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Cover Page Footnote

Foley & Lardner-Bascom Emeritus Professor of Law, University of Wisconsin Law School This article is the Edward Ball Chair Lecture delivered at the Florida State University College of Law, September 30, 1999. It draws in part on and develops ideas included in a series of lectures I gave on "Rethinking International Human Rights: What Have We Learned, Where Are We Going?" at the European University Institute, Academy of European Law, Tenth Anniversary Session on Human Rights, in Florence, Italy, June 21-23, 1999. The "Collected Courses" of the Academy will be published by the Oxford University Press in 2000.

KOSOVO AND THE "NEW INTERVENTIONISM": PROMISE OR PERIL?

RICHARD B. BILDER*

As we all know, the United States and NATO justified their recent bombing of Yugoslavia and the expulsion of Serb forces from Kosovo primarily on the grounds that their intervention was necessary to halt and reverse a humanitarian disaster, namely, the Serb's widespread atrocities against, and ethnic cleansing of, the Albanian Kosovars. President Clinton, repeatedly citing the unspeakable atrocities waged by Yugoslav leader Slobodan Milosevic, called the bombing a moral duty and declared NATO's air campaign "a just and necessary war."¹ British Prime Minister Tony Blair said that NATO "must be willing to right wrongs and prosecute just causes."² Elie Wiesel, the Nobel Laureate Holocaust survivor, pronounced the bombing "a moral war" and said that "[w]hen evil shows its face . . . [y]ou must intervene."³

To many, particularly western human rights advocates, Kosovo was a noble humanitarian crusade — not simply a victory over evil, but the dawn of a new world order, a turning point in international affairs in which respect for human dignity had triumphed over outmoded concerns for national sovereignty and foreign policy was finally assuming a moral dimension. In his "victory" speech at the end of the bombing, President Clinton's theme was that, when people were repressed for their religion or nationality, the world did not look away: "In Kosovo, . . . we did the right thing. We did it the

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1. William Jefferson Clinton, *A Just and Necessary War*, OpEd, N.Y. TIMES, May 23, 1999, at wk. 17; see also Nancy Mathis, *Our Bombing a Moral Duty, Clinton Says: 'Ethnic Cleansing' Like the Holocaust, he argues*, WISC. ST. J., May 14, 1999, at 2A; Francis X. Clines, *Missiles Rock Kosovo Capital, Belgrade and Other Sites*, N.Y. TIMES, March 25, 1999, at A1; Serge Schmemmann, *From President, Victory Speech And a Warning*, N.Y. TIMES, June 11, 1999, at A15.

2. Tony Blair, *A Military Alliance, and More*, OpEd, N.Y. TIMES, April 24, 1999, at A19; see also Tony Blair, *A New Moral Crusade*, NEWSWEEK, June 14, 1999, at 35 ("We are succeeding in Kosovo because this was a moral cause . . .").

3. David Rohde, *Wiesel, a Man of Peace, Cites Need to Act*, N.Y. TIMES, June 2, 1999, at A14.

right way"⁴ A New York Times article at this time enthused: "Fifty-four years after the Holocaust revelations, America and Europe had finally said 'enough,' and struck a blow against a revival of genocide [h]uman rights had been elevated to a military priority and a pre-eminent Western value."⁵

But at least some others, particularly nonwestern governments and peoples, saw Kosovo quite differently. They viewed it as a blatant act of illegal aggression and intervention by the United States and NATO against a weak and virtually helpless state, a particularly reprehensible act because it was done under what they considered the cynical and hypocritical pretense of human rights ideals.⁶ The above-mentioned New York Times article reluctantly conceded: "But to many other nations, the Kosovo atrocities . . . were just the broken eggs of yet another national omelet, and the West was a self-righteous, ever-more-meddlesome cook."⁷ From their standpoint, the relevant analogy was not the United States and NATO cavalry bravely riding to the rescue of about to be butchered, helpless, decent settlers, but of an arrogant and bullying Imperial Rome, with its docile and subservient "allies" in tow, launching a brutal punitive expedition against a small and weak nation that had the temerity to try to preserve its sovereignty and defy Rome's ultimatums and hegemony — in the process devastating its territory, killing and humiliating its people, and seeking to capture and bring its leaders in chains to Rome — read, the Hague — as a lesson to others. More broadly, there may be some concern that Kosovo may presage a growing "hijacking" and debasing by governments and nongovernmental organizations of the moral power of human rights ideals for other more selfish ends.

Certainly, there is an appealing case to be made for NATO's intervention and bombing. For all of us in the West who watched

4. Schmemmann, *supra* note 1, at A15.

5. Michael Wines, *Two Views of Inhumanity Split the World, Even in Victory*, N.Y. TIMES, June 13, 1999, at wk. 1.

6. See Erik Eckholm, *Bombing May Have Hardened China's Line*, N.Y. TIMES, May 18, 1999, at A11 (noting that the People's Daily, the official Communist Party newspaper in China, said that NATO's bombing campaign was "part of an American 'global strategy for world hegemony.' . . . an 'aggressive war' that was 'groundless in morality or law'," and "'a new form of colonialism,' using pretexts like human rights to turn other countries into dependents"); see also Christopher Bodeen, *Chinese President Claims U.S. Seeking Global Dominance*, WISC. ST. J., May 14, 1999, at 9A; Steven Erlanger, *City Begins Rebuilding, But the Despair Lingers*, N.Y. TIMES, June 6, 1999, at 15 ("[T]here is significant bitterness toward Mr. Milosevic, but there is much directed at what many Serbs consider American arrogance and hypocrisy, where the language of human rights has clothed the naked exercise of power.").

7. Wines, *supra* note 5, at wk. 1.

the extensive media coverage of Serb atrocities — the constant images of endless columns of refugees — it was difficult not to feel outrage. But, it is said that on the margins of some ancient maps depicting the limits of the known world the words appear: “Terra Incognita-Hic Dragones” — “Unknown Lands-Here Be Dragons!” While NATO’s intervention in the Kosovo crisis certainly offers some promise for international law and human rights, it may also pose dangers.

I would like to suggest some of the potential problems and perils posed by NATO’s Kosovo intervention. I will focus primarily on some issues Kosovo raises, first, for the U.N. and the doctrine of humanitarian intervention, and, second, for the laws of war. I will also briefly comment on some other implications of Kosovo with regard to the role of international criminal courts, self-determination and ethnic conflict, and the role of the media and non-governmental organizations (NGO’s).

1. Kosovo, the U.N., and the Doctrine of Humanitarian Intervention

The first and most salient issue concerns, of course, the legality and appropriateness — particularly under the U.N. Charter, as well as, customary international law — of NATO’s intervention and bombing of Yugoslavia. As indicated, the United States and NATO justified their actions, including the bombing, primarily as a humanitarian intervention, morally required to forestall Serb atrocities and “ethnic cleansing” in Kosovo.

At the threshold are several important groups of factual questions to which we still do not fully know the answers. One set of questions relates to the nature of events in Kosovo, both before and after the bombing. For example, what was actually happening in Kosovo before the bombing began and what was the character of the actions of both the Serbs and the Kosovo Liberation Army (KLA)? Who was doing what to whom? Had Milosevic planned and begun a deliberate policy of atrocities and “ethnic cleansing” of the Kosovars before the Rambouillet ultimatum and bombing? Did the anger and desire for revenge which the bombing produced help cause the atrocities and exodus? And finally, who actually perpetrated most of the atrocities after the bombing began — the Serb army and police, paramilitaries, private bands of criminals exploiting the situation, or all of the above?

Another set of questions relates to the United States and NATO’s motivations for their intervention. Certainly, humanitarian considerations were a significant factor in NATO’s decisions, particularly after the massive exodus of Kosovars following the

beginning of the bombing — and there can be no doubt that humanitarian concerns were the basis of the wide public support of NATO's actions by its citizens. But, as indicated, some (particularly in nonwestern countries) may be more skeptical about the unselfishness of the United States and NATO's motives and may suggest less altruistic ones. These could include, for example: NATO's desire to maintain its "credibility" after its diplomatic blundering and its "bluff" being called in the Rambouillet negotiations; NATO's concern for maintaining stability in the Balkans; NATO's need to find a crisis which would justify its continued existence and expansion, continued employment for its bureaucrats and, in particular, continued arms markets for its armaments industries; NATO's desire to intimidate Russia and expand its sphere of influence into the Balkans closer to Russia's borders; the United States and NATO's desire to "get even" with and "teach a lesson to" Milosevic for what they considered his past intransigence, betrayals, atrocities, and manipulation of NATO in Bosnia; the United States and NATO's concern over criticism they had received for their failure to do something to prevent atrocities in Bosnia, and their consequent desire to avoid similar criticism for failing to take action in Kosovo; and even the Pentagon's desire to test and to justify to Congress its expensive hi-tech weapons. Hopefully, historians will soon give us better answers to these questions.

