

The Kosovo Report

EXECUTIVE SUMMARY -- MAIN FINDINGS

PREVENTION

The origins of the crisis have to be understood in terms of a new wave of nationalism that led to the rise of Milosevic and the official adoption of an extreme Serbian nationalist agenda. The revocation of Kosovo's autonomy in 1989 was followed by a Belgrade policy aimed at changing the ethnic composition of Kosovo and creating an apartheid-like society.

From the early 1990s onwards, governments and international institutions were aware of the impending conflict in Kosovo. There were plenty of warnings, and moreover, the Kosovo conflict was part of the unfolding tragedy of the break-up of Yugoslavia. Yet prior to 1998, the international community failed to take sufficient preventative action. There were some diplomatic initiatives especially in 1992-93, but they were confused and not backed by sufficient high-level pressure. More importantly, insufficient support was provided to the non-violent resistance movement, which created its own parallel institutions and which managed to prevent large-scale violence in Kosovo up to 1997. The decision to exclude the Kosovo question from the Dayton negotiations, and the lack of results achieved by the strategy of non-violence, led many Kosovar Albanians to conclude that violence was the only way to attract international attention. It was during this period that the KLA groups first made their appearance. Until late 1997 they were small resistance groups who pursued hit and run, low level guerrilla warfare, hoping for international intervention. The Serbian response to the initial KLA attacks was, as expected, brutal and was also directed against civilians. The Serbian massacre of 58 people in Prekazi/Prekaze in February 1998 became a turning point. The internal war escalated.

The general conclusion to be drawn from this experience is that much more effort needs to be devoted to prevention. It is not necessarily a matter of early warning; it is a matter of political will, readiness to expend resources, and having a presence on the ground.

ARMED CONFLICT

This armed conflict between the KLA and the FRY lasted from February 1998 to June 1999 although it escalated after March 1999 when the NATO air campaign supervened. It can be characterized both as an armed insurgency and counter-insurgency, and as a war (against civilians) of ethnic cleansing.

The Commission has collated information from a wide variety of sources in order to assess the extent of atrocities. In the first phase of the conflict from February 1998 to March 1999, casualties were relatively low: around 1,000 civilians were killed up to September although the evidence is uncertain; the number of victims between September and March is unknown but must be lower. More than 400,000 people were driven from their homes during this period, about half of these were internally displaced. Most of these internal refugees returned after the Holbrooke-Milosevic agreement of October 1998. There were also widespread arrests and detentions during this period.

In the period March 24, 1999 to June 19, 1999, the Commission estimates the number of killings in the neighborhood of 10,000, with the vast majority of the victims being Kosovar Albanians killed by FRY forces. Approximately 863,000 civilians sought or were forced into refuge outside Kosovo and an additional 590,000 were internally displaced. There is also evidence of widespread rape and torture, as well as looting, pillaging and extortion.

The pattern of the logistical arrangements made for deportations and the coordination of actions by the Yugoslav army, para-military groups and the police shows that this huge expulsion of Kosovo-Albanians was systematic and deliberately organized. The NATO air campaign did not provoke the attacks on the

civilian Kosovar population but the bombing created an environment that made such an operation feasible.

THE DIPLOMATIC EFFORT

The most promising window of diplomatic opportunity was prior to 1998. At each stage of the conflict, the diplomatic options narrowed. However, the political will to mount a major diplomatic effort could only be mobilized after the conflict escalated into full-scale violence.

The diplomatic effort throughout 1998, culminating in Rambouillet, was characterized by confusion and mixed signals. In the face of Milosevic's ruthless strategy of oppression and the maximalist demands of both the LDK and KLA, there was little chance that diplomacy would prevail. The Holbrooke-Milosevic agreement of October 1998 led to the introduction of unarmed international monitors and did succeed in reducing the level of violence. However, KLA units took advantage of the lull in the fighting to reestablish their control of many positions vacated by the redeployed Serbian troops. Violence escalated again in December 1998 also after Serbian forces reentered the province.

The Commission believes that there are important lessons to be learned about the role of unarmed monitors in reducing the level of civilian suffering, if not averting humanitarian catastrophe.

The overall narratives of the international response are inherently inconclusive, and hence without clear "lessons" beyond the prudential observations in favor of early engagement and greater attentiveness to nonviolent options. Certain key conclusions are worth emphasizing.

1. Multiple and divergent agendas and expectations and mixed signals from the international community impeded effective diplomacy,
2. The international community's experience with Milosevic as not amenable to usual negotiations created a dilemma. The only language of diplomacy believed open to negotiators was that of coercion and threat. This led to legal and diplomatic problems - such threat diplomacy violates the Charter and is hard to reconcile with peaceful settlement. The credibility of the threat must, in the final analysis, be upheld by the actual use of force.
3. It is impossible to conclude, however, despite these weaknesses, that a diplomatic solution could have ended the internal struggle over the future of Kosovo. The minimal goals of the Kosovar Albanians and of Belgrade were irreconcilable.
4. Russia's contribution to the process was ambiguous. Its particular relationship with Serbia enabled crucial diplomatic steps, but its rigid commitment to veto any enforcement action was the major factor forcing NATO into an action without mandate.

THE NATO AIR CAMPAIGN

The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.

NATO believed that a relatively short bombing campaign would persuade Milosevic to sign the Rambouillet agreement. That was a major mistake. NATO also underestimated the obvious risk that the Serbian government would attack the Kosovo Albanians. NATO had to expand the air campaign to strategic targets in Serbia proper, which increased the risk of civilian casualties. In spite of the fact that NATO made substantial effort to avoid civilian casualties there were some serious mistakes. Some 500

civilian deaths are documented. The Commission is also critical of the use of cluster bombs, the environmental damage caused by the use of depleted-uranium tipped armor-piercing shells and missiles and by toxic leaks caused by the bombing of industrial and petroleum complexes in several cities, and the attack on Serbian television on April 17, 1999. The Commission accepts the view of the Final Report of the ICTY that there is no basis in the available evidence for charging specific individuals with criminal violations of the Laws of the War during the NATO campaign. Nevertheless some practices do seem vulnerable to the allegation that violations might have occurred and depend, for final assessment, on the availability of further evidence.

The Commission argues for a higher threshold of protective standards in any future undertaking and proposes the negotiation of a "Protocol III" to make this explicit and mandatory.

In conclusion, the NATO war was neither a success nor a failure; it was in fact both. It forced the Serbian government to withdraw its army and police from Kosovo and to sign an agreement closely modeled on the aborted Rambouillet accord. It stopped the systematic oppression of the Kosovar Albanians. However, the intervention failed to achieve its avowed aim of preventing massive ethnic cleansing. Milosevic remained in power. The Serbian people were the main losers. Kosovo was lost. Many Serbs fled or were expelled from the province. Serbia suffered considerable economic losses and destruction of civilian infrastructure. Independent media and NGOs were suppressed and the overall level of repression in Serbia increased.

RESPONSE TO HUMANITARIAN CRISIS

Both governmental and non-governmental agencies were unprepared for the scale of the refugee crises in the neighboring states of Albania and Macedonia. There were obviously no warnings from NATO to either UNHCR or other organizations of a possible refugee flow. The lack of planning can be partly attributed to the underfunding of UNHCR. NATO peacekeeping troops based in Macedonia were brought in by governments to assist with the refugee crisis. Lack of cooperation and competition between the military and the main humanitarian agencies as well as with the numerous NGOs who rushed to the region to help, hindered the humanitarian effort.

Given these initial difficulties, the Commission commends the scale and effectiveness of the humanitarian response and proposes a number of measures, such as the screening of NGOs and more cooperation among military and civilian agencies, to improve planning and coordination in the future. To ensure more even-handed response to humanitarian crises and to promote preparedness and coordination, the international community must provide more funds for UNHCR.

The extraordinary scale of the humanitarian response took place at a time when worldwide aid budgets were dwindling. This compromised the claim of impartiality and universality in the provision of humanitarian assistance and aid.

ROLE OF THE MEDIA

Both NATO and the Belgrade government engaged in a propaganda war and made exaggerated claims. Nevertheless, on the whole, journalists did not allow themselves to be "spun." Even in Belgrade, where the government cracked down on independent media, a few courageous journalists continued to speak out.

Just as the Commission has concluded that the conduct of military operations in humanitarian interventions should be conducted according to especially strict rules of engagement, it also concludes that media operations must be conducted under especially stringent rules of disclosure. The Commission

strongly believes that open access to both sides of any humanitarian intervention is critical if military operations, on both sides, are to be kept under effective public scrutiny. The Commission believes there is no case for restricting the ability of journalists to operate in theaters of conflict where humanitarian interventions are taking place. The Commission strongly condemns the attempts by the Serbian government to place restrictions on their own media's coverage of the war and its aftermath, especially the detention of Miroslav Filipovic for his interviews with FRY soldiers who took part in operations in Kosovo, and for his publication of their admission of atrocities and war crimes.

UNMIK RULE

United Nations Resolution 1244 authorized the deployment of military forces, KFOR, to Kosovo and the establishment of a civilian administration, UNMIK. Dr. Bernard Kouchner was appointed by the UN Secretary General to head the mission.

After the summer of 1999, Kosovo was characterized by a high level of crime and aggression, much of which was directed against the minority population, especially Serbs. The inability to stop a new wave of ethnic cleansing in Kosovo, in spite of the presence of 40,000 armed soldiers, was a major failure for the international community. More than half of the Serb population left the province together with departing Serbian forces or were later forced to leave. The remaining Serb population is living in enclaves or divided cities. In particular, the division of the northern city of Mitrovica/Kosovska Mitrovica represents a focal point for renewed conflict. In addition, those political forces among the Albanian population who had advocated violence were greatly strengthened by the war.

Although the international authorities can claim some achievements in establishing an administration and starting to solve some of the problems of the economy and of law and order, they still face serious challenges. The establishment of UNMIK was slow and its work has been seriously hampered by a number of obstacles, notably the absence of police and of judicial processes, and the slowness of donors to implement their funding commitments. Although KFOR troops did undertake civilian tasks, only some national contingents were ready to undertake police work. Moreover, the contradictory character of 1244 which includes commitments both to "substantial autonomy and meaningful self-administration" for Kosovo and to the sovereignty and territorial integrity of FRY, greatly complicates policy-making on a range of issues such as security, currency, trade etc.

The lessons of UNMIK rule for other UN operations include the need to create an international policing capability, the need to increase funding for post-conflict operations, and the importance of supporting and strengthening moderate democratic political groupings.

EFFECTS ON THE SURROUNDING REGION

The conflict in Kosovo cannot be understood except in the broader regional context. The Kosovo conflict produced shock waves affecting neighboring states as a result of the influx of refugees, the economic damage caused by disruptions to trade and production and the growth of criminality, and the political impact on fragile states such as Albania, Macedonia and Montenegro.

The Commission welcomes the initiative for a Stability Pact, which opens up new opportunities to create a post-conflict zone of stability and cooperation in the Southeast European region as a whole. The Pact has generated high expectations but has achieved relatively little in its first year. The combination of extensive conditionality and Brussels red tape has kept disbursement on a low level. There is a risk of failure or fading into irrelevance if it were to remain essentially a concept imposed on the region from above without adequate input from, and identification within, the region. It will work only if the desire to

join Europe prevails over nationalistic agendas and corrupt practices. The destination of the Balkans as a whole must be European integration.

Two important obstacles to regional integration are weak state institutions and widespread criminalization of the economy. It is important to strengthen civil society in the region as a whole and to assist state-building processes. There also needs to be much greater international cooperation in fighting organized crime, including adequate legislation and improved enforcement capacity.

The Commission is deeply concerned about the deteriorating political situation in Serbia and the risk of a new violent conflict between Montenegro and Serbia. It recommends greatly increased political and economic support for Montenegro and an expanded international presence in that country. It also recommends a long-term project of promoting civil society in Serbia, including NGOs, alternative or independent media, municipalities and universities, while maintaining targeted sanctions against the Belgrade regime.

FUTURE STATUS

Resolution 1244 created a unique institutional hybrid, a UN protectorate with unlimited power whose purpose is to prepare the province for autonomy and self-government - but in the framework of FRY. There is also a sharp division in the UN Security Council concerning if and how the resolution should be implemented. It is however very clear that, after what the Kosovo Albanians have experienced at the hands of the FRY authorities, they are absolutely unwilling to accept any meaningful or even symbolic expression of FRY sovereignty on the province.

The Commission has concluded that the best available option for the future of Kosovo is "conditional independence". This means expanding the autonomy and self-government promised by 1244 in order to make Kosovo effectively self-governing outside the FRY, but within an international framework. The international community would take responsibility for an initial security guarantee and for overseeing the protection of minority rights and would also integrate Kosovo into an effective stability pact.

The status of "conditional independence" would have to be reached through an "internal agreement" between representatives of the international community in Kosovo and the Kosovo majority, as well as representatives of ethnic minorities, and an "external agreement" negotiated with Kosovo's neighbors. Eventually, this will also have to include the Serbian government but a refusal of the Serbian government to engage in dialogue should not constitute a veto on this process.

THE FUTURE OF HUMANITARIAN INTERVENTION

Experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy. The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention. It is our hope that the UN General Assembly could adopt such a framework in some modified form as a Declaration and that the UN Charter be adapted to this Declaration either by appropriate amendments or by a case-by-case approach in the UN Security Council. We also suggest a strengthening of the level of human rights protection contained in the UN Charter - aware of course of the political problems of implementing such a change.

Our proposed principled framework includes three threshold principles, which must be satisfied in any legitimate claim to humanitarian intervention. These principles include the suffering of civilians owing to severe patterns of human rights violations or the breakdown of government, the overriding commitment

to the direct protection of the civilian population, and the calculation that the intervention has a reasonable chance of ending the humanitarian catastrophe. In addition, the framework includes a further eight contextual principles which can be used to assess the degree of legitimacy possessed by the actual use of force.

The implication of our framework is that governments and international institutions also need to possess the appropriate means for carrying out this kind of operation. This means expanding the international peacekeeping capacity to protect civilians on the ground.

The Commission is aware that in many countries of the world there is a much stronger commitment to the protection of their sovereignty than currently exists in the West. Given the dual history of colonialism and the Cold War, there is widespread concern about Western interventionism. The growing global power of NATO creates a feeling of vulnerability in other parts of the world, especially in a case such as Kosovo where NATO claims a right to bypass the United Nations Security Council.

The Commission, composed as it was of citizens of many non-European, non-Western societies, puts great emphasis on the continued importance of the United Nations. It advocates increased funding and the need to consider ways to reform the main bodies of the United Nations, especially the Security Council, so that they are better suited to the post-Cold War environment.

The proposal for a new framework for humanitarian intervention should not detract from the need to prevent humanitarian catastrophes in the future. The Commission takes the view that much more political effort and economic resources need to be devoted both to pre-conflict and post-conflict situations. In the case of Kosovo, far more attention and money was spent on Kosovo during the intervention than before or after.

The Commission also advocates greater emphasis on the gender dimension of humanitarian intervention. In Kosovo, insufficient attention has been paid to the impact of the conflict on women, in particular, the use of rape as a weapon of war, and the rise of trafficking in the post-conflict period. Moreover, women have a crucial role to play in post-conflict reconciliation and reconstruction.

Finally, the Commission is acutely aware that the world has not given the same priority to humanitarian catastrophes outside Europe as it gave to Kosovo. It is the Commission's hope that, after the Kosovo experience, it will be impossible to ignore tragedies such as the genocide in Rwanda in other parts of the world, and that the lessons of the Kosovo conflict will help us to develop a more effective response to future humanitarian catastrophes wherever they occur.

ADDRESS BY FORMER PRESIDENT NELSON MANDELA

Delivered at the Independent International Commission on Kosovo's final seminar, University of the Witwatersrand, South Africa, August 25, 2000

In his opening address to the General Assembly in September 1999 Secretary-General Kofi Annan made a plea for United Nations intervention in cases of gross violations of human rights. We know that few states endorsed the remarks of the Secretary-General, and even fewer supported the Swedish position that "the collective conscience of mankind demands action."

The reluctance on the part of states is perhaps understandable due to a wariness of intervention too readily initiated; but we must all admire the determination of Secretary-General Annan and Sweden to end the conflicts which continue to plague so many regions of our world. It is hardly surprising that both

had given their support to the Independent International Commission on Kosovo -- a commission established to examine the events in Kosovo. Both Prime Minister Persson and Secretary-General Annan believe that to end conflict we must better understand it.

We must say to Secretary-General Annan that, at a time when the quest for peace demands greater accountability on the part of states and international organisations for their actions, we are fortunate to have a man like him at the helm of the United Nations Organisation. In Africa we take particular pride in him.

The quest for peace has created a need for even more dialogue on the international plane. The report of the Kosovo Commission will provide an independent assessment of conflict and intervention that can assist in advancing dialogue amongst all leaders, scholars and interested parties. It is vitally important that we engage in this discourse and discussion. The century behind us was one of great wars and conflicts. As we start this one, we need to understand the lessons of those conflicts and learn from them for our future.

We find it most fitting that the Kosovo Commission has decided to host its final meeting and seminar here in South Africa. It is equally fitting that it chose as its focus for this seminar the lessons to be learnt from Kosovo for dealing with conflicts in regions like Africa and Asia. While we are not convinced that it is only a lack of schooling on the part of the international community that has made it so reluctant to act to halt conflicts in Africa, this disparity of treatment does desperately require attention. And the Kosovo Commission can play an important part in addressing also that issue.

It has now become so customary to point to the failure of the international community to intervene and end the genocide in Rwanda that it is almost forgotten that this relative neglect of Africa in these matters is much more general than only the Rwanda case. For example, while NATO prepared itself for action in Kosovo, Sierra Leone seemed a virtually forsaken place from an international perspective. As atrocities were carried out in Sierra Leone, Nigeria, under the aegis of an ECOMOG peacekeeping mandate, sent in troops, but the weaponry, funding, communications and intelligence promised by Western powers failed to materialise.

And even in Rwanda itself, once the genocide had ended, there was and is more that the international community could do than merely repent about its failures. The dynamics that ignited the genocide in Rwanda today continue to play a role in the conflicts in neighbouring Burundi and Democratic Republic of Congo.

We are not suggesting that these and other African conflicts can be subjected to the same template of conflict resolution or that the actions of Kosovo can simply be transplanted to the conflicts on this continent. We in Africa and Asia must, however, envy the readiness and willingness on the part of the international community to intervene and commit resources to the reconstruction of Kosovar society. It is therefore particularly encouraging to us to note the interest of the international community in the Burundi Peace Process to which we have been the Facilitator since the beginning of this year, building on the sterling work done by Mwalimu Julius Nyerere. A number of leaders from both Africa and the broader international community have given their time to attend some of the plenary sessions of the peace process held in Arusha. On Monday 28, August we shall again have such a plenary, this time with the intention to have a peace agreement signed. Once more a number of heads of states and governments, or their representatives, will be in attendance, signalling a renewed interest of the world in the affairs of Africa.

Even more encouraging has been the indications from Western leaders of their willingness to actively assist in the rebuilding and development of the Burundi economy once a peace agreement had been reached. We shall ourselves remain actively involved in mobilising the international community for that project. We would wish to see Burundi as a showcase of peace bringing its dividends through the actions of the international community.

We have quite often in the past made the comment that in this contemporary world of globalisation, we have indeed again become the keepers of our brother or sister. The global village cannot only be such where it concerns the accessibility and penetrability of markets; it must surely also mean that the ills and woes of one are the shared concern of all.

We speak here today to support the Kosovo Commission as potentially a powerful means of promoting and consolidating that sense of oneness amongst ourselves. As we learn to understand that destructive part of our human condition that has caused so much pain and suffering throughout our human history, we may advance in the knowledge that we share so much -- bad or good. Together, and only together, can we make of the world a better place for our children to grow up in.

I wish you well, and thank you for the opportunity of sharing with you. And thank you for thinking specifically of Africa in your deliberations.

I thank you.

IN-DEPTH ANALYSIS OF MILITARY INTERVENTION AND INTERNATIONAL LAW

The analysis concludes that the negotiations conducted before March 24, 1999, although extensive, were enmeshed in threat diplomacy and ambiguous offers of negotiation, and thus failed to satisfy fully the legal requirements associated with the obligation to pursue the peaceful settlement of all international disputes. Such an assessment of the Kosovo negotiations is particularly important since NATO actions were, in any event, on shaky legal ground, given the decision to proceed with an armed intervention without obtaining, or even seeking, a clear UN Security Council (UNSC) authorization, and without making any sort of secondary appeal to the General Assembly. Under the Uniting for Peace Resolution, the General Assembly is authorized to act in the event that the UNSC cannot meet its obligations to address threats to international peace and security). NATO's own constituting treaty does not provide any convincing legal grounds for recourse to force aside from meeting an external use of force directed at the territorial integrity and political independence of its member countries.

International law as embodied textually in the UN Charter is on the surface clear with respect to the permissible scope for the use of force in international life. The threat or use of force by states is categorically prohibited by Article 2(4). The sole exception set forth in Article 51 is a right of self-defense, but only if exercised in response to a prior armed attack across an international frontier, and then only provisionally. A claim to act in self-defense must be promptly communicated to the UNSC, which is empowered to pass final judgment. The UNSC, in discharging its responsibility for international peace and security under Chapter vii is empowered to authorize the use of force. This narrow interpretation of the legal framework governing the use of force was strongly endorsed by a commanding majority within the International Court of Justice in the *Nicaragua Case* decided in 1986. The only other relevant directive as to the use of force is contained in Article 53, which allows regional organizations to engage in enforcement actions provided that they do so on the basis of UNSC authorization. Although there is a subsidiary argument about implied authorization to use force once a

conflict has been formally treated by the UNSC as a threat to international peace and security under Chapter vii of the Charter, it remains difficult to reconcile NATO's recourse to armed intervention on behalf of Kosovo with the general framework of legal rights and duties which determines the legality of the use of force.

It is, however, possible to argue that, running parallel to the Charter's limitations on the use of force, is Charter support for the international promotion and protection of human rights. In this vein it has been asserted that, given the unfolding humanitarian catastrophe precipitated by the Serb pattern of oppressive criminality toward the civilian Albanian population in Kosovo, the use of force by NATO was legitimate, as it was the only practical means available to protect the Albanian Kosovars from further violent abuse. The main difficulty with such a line of argument is that Charter restrictions on the use of force represented a core commitment when the United Nations was established in 1945—a commitment which has reshaped general international law. In contrast, the Charter provisions relating to human rights were left deliberately vague, and were clearly not intended when written to provide a legal rationale for any kind of enforcement, much less a free-standing mandate for military intervention without UNSC approval. Human rights were given a subordinate and marginal role in the UN system in 1945, a role that was understood to be, at most, aspirational.

Any interventionary claim based on human rights would face the additional legal obstacle posed by Article 2(7) which forbids intervention, even by the United Nations, in matters that fall essentially within the “domestic jurisdiction” of states. Even serious infractions of human rights were considered to be matters of domestic jurisdiction when the Charter was drafted, and were not thought to provide any grounds for an external use of force. The more sovereignty-oriented members of the United Nations, including notably China and Russia, continue to support such a view of human rights. Additionally, there has been as yet no clarification by the ICJ or other authoritative body as to the extent to which the evolution of law in relation to international human rights erodes the prohibition on non-defensive uses of force.

However, the Commission recognizes that, in the more than fifty years of UN existence, the status of human rights has changed dramatically. International legal standards have been agreed upon. Numerous NGOs have devoted great energy to their implementation. During the anti-apartheid campaigns of the 1980s, the UN committed itself to the implementation of human rights with respect to South Africa, and even went so far as to reject claims of sovereign rights. European states have shown a willingness to accept external accountability for upholding human rights, including giving their citizens the right to petition for relief to the European Commission on Human Rights. If the claim is viewed as substantial, citizens then have the right of access to the European Court of Human Rights. Also, the Helsinki Accords of 1975 led to an important process, as the countries of East Europe accepted both an obligation to uphold human rights and a procedure of regional assessment. Such an experience is widely credited with undermining the legitimacy of authoritarian rule in East Europe and precipitating the non-violent transitions (except in Romania) to market constitutionalism at the end of the 1980s.

Such developments have led Secretary General Kofi Annan and his two predecessors, Javier Perez de Cuellar and Boutros Boutros Ghali, to insist that the evolution of international human rights standards and support for their implementation has now reached the stage where norms of non-intervention, and the related deference to sovereign rights, no longer apply to the same extent in the face of severe human rights or humanitarian abuses. The organized international community, according to this view, now enjoys a permissible option of humanitarian intervention as one way to protect vulnerable people against severe abuses of human rights, crimes against humanity, and genocide. Nevertheless, prudential considerations still inhibit humanitarian intervention, especially when the effort is likely to require a serious military

commitment or involves the risk of provoking a major war. Still, this process of evolution could suggest that interventionary force to uphold human rights in extreme situations of abuse is less inconsistent with the spirit of the UN Charter and general international law than has been suggested by some.

Even against this background, it remains open to question whether, under the circumstances of political blockage in the UNSC, NATO was a suitable agent for carrying out the intervention into Kosovo. At the time, the prevailing view in support of the approach adopted was that there was no realistic alternative to NATO available in 1999. Indeed, advocates of NATO's action argue that its performance as compared to the inadequacy of the protective response of the UN to the ethnic cleansing in Bosnia a few years earlier, vindicates the bypassing of the UNSC. In this regard, not only is the validity of the interventionary claim important, but also the question of political will, perseverance, and capabilities.

This argumentation is, however, somewhat self-serving, as the earlier UN failure was partly a result of the refusal by the NATO countries to support the Bosnian effort in a more vigorous and effective manner. The mandating powers viewed damage to the UN's credibility as a result of its failure in Bosnia unfortunate, but not an occasion for greatly expanded commitment. In contrast, in relation to Kosovo, the central involvement of NATO assumed a different form, and the major states were unwilling to accept an outcome that could not be presented as "a success" because damage to the credibility of NATO was unacceptable.

International law on these matters is not yet settled, and the fluidity caused by competing doctrines generates controversy and uncertainty. In these settings "coalitions of the willing" provide a subsidiary source of protection for a beleaguered people that cannot summon a response from the UN System, but this in turn creates a concern about the loosening of legal restraints on war and intervention. The Rwanda genocide in 1994 reinforced a perception that effective action to prevent such a tragedy should not be inhibited by deference to the UN or to outmoded or overly rigid restrictions governing use of force. But much of the non-Western world remains unconvinced, and is suspicious of validating use of force that endow the powerful countries of the North with such a discretionary option in this regard. This suspicion is associated not only with NATO action in Bosnia and Kosovo, but with the sort of open-ended mandate provided by the UNSC regarding the use of force against Iraq to recover the sovereignty of Kuwait in 1990-91, and the indefinite prolongation of this use of force without a subsequent renewal of the mandate.

It is also suggested by advocates of intervention that UN practice has created greater flexibility and permissiveness with respect to the use of force than can be derived from the most relevant international law texts, including the Charter. On this reading of international law, the Charter is overly restrictive. This conclusion is arguably reinforced by the failure of UN membership, even after the end of the cold war, to implement the collective security provisions of Chapter vii (including the designation of standby forces and the active operation of the Military Staff Committee). As a result, all claims to use force must be considered in each context, and evaluated as reasonable or not, based on their specific merit. Such a view is usually coupled with the argument that states have often acted in apparent opposition to these Charter restrictions, and have not encountered legal censure. In part, this more flexible approach to the interpretation of international law governing the use of force acknowledges the reasonableness of taking transnational action to respond to either international terrorism or genocidal behavior. It also accepts the necessity of acting in some circumstances without a UN authorization, when such authorization might be unavailable due to a veto being cast or anticipated by a Permanent Member of the UNSC.

In the case of NATO's recourse to force, some clarification of its claims can be made, but the controversy as to their legal propriety cannot be put to rest. There was no factual basis upon which

NATO could claim a defensive use of force that could qualify as self-defense under international law. Not even an authorization by the United Nations could have persuasively converted the NATO use of force into an instance of self-defense. NATO's action could more plausibly have been treated as an instance of enforcement of peace and security by a regional organization, an option embodied in Article 53 of the Charter.

The most convincing legal ground for the NATO military campaign relates to the UNSC's authority to regard any set of circumstances as posing a threat to international peace and security as understood by Chapter VII of the Charter, and thereby opening up the possibility of authorizing the use of force to "maintain or restore" peace and security. The Gulf War proceeded on this logic, although in that instance there also existed a clear factual foundation for the more accepted claim of collective self-defense of territorial integrity and political independence under Article 51 of the Charter. It is certainly legally relevant that the deteriorating situation in Kosovo in the year prior to the NATO campaign was being treated as falling within Chapter VII. The international dimension of Kosovo was explicitly associated with the wider danger of instability spreading to such neighboring countries as Macedonia, Albania, and Bulgaria and with the prospect of hundreds of thousands of refugees streaming across Europe.

In considering the legality of NATO's campaign, an additional extra-legal complexity makes reliance on force more reasonable. There were strong grounds for believing that a political compromise, even if negotiable, would not work reliably to protect the Kosovar Albanians, given the nature of Milosevic's past record of war crimes and illusory reassurances, and especially considering the precariousness of the situation in Kosovo. This consideration was a further basis for the view that it was not feasible to act within the UN to achieve the goal of effective protection of the Kosovar civilian population. This analysis reverts to the difficulties of reconciling legality and legitimacy in the Kosovo setting, and also evokes the anguished memories of international complicity in the terrible events in Bosnia, particularly the massacre at Srebrenica.

One way to analyze the international law status of the NATO campaign is to consider legality a matter of degree. This approach acknowledges the current fluidity of international law on humanitarian intervention, caught between strict Charter prohibitions of non-defensive uses of force and more permissive patterns of state practice with respect to humanitarian interventions and counter-terrorist use of force. The Chapter VII resolutions prior to March 1999 usefully support this analysis, as does the one-sided rejection of the Russian-sponsored resolution of censure after the intervention. Even more indicative of a quasi-ratification of the NATO action was the willingness of the UNSC in Resolution 1244 to accept a central role for restoring normality to Kosovo on the basis of the NATO negotiating position at Rambouillet and elsewhere, including the imposition of an UNMIK regime that amounts to de facto independence for the former province. These factors supportive of "legality" are offset in part, though, by the negotiating ambiguities outlined in the previous chapter, the exclusive reliance on air warfare, and the ambivalent relationship to the KLA.

Another fundamental legal concern relates to the kind of precedent being established by forceful intervention in Kosovo and Serbia. To endow the NATO campaign with an aura of legality on the basis of "implicit" authorization to use force by the UNSC seems an undesirable precedent. This is likely to encourage an even greater reliance on the veto by those Permanent Members who fear expansive subsequent interpretations. Such states may well be concerned that their concurring vote on what seems like a preliminary resolution on a threat to peace might later be relied upon by some states to justify force and what they would regard as unwarranted intrusions on sovereign rights. There is little doubt that any move toward an implicit authorization for force tends to undermine "the bright red line" that

the Charter has attempted to draw around permissible force, although this dilution, it must be admitted, may already be occurring in practice.

Several non-legal or quasi-legal justifications for the intervention have been put forward after the fact by supporters of the NATO undertaking. These include assertions that the Charter framework is obsolete in the current era of intrastate conflict, and that the moral priority of preventing genocide and severe crimes against humanity justifies action even when the UNSC cannot find a political consensus. This geopolitically grounded argument suggests that a coalition of like-minded or “enlightened” states excluding the blocking Permanent Members can still wield sufficient moral authority for the international community to justify bypassing a paralyzed UNSC when the circumstances demand it. At the very least, such an argument demands that it be demonstrable that what is at stake is indeed as morally extreme as genocide or severe criminality, and that no course of action within the capacity of the UNSC could reasonably be expected to stop it. Despite this high threshold and the ambiguities surrounding whether Kosovo met such conditions, the recognition of such a vaguely defined right to “coalition” action has disturbing implications for future world stability. If the Kosovo war is employed as a precedent for allowing states, whether singly or in coalition, to ignore or contradict the UNSC based on their own interpretation of international morality, the stabilizing function of the UNSC will be seriously imperiled, as will the effort to circumscribe the conditions under which recourse to force by states is permissible.

In situations such as the Kosovo crisis, however, a decisive obstacle to recourse to the United Nations may have to do with the general absence of a supportive consensus among states rather than merely with the prospect of a veto. Indeed, the NATO states chose not to utilize the residual role of the General Assembly under the Uniting for Peace Resolution because, even though there is no veto in the General Assembly, the sensitivity of non-Western states to interventionary claims of any sort made it unlikely that an authorization of force would have been endorsed by the required two-thirds majority. Arguably, Kosovo thus fell into a special zone where neither approval nor censure was forthcoming, making a weak case for bypassing the United Nations.

NATO and its supporters have wisely avoided staking out any doctrinal claims for its action either prior to or after the war. Rather than defining the Kosovo intervention as a precedent, most NATO supporters among international jurists presented the intervention as an unfortunate but necessary and reasonable exception. Nevertheless, NATO cannot hope to preclude states, and especially other regional organizations, from referring to its claims of intervention in Kosovo as a precedent. NATO could in theory formally commit itself not to repeat such an unauthorized intervention in the event of similar circumstances arising in the future, but such a step would be seen as amounting to the repudiation of its campaign on behalf of Kosovo, and is extremely unlikely.

The Kosovo “exception” now exists, for better and worse, as a contested precedent that must be assessed in relation to a wide range of international effects and undertakings. Chief among these is that NATO, as mentioned earlier, was widely viewed by many non-NATO countries as having independently waged a non-defensive war without having made sufficient effort to obtain proper authorization or to achieve a peaceful settlement. The ambiguities of these efforts, which support the judgment of “insufficiency”, were discussed in the previous chapter. NATO was either engaging in threat diplomacy or treating the use of force as a foregone conclusion, and in any event seemed prepared to circumvent the UN because of anticipated Russian and Chinese opposition, reasons of military and political efficiency, and possibly because of an ancillary interest in constructing a new post-cold war security architecture in Europe based on a renovated NATO.

Even if the benefit of the doubt is given to the diplomacy conducted on behalf of NATO, there was a failure to make a maximal effort at the UN level, where it did no more than informally justify non-recourse to the UNSC on the grounds that a veto was anticipated. Such an anticipation is itself highly subjective and conjectural, and does not take into account the obligation to explore the grounds for agreement with potential objecting states so as to achieve a UNSC consensus. In evaluating claims by parties that there is no reasonable alternative to the use of force in a given set of circumstances, the international law approach gives primacy to the UNSC and to the related priority accorded the avoidance of war.

Finally, eventual assessment of the “Kosovo principle” will also be strongly influenced by the ultimate outcome in Kosovo-whether the international action is seen as producing stable and humane governance, or the opposite.

The above discussions of the ambiguities inherent in all facets of adjudicating NATO’s intervention into Kosovo place before the Commission a central question-whether, in a post-Cold War setting, international law as conceived a half century earlier provides adequate guidelines, especially given the failure of states to endow the United Nations with sufficient authority and capabilities? In answering this question, the Commission feels strongly that the moral imperative of protecting vulnerable people in an increasingly globalized world should not be lightly cast aside by adopting a legalistic view of international responses to humanitarian catastrophes. The effectiveness of rescue initiatives would seem to take precedence over formal niceties.

In this regard, it must be acknowledged that even a negotiated outcome attained by NATO diplomacy would still have consigned over 90% of the Kosovo population to oppressive and discriminatory rule under the FRY. The NATO military campaign, despite its vulnerability to legal and moral criticism, did at least have the effect of liberating the majority population from a long period abuse, and has given them some hope for a secure and genuinely autonomous future based on a seemingly irreversible de facto independence. Such a favorable set of circumstances for Kosovar Albanians would not have been achieved even if the restoration of pre-1989 style autonomy had been agreed to by Belgrade. Autonomy would have left Kosovo with a continued Serb police presence, and an ongoing vulnerability to FRY armed interference. Consequently, it would have also been subject to the probable continuation of a KLA-led movement for an independent Kosovo. Of course, the beneficial aspects of the actual outcome for Kosovar Albanians need to be balanced against the failure to protect the non-Albanian minorities since June 1999, and the related unlikelihood of a future multiethnic, democratic Kosovo.

LAWS OF WAR: METHODS AND TACTICS

International law governing conduct in war is set forth in a series of international agreements that have the status of treaties. The most pertinent treaty instrument is Additional Protocol I to the Geneva Conventions, which pertains to civil wars. More than 150 states have ratified Protocol I, but it has not been ratified by all members of NATO including France, Turkey, and the United States. Nevertheless, most of its content is widely considered to be operative as “customary international law,” that is, rules and standards that impose obligations on states as a result of their acceptance over time as norms which should be binding on states. This is augmented by a series of customary law principles that have developed regarding the methods and tactics of warfare, including the principle of necessity (the use of force must be essential to achieve goals of war), the principle of proportionality (relation of means to ends; avoidance of excessive force), the principle of discrimination or distinction (methods and tactics must be directed at military targets), and the principle of humanity (methods and tactics must not inflict superfluous suffering on people; avoidance of cruelty). Considerable latitude has been afforded to the interpretation of these principles.

In many respects, Article 48 of Protocol I formulates the basic rule relating to the protection of civilians, which is a treaty formulation of the customary rule of discrimination:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.

Article 52(2) elaborates on the nature of military objects as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.” Article 51(2) rules out the idea of weakening a military effort by attacking civilians: “(...)the civilian population as such, as well as individual civilians, shall not be the object of attack.” Further, Articles 51(4) (5)(7) and (8) specify the facets of this underlying obligation.

In analyzing whether the NATO military campaign of 1999 complies with these treaty and customary rules of international law, the Commission has taken account of and given great weight to the Final Report of the Committee of the ICTY Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. On the basis of a detailed examination of the evidence presented to it by the FRY, and by its reliance on sources in the public domain, the ICTY concluded that the most serious allegations against NATO relating to the law of war were not of sufficient merit to warrant further investigation. It should be noted, however, that this conclusion goes directly against the recommendation of Amnesty International, which in its earlier report, “Violations of the Laws of War by NATO during Operation Allied Force,” June 7, 2000, specifically enjoins the ICTY to conduct investigations of “all credible allegations of serious violations of international humanitarian law (...) with a view of bringing to trial anyone against whom there is sufficient admissible evidence.” The ICTY could argue that its inquiry was consistent with this recommendation to the extent that there was not sufficient admissible evidence available to justify an “investigation” of the sort being proposed by Amnesty International. The FRY’s allegations against NATO either were found not “sufficiently well-established as violations of international law to form the basis of a prosecution” or were such that “the prospects for obtaining evidence sufficient to prove that the crime had been committed by an individual who merits prosecution in the international forum” were not available.

It should be kept in mind that the ICTY was concerned only with the very specific question as to whether there was a basis to charge particular individuals with crimes. This type of criminal inquiry, while obviously appropriate for the ICTY, is an inappropriately narrow undertaking for an independent international commission. The Commission is concerned about whether there is a basis for believing that NATO committed violations of the applicable laws of war, and thus does not need to connect individuals with specific violations, but rather seeks to investigate the responsibility of the governments involved in possible violations. The focus of the Commission thus is more in accord with the sort of assessment made by the Amnesty International study. The ICTY also pointed out that “The Prosecutor may, in her discretion require a higher threshold be met before making a positive decision that there is sufficient basis to proceed.” Again, as the Commission is not responsible for prosecution, it is freer to inquire into allegations pertaining to the laws of war. When criminal responsibility is at stake, there is a stronger tendency to require a treaty basis for violations, but when the inquiry is more general and provisional, the principles of customary international law have greater relevance. Beyond this, where the claim is based on a rationale of “humanitarian intervention,” adherence to the laws of war might properly be assessed in a particularly rigorous manner.

TARGETS

After the first period of bombing, NATO expanded its target list and began destroying the civilian infrastructure of Serbia, bombing bridges, broadcasting stations, electricity supply, political party offices, and other facilities considered basic to civilian survival. Such targeting is questionable under the Geneva Conventions and Protocol I, but it must be acknowledged that state practice in wartime since World War II has consistently selected targets on the basis of an open-ended approach to “military necessity,” rather than by observing the customary and conventional norm that disallows deliberate attacks on non-military targets. It must also be noted that the NATO campaign was more careful, in relation to its targeting, than was any previous occasion of major warfare conducted from the air. This care with targeting was partly an expression of declared policy, and it reflected the availability of “smart” technology that had the capacity to be precise. As the ICTY noted, several serious mistakes were made. Nevertheless, there is no evidence of deliberate targeting of civilians. There is, nevertheless, reason to question the selection of targets relating to the civilian infrastructure of the FRY in which the probability of civilians being present and killed was quite high. There are also allegations and evidence to suggest that NATO persisted with attacks after it realized that civilians were present at the target site, including Grdelica railroad bridge, the automobile bridge at Luan/Luan, and the Barbarin/Barbarin bridge.

CLUSTER BOMBS

Human Rights Watch has carefully documented that at least 500 non-combatant civilians were killed by NATO bombs and missiles in Serbia and Kosovo. A significant number of these civilian deaths occurred during attacks on civilian infrastructure targets, and others as a result of the use of legally dubious cluster bombs against targets located in densely populated areas. Thousands of cluster bombs remain unexploded throughout Kosovo and Serb territory, posing a serious ongoing hazard somewhat analogous to “anti-personnel landmines” that have been outlawed since the 1998 Ottawa Treaty. Although the legal force of this analogy can be questioned, especially with respect to those members of NATO that have so far not signed the treaty, the analogy is sound in that cluster bombs are often more destructive than mines, and have been responsible for over 500 civilian deaths. NATO has been slow to deploy its own expert teams to help in the locating and defusing of these unexploded bombs. In Kosovo, UN teams and NGOs are taking on the task, mostly with newly trained Albanian staff, but at a very slow pace due to limited resources. The ICTY view is that cluster bombs are not clearly prohibited by international humanitarian law, and thus are not suitable for an investigation as to individual responsibility for their use. The Commission does not dispute this conclusion, but nevertheless recommends that cluster bombs should never be used in any future undertaking under UN auspices or claiming to be a “humanitarian intervention.”

TACTICS

The reliance by NATO on a high-altitude rule of engagement for its bombing sorties so as to minimize the risk of casualties to itself has been widely criticized. The fact that NATO endured zero casualties despite the magnitude of the war and the damage inflicted has underscored this critique. In the words of the Amnesty International report, “the requirement that NATO aircraft fly above 15,000 feet, made full adherence to international humanitarian law virtually impossible.” Nevertheless, it must be kept in mind that, despite a series of “mistakes,” NATO’s overall record was unprecedented to the extent that it avoided civilian damage through the accuracy of its targeting. The ICTY concluded that:

there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears

that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.

The high-altitude tactic does not seem to have legal significance, although it does weaken the claim of humanitarianism to the extent that it appears to value the lives of the NATO combatants more than those of the civilian population in Kosovo and Serbia, and especially the lives of the Kosovar Albanians that it was acting to protect.

ENVIRONMENTAL DAMAGE

The ecological/environmental effects of the bombing campaign also are alleged to have a long-term civilian consequences, both in Serbia and in Kosovo. A recent United Nations Environmental Program (UNEP) study conducted by the Balkan Task Force concludes that the environmental consequences it could document were in most cases either not substantial or not long-lasting, in contrast to some of the NGO contentions that were made during and shortly after the war. However, UNEP does document several extremely serious toxic leaks caused by the bombing of industrial and petroleum complexes in several cities. These leaks created environmental and humanitarian emergencies posing uncertain long-term risks and demanding immediate clean-up. The UNEP report asserts that the FRY is responsible for its own environmental clean-up, but it does acknowledge that any such clean-up efforts might be hindered by the ongoing embargo. Some NGO reports and scholarly assessments suggest more extensive and serious environmental damage that seems to cross the threshold of accountability embodied in Articles 35(3) and 55 of Protocol I. The ICTY Final Report stresses the demanding character of this threshold, with the key words being that the damage sustained must be "widespread, long-term, and severe," taking special note of the word "and" that suggests that all three features must be cumulatively present for a violation to take place.

Another disturbing environmental concern raised during the war was the widespread use of depleted-uranium (du) tipped armor-piercing shells and missiles. Upon explosion, such shells and missiles release respirable uranium dioxide into the atmosphere, with potential serious long-term health consequences. NATO does not deny the use of such shells and missiles, as du is considered a cost-effective material with valued armor-piercing properties. Disturbingly, though, as of this writing NATO has been slow to assist the UNEP investigation. The UNEP report called for a World Health Organization investigation of the long-term health implications of the use of du armament. Five months after a special request to NATO from Kofi Annan for more precise information, NATO confirmed that 31,000 rounds of du ammunition, equivalent to 10 tons, was used in the Kosovo conflict, but UNEP still lacks sufficient targeting detail to allow for additional investigation of whether a significant radiation hazard might exist. Other studies provide reassurance that the damage resulting from du is not substantial and not dangerous for the civilian population. The ICTY conclusion is that at present there is no consensus supportive of the prohibition of such du ordinance, although it raises the possibility of such a development in the future. It reinforces its conclusion more questionably by suggesting that the ICJ was unable to agree that even nuclear weapons were unconditionally prohibited despite their undoubted character of doing severe and extensive environmental damage. What makes this reasoning questionable is that the ICJ was considering the legality of a possible use of nuclear weapons without any real consideration of effects, and limited such use to extreme circumstances of self-defense, and then only as a legal possibility.

The Commission recommends that particular care be taken in the context of a humanitarian intervention to avoid targets that would cause serious environmental damage, adhering to standards of restraint greater than needed to comply with the current high threshold of Protocol I. It is noted that Iraq has been charged with tactics designed to inflict environmental damage in the course of the Gulf

War, although its actions were connected with measures related to “military necessity” as seen from its perspective.

DISCUSSION

The Commission is impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of “military necessity” in the context. The Commission accepts the view of the Final Report of the ICTY that there is no basis in available evidence for charging specific individuals with criminal violations of the laws of war during the NATO campaign. Nevertheless, some practices do seem vulnerable to the allegation that violations might have occurred, and depend for final assessment upon the availability of further evidence. The Commission does recommend that the ICRC or other appropriate expert body prepare a new legal convention for military operations that are either instances of UN peacekeeping or humanitarian intervention. This convention should impose more constraints on the use of force than are embodied in the law of war as now generally interpreted. A less ambitious alternative, recommended by Amnesty International, would be to accept stricter adherence to the existing standards of international law, particularly as already embodied in Protocol I. Such an interpretation has been provided in competent form by the ICTY Final Report. While so recommending, the Commission is mindful of the importance of effectiveness in carrying out a humanitarian intervention under difficult conditions, and with a sense of urgency, and does not intend its emphasis on enhanced legal guidelines to undermine a reasonable view of “military necessity.” There is a delicate balance here, as countries are being asked to take risks for humanitarian purposes, and may be reluctant to do so. Such reluctance points to the need for some form of global professional voluntary military, peace observation, and police force. Unfortunately, the current political obstacles to moving in such a desirable direction are formidable.

ON THE DOCTRINE OF HUMANITARIAN INTERVENTION

With the ending of the Cold War, new conditions of world order have complicated earlier priorities with respect to the use of force in international relations. The post-1945 preoccupation was with the prevention of international wars between two or more states, and especially between major states. Nuclear weaponry and missile guidance systems lent a geopolitical urgency to this undertaking. Nevertheless, even before the Soviet collapse, many of the most serious challenges to international peace and security were arising in the course of intra-national crises of a wide variety. The UN Charter discouraged responses to such crises with its assurance that matters “essentially within the domestic jurisdiction” of states were beyond its purview unless defined by the UNSC as threats to international peace and security. Although the UNSC has increasingly identified domestic crises as threats to international peace and security, the feeling persists that the Charter as originally written is not satisfactory for a world order that is increasingly called upon to respond to humanitarian challenges. This concern had already been clearly articulated before the Kosovo challenge, but it was accentuated by the NATO response.

The Commission’s initial discussion above of the legality of the NATO campaign ended inconclusively with an appreciation of the difficulty of reconciling what was done to protect the people of Kosovo with the core prohibition on recourse to non-defensive force that has not been authorized by the United Nations. At the same time, the Commission takes the view that the pattern of Serb oppression in Kosovo, the experience of ethnic cleansing a few years earlier in Bosnia, and the lack of international response to genocide in Rwanda in 1994 combine to create a strong moral and political duty on the part of the international community to act effectively, and to express solidarity with civilian societies victimized by governments guilty of grave breaches of human rights. This duty pertains both to the

protection of the Kosovar Albanians and to the reestablishment of autonomy for the province. Arguably, it extends to the realization of the right of self-determination for the people of Kosovo. As the previous has argued, diplomacy failed to produce these results in a reliable manner, leaving the options of doing nothing or mounting a military intervention under NATO auspices. This situation supports the general conclusion that the NATO campaign was illegal, yet legitimate. Such a conclusion is related to the controversial idea that a “right” of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse. Humanitarian intervention may also thus be legitimately authorized by the UN, but will often be challenged legally from the perspective of Charter obligations to respect the sovereignty of states.

Allowing this gap between legality and legitimacy to persist is not healthy, for several reasons. Acknowledging the tension with most interpretations of international law either inhibits solidarity with civilian victims of severe abuse by territorial governments, or seriously erodes the prohibition on the use of force that the World Court and other authorities have deemed valid. Closely related to this effect, recourse to force without proper UN authorization tends to weaken the authority of, and respect for, the United Nations, especially the UNSC, in the domain of international peace and security. It needs to be observed, at the same time, that a failure to act on behalf of the Kosovars, or a repetition of the Bosnian or Rwandan experience of an insufficient UN mandate and capabilities, would have also weakened the United Nations, probably to a greater degree. Therefore, although the Commission’s finding is that the use of force by NATO in intervening in Kosovo is validated from the perspective of the legitimacy of the undertaking and its overall societal effects, the Commission feels that it would be most beneficial to work diligently to close the gap between legality and legitimacy in a convincing manner for the future.

The Commission is of the opinion that the best way to do this is to conceive of an emergent doctrine of humanitarian intervention that consists of a process of three phases:

- a recommended framework of principles useful in a setting where humanitarian intervention is proposed as an international response and where it actually occurs;
- the formal adoption of such a framework by the General Assembly of the United Nations in the form of a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by UNSC interpretations of the UN Charter that reconciles such practice with the balance between respect for sovereign rights, implementation of human rights, and prevention of humanitarian catastrophe;
- the amendment of the Charter to incorporate these changes in the role and responsibility of the United Nations and other collective actors in international society to implement the Declaration on the Right and Responsibility of Humanitarian Intervention.

The main problems relating to the protection of human rights and the prevention of humanitarian catastrophes are political rather than legal. In the face of serious abuses of human rights, even genocide, or the need to prevent or mitigate a humanitarian catastrophe, armed or unarmed intervention will not occur in an effective form unless such action conforms to the interests of potential intervening states; the action does not fly in the face of prudential concerns about sustaining the stability of world order; and, above all, the action does not risk the outbreak of a major war among states with nuclear capacity. For these reasons, it is unrealistic to expect humanitarian intervention to evolve according to the rule of law such that equal cases are treated equally. The only viable option is to prohibit such interventionary claims altogether, or to accept their selective implementation, ensuring only that in appropriate instances such intervention proceeds on a principled basis that is as consistent as possible with the humanitarian rationale.

During the cold war there was not the political will, nor the foundation in law, nor the practical conditions that would support a humanitarian diplomacy that might include the use of interventionary force. For different reasons, both superpowers were most reluctant to pursue goals in international society that did not relate to their rivalry, and both were acutely conscious of not taking action that would be likely to provoke its adversary to embark on warfare. The Soviet Union essentially appropriated the sovereignty of its client states in eastern Europe in an oppressive manner, but at the same time it dogmatically resisted any infringement of sovereignty by the West. The United States allied itself with many states that were guilty of extreme violations of human rights, so long as their governments adopted an anti-Communist orientation and supported the Western cause in international settings. The only important exception arose in relation to the apartheid regime in South Africa, where East and West, North and South, could, at least in the 1980s, agree on the illegality of the racist practices, and on a gradually more coercive approach toward the official government that included the imposition of sanctions. The South African example generated an interventionary approach which, while falling well short of the threat or use of force, provided a sort of prelude to subsequent claims of humanitarian intervention.

There were additional inhibitions on any authorization of interventionary force by the United Nations. First of all, the normative standards associated with international human rights had not been accepted as internally binding in any serious sense. Second, the cold war era interventions were seen as extremely destructive exercises in geopolitics which had little bearing on the well-being of the societies in which the violence occurred, despite lofty ideals proclaimed by the intervenors. This legacy has resulted in continuing suspicion, especially by states that had been colonized or dominated by the West, that "humanitarian intervention" is a new name for Western domination. For the UN to give such claims any sort of legitimacy would be to create a "Trojan Horse" that could be used to undermine political independence and even the territorial integrity of weaker sovereign states. As such, the most that can be said regarding humanitarian intervention is that there is a disposition to approach imminent humanitarian catastrophes on an ad hoc or case-by-case basis. This reinforces an impression of double standards (taking action in Kosovo, but not in other places of equal or greater abuse), but it retains the basic norm of unconditional non-intervention in internal affairs. For opposite reasons-the desire to avoid pressures to act, as in sub-Saharan Africa or South Asia-those states that mounted the intervention on behalf of the Kosovars are also inclined to prefer an ad hoc approach at this point.

The Commission believes that the end of the Cold War has brought about some dramatic changes in circumstances, which make the case for a doctrine of humanitarian intervention much more compelling than in the past. There has been an impressive evolution of international standards governing human rights, and some expectation of implementation both by the organized international community (such as the anti-apartheid campaign) and through the initiative of civil society organizations and concerned governments. Further, there is a growing trend toward an insistence on accountability of leaders for crimes of states, demonstrated by the controversy over the extradition case against General Augusto Pinochet, and epitomized by the ICTY and by the Rome Treaty of 1998, which sets the framework for the establishment of an International Criminal Court.

Meanwhile, the threat that interventions undertaken for humanitarian goals will provoke strategic warfare among leading states has declined. In recent years the United Nations and other powerful actors have been harshly criticized for taking insufficient action in response to threatened or imminent humanitarian catastrophes. The Organization of African Unity (OAU) issued a report recently criticizing the UN, France, and the United States for their failure to take action to prevent genocide in Rwanda in 1994. A similar pattern is associated with the UN role in Bosnia, culminating in its ineffectiveness in upholding "the safe havens" established under the authority of the UN, and not protecting them

sufficiently. In other words, the political, moral, and legal ground now exists to strike a new balance between the general duty of non-intervention in internal affairs of states and the ethos of humanitarian intervention on the basis of principled, collective decisions.

To advance discussion and to present recommendations for addressing these important issues, the Commission believes that the time is now ripe for the presentation of a principled framework, useful for evaluating past claims of humanitarian intervention, to guide future responses in the face of imminent or unfolding humanitarian catastrophe. It is important to understand that the scope of this framework extends beyond situations of governmental abuse to encompass acute human suffering associated with governmental collapse, as in Somalia in the early 1990s. It is our hope that this framework can be subsequently adopted in some modified form as a Declaration on Humanitarian Intervention by the UN General Assembly. On this basis, two lines of development can be projected. The preferred approach would be to have the Charter adapted to this Humanitarian Intervention Declaration by upgrading human rights and conditioning sovereign rights on respect for human rights and the maintenance of the capacity to govern. An alternative approach would be to encourage UNSC interpretations of the Charter that moved explicitly in this direction on a case-by-case basis, building up a new authoritative approach to this subject along the lines of the Humanitarian Intervention Declaration.

Such “innovations” in Charter interpretation have been part of the UN history all along, and were most notably associated with Dag Hammarskjöld’s tenure as Secretary General, particularly in the context of UN peacekeeping activities. A good example of such “legislative” interpretation is the conversion of the Article 27(3) requirement that UNSC decisions be supported by the “concurring” votes of the five Permanent Members into a pattern of practice in which “abstentions” or absences are treated as equivalent to “concurring”.

It might be unrealistic, however, to expect such an outcome in the near future. A large number of states continue to view humanitarian intervention outside the United Nations with great suspicion, and are not favorably disposed to such claims even within the UN. They distrust the assertion of “humanitarian” intentions and oppose intrusions on territorial sovereignty. The majority of states on the UNSC indicated a willingness to confirm the result of the Kosovo intervention as a practical reality. Similarly, many have given some indirect support to the intervention via UNMIK, by way of appropriations and through refUSAI to pass any kind of critical resolution. Nevertheless, there is no current disposition at the United Nations to provide a principled regime that would “legalize” such interventions in the future. There is another source of resistance to any effort to put humanitarian intervention on a principled basis. Several important countries are extremely reluctant to remove humanitarian intervention from the realm of ad hoc diplomacy for fear of building expectations that, whenever a humanitarian catastrophe occurs, an interventionary duty to prevent or the ameliorate the crisis would arise. Here, their objective is to retain the diplomatic flexibility associated with treating such challenges selectively, responding where the political will is present, but not undertaking a more general commitment to act in a consistent fashion that might not accord with their interests or reflect the outlook of their domestic society. These states are not currently willing to accept a duty of humanitarian intervention except at times and places of their own choosing.

We acknowledge that a framework for intervention is thus a controversial step. One opposing position argues that it is not necessary, because of the possibility of loosening the interpretation of the prohibition on force to an extent that “international law” encompasses what is here called “legitimacy.” The second position insists that positing such a principles regime would contribute further to a revival of geopolitical discretion with respect to force, weakening both international law and the United Nations in

the process. This position was particularly firmly emphasized to the Commission by participants at its Johannesburg seminar.

However, the importance of agreeing upon a principled regime for humanitarian intervention or human rights enforcement has assumed prominence throughout the 1990s. Somalia, Bosnia, Haiti, Rwanda, and East Timor are only the most salient cases in which great moral pressure was exerted on the international community and the UN system to take forcible action to end a humanitarian catastrophe in the making—pressure exerted as a result of domestic circumstances. Kosovo underscored the challenge, and the NATO response is being treated by many commentators as the defining moment in the debate on humanitarian intervention.

A FRAMEWORK FOR PRINCIPLED HUMANITARIAN INTERVENTION

The Danish Institute of International Affairs suggests five “possible criteria” for “legitimate humanitarian intervention.” Although the Institute frowns on creating any basis for the use of force outside the framework of existing international law, these criteria nonetheless offer a useful background to the Commission’s recommended informal regime applicable to humanitarian intervention. The Danish Institute’s criteria are as follows:

- serious violations of human rights or international humanitarian law;
- a failure by the UNSC to act;
- multilateral bases for the action undertaken;
- only necessary and proportionate force used;
- “disinterestedness” of the intervening states.

The Commission’s recommended framework of principles is divided into two parts. The first suggests threshold principles that must be satisfied in order for any claim of humanitarian intervention to be legitimate. The second puts forward principles that enhance or diminish the degree of legitimacy possessed by forceful intervention. These “contextual principles” can be applied either before an intervention in order to determine whether force should be used, or to assess whether an intervention was justifiable. Unless it is apparent from the text that a principle is relevant only to instances of intervention without a UN mandate, these principles should be understood to be capable of application to coercive humanitarian intervention either by the UN, or by a coalition of the willing acting with or without the approval of the UN. It should further be kept in mind that the term “intervention” is not applicable to a situation where a government in power gives its consent to an international presence, given that, in such a situation, no legal problem arises regarding the legitimacy of the humanitarian participation.

THRESHOLD PRINCIPLES

1. There are two valid triggers of humanitarian intervention. The first is severe violations of international human rights or humanitarian law on a sustained basis. The second is the subjection of a civilian society to great suffering and risk due to the “failure” of their state, which entails the breakdown of governance at the level of the territorial sovereign state.
2. The overriding aim of all phases of the intervention involving the threat and the use of force must be the direct protection of the victimized population.
3. The method of intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible, and must specifically take measures to protect all civilians, to avoid collateral damage to civilian society, and to preclude any secondary punitive or retaliatory action against the target government.

CONTEXTUAL PRINCIPLES

4. There must be a serious attempt to find a peaceful solution to the conflict. This solution must ensure that the pattern of abuse is terminated in a reliable and sustainable fashion, or that a process of restoring adequate governance is undertaken.
5. Recourse to the United Nations UNSC, or the lack thereof, is not conclusive. This is so if approaching the Council fails because of the exercise of a veto by one or more of the permanent members; or if the failure to have recourse to the UNSC is due to the reasonable anticipation of such a veto, where subsequent further appeal to the General Assembly is not practical. Effectively, the latter case suggests that the veto right is superseded by a O or better majority determination by “a coalition of the willing” that a humanitarian catastrophe is present or imminent.
6. Before military action is taken, lesser measures of mediating and coercive action, including sanctions, embargoes and non-violent methods of peace observation, must have been attempted without success. Further delay must be reasonably deemed to significantly increase the prospect of a humanitarian catastrophe;
7. Any recourse to the threat or use of force should not be unilateral, but enjoy some established collective support that is expressed both by a multilateral process of authorization and the participation of countries in the undertaking;
8. There should not be any formal act of censure or condemnation of the intervention by a principle organ of the United Nations, especially by the International Court of Justice or the UNSC.
9. There must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations. This applies to all aspects of the military operation, including any post cease-fire occupation.
10. Territorial or economic goals are illegitimate as justification for intervention, and there should be a credible willingness on their part of intervening states to withdraw military forces and to end economic coercive measures at the earliest point in time consistent with the humanitarian objectives.
11. After the use of armed force has achieved its objectives, there should be energetic implementation of the humanitarian mission by a sufficient commitment of resources to sustain the population in the target society and to ensure speedy and humane reconstruction of that society in order for the whole population to return to normality. This implies a rejection of prolonged comprehensive or punitive sanctions.