NATO. Yet it is equally true that to regard the textual barriers to humanitarian intervention as decisive in the face of genocidal behavior is politically and morally unacceptable, especially in view of the qualifications imposed on unconditional claims of sovereignty by the expanded conception of international human rights. Of course, the United Nations was not constituted in a setting that addressed the challenges of intrastate conflict, and the understanding among the founders was that such an agenda would be treated as falling within the "domestic jurisdiction" limitation on UN competence to act. But a series of normative developments over the years have eroded the clarity of this distinction: the adoption of the Genocide Convention, the blurring of inside/outside distinctions (in relation to the territorial state) under the pressures of "globalization," and the spread of democracy and the media's capacity to report human tragedy in real time have generated a new global ethos of responsibility in relation to humanitarian emergencies. Admittedly, this ethos is unevenly implemented on the level of political action, as the earlier experiences in Bosnia and Rwanda illustrate, but in the European setting, and given the perceived failures of the recent response in relation to Bosnia, the pressure to act was legitimized in a way that superseded legalistic restraints.

In essence, the textual level of analysis, upon which legalists rely, cannot give a satisfactory basis for NATO intervention; nor can it provide a suitable rationale for rejecting the humanitarian imperative to rescue the potential victims of genocidal policies in Kosovo. Moreover, textualism does not help focus attention on whether the means chosen were legally acceptable in light of the goals being pursued. More nuanced attention to context is required so that the debate can be reformulated in a manner corresponding with the broad injunction to seek a global security system that contributes to the achievement of "humane governance" on a global scale. Otherwise, the self-marginalization of international law and international lawyers is assured in contemporary situations involving claims to use force, consigning their vocational fate to the demeaning roles of "apologist" or "utopian."

IV. The Geopolitical Prerogative

Another framework for assessment involves rationalizing special exemptions from the constraining impact of international law by reference to the special role of the United States as a self-anointed guardian of international justice, and, as such, exempt from any inhibiting constraints of international law. The fact that the United States chose to act within the collective framework of NATO is of mild relevance, suggesting some diminution of an essentially unilateral geopolitical prerogative. Yet not too much should be made of recourse to NATO owing to its control by Washington. Revealingly, Richard Holbrooke reprinted, in his book on the Bosnian negotiations that produced the Dayton Agreement at the end of 1995, the text of a letter he later wrote to President Clinton in which he unwittingly confirmed the prevailing view of NATO as a U.S. pawn: "Of the many organizations in the former Yugoslavia in the last five years, only NATO—that is, the United States—has been respected."[4]

The main problem with presupposing the validity of NATO's response is that it focuses exclusively on the injustice of Milošević's policies in Kosovo, and does not consider the injustice of the NATO response. My contention is that, unless this double injustice is placed in focus, no jurisprudential appraisal will be generally convincing, nor should it be. At most,

[4] Richard C. Holbrooke, To End a War 339 (1998).

it will help those firmly within the NATO circle of support to find the most satisfying spin for their preferred course of action, and it will widen the gap between NATO's critics and supporters to such a degree that it would render constructive dialogue impossible. I also view in the same manner those who one-sidedly condemn NATO for bypassing the United Nations, defying international law applicable to the use of force, and ignoring legal restraints relevant to the conduct of war. They, too, unacceptably simplify the search for a conclusion, but at the far too high a cost of a regressive insensitivity to the challenge posed by ethnic cleansing in Kosovo.

Against this background, my argument centers on the need to ground a legal appraisal, and an appeal to justice, on the contextual reality of Kosovo, which includes the inability and unwillingness of NATO to fashion a response that was commensurate to the challenge. Because of this fundamental circumstance, no clear line of legal inference can be persuasively drawn: in effect, it was justifiable to act, but not in the manner undertaken.

V. THE CONFIGURATIVE OPTION

The argument being made is that an assessment of the NATO response to the humanitarian crisis in Kosovo cannot be usefully resolved by reliance on positivist styles of legal appraisal. Such an appraisal in this setting cannot illuminate the complexity of decision arising from the apparent dilemma of either intervening without appropriate legal authorization or watching on the sidelines while ethnic cleansing of an embattled minority takes place. The best that it can do is to mount legalistic arguments on one side or the other by strained reasoning that is insensitive to the main doctrinal contradiction embedded in *this* factual context. To some extent, every set of circumstances that gives rise to factual controversy exhibits these features, but to varying degrees. In some settings, the hierarchy among legal considerations is sufficiently clear to give decisive weight to textual factors and positivist lines of reasoning, as when Indonesia attacked East Timor in 1975 and Iraq attacked Kuwait in 1990.

Jurisprudential options, then, are to be considered as tools of illumination rather than as expressions of ontological truth, and are to be evaluated primarily in terms of whether they engender constructive debate about policy choices and past decisions. In this regard, the role of international law and lawyers is to clarify decisional contexts, to recommend preferred options, and to engender useful societal debate on controversial issues of great public significance.

In relation to Kosovo, the analysis set forth here is based on acceptance of a humanitarian imperative and criticism of the way the response was fashioned. It is now necessary to explain the main lines of criticism.