Turning to the legal issues, you are probably familiar with the relevant legal principles. The U.N. Charter prohibits the threat or use of force against the territorial integrity or political independence of any state, except in self-defense or as authorized by the Security Council under Chapter VII of the Charter.⁸ Chapter VIII permits regional organizations to take enforcement action under certain circumstances, but only with the authorization of the Security Council.⁹ Other related principles of international law, reflected in various treaties and General Assembly resolutions, and endorsed by the International Court of Justice (ICJ) in the 1986 *Nicaragua* case as binding customary law,¹⁰ prohibit coercive intervention in the internal affairs of another state. There is broad agreement that this prohibition of the unauthorized use of force is at the heart of the

8. See generally Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevens 1153 [hereinafter U.N. Charter].

9. See *id.* at ch. VIII.

10. Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*) (Merits), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

Charter and contemporary international law and is one of the most significant legal advances in human history.

NATO never sought or obtained Security Council authorization for either its Rambouillet ultimatum or its subsequent bombing of Yugoslavia — presumably because Russia and China were almost sure to veto any such authorizing resolution — nor did it ever assert that it was acting in self-defense. Nor did NATO seek approval for its actions by the General Assembly, as it might conceivably have done under the "Uniting for Peace" Resolution — again, presumably because it was either doubtful it could obtain a substantial majority for such a vote or it was concerned about Russian and Chinese reactions to NATO's seeking such a vote. Indeed, so far as I am aware, neither NATO nor its principal leaders have had much to say about the relevance of either the U.N. Charter or international law to the Kosovo crisis. It would be interesting to know what, if any, legal advice the legal advisers of the United States and other NATO countries gave their governments as to the international legal implications of beginning the bombing!

Yugoslavia, in fact, charged that NATO was committing aggression and indeed genocide (a claim supported by Russia, China, and India) and on April 29, 1999, instituted proceedings in the ICJ against the ten NATO countries participating in the bombing campaign, accusing them of violating the Charter and international law and asking the Court for provisional interim relief ordering a halt to the bombing.¹¹ On June 2, 1999, the Court by a 12-4 vote (the judges of Chinese, Russian, and Sri Lankan nationality and the Yugoslav-appointed *ad hoc* judge dissenting) rejected Yugoslavia's request for an interim order, and also dismissed Yugoslavia's case against the United States and Spain on the grounds that there was no basis for showing consent by those countries to the Court's jurisdiction and that it consequently manifestly lacked jurisdiction over them.¹² However, the Court retained jurisdiction over the other

11. See I.C.J. Press Communique No. 99/17, April 29, 1999; see also Marlise Simons, *Yugoslavia Seeks a Legal Order to Halt the NATO Bombing*, N.Y. TIMES, May 12, 1999, at A14 ("The 10 NATO countries in their replies have all mocked Yugoslavia's claim, calling it cynical and absurd . . . [t]he United States said . . . that Belgrade's suit was 'a feat of hypocrisy and cynicism of Orwellian proportions.'").

12. See 38 I.L.M. 950 (July 1999); see also <<http://www.icj-cij.org/icjwww/idocket.htm>> (containing full text of the orders and opinions). Despite its rejection of the Yugoslav request for an interim order that NATO members cease their use of force against Yugoslavia, the Court, in each of its orders in the case, declared itself "profoundly concerned with the use of force in Yugoslavia" which it said "under the present circumstances . . . raises very serious issues of international law[.]" 38 I.L.M. at 955 (para. 17 of the Court's Order in the case against Belgium), at 1106 (para. 17 of the Court's Order in the case against the Netherlands), at 1042 (para. 16 of

eight NATO members and those cases continue. It is interesting to speculate how any Court order to halt the bombing could in any case have been effective, as the United States, which was doing most of the bombing, was not, as the Court had decided, subject to the Court's jurisdiction; how the Court, with its substantial membership of judges from NATO countries, might eventually rule in this case; and how Yugoslavia might expect to enforce any eventual Court order in its favor, presumably for money damages. In any event, the mere filing by Yugoslavia of the case, like Nicaragua's 1982 filing of its *Nicaragua* case against the United States,¹³ will likely further discourage the United States, and possibly also some of its NATO allies, from acceptance in advance of the compulsory jurisdiction of the Court under the "Optional Clause" of Article 36(2) of the Court's statute or "compromissory clauses" in treaties such as the Genocide Convention.

Although I have not as yet seen any formal statement of the United States and NATO's legal positions, they will presumably claim that NATO's actions in Kosovo were a legitimate exercise of the privilege of humanitarian intervention, which they may argue constitutes an exception to the Charter's prohibitions on the use of force. NATO lawyers might focus, perhaps, on the language of Article 2(4) of the Charter which bars "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations"¹⁴ — contending that humanitarian interventions are not inconsistent, but rather consistent, with the purposes of the U.N. Conceivably, they might also argue that, under a reasonable contemporary reading of Chapter VIII of the Charter, a regional organization (and they may claim NATO is one) may in particular exercise such a privilege of humanitarian intervention, at least absent express denial by the Security Council of such authorization. Arguably, the collective character of any such regional organization's

the Court's Order in the case against Canada), at 1064 (para. 16 of the Court's Order in the case against France), at 1080 (para. 16 of the Court's Order in the case against Germany), at 1093 (para. 16 of the Court's Order in the case against Italy), at 1132 (para. 16 of the Court's Order in the case against Portugal), at 1154 (para. 16 of the Court's Order in the case against Spain), at 1172 (para. 16 of the Court's Order in the case against the United Kingdom), and at 1193 (para. 16 of the Court's Order in the case against the United States). See generally I.C.J. Press Communiqué 99/33, June 2, 1999; Int'l L. In Brief, Vol. 2, No. 6, June 1999, at 1 (containing abstracts of the orders and opinions); Marlise Simons, *Judges at the Hague Refuse To Halt the NATO Bombing*, N.Y. TIMES, June 3, 1999, at A16.

13. See Richard B. Bilder, *The United States and the World Court in the Post-"Cold-War" Era*, 40 CATH. U. L. REV. 251 (1991).

14. U.N. Charter art. 2, para. 4.

decision to intervene in such cases will serve as a guarantee against any abuse of such an exceptional doctrine of regionally-authorized humanitarian intervention for what are really selfish or other-than-humanitarian purposes. NATO lawyers would presumably also note that the Security Council, at a meeting on March 26, 1999, defeated by a wide margin a Russian, Belarus, and India-proposed resolution which would have condemned NATO's bombing attacks as a "threat to international peace" and a "flagrant violation of the United Nations Charter."¹⁵ It is noteworthy that, during the Cuban Missile Crisis, the United States argued that the Security Council's silence in the face of the OAS-authorized quarantine was in effect "consent" to the OAS's action under Chapter VIII.¹⁶

The position that NATO's actions were justified as "humanitarian intervention" has received some scholarly support, perhaps most notably and strongly from Professor Michael Glennon in an article entitled "The New Interventionism" in the May/June issue of *Foreign Affairs*.¹⁷ In Professor Glennon's article, he argues that the Charter's provisions are simply inadequate to deal with present human rights and other challenges such as Kosovo and need not be respected; that NATO and other nations committed to international justice should feel free to adopt an "ad hoc, . . . opportunistic" approach; and that openly breaking the law is much less dangerous to international order than pretending to comply with it.¹⁸ He concludes: "the new interventionists should not be daunted by fears of destroying some lofty, imagined temple of law enshrined in the U.N. Charter's anti-interventionist proscriptions. . . . If power is used to do justice, law will follow."¹⁹ In an OpEd in the *Wall Street Journal* last June, Secretary of State Madeleine K. Albright argued along similar lines. She stated:

The crisis in Kosovo should cause a reexamination of the paradigms of the past. As the world has changed,

15. U.N. SCOR, 54th Sess., 3989th mtg. at 3, 5, U.N. Doc. S/PV.3989. The Security Council vote was three members for the resolution (Russia, China, Namibia) and twelve members against the resolution (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, and United States). See *id.* at 6. See also Judith Miller, *Russia's Move To End Strikes Loses; Margin is a Surprise*, N.Y. TIMES, March 27, 1999, at A7.

16. See Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 522 (1963).

17. Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFFAIRS at 2 (May/June 1999).

18. *Id.* at 6.

19. *Id.* at 7.

so have the roles of key institutions such as the EU, NATO and the United Nations. And so have American interests. In today's world of deadly and mobile dangers, gross violations of human rights are everyone's business. As for the use of force, Kosovo tells us only what we should have already known. Yes, in confronting evil and otherwise protecting our interests, force is sometimes required. No, as before Kosovo, it is not wise to formulate assumptions based on any single experience about exactly when and how force should be applied. In coping with future crisis, the accumulated wisdom of the past will have to be weighed against factors unique to that place and time. This is why foreign policy is more art than science, and how chief executives earn their pay.²⁰

Clearly, this "new interventionism" has the appeal of permitting powerful countries, such as the United States, considerable elbowroom!

