Humanitarian intervention: the case of Kosovo

Book section

HUMANITARIAN INTERVENTION: THE CASE OF KOSOVO

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Part I: Introduction

Humanitarian intervention is a particularly appropriate topic for consideration at the present symposium. Events in Kosovo[1] and, to a lesser extent, East Timor have made the questions whether there is a right of humanitarian intervention and, if so, when that right may be exercised and by whom into issues of the utmost importance. They have also posed, in a particularly stark form, the question which is the overall theme of this symposium — are we witnessing the end of the post-war system in international law?

There is certainly a strong case for ending —or, at least, reforming— that system. For much of the last fifty-five years international law has been dominated by the shadow of the last world war and the fear that there might be another. All too

* QC; Professor of International Law, London School of Economics and Political Science. This article was originally delivered as a conference paper at the 1999 Erik Castrén Symposium 'The Post-War Peace System: The End of an Era?' held at the University of Helsinki. Publication was somewhat delayed and, ironically, revision of the article was completed in July 2001 just as the former President of the Federal Republic of Yugoslavia, Slobodan Milosevic was handed over to the International Criminal Tribunal for the Former Yugoslavia to face charges of war crimes and crimes against humanity arising out of the events in Kosovo in 1998-99. In revising the article, I have tried to take account of certain developments since the 1999 symposium and to add reference to some of the extensive literature which has been published since then. I am most grateful to Ms Susan Breau, LL.M., for assistance in this task. The responsibility for any errors is mine alone.

[1] The writer appeared as counsel for the United Kingdom in the case concerning *Legality of Use of Force* brought by the Federal Republic of Yugoslavia ('FRY') against the United Kingdom in the International Court of Justice ('ICJ'). The FRY brought parallel cases against nine other NATO States. The Orders of the Court of 2 June 1999, rejecting the FRY's request for provisional measures directing a halt to the NATO operations respecting Kosovo are reported at 38 *International Legal Materials* (1999) 950. The Court ordered that the cases against Spain and the United States of America be removed from the Court's list. At the time of writing, the eight remaining cases were still pending before the Court. The present paper is written in my personal capacity and not as counsel.

Finnish Yearbook of International Law, 141–175.

often these have combined to leave international law looking like a frightened rabbit staring into the headlights of an approaching car, obsessed by the fear of an oncoming disaster which it was almost entirely powerless to prevent. Not surprisingly, in that environment the preservation of peace was regarded as more important than justice, human rights, 'the dignity and worth of the human person', the self-determination of peoples or any of the other values which are also fundamental to international law and international life.

Certainly the preservation of peace is scarcely an ignoble objective. At the end of a century of unparalleled violence, we ought to have every reason to know how important are the rules which forbid aggression, forcible self-help and the gunboat diplomacy of the past. The end of the cold war may have removed —or, at least, greatly reduced— the threat of nuclear war, and thus the absolute imperative of preserving peace between the big Powers, but it has replaced certainty of a kind with challenges which the international system has had difficulty meeting. These challenges exist in many different areas of international life. For over fifty years, for example, governments have concluded treaties providing for universal jurisdiction —frequently of an obligatory character— for international crimes. Yet these treaties remained almost entirely unused — a law which existed only on paper. Today, however, there is an unrivalled opportunity —and a crying need— to enforce those laws in practice. The creation of the Yugoslav and Rwanda tribunals, the International Criminal Court and the *Pinochet* case[2] are all signs of the changes that have come about in the last few years in this respect and each has produced some very uncomfortable moments as they exposed the tensions between different values such as State immunity and individual criminal responsibility, State sovereignty and internationalism.

East Timor is just such a case of having to take seriously a law which was in danger of being forgotten. Indonesia's annexation of East Timor always lacked validity in international law and was rightly denied recognition by most of the world community.[3] The legal position was clear but for most of the time since 1975 it cannot be said to have made much difference on the ground. The referendum in 1999 was a welcome, albeit belated, opportunity for the people of East Timor to exercise a right of self-determination which they have always possessed and which

[2] R v. *Bow Street Magistrate*, ex parte *Pinochet (No 1)* [2000] 1 *Appeal Cases* 61 and *(No. 3)* [2000] 1 *Appeal Cases* 147 (House of Lords). Decisions in the Belgian, French and Spanish courts are discussed in 93 *American Journal of International Law* (1999) 690 et seq. All of these decisions, together with an ntroductory note, are reported in volume 119 of the *International Law Reports*.