An authoritative assessment will have to wait for decades, until archival records are released for public scrutiny. Nevertheless, there are preliminary conclusions that can be reached on the basis of available information. Without entering into the factual detail needed to support such assertions, it seems clear that the diplomatic stance of the American Secretary of State, Madeleine Albright, was to oppose any sort of flexibility in dealing with Belgrade in the lead-up to the war and, further, to oppose seeking seriously to engage the United Nations in the process of offering protection to the people of Kosovo. This inflexibility was exhibited in several ways, including by relying exclusively on an American negotiator in discussions with Milošević, excluding Russia and China from the effort to find a diplomatic solution based on a political compromise, and drafting conditions for the NATO role in Kosovo in such an extravagant fashion that it would assure that Belgrade would not possibly accept them.

This impression of inflexibility contrasts with the approach accepted after the war strategy failed to achieve a quick collapse of resistance in Belgrade. At this point a Russian negotiator was given a central role, and abetted by a former Finnish diplomat. This diplomacy resulted in a return to a set of arrangements that were at least nominally under the auspices of the United Nations and that accorded the Russians (despite not being members of NATO) an active role in the Kosovo peacekeeping process. Even the Kosovars have not clearly benefited from the submission of Belgrade. At Rambouillet, Kosovo was promised immediate autonomy and a referendum in three years that would allow the population to determine its future status, including the option of secession and independence. This promise disappeared in the agreed Security Council Resolution 1244, although arguably the almost total de facto independence attained as a result of the war could not have previously been achieved even if the Rambouillet terms had been accepted.

There are several conjoined points here. First, flexible diplomacy was not pursued. Second, there are some grounds for supposing that a more flexible approach might have achieved acceptable results without recourse to war. Third, and most important, whether or not flexible diplomacy would have succeeded, which we cannot know at this point, the failure to attempt it casts a dark shadow across the NATO initiative. This last point requires some clarification. It needs to be recalled that the basic undertaking of the United Nations, as famously enunciated in the Preamble to its Charter, is "to save succeeding generations from the scourge of war." Arguably, the whole effort of international law in this century has been to take such a pledge seriously, although not absolutely, as the acceptance of the need to prevent genocide concedes. The recourse to war by NATO in these circumstances seems to have cast aside the legal, moral and political commitment to make recourse to war a *last resort.* This is a serious allegation from the perspective of both international law and world order.

Note that it is often argued that the failure of the United Nations itself to evolve a collective security system justifies greater latitude in interpreting the occasions on which it is reasonable for a state to use force. This latitude allows for uses of force to uphold vital security interests or to serve the cause of humane governance that the Charter appears on its face to foreclose. In this regard, Articles 2(4) and 51, although important guidelines, are no longer dispositive in relation to inquiries as to legality. However, a recourse to force should be clearly presented as the consequence of an energetic, good faith attempt via flexible diplomacy to find a peaceful solution. The failure to make this attempt severely compromises the normative status of the NATO initiative, and does so regardless of the legal rationale selected to justify the action. NATO's way of proceeding also weakens the argument for bypassing the United Nations and the restrictive constraints of international law. The United Nations was justifiably criticized along the same lines for its apparent unwillingness to pursue flexible diplomacy in the Persian Gulf crisis.

The situation is somewhat less clear with respect to the modalities of force. The widespread reliance on strategic bombing by the Allies in World War II appeared to flout the prohibition on indiscriminate military tactics, but also to establish a pattern of practice that was repeated to a substantial degree in the Vietnam War and again in the gulf war. At the same time, the NATO initiative was not a war in the conventional sense, but one based on a claim of "humanitarian intervention." As such, it would seem subject to stricter standards of constraint relative to the use of force, especially with regard to civilian harm, and particularly in reference to the population that was being protected. NATO's style of bombing after the first few days was to inflict heavy, deliberate damage on civilian targets of a wide variety, relying on mastery of the air, smart weaponry, and a proclaimed intention to continue the bombing on an intensifying scale until Belgrade "submitted" without conditions. The magnitude and effects of such bombing are difficult to reconcile with the

humanitarian claims made by NATO spokespersons. This difficulty is compounded by NATO's reliance on tactics of warfare that minimized the risk of harm to the intervening forces, while shifting that risk to the civilians in the former Yugoslavia, including Kosovo. And in that sense the absence of casualties among the military forces of NATO during the bombing campaign and the killing of two thousand or more civilians in Serbia and Kosovo do seriously damage the humanitarian rationale for the action. Skeptical observers must wonder whether the primary motives for intervention were other than those publicly relied upon, such as keeping NATO alive and testing new weaponry and war-fighting doctrine. An additional subtext was to demonstrate that, contrary to the teaching of "the Vietnam syndrome," internal wars can be fought and won at acceptable costs.