I have a great deal of trouble with this "new interventionism." The so-called doctrine of humanitarian intervention has, of course, been around for a long time — at least since the time of Hugo Grotius some 350 years ago. The argument for the doctrine has always been, in Ronald Dworkin's evocative phrase, "rights . . . are trumps"²¹ — that when people in other nations are subjected to intolerable atrocities, decent countries cannot just "pass by" but are morally obliged to do what they can to help. More broadly, the position is that, in any decent society, claims of moral necessity must prevail over claims of law and expediency.

This is certainly an attractive argument. But the problem is, as always, who is to be the judge of the "moral necessity" and of what it requires? Many believe that, even if there may be some cases in which such a claim of moral necessity is justified, this is not the way the doctrine has been, or most likely will be, used. Instead, historically, claims of humanitarian intervention have typically served simply as a pretext for what are, in fact, selfish assertions of national interest, power, and greed — witness Nazi Germany's invocation of the supposed Czech abuse of Sudetan Germans as an

20. Madeleine K. Albright, *To Win the Peace . . .*, WALL ST. J., June 14, 1999, at A20.

21. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY*, at xi (Gerald Duckworth & Co. Ltd. 1977) ("Individual rights are political trumps held by individuals.")

excuse for occupying the Sudetan land and ultimately Czechoslovakia itself.

I believe I am correct in saying that most scholars have rejected the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in the UN Charter. For example, in his well-regarded 1985 Hague lectures, Professor Oscar Schachter concluded:

[G]overnments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities in their own country The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in the light of past abuses by powerful States. States strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest. Most governments are acutely sensitive to this danger and they show no disposition to open up Article 2(4) to a broad exception for humanitarian intervention by means of armed force.²²

22. Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 9, 143-44 (1982-V); see also Professor Schachter's further discussion of these issues in the revised version of his Hague lectures, published as OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 117-26 (Martinus Nijhoff Publ. 1991), where he notes:

Even in the absence of such prior approval [by the Security Council], a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.

Id. at 126.

It is interesting that, in its 1986 decision on the merits in the Nicaragua case, the International Court of Justice said, in dicta:

The Court also notes that Nicaragua is accused by the 1985 findings of the United States Congress of violating human rights....

...[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the

And, very recently, Professor Sean Murphy, in a scholarly and exhaustive 1996 study of humanitarian intervention, carefully reviewed the language of the Charter, state practice since the enactment of the Charter, and the moral and philosophical underpinnings of the so-called doctrine of unilateral humanitarian intervention. He found within them virtually nothing to support the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in Article 2(4) of the Charter.²³

Indeed, despite its surface moral appeal, the implications of a Kosovo-like doctrine of "new interventionism" are far-reaching and disturbing. For example, as has often been pointed out, if NATO can decide on its own that Yugoslavia's treatment of its Kosovar Albanians warrants NATO's bombing, occupation, and *de facto* severance of Kosovo from Yugoslavia, why can not every powerful nation or regional group, on the "mirror image" principle, do the

destruction of oil installations, or again with the training, arming and equipping of the Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

Nicaragua, 1986 I.C.J. 14, 134-35 (June 27). See also Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L. COMP. L. Q. 321, 332 (1989) (arguing that this language suggests that the Court, at least under the facts of the Nicaragua case, rejected the so-called doctrine of humanitarian intervention); SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 129 (U. Pa. Press 1996).

23. See Murphy, *supra* note 22, at 366, 387 (especially for summaries of his views) (including an extensive bibliography to the relevant literature at 399-418); see also Neil A. Lewis, *A Word Bolsters Case For Allied Intervention*, N.Y. TIMES, April 9, 1999, at 7 (discussing a news analysis of the international legal "rationale" for NATO's intervention, which, while indicating the continuing debate and arguments that intervention to halt "genocide" could be justified, noted that "a broad spectrum of legal scholars agree that there is currently no simple, straightforward or obvious legal basis for the bombing of Serbian targets to be found in treaties, the United Nation Charter or binding resolutions or any other written international legal code."); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L. L. 1 (No. 1, 1999); 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 (No. 1, 1999). Both Professor Simma and Professor Cassese, while raising questions as to the "legality" of NATO's bombing without U.N. authorization, seem to view it somewhat less critically than I do. Thus, Professor Simma views Kosovo as a "hard case," in which there may have been no choice but to act outside the law, but which should in any event be regarded as exceptional and not as a precedent. Professor Cassese disagrees with Professor Simma that NATO's breach of the Charter may be regarded as negligible and countenanced as exceptional, but suggests it may be taken as evidence of an emerging doctrine in international law allowing "the use of forcible countermeasures to impede a state from committing large-scale atrocities in its own territory, in circumstances where the Security Council is incapable of responding adequately to the crisis." *Id.* at 1 (citing abstract of Comment).

same? Would the United States and NATO concede the Arab League's legal right to decide for itself that Israel's treatment of its Palestinian minority warranted the League's bombing of Israel? Can China decide that Indonesia's mistreatment of ethnic Chinese allows it to bomb Djakarta? Can Russia bomb Istanbul to make the Turks stop their effort to suppress the Kurdish separatist movement — hard to distinguish, incidentally, from Yugoslavia's efforts to suppress Kosovar Albanian separatism? And so on! Do we really want to say that the Charter and international law permit that kind of world? And if NATO flouts and bypasses the Charter's basic and most significant principles, how can it hope to later invoke those principles against other states? Or, if the United States and NATO do claim those Charter principles still apply, will there be, as cynics claim, one Charter and one international law for the weak and one very different and less demanding one for the strong?

Moreover, skeptics question whether Kosovo really does represent a sea-change in either the United States' or NATO's commitment to international human rights. As previously indicated, they suggest other, less altruistic, motives for the bombing, such as NATO's need to save face, maintain its credibility, and justify its continued existence. Moreover, they point to what they regard as the United States' previous uses of humanitarian justifications as simply pretexts for what, in retrospect, seem clearly politically-motivated interventions in Vietnam, Grenada, Haiti, and elsewhere; to what they consider the United States' own sorry record of supporting regimes and groups which violated human rights in Vietnam, Guatemala, El Salvador, Nicaragua, Indonesia and many other places; and particularly to the United States' and NATO's failure to take action to halt equally, or even more tragic and massive, violations of human rights in Cambodia, Uganda, the Sudan, Angola, Sierra Leone, Liberia, Tibet and, most recently, East Timor — and particularly to the Rwanda genocide where up to 500,000 - 800,000 people were slaughtered in eight weeks while the United States, Belgium, France, and other NATO countries simply stood by and watched.²⁴

Of course, the fact that the United States and NATO failed to act in previous humanitarian disasters, or that it will not or can not act

24. See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (St. Martin's Press, Inc. 1999); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (Columbia Univ. Press 1997); Jose E. Alvarez, *Crimes of States/Crimes of Hate, Lessons from Rwanda*, 24 *YALE J. INTL. L.* 365 (1999).

in *all* humanitarian crises, does not mean that they should not act now, at least in those situations where intervention might be effective in preventing genocide or other crimes against humanity. Certainly one can learn from past mistakes, change one's behavior for the better and do good where one reasonably can hope to accomplish something, without the need to act even in situations where action would be useless or foolish. But this history does raise legitimate questions as to whether Professor Glennon's "new interventionism" would in fact reflect a more moral world order, rather than simply serving as an "open á sesame" or excuse for more powerful countries to intervene and bully weaker countries solely in their own interests, under the cloak of humanitarianism and human rights!

And in my opinion, this "new interventionism" poses even broader and more serious dangers. The United Nations and international law form the essential underpinning and infrastructure for existing efforts, standards, and institutions designed to promote and protect international human rights. Any supposed doctrine which, in the name of human rights, weakens the U.N. System cannot but pose a most serious threat to the long-term cause of human rights.

Does rejecting the "new interventionism" mean that the international community must, or should, stand helplessly by in the face of genocide or other massive human rights violations? Certainly not! Everyone agrees that from now on we *must* do something to try to cope with humanitarian disasters. It is now clear that the Security Council, acting under its Chapter VII authority — especially as that has been creatively interpreted and applied since the Gulf War, and particularly in Haiti — can respond with the full authority of the U.N.'s collective weight to such crises;²⁵ Article 2(7) of the Charter does not prevent the Security Council from intervening in matters within the domestic jurisdiction of a state when applying enforcement measures under Chapter VII. Of course, any such response would be subject to the veto or failure to obtain majority support in the Council. However, in the event of Security Council veto, authorization for at least voluntary collective action could be sought from the General Assembly under the "Uniting for Peace" resolution.²⁶

25. See generally MURPHY, *supra* note 22.

26. See G.A. Res. 377(V)A, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

It is true that the "veto" in the Security Council has, with some justice, been long and widely criticized. Indeed, it might be worth trying to seek understandings among the Permanent Members (the United States, Russia, China, the United Kingdom, and France) that none of them should normally exercise their veto to block the U.N. from taking urgent and appropriate action in dealing with genuine humanitarian disasters. For example, the Permanent Five might agree that a veto is inappropriate in situations where it is evident that there is a consistent and widespread pattern of gross, massive, and reliably attested violations of human rights,²⁷ such as genocide, arguably demanding immediate U.N. action, and there is also widespread support among Permanent and other Members favoring such action. In such a case, a single dissenting Permanent Member should normally choose to register its disapproval through an "abstention" (which would not prevent the Security Council from adopting an authorizing resolution) rather than by a negative vote constituting a veto.