[3] For a useful collection of documents, see Krieger, *East Timor and the International Community: Basic* [illegible] (1997).

was expressly acknowledged by the International Court in 1995.[4] As is well known, the referendum was followed by a horrific outburst of violence but the Security Council was able to act so that forces were deployed to restore peace in East Timor.[5] While intensive negotiations ensured that the deployment of the United Nations-authorized force had the consent of the Government of Indonesia, there is no doubt that the Security Council had the authority to take such action even if that consent had been absent.

Kosovo, however, is a more difficult case and it is for that reason that I shall concentrate upon it. The conduct of the Yugoslav and Serbian authorities in Kosovo created a situation which most people found intolerable. While there has been considerable debate about what actually happened in Kosovo before 24 March 1999,[6] there was an almost universal recognition that, if the reports from bodies such as the Organization for Security and Co-operation in Europe were accurate, that behaviour was both morally and legally unacceptable. The military response by NATO, however, aroused more controversy than any use of force since the end of the cold war.[7] NATO's intervention was, in the end, effective in stopping the mass

[4] *Case Concerning East Timor*, ICJ Reports (1995) 90; 105 *International Law Reports* 226, at para. 31.

[5] See SC Res. 1264 (1999).

[6] For discussion of this question, see Parts II and V, below.

[7] Amongst the literature on the subject, which reflects the very different positions taken by a wide range of international lawyers, see the evidence given by Brownlie, Chinkin, Lowe and Greenwood to the Foreign Affairs Committee of the United Kingdom House of Commons, reprinted in 49 *International and Comparative Law Quarterly* (2000) 876-943; Henkin, Wedgwood, Charney, Chinkin, Falk, Franck and Reisman, 'Editorial Comments: NATO's Kosovo Intervention', 93 *American Journal of International Law* (1999) 824-878; Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999) 1; Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *European Journal of International Law* (1999) 23 and 'A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis' *ibid.*, at 791; Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Yearbook of United Nations Law* (1999) 59; Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia', 49 *International and Comparative Law Quarterly* (2000) 330; Blockmans, 'Moving into UNchartered Waters: An Emerging Right of Unilateral Intervention?', 12 *Leiden Journal of International Law* (1999) 759; Wheatley, 'The NATO Action Against the Federal Republic of Yugoslavia: Humanitarian Intervention in the Post-Cold War Era', 50 *Northern Ireland Legal Quarterly* (1999) 478; and Francioni, 'Of War, Humanity and Justice: International Law After Kosovo', 4 *Yearbook of United Nations Law* (2000) 107. The Kosovo crisis has also attracted an unusual number of studies by official and semi-official bodies. These include the report of the Foreign Affairs Committee of the United Kingdom House of Commons, House of Commons Paper (1999-2000) No. 28-I together with the response by the United Kingdom Government at *Command Papers* 4825 (August 2000); the report of the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law of the Netherlands Government, Report No. 13 (April 2000), <www.AIV-Advisory- (reviewed by Dekker in 6 *Journal of Conflict and Security Law* (2001) 115); the report of the

expulsion and persecution of Kosovo Albanians but it involved the large scale use of force against a State, not because of its aggression against other countries but because of the way it was treating its own citizens.

Did NATO act legally when it intervened? In my opinion, NATO was justified in resorting to force in the circumstances of the Kosovo crisis. My reasons for coming to that conclusion are the subject of this article. I have not attempted to address here two other questions which have also aroused controversy, namely whether the conduct of the campaign by NATO complied with the requirements of the law of armed conflict and whether the administration of Kosovo since the end of the campaign has been satisfactory. I have omitted these questions not because I do not consider them significant (it is manifest that they are questions of the greatest importance) but simply because each requires a detailed study which cannot be undertaken here. I have therefore focussed on the question whether NATO's resort to force was lawful or not.

There is, however, a preliminary question which requires some discussion – does it matter whether NATO's action was legal or not? There are those who have argued that intervention in Kosovo was morally right but unlawful.[8] That is, of course, a perfectly tenable position, though one which implies a terrible criticism of international law. The logical consequence of such a view, however, ought to be that the law should change.[9] If it is morally right to use force to prevent a humanitarian emergency, then it should be legally permissible as well.

Nevertheless, it appears that not everyone who regards humanitarian intervention as morally legitimate would accept that proposition. Numerous observers argue either that the law is irrelevant here and that we should not waste time debating the legality of intervention, or that it is actually better that we accept a law which prohibits humanitarian intervention and recognize that sometimes States have to act outside the law.[10] Both of these siren voices should be resisted. The first marginalises the law. The second is a counsel of despair which treats the task of formulating legal principles which distinguish between cases when intervention is right and those when it is not as being simply too difficult. Worse, however, both approaches encourage each State and each decision-maker to set up its own ideas of what is right and wrong above the standards hammered out by the international

Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999); and the *Kosovo Report* published by the Independent International Commission on Kosovo (2000).

[8] That is, for example, the position adopted by both Simma and Cassese, *supra* note 7.

[9] That is, for example, the position taken by Cassese and Lowe, as well as by the House of Commons Foreign Affairs Committee, *supra* note 7, at i-liii.

[10] Simma appears, albeit reluctantly, to accept this last position, cf. *supra* note 7.

community and then makes that superiority permanent. While law and morality will, of course, sometimes be out of step with one another, a dichotomy between what is 'lawful' and what is 'legitimate' is undesirable in any society and particularly undesirable in international law, which the comparative weakness of sanctions for non-compliance makes particularly dependent on perceptions of legitimacy for its effectiveness. Moreover, since international law norms on the use of force occupy a central position within the international legal order, to say that humanitarian intervention is unlawful is no accusation of a mere technical breach but a charge that those concerned are committing a particularly serious international wrong. To accept a permanent dichotomy between law and morality on something as important as the right to prevent genocide or other humanitarian catastrophes is to undermine law and morality and, indeed, international society itself.

This article will therefore take as its starting point that it does matter whether NATO's resort to force was lawful or not. Part II of the article will briefly review the factual background to the use of force in Kosovo. Part III will then consider the legal framework and the justifications advanced by governments for the military action. Part IV will then consider whether there is a right of humanitarian intervention in international law. Whether, if such a right exists, the NATO action in 1999 was a valid exercise of that right is discussed in Part V. I set out my conclusions in Part VI.

Part II: The Factual Background

Events prior to 24 March 1999

It is not the purpose of this article to give a history of the Kosovo crisis[11] but a few salient features of the events prior to the NATO campaign require brief mention. While discussion of Kosovo tends to start with the battle of Kosovo in 1389, for present purposes it is enough to start 600 years later. In 1989, Kosovo, a province of the Republic of Serbia (itself at that time one of the six republics of the Socialist Federal Republic of Yugoslavia (SFRY), lost most of the autonomy which it had previously possessed. For the next ten years its government was largely directed from Belgrade. Approximately eighty percent of the two million inhabitants of

[11] The *Kosovo Report*, *supra* note 7, contains a useful account of the history. On the earlier history of Kosovo, see Glenny, *The Balkans 1804-1999: Nationalism, War and the Great Powers* (1999) and Malcolm, *Kosovo: A Short History* (1998). For very different accounts of the NATO action, cf. Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (2001) (by the then NATO Supreme Allied Commander in Europe), Ignatieff, *Virtual War: Kosovo and Beyond* (2000), Judah, *Kosovo: War and Revenge* (2000) and Daalder and O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (2000).

Kosovo at this time were ethnic Albanians. While the Serbs were, therefore, a minority within the Kosovo population, Kosovo had an important part in Serb history and culture and contained some of the most important churches and monasteries of the Serbian Orthodox Church.

Kosovo remained largely peaceful throughout the conflicts of 1991-95 which marked the collapse of the SFRY, the independence of Bosnia-Herzegovina, Croatia, Slovenia and Macedonia and the creation of the Federal Republic of Yugoslavia (FRY) by Serbia and Montenegro. While there were warnings to the FRY about excessive use of force in Kosovo during this period[12] and attempts by the OSCE to maintain a presence there,[13] the status of Kosovo as part of Serbia (and thus of the FRY) was not questioned by the outside world and, in contrast to the populations of the republics which made up the SFRY, the Kosovars were not generally perceived as possessing a right of self-determination (at least in the form of a right to create an independent State).[14] In particular, the Dayton Peace Agreement, which ended the conflict in Bosnia-Herzegovina in 1995,[15] did not deal with Kosovo.

The 1990's, however, saw the growth of a separatist movement amongst the Albanian majority in Kosovo. As part of that movement Albanians increasingly boycotted official institutions in Kosovo and established their own unofficial bodies in parallel. By 1998 there had also emerged a paramilitary separatist movement, the 'Kosovo Liberation Army' (KLA) which embarked on a campaign of violence against the Serbian and FRY authorities and those co-operating with them. By March 1998 terrorist activity by the KLA and increasingly repressive action by the FRY army and Serbian police, including the killing of 58 Albanians (most of them civilians from one extended family) at the beginning of March,[16] led the Security Council to adopt, on 31 March 1998, the first of a series of resolutions on Kosovo.

Resolution 1160 (1998) (adopted by fourteen votes to none, with China abstaining) condemned:

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[12] See the Memorandum by the United Kingdom Foreign and Commonwealth