VI. A Concluding Note

Several relatively clear conclusions emerge from a configurative assessment of the NATO initiative:

- there is a strong burden of persuasion associated with the rejection of the United Nations framework of legal restraint on the use of force;
- this burden can be initially met if there is a credible prospect that a humanitarian catastrophe will otherwise occur;
- such a burden cannot be discharged fully if diplomatic alternatives to war have not been fully explored in a sincere and convincing manner;
- the humanitarian rationale is also sustained or undermined by the extent to which the tactics of warfare exhibit sensitivity to civilian harm and the degree to which the intervenors avoid unduly shifting the risks of war to the supposed beneficiaries of the action so as to avoid harm to themselves; and
- the humanitarian rationale is also weakened if there were less destructive means to protect the threatened population than those relied upon.

The postwar Kosovo experience will also inform our sense of the precedent. An important element will be whether the peacekeeping operation can avoid reverse ethnic cleansing, that is, a new coercive process by which the Serbs are induced to leave Kosovo; or contrariwise, whether NATO takes responsibility for economic and social reconstruction, including the reintegration of returning refugees. It is also important that the peacekeeping force remain a strong enough presence over a period of years, to ensure that Belgrade does not reimpose oppressive rule over Kosovo. Finally, it is important that NATO countries take responsibility for restoring the civilian infrastructure of Serbia, as well as the neighboring Balkan countries. To argue that, so long as Milošević remains in power, no assistance can be given to Serbia, is to dilute further and retrospectively the humanitarian claim of the overall operation by making the Serbian people continue to bear the burdens of war in a period of nominal "peace." A similar approach has cast such a backwards shadow on the gulf war, which exacted a severe toll on the Iraqi civilian population as a result of sustaining sanctions for more than eight years.

In sum, unfortunately, the NATO initiative on behalf of Kosovo offers us a badly flawed precedent for evaluating future claims to undertake humanitarian intervention without proper UN authorization. But perhaps "the lessons of Kosovo" can build pressure in the future to view war as a last resort and to uphold the humanitarian character of a humanitarian intervention. They may also build pressure to endow the United Nations with independent enforcement capabilities, enabling an effective response to humanitarian

catastrophes with a minimum of geopolitical supervision. At this point, such an approach may seem far-fetched, given the hostility to the United Nations that persists in Washington, but over time the efficiency and legitimacy of global governance would seem to depend on just such a capability.

RICHARD A. FALK

LESSONS OF KOSOVO

On June 10, 1999, the United Nations Security Council adopted Resolution 1244. Acting under Chapter VII of the Charter,[1] the Council required the withdrawal of all Yugoslav military, police and paramilitary forces from Kosovo,[2] authorized NATO military deployment,[3] and created a UN civil administration to develop "provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections."[4] This regime was imposed[5] for a period of twelve months and indefinitely thereafter, until a majority of the Council, including the permanent members, agrees to terminate it.[6]

In effect, Resolution 1244 imposes a peace treaty on Yugoslavia. The only precedent for such a radical move is Resolution 687,[7] which eight years earlier had ended Operation Desert Storm against Iraq. In that instance, the Council used its Chapter VII powers to demarcate an international boundary, establish and monitor a demilitarized zone, and impose an open-ended prohibition on possession by Iraq of chemical, biological and nuclear weapons.[8] It required Iraq to submit to on-site weapons inspection and pay compensation to the victims of its aggression.[9] The resolution is based not on Iraq's agreement but on its submission.[10]

While both Resolutions 687 and 1244 ritually reaffirm the sovereignty, independence and territorial integrity of the affected states,[11] it is clear that they significantly revise and diminish this traditional attribute of statehood. In the instance of Resolution 1244, Professor Antonio Cassese has concluded that it evidences an important evolution in international law:

> Human rights are increasingly becoming the main concern of the world community as a whole. There is a widespread sense that they cannot and should not be trampled upon with impunity in any part of the world.
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> . . . [T]he international community is increasingly intervening, through international bodies, in internal conflicts where human rights are in serious jeopardy.[12]

[1] SC Res. 1244, preambular para. 13 (June 10, 1999).

[2] *Id.*, para. 3.

[3] *Id.*, paras. 7–9.

[4] *Id.*, para. 11(c).

[5] Yugoslavia "agreed" to this settlement. *See id.*, Annex 2. However, the resolution is mandatory under Chapter VII of the Charter and is not based on consent.

[6] SC Res. 1244, *supra* note 1, para. 19.

[7] SC Res. 687, UN SCOR, 46th Sess., Res. & Dec., at 11, UN Doc. S/INF/47 (1991), *reprinted in* 30 ILM 846 (1991).

[8] *Id.*, paras. 1–3, 5–6, 7–10, 12–13.

[9] *Id.*, paras. 7–10, 16–19.

[10] Iraq "has no choice but to accept this resolution." Identical letters from the Minister for Foreign Affairs of the Republic of Iraq addressed respectively to the Secretary-General and the President of the Security Council (Apr. 6, 1991), UN Doc. S/22456 (1991).

[11] SC Res. 687, *supra* note 7, preambular para. 3; SC Res. 1244, *supra* note 1, preambular para. 10.

[12] Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23, 26 (1999) (the author was then Presiding Judge, Trial Chamber II, International Criminal Tribunal for the former Yugoslavia).