But, more broadly, we should consider whether there may not be considerable wisdom in the Charter scheme, which, in essence, is intended to constrain the use of force by any nation or group of nations in the absence of a broad consensus and against the will of a major power or powers. As indicated, in the case of Kosovo, NATO's bombing of Yugoslavia was strongly opposed by a number of U.N. Members including Russia, China, and India, which in themselves comprise over one-third of the world's peoples. Is not there much to be said for the idea that, except in self-defense, the decision whether and how to respond to serious humanitarian crises should be made, not by any single nation or group, but rather by a collective and broadly international-representative body? Is not it rather presumptuous for the United States and NATO, particularly in view of their own somewhat checkered record, to insist that only they have sufficient moral impulses and judgment to properly assess and respond to such humanitarian situations?

In a 1997 *Carnegie Commission Report on Preventing Deadly Conflict*, an eminent panel was asked to address the question "as to when, where, and how individual nations, and global and regional organizations, should be willing to apply forceful measures to curb

27. This language draws on U.N. Economic and Social Council Resolution 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970) (Resolution 1503 titled "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms," adopted May 27, 1970).

incipient violence and stop potentially much greater destruction of life and property."²⁸ The Commission concluded that the first broad principle that should govern any such decisions was: "First, any threat or use of force must be governed by universally accepted principles, as the U.N. Charter requires. Decisions to use force must not be arbitrary, or operate as the coercive and selectively used weapon of the strong against the weak."²⁹

And, in his September 20, 1999 annual report to the General Assembly,³⁰ U.N. Secretary General Kofi Annan, while emphasizing that "massive and systematic violations of human rights — wherever they may take place — should not be allowed to stand" and calling for "a new commitment to intervention" (but under U.N. auspices),³¹ said that enforcement action without United Nations approval represents a threat to the "very core of the international security system founded on the Charter"³² and added ". . . if the primacy of the Security Council with respect to the maintenance of international peace and security is rejected, the very foundations of international law as represented by the Charter will be brought into question."³³ Much earlier, even before Kosovo, in an address on June 26, 1998 at Ditchley Park, United Kingdom, the Secretary General had asked:

Can we really afford to let each State be the judge of its own right, or duty, to intervene in another State's internal conflict? If we do, will we not be forced to legitimize Hitler's championship of the Sudeten Germans, or Soviet intervention in Afghanistan? Most of us would prefer, I think — especially now that the

28. Preventing Deadly Conflict, Final Report with Executive Summary, Carnegie Commission on Preventing Deadly Conflict (Carnegie Corp. NY 1997) <<http://www.ccpdc.org/pubs/rept97/toc.htm>> (quoted material from the Executive Summary is on page 9 of the website).

29. *Id.* at 9.

30. *Secretary-General Presents His Annual Report to General Assembly*, U.N. Press Release No. SG/SM/7136, GA/9596 (Sept. 20, 1999).

31. *Id.* See also Barbara Crossette, *U.N. Chief Wants Faster Action To Avoid Slaughter in Civil Wars*, N.Y. TIMES, Sept. 21, 1999, at A1; Nicole Winfield, *Annan Urges Humanitarian Intervention, With U.N. OK*, CHATTANOOGA TIMES AND FREE PRESS, Sept. 21, 1999, at A2 ("Secretary-General Kofi Annan urged world leaders at the General Assembly's annual debate Monday to be more ready to intervene in strife-torn regions to protect civilians — provided the United Nations is involved in authorizing the intervention."). See generally David Rieff, *Wars Without End?*, N.Y. TIMES, Sept. 23, 1999, at A29; Christopher S. Wren, *Clinton Urges U.N. to Intervene More*, N.Y. TIMES, Sept. 22, 1999, at A18; *Kofi Annan's Critique*, Editorial, N.Y. TIMES, Sept. 22, 1999, at A26.

32. See *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 54th Sess., Supp. No. 1, at para. 66, U.N. Doc. A/54/1 (1999).

33. *Id.* at para. 69.

cold war is over — to see such decisions taken collectively, by an international institution whose authority is generally respected. And surely the only institution competent to assume that role is the Security Council of the United Nations.³⁴

I share the Secretary General's concerns and believe that NATO's decision to bomb Yugoslavia, without Security Council or General Assembly approval, seriously challenged both the Charter and international law.

2. *Kosovo and the Laws of War*

Apart from the *jus ad bello* of NATO's bombing of Kosovo — its apparent violation of the Charter and international law rules which govern resort to the use of force — Kosovo also raises questions about the way NATO conducted the bombing — the *jus in bello* of its humanitarian intervention. Of course, the two are closely related.

Presumably a humanitarian intervention, even if legally and morally justified, should be conducted in a humanitarian way and solely to achieve its humanitarian purpose. But, as the Kosovo bombing campaign lengthened, many people were increasingly troubled in this respect. Thus, by June 6, 1999, when the bombing stopped, NATO had:

- continuously bombed Yugoslavia and Kosovo for 78 days — more than 11 weeks — using some 1100 primarily United

34. *Secretary-General Reflects On 'Intervention' In Thirty-Fifth Annual Ditchley Foundation Lecture*, U.N. Press Release No. SG/SM/6613, at 7 (June 26, 1998); *The Quotable Kofi Annan* (visited Nov. 30, 1999) <<http://www.un.org/Docs/SG/quotable/peace.htm>>. See also Kofi A. Annan, *Two Concepts of Sovereignty* (visited Nov. 30, 1999) <<http://www.un.org/Overview/SG/kaecon.htm>> (from THE ECONOMIST, Sept. 18, 1999), where the Secretary General wrote:

To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might equally ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the second world war, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances? Nothing in the U.N. Charter precludes a recognition that there are rights beyond borders. What the Charter does say is that 'armed force shall not be used, save in the common interest.' But what is that common interest? Who shall define it? Who shall defend it? Under whose authority? And with what means of intervention?

States aircraft, which had carried out over 35,000 sorties at a cost to NATO of over \$4 billion;

- struck Yugoslavia with over 23,000 bombs and missiles, including large numbers of cluster bombs, many of which are still unexploded and currently causing civilian deaths and injuries;
- according to NATO, killed over 5000 Yugoslav military and wounded 10,000 more; and, according to Yugoslavia, killed over 1500 civilians and wounded many more;
- according to Yugoslavia, caused some \$100 billion in damage to the Yugoslav infrastructure and economy, including the widespread destruction of factories, refineries, bridges, roads, railway lines, and radio and television stations.³⁵

NATO repeatedly claimed that the war was solely against Milosevic and Yugoslavia's "evil leadership," rather than its people, and that the bombing was directed solely against military targets. To its credit, NATO appears to have tried to avoid civilian casualties. But, perhaps due particularly to NATO's decision to avoid the risk of NATO military casualties by resorting only to very high-level bombing and remote missile strikes, there were a growing number of instances of what NATO called "regrettable collateral damage" to civilians, culminating in the bombing of the Chinese Embassy in Belgrade. And, as NATO's generals became increasingly frustrated and embarrassed by the refusal of Yugoslavia to capitulate, a deepening rift reportedly appeared between NATO's generals, who wished to be fully "unleashed to do the job," and NATO's politicians, who were clearly afraid that more massive and indiscriminate attacks might result in a loss of public support, particularly in Europe. In any event, NATO appeared to turn increasingly to the bombing of targets which seemed of primarily civilian rather than military significance, such as factories producing primarily civilian

35. These figures are drawn from the following various articles: Michael Hirsh, *The Road to Peace*, NEWSWEEK, June 21, 1999, at 44; Celestine Bohlen, *Yeltsin Foes Urge an End To Campaign In Chechnya*, N.Y. TIMES, Sept. 29, 1999, at A10; David S. Cloud, *U.S., Britain Press Allies For More Kosovo Troops*, WALL ST. J., May 25, 1999, at A23; Michael Gordon, *Nato Says Serbs, Fearing Land and War, Dig In On Border*, N.Y. TIMES, May 19, 1999, at A1, A10; Steven Lee Myers, *Last Serbian Troops Pull Out of Kosovo, NATO Is Lifting Threat of New Air Attacks*, N.Y. TIMES, June 21, 1999, at A1, A8; David Rohde, *Serbs Open the Border and Expel Kosovars to Macedonia*, N.Y. TIMES, May 19, 1999, at A10; Serge Schmemmann, *From President, Victory Speech And a Warning*, N.Y. TIMES, June 11, 1999, at A15; Craig R. Whitney, *Bombing Ends as Serbs Begin Pullout, U.N. Council Acts, NATO Troops Now Plan to Begin Moving Into Kosovo Tomorrow*, N.Y. TIMES, June 11, 1999, at A1, A12.

goods, bridges, television and radio stations, the electric grid, and civilian buses. Presumably, it was hoped that these broader attacks would induce a popular outcry that Milosevic and his government yield to NATO's demands.

Interestingly, arguments emerged that, because Kosovo was a "humanitarian war" against evil, extreme measures were particularly justified. For example, a Pentagon official, commenting on the targeting of electrical transformers, said: "We are aware this will have an impact on civilians, but we are in the midst of a military operation against Slobodan Milosevic. . . . Compare that to the consequences suffered by the civilian population of Kosovo who have been driven from their homes . . ."36 NATO's claim to the moral high ground was bolstered by a growing "demonization" of Milosevic by NATO and the media. For example, Newsweek's April 19, 1999 cover showed Milosevic's face surrounded by raging hell fires and labeled "The Face of Evil,"37 and former British Prime Minister Margaret Thatcher called him the "butcher of Belgrade."38 Surprisingly for a campaign supposedly against ethnic hatred, this "demonization" gradually embraced the Serb people as a whole. New York Times Columnist Anthony Lewis wrote: "The Serbian people will suffer, but so they must for the tyranny they have repeatedly endorsed."39 In an OpEd in early May, Mrs. Thatcher wrote: "There are, in the end, no humanitarian wars. . . . it is the men of evil, not our troops or pilots, who bear the guilt."40 And Michael Ignatieff, a noted author on human rights, concluded a New York Review article by saying: "There are times, and Kosovo is one, when we need to be as ruthless and determined in our choice of means as we have been high-minded in our choice of ends."41

36. Elizabeth Becker, *NATO Calls Transformers A Key Target In War Plan*, N.Y. TIMES, May 25, 1999, at A16; see also *A Four Star Welcome*, N.Y. TIMES, June 25, 1999, at A15 (reporting, in a photo caption, that General Wesley Clark, the NATO commander, meeting with Albanian residents of Pristina, "told the jubilant Kosovars that he believes the horrors being uncovered provide clear justification for the alliance's 78 days of punishing air raids").

37. NEWSWEEK, April 19, 1999.

38. Margaret Thatcher, *OpEd, The West Must Answer Evil With Strength*, WALL ST. J., May 6, 1999, at A26; see also Warren Hoge, *Blair Rallies Public Support After China Embassy Strike*, N.Y. TIMES, May 10, 1999, at A9 (noting that Prime Minister Tony Blair reportedly used the term "butchers of Belgrade" in a front page article in the Sunday Mirror); Susan Sontag, *Why Are We In Kosovo?*, N.Y. TIMES MAGAZINE, May 2, 1999, at 52, 55 ("There is radical evil in the world, which is why there are just wars.")

39. Anthony Lewis, *Proof of the Pudding*, OpEd, N.Y. TIMES, June 5, 1999, at A15; see also Anthony Lewis, *The Question Of Evil*, OpEd, N.Y. TIMES, June 22, 1999, at A27.

40. Thatcher, *supra* note 38, at A26.

41. Michael Ignatieff, *Human Rights: The Midlife Crisis*, THE NEW YORK REVIEW OF BOOKS, May 20, 1999, at 58, 62.

Clearly, Kosovo — and any humanitarian intervention — poses special challenges and dilemmas for the laws of war. For example, with respect to the Kosovo intervention:

- If NATO's war was really only against Milosevic and his policies, what justified its escalation of the bombing to the basic infrastructures of Yugoslav society? If the purpose of the escalation was to punish the population as a way of pressuring them to overthrow Milosevic or force him to yield, was holding the population hostage in this way consistent with the intervention's ostensible humanitarian purposes? More broadly, if NATO's intervention on balance caused more suffering and destruction to all concerned — the Kosovars, Serbs and surrounding countries — than it prevented, did it thereby lose its moral justification? As President Carter said in a New York Times OpEd, "Even for the world's only superpower, the ends don't always justify the means."⁴²
- As many critics have suggested, if NATO's purpose was really to stop the atrocities and "ethnic cleansing" against the Kosovars, how could it reasonably believe that its high-level bombing and long-range missile attacks could accomplish that? Indeed, wasn't it completely predictable that the bombing, against which the Serb soldiers and civilians were virtually helpless, would not only fail to protect the Kosovars, but would also further enrage and increase atrocities by the Serbs against the Kosovars, whom they would certainly blame for encouraging and being the intended beneficiaries of the bombing? Interestingly, the New York Times reported the following comment by Special Envoy Holbrooke after his failed attempt on March 23, 1999, to get Milosevic to accept NATO's ultimatum or face the bombing, which began the next day:

On his way out of the country, Mr. Holbrooke was asked if he feared that NATO's air attacks would push the Serbs into ever more vicious 'ethnic cleansing.'

'That is our greatest fear by far, by far,' he replied.

42. Jimmy Carter, *Have We Forgotten The Path To Peace?*, OpEd, N.Y. TIMES, May 27, 1999, at A33.

Asked what NATO, operating only from the air, could do to prevent a catastrophe, Mr. Holbrooke went silent and shrugged.⁴³

If the bombing was not only unlikely to accomplish its ostensible purpose, but likely instead to make matters worse, did it thereby lose its humanitarian justification?

- Did NATO's high-level bombing strategy, designed to minimize the risk of any NATO casualties, predictably and significantly increase the likelihood of "collateral damage" to civilians and nonmilitary targets? And what justified NATO's widespread use of cluster bombs and depleted uranium weapons, with their obvious potential for causing harm to civilians even after the cessation of hostilities? Is there a moral and perhaps legal issue in adopting such tactics, particularly in the context of a purportedly humanitarian intervention?⁴⁴
- NATO appears to have taken the position that it was permissible in such a humanitarian intervention to bomb anything that might conceivably have been of even marginal relevance to the Serb forces in Kosovo — including such otherwise questionable targets as Yugoslavia's electric grid; television and radio stations; factories making primarily civilian goods and employing large numbers of civilians workers; roads, railways and bridges quite remote from Kosovo; buses traveling on the roads; and so forth. Similarly, NATO also regarded the homes and business enterprises owned by Milosevic and his family, as well as civilian enterprises owned by alleged supporters of the Milosevic government, as legitimate targets, apparently on the theory that anything was permissible that might pressure the Yugoslav leadership to give up. If this is so, is there really

43. Blaine Harden, *A Long Struggle That Led Serb Leader to Back Down*, N.Y. TIMES, June 6, 1999, at A16; see also *A Bungled War*, THE ECONOMIST, May 8, 1999, at 11 ("The humanitarian catastrophe [the West's war against Serbia] was designed to avert has merely been intensified."); James Dao, *Back From Belgrade, Congressman Says NATO Is Worsening Refugee Crisis*, N.Y. TIMES, April 23, 1999, at B5 (reporting that U.S. Representative Saxton, an 8-term Republican Congressman from New Jersey said: "I know when the ethnic cleansing started, I know when the refugees started to move It was when we started bombing").

44. It is interesting - and of concern - that Russian military leaders reportedly explained that they modeled their bombing of Chechnya on NATO's air campaign against Yugoslavia. See Michael R. Gordon, *Imitating NATO: A Script Is Adapted for Chechnya*, N.Y. TIMES, Sept. 28, 1999, at A3.

much left that is not now arguably a permissible target in a humanitarian intervention?

- Finally, was the enormous disparity in power between NATO and Yugoslavia relevant? By my very rough calculations, NATO had approximately 40 times the Yugoslavian population, 400 times Yugoslavia's industrial capacity and wealth, and an incalculable superiority over Yugoslavia in military forces and hi-tech weapons.⁴⁵ As often noted, this tremendous disparity allowed NATO to kill a great many people and virtually destroy much of the key infrastructure of Yugoslavia without incurring a single combat death. The character of NATO's war was well-caught in a news article which described an American B-2 pilot taking off in the morning from an Air Force Base in Missouri, dropping tons of bombs on Yugoslavia, and returning at night to his home to mow the grass and order out for pizza with his family!⁴⁶ Certainly there seems little in the laws of war — in contrast to concepts of chivalry — which requires a "fair fight" or proportionate casualties on all sides. But it is understandable why in the eyes of much of the nonwestern world Kosovo was not really a "war" at all, but simply the United States' and NATO's bullying of a small and much weaker country into submission.⁴⁷

45. I have based my rough estimate on statistics on populations and gross national products in the *WORLD ALMANAC AND BOOK OF FACTS 1999*, at 856, 860 (World Almanac Books 1998), which lists Yugoslavia's population as 11,206,039 and its 1995 gross domestic product ("GDP") as \$20.6 billion; the U.S. population alone is listed as 270,311,758 million and its 1997 GDP as \$8.11 trillion. The NATO countries represent about one-half the productive capacity of the planet, and Yugoslavia's GDP is about one-fifteenth the size of the U.S. defense budget. See Eliot Cohen, *This Victory Is Muddled at Best . . .*, WALL ST. J., June 7, 1999, at A22.

46. See Thomas E. Ricks, *For These B-2 Pilots, Bombs Away Means Really Far, Far Away*, WALL ST. J., April 19, 1999, at A1 ("When he got home, recalls this blond son of the Midwest, 'my wife kissed me and she said, 'You need to mow the lawn. I'll go get the kids.'" After he did his chores, 'we ordered out from Pizza Hut . . .").

47. See Steven Erlanger, *Beneath the Falling Bombs*, N.Y. TIMES MAGAZINE, June 13, 1999, at 86, in which, reflecting on his role as New York Times Bureau Chief in the Balkans, he writes:

Here I feel some shame. Looked at from beneath the bombs, NATO's conduct can seem cowardly. The Serbs knew they were powerless to prevent NATO from doing what it pleased, but they have been insulted by the invisibility of the enemy. They sense that it is a way of pretending that their lives are expendable, the "collateral damage" of NATO's desperate effort to retain credibility in a mismanaged war.

Again, the writer of a recent letter to the Wall Street Journal noted the "moral ambiguity" of NATO's air strategy and of its "self-congratulation" at having no combat casualties:

We suffered no casualties because, except to an almost insignificant extent, we did not engage enemy forces. Rather, we heavily damaged infrastructure essential both to the military and to the civilian

More broadly, there is a risk that NATO's hi-tech bombing campaign against Yugoslavia may lead poorer nonwestern nations to ask whether the existing laws of war and current arms control efforts are not simply another tool of western hegemony — designed to permit the use of the kinds of expensive hi-tech weapons that only the very rich industrialized nations can afford, while proscribing the kinds of low-cost weapons that are all that poorer countries can afford — for example, land mines, chemical and bacteriological weapons, or even crude and "dirty" nuclear devices. Indeed, some fear that Kosovo may spur the proliferation of such weapons or unorthodox methods of warfare as nonwestern countries desperately seek ways of deterring or countering possible similar United States or western interventions into their internal ethnic struggles or affairs.⁴⁸

Kosovo suggests that, if we are to legitimate, or at least tolerate, the "new interventionism," we may have to rethink the ways our laws of war apply in such situations. Perhaps there is something to suggestions that, if the military had been "unleashed" to launch an even more massive and overwhelming assault, Yugoslavia might have yielded more quickly and fewer lives would have been lost. But many in my generation are haunted by the remark attributed to an American infantry officer during the Vietnam war: "It was

economy, causing immense suffering and death to women, children and other noncombatants—both Serbs and Kosovars—who are defenseless and wholly powerless to influence the depredations taking place in Kosovo.

Avoiding military casualties by inflicting death and suffering on innocent civilians can only weakly be argued as the better of terrible alternatives, considering that it totally failed to halt the dreadful ethnic cleansing in Kosovo.

C.H. McCrea, Sr., *Casualties Avoided By Killing Innocents*, WALL ST. J., June 17, 1999, at A27 (letter to the Editor); see also R.W. Apple, Jr., *On Killing From Beyond Harm's Way*, N.Y. TIMES, April 18, 1999, at wk 4.

48. See John Pomfret, *China Ponders New Rules of 'Unrestricted War*, WASH. POST, Aug. 8, 1999, at A25, reporting on a book by two Chinese Colonels proposing the use of unorthodox weapons in warfare:

The book is an important expression of China's feelings of powerlessness when confronted by U.S. might. . . .

'War has rules, but those rules are set by the West', continued [the Chinese Colonel's son]. 'But if you use those rules, then weak countries have no chance.'

To military men such as Qiao and Wang, there is a direct connection between Kosovo and Taiwan and Tibet. 'If today you impose your value systems on a European country, tomorrow you can do the same to Taiwan or Tibet,' Wang said.

necessary to destroy the village in order to save it."⁴⁹ Somehow, it is hard to accept the idea that "bombing for peace and human rights" makes moral or legal sense!

3. *Some Other Issues*

Time does not permit full discussion of the many other interesting issues and concerns raised by the Kosovo intervention, but let me briefly mention a few.⁵⁰

First, Kosovo raises further questions about the role of international criminal courts in the context of any "new interventionism." As you know, on May 27, 1999, the International Criminal Tribunal for Former Yugoslavia (ICTY), following strong United States urging, indicted Milosevic and his principal civilian and military aides for war crimes.⁵¹ And the Tribunal, with a very large staff and extensive United States and NATO assistance, has now embarked on a massive effort to investigate and prosecute war crimes and other atrocities committed in Kosovo.⁵²

The case for effective international criminal courts, particularly a global court such as the International Criminal Court which will be established under the recently concluded Rome Statute, is persuasive and appealing. Moreover, the still relatively few decisions the Yugoslav and Rwanda Tribunals have thus far handed down have been justly praised as significant steps forward for human rights, and there can be no doubt that widespread atrocities were committed in Kosovo. But concerns about the impartiality and usefulness of such courts remain and may be heightened by current events in Kosovo. For example:

49. Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WISC. L. REV. 171, 202 (1969), reprinted in, 2 REVUE DES DROITS DE L'HOMME 557, 590 (1969).

50. I have discussed these other issues at more length in my European University Institute lectures on *Rethinking International Human Rights: What Have We Learned, Where Are We Going?*, cited in the asterisked footnote at the beginning of this article.

51. See *Prosecutor v. Milosevic*, No. IT-99-37, Indictment and Decision on Review of Indictment and Application for Consequential Orders (May 24, 1999) <<http://www.un.org/icty/special/index.html>>; see also *Tribunal indicts Milosevic and four other leaders*, INT'L L. IN BRIEF, Vol. 2, No. 6, June 1999, at 14. See generally Roger Cohen, *Warrants Served For Serbs' Leader and 4 Assistants*, N.Y. TIMES, May 28, 1999, at A1, A10; Steven Erlanger, *Serbs Dismiss Indictment as Just Another Enemy Tactic*, N.Y. TIMES, May 28, 1999, at A13; *The Charges: 'An Unknown Number of Kosovo Albanians Have Been Killed'*, N.Y. TIMES, May 28, 1999, at A12, A13.

52. See David E. Rosenbaum, *FBI Plans To Begin Its Inquiry At Once*, N.Y. TIMES, June 12, 1999, at A8; Marlise Simons, *Investigators From Many Nations to Begin Search for War Crimes*, N.Y. TIMES, June 15, 1999, at A16; Charles Trueheart, *War Crimes Court Set to Start Kosovo Probe; Investigators Hope to Move in Quickly*, WASH. POST, June 10, 1999, at A22.

- Will the ICTY's indictments and judgments with regard to Kosovo be widely accepted as impartial rather than simply as "victor's justice"? Yugoslavia — with some support from Russia and China — charged that the indictments of Milosevic and other Yugoslav leaders were politically-motivated responses to United States pressures; that the largely western-promoted, financed and manned tribunal is now simply a tool of NATO; and that it will therefore hardly be surprising if the Court "finds" Serb atrocities which appear to retroactively justify NATO's intervention and bombing.⁵³ Certainly, there seems little doubt that the indictment of Milosevic was sought by, and a political bonanza for, the United States and NATO (he is now regularly referred to as "the indicted war criminal Milosevic"), although there is no evidence the Court was in fact influenced by United States pressure. Moreover, charges of bias have been made since the Court's indictments and prosecutions thus far have been predominantly of Serbs; few expect that the Tribunal will indict NATO leaders or military personnel, and we will have to see to what extent it is prepared to indict Kosovars or KLA leaders or personnel.
- While the United States has strongly supported the ICTY, the United States has strongly opposed the proposed Rome statute which would establish a global international criminal court;⁵⁴ the United States has made it clear that we will never participate in such a court unless its statute is changed to ensure that, in effect, no American is ever tried by the Court, absent United States consent.⁵⁵ Indeed, United States Senate Foreign Relations Committee Chairman Jesse Helms has

53. See Steven Erlanger, *Word of Indictment Stuns Serbs and Blights Hopes*, N.Y. TIMES, May 27, 1999, at A12 (reporting that the indictment would confirm the suspicions of most Serbs that the tribunal is prejudiced against them and not an independent court; Yugoslavia's delegate to the U.N. told the BBC: "It is a politically motivated decision that renders the tribunal an accomplice to NATO as an aggressor").

54. See Neil King, Jr., *Nations Create War-Crimes Court Despite U.S. Protest*, WALL ST. J., July 20, 1998, at A16; Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

55. See Statement of Hon. David J. Scheffer, *Is A U.N. International Criminal Court in the U.S. National Interest?: Hearing Before The Subcommittee On International Operations Of The Committee on Foreign Relations, U.S. Senate, 105th Cong., 2nd Sess. at 10 (July 23, 1998)*; see also Kenneth Roth, *The Court the U.S. Doesn't Want*, THE NEW YORK REVIEW OF BOOKS, Nov. 19, 1998, at 45.

published an OpEd on the ICC entitled "Slay This Monster"⁵⁶ and said that the Rome Treaty is "dead on arrival."⁵⁷ Can an international criminal court be a great advance for human rights only if it tries Serbs or people the United States does not like, but not if it tries Americans or people the United States likes?

- Are we sure that prosecuting and punishing supposed "evildoers," such as Milosevic, in international criminal courts is really the best way to deal with complex ethnic conflicts like Kosovo, and to promote peace, justice and human rights?⁵⁸ Certainly, western nongovernmental organizations (NGO's) have been enthusiastic advocates of criminal accountability and prosecution. But such courts raise many questions. For example, the judges and staff of international tribunals, like some national courts, may be politically appointed, incompetent, or subject to political pressure to fulfill their appointers' expectations in order to maintain their positions. Prosecutions will necessarily be selective, or even random, as many of the worst offenders may be unreachable. Most troubling, criminal prosecutions may institutionalize revenge or be used by accusers as a weapon against personal enemies or persons whose property or job one covets. Indeed, the threat of widespread ICTY criminal prosecutions — what the Serbs fear may be a "witch hunt" — may have helped spur the massive "reverse ethnic cleansing" of most Serbs from Kosovo. Nor is it clear that the threat of criminal prosecutions is likely to effectively deter other tyrants from committing atrocities; the lesson may be rather, make sure you are on the winning side, or at least have powerful friends!

56. Jesse Helms, *Slay This Monster*, FINANCIAL TIMES (London) (U.S.A. Ed.), July 30, 1998, at 12.

57. Barbara Crossette, *Helms Vows to Make War On U.N. Court*, N.Y. TIMES, March 27, 1998, at A9.

58. There is extensive recent literature on this issue. See, e.g., TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, (Neil J. Krutz ed., United States Institute of Peace, Washington, D.C. 1995); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (Beacon Press 1998); ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (Times Books, 1998); STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (Oxford University Press 1997); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L. L. & POL'Y 591 (1998).

Moreover, despite western NGO's current enthusiasm for "ending the culture of impunity" and ensuring that all human rights violators are punished, it isn't clear that the people most concerned — the victims of tyranny and atrocities — always share this enthusiasm. In many cases, the weary people of riven societies, desperately seeking transitions to democracy and a more hopeful future, have preferred other ways of dealing with the past, such as amnesty and truth and reconciliation commissions.⁵⁹ This has been the case, for example, in Argentina, Chile, Uruguay, El Salvador, South Africa, Sierra Leone, and now perhaps, Algeria. It is an interesting question whether western governments and NGO's should try to impose on other people our own punitive, rather than conciliatory, approach to justice, even if the people most concerned would just as soon put the past behind them and move on!⁶⁰

Second, Kosovo obviously raises issues concerning how the international community will deal with other ethnic conflicts and claims of self-determination. In general, while the international community and international law have long supported the right of overseas colonies to self-determination, there has been much less enthusiasm for the claims of internal separatist groups to independence — particularly since many of the world's states have, or can foresee, problems of their own in this regard.⁶¹ It seems evident, however, that Kosovo — and the KLA's success (due entirely to NATO's help) in winning autonomy and probably independence from Yugoslavia — is likely to spur the emergence and activities of other violent separatist movements, any of which

59. See generally TRANSITIONAL JUSTICE, *supra* note 58.

60. See Norimitsu Onishi, *Trail of Brutality Mars Rebel's Return to Civil Life*, N.Y. TIMES, June 18, 1999, at A4 (discussing efforts to secure peace as Sierra Leone and, in particular, the question of whether Foday Sankoh, leader of the Revolutionary United Front, responsible for some 14,000 deaths and the campaign of terror against the population which included deliberate amputation of many people's (including children's) limbs, should have a role in the transitional government). The article noted that: "The negotiators have chosen in many ways not to tackle these issues, one [g]overnment representative said, 'because we want to have peace.' 'It's like having two evils', the representative said of the choices between pursuing the war or negotiating with Mr. Sankoh. 'We can only choose the lesser one!'" *Id.* See also Norimitsu Onishi, *Survivors Sadly Say, Yes, Reward the Tormentors*, N.Y. TIMES, Aug. 30, 1999, at A4.

61. See Ronald Steel, *Playing Broker Has Its Pitfalls*, N.Y. TIMES, Feb. 25, 1999, at A27 (suggesting that ". . . it is not in America's interest to encourage disgruntled ethnic groups to dismember sovereign states"). For a subsequent comment by President Clinton, see James Brooke, *Clinton Jolts Canadians With a Plea on Federalism*, N.Y. TIMES, Oct. 10, 1999, at A4 (reporting President Clinton's statement at a Canadian forum on federalism that, "if every major 'racial and ethnic . . . group' won independence, 'we might have 800 countries in the world and have a very difficult time having a functioning economy' 'Maybe we would have 8,000 — how low can you go?'").

would be delighted to provoke a humanitarian crisis which would similarly lead the United States, NATO or other countries to intervene on their behalf. Certainly, there is no end to such other existing and potential separatist groups (the Kurds, Tamils, Basques, IRA, Quebecoise, Guatemalan Indians, and Kashmiri Moslems, to name but a few), none of which the United States and NATO have previously chosen to support. Indeed, the United States has, in the past, more often supported national governments against such separatist movements, frequently labeling the separatists — as it did the KLA until shortly before the bombing — as “terrorists.” But, the United States and NATO policymakers may now be hard put to explain why they resorted to the “new interventionism” in Kosovo, but not in these other, often equally or more morally compelling, situations.

Third, Kosovo raises issues concerning the role of the media and NGO's in the “new interventionism.” No one doubts the enormous, positive contribution that the media and NGO's can make to effective human rights efforts. Nor can there be any doubt as to the media's and NGO's recent emergence as significant international actors in their own right on the international scene — witness, for example, the role of the media and NGO's in spurring humanitarian intervention in the Somalia crisis, or the central role of NGO's in bringing about the successful conclusion of the 1997 Ottawa Land Mine Treaty or last year's Rome ICC Statute. But Kosovo reinforces growing concerns that the media and NGO's can, on occasion, play a darker and more questionable role in human rights crises. For example, there is no doubt that the television and NGO reports of Serb atrocities — the recurrent images of unending columns of refugees — were crucial (and fully-exploited by NATO) to mobilize and maintain support for the bombing. New York Times columnist Max Frankel commented that, in the Kosovo crisis, “the tube” was driving our politics,⁶² and, in his 1997 Hague lectures, Professor Zemanek lamented that an international crisis only existed “if it is covered by CNN.”⁶³ But should the media be driving our politics?

62. Max Frankel, *Word & Image: Our Humanity Vs. Their Sovereignty*, N.Y. TIMES MAGAZINE, May 2, 1999, at 36.

63. Karl Zemanek, *The Legal Foundations of the International System: General Course on Public International Law*, 266 RECUEIL DES COURS, 9, 41 (1997). See generally, e.g., FROM MASSACRES TO GENOCIDE: THE MEDIA, PUBLIC POLICY AND HUMANITARIAN CRISES (Thomas G. Weiss and Robert I. Rotberg eds., World Peace Found. 1996); *Media Coverage: Help Or Hinderance In Conflict Prevention* (Carnegie Commission on Preventing Deadly Conflict, Carnegie Corp. of N.Y. 1997) <<http://www.ccpdc.org/pubs/media/media.htm>>.

More broadly, there is growing literature questioning the role and efficacy of at least some NGO's in current international humanitarian crises, such as Kosovo, Rwanda, Somalia, and the Sudan.⁶⁴ These criticisms include charges that:

- NGO's frequently reflect only special, often elite or parochial concerns and tend to pursue only their own agendas, even at the cost of the broader public interest;
- Many NGO's are unrepresentative, opaque and unaccountable;
- Some NGO's are driven more by a desire for gain and prestige than by genuine humanitarian ideals — "doing well by doing good" — and may manipulate the public or refuse to cooperate with other NGO's in their desperate competition for the media publicity that will bring them the substantial public contributions and lucrative government contracts that can be generated by humanitarian disasters;
- NGO's can be wasteful, inefficient, and ineffective, doing little to help the real victims in such situations and, indeed, sometimes doing more harm than good.⁶⁵

Hopefully, few NGO's fit this description. But a more careful look at the role and effectiveness of NGO's in such humanitarian interventions as Kosovo seems overdue.

4. Conclusion: Assessing Kosovo

Was the bombing really necessary? During the Rambouillet negotiations which preceded the bombing, Yugoslavia was reportedly willing to withdraw most of its forces from Kosovo, to accept the stationing of a U.N. force there, and to grant the Kosovar Albanians autonomy. But NATO demanded instead that Yugoslavia accept a solely NATO rather than U.N. force, allow the NATO force

64. See generally, e.g., MICHAEL MAREN, *THE ROAD TO HELL: THE RAVAGING EFFECTS OF FOREIGN AID AND INTERNATIONAL CHARITY* (The Free Press 1997); *COMPASSION AND CALCULATION: THE BUSINESS OF PRIVATE FOREIGN AID* (David Sogge ed., Pluto Press 1996); THOMAS G. WEISS, *MILITARY-CIVILIAN INTERACTIONS: INTERVENING IN HUMANITARIAN CRISES* (Rowman & Littlefield Publishers, Inc. 1999); Jessica Matthews, *Power Shift*, *FOREIGN AFFAIRS*, Jan./Feb. 1997, at 50; P.J. Simmons, *Learning to Live With NGO's*, *FOREIGN POLICY* 84 (Fall 1998); Paul Lewis, *Not Just Governments Make War or Peace*, *N.Y. TIMES*, Nov. 28, 1998, at B9.

65. See, e.g., Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 *CARDOZO L. REV.* 957 (1996); Marcus Mabry, *The Price Tag on Freedom*, *NEWSWEEK*, May 3, 1999, at 50; Richard Minter, *The False Promise of Slave Redemption*, *THE ATLANTIC MONTHLY*, July 1999, at 63-65; David Rieff, *The Humanitarian Illusion*, *NEW REPUBLIC*, March 16, 1998, at 27; Raymond Bonner, *Aid for Sudan's Hungry Keeps War Well Fed*, *N.Y. TIMES*, Oct. 11, 1998, at 20.

to enter Serbia itself, and, in effect, agree to Kosovar independence after a three-year transition period. And when Yugoslavia predictably rejected NATO's ultimatum the bombing began. However, in the Petersberg agreement which ended the bombing,⁶⁶ NATO seems to have accepted something close to the terms Yugoslavia might have been willing to accept at Rambouillet. Thus, Petersberg provides for continued Yugoslav formal sovereignty over Kosovo, albeit with Kosovar autonomy; U.N. authorization of and participation in the military presence and administration in Kosovo; restriction of the U.N. and NATO forces to Kosovo itself, with no right of NATO or U.N. forces to enter Serbia; and even eventual reentry of at least limited Serb forces to protect Serb historical and religious sites in Kosovo. This raises the question, if NATO could have gotten at Rambouillet much of what it finally agreed to at Petersberg, what then was accomplished by the terrible loss of life, destruction, and suffering caused by the bombing?⁶⁷

Obviously, it is easy to "Monday morning quarterback." No one can pretend that Kosovo was not a genuine moral and political dilemma or to be sure what "the right answer" would have been. Perhaps, once the bombing started and the atrocities and ethnic cleansing became apparent, the United States and NATO had no real moral or political choice but to somehow try to stop what was happening. Perhaps there is truth in NATO's claim that, when all is said and done, what else could anyone in good conscience do. Indeed, perhaps in the face of such human tragedy and moral necessity — as Jean Valjean argues in *Les Miserables* — the law becomes of little consequence.⁶⁸ But it seems strange and sad that,

66. See *Agreement on the Principles (Peace Plan) to Move Towards a Resolution of the Kosovo Crisis*, U.N. Doc. S/1999/649 (1999) (agreed to by the Yugoslav Parliament June 3, 1999), reprinted in U.N. SCOR Res. 1244, Annex 2 (June 10, 1999), and in 38 I.L.M. 1451 (1999). The unofficial text of the Kosovo Peace Plan was also posted on the WASHINGTON POST website, as translated from Serbian by the Associated Press, <http://www.washingtonpost.com/wp-srv/matl/ddily/june99/plan_text03.htm> Both are abstracted in *Kosovo Peace Plan Approved by Milosevic and Serbian Parliament and Security Council Adopts Resolution Establishing Framework for Peace in Kosovo*, INT'L L. IN BRIEF, Vol. 2, No. 6, at 11-13, June 1999; see also N.Y. TIMES, June 4-6, 1999 (discussing the ending of the bombing campaign and peace agreement).

67. See Henry A. Kissinger, *As the Cheers Fade*, NEWSWEEK, June 21, 1999, at 48; Henry A. Kissinger, *The New World Disorder*, NEWSWEEK, May 31, 1999, at 41; Alan J. Kuperman, *Kosovo Deal Represents 'Botched Diplomacy'*, U.S.A. TODAY, June 14, 1999, at 18A (letter from research fellow at The Brookings Institution).

68. The quotation from Professor Schachter, *supra* note 22, suggests, in the context of humanitarian intervention, a recurrent and perplexing question of legal policy. Is it better to attempt to craft a carefully delineated rule and criteria expressly permitting an exceptional privilege of unilateral humanitarian intervention in cases of clear and urgent moral necessity such as Rwanda, despite the possibility that such an exception might be abused to weaken the prohibition on the use of force in Article 2(4) of the U.N. Charter? Or is it wiser to "maintain

with all the talent, wealth, and power the United States and NATO had at their disposal, they could not have found a better and less destructive way of handling the Kosovo crisis.

What will happen next in Kosovo? Certainly, the United Nations and NATO are likely to face an increasingly awkward time as the KLA and Kosovar "reverse" atrocities and "ethnic cleansing" against Serbs and gypsies continue,⁶⁹ and as the KLA seeks to expand its authority and pushes for either independence or union with Albania. And as time goes on, the NATO governments and peoples — particularly the United States Congress — are likely to become increasingly restive as an extremely costly, frustrating, and possibly disillusioning period of international stewardship drags on.

Is Professor Glennon correct? Are we really entering an era of the "new interventionism" in which we will see many more Kosovos? I doubt it! The NATO countries early indicated that Kosovo should not be considered "a precedent"⁷⁰ and the United States seems already to be "distinguishing" Kosovo from other situations throughout the world where governments are using brutal means in an attempt to suppress separatist or dissident movements. Indeed, perhaps with the Petersberg agreement and the current U.N. intervention in East Timor, we are back to where I believe we ought to be — with humanitarian intervention occurring only with U.N. participation, authorization or approval, and, hopefully, with the Permanent Five and other U.N. Members more willing in cases of

the rule" and instead simply tolerate or "turn a blind eye to" occasional violations of Article 2(4) in those cases where there is a very broad consensus that such a violation is clearly morally justified? This kind of issue arises, of course, not only in the context of humanitarian intervention but in diverse other contexts as well, such as the regulation of euthanasia, the defense of "superior orders" and other situations where "necessity" is claimed as justification for otherwise unlawful conduct. For a classic exploration of some of these issues, see Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

69. It should be noted that the NATO-led force occupying Kosovo has clear obligations under international humanitarian law to insure the protection of all civilians in Kosovo, many of whom may be innocent of wrongdoing. The Hague Regulations and the Fourth Geneva Convention expressly forbid collective penalties, intimidation, terrorism, acts of revenge or reprisal against the civilian population or forcible mass transfers of population. Consequently, any retaliatory actions or atrocities by the Kosovo Liberation Army, returning refugees, or others in Kosovo, as well as any failure by the NATO-led force to take whatever measures are necessary to prevent such acts, may constitute war crimes, presumably falling within the jurisdiction of the International Criminal Tribunal for Yugoslavia. See *Letter to the Editor from Richard B. Bilder*, N.Y. TIMES, June 11, 1999, at A32; CAPITAL TIMES (Madison, WI), June 23, 1999, at 11A.

70. For indications of the limited effectiveness of assertions that particular actions should be regarded as exceptional and should not be regarded as a "precedent," see DAVID MALONE, *DECISION-MAKING IN THE U.N. SECURITY COUNCIL: THE CASE OF HAITI*, 85, 146-47, 190-97 (Oxford University Press 1998).

clear and urgent need, such as Rwanda, to give, or at least not prevent, such approval.

But like it or not, Kosovo *will* remain a precedent and a warning that our international institutions remain fragile and subject to the whims of power even by nations that generally support international law. It also reminds us that we must always be on our guard against attempts by governments, groups, or individuals to appropriate the enormous potential appeal of human rights ideals for selfish rather than truly humanitarian ends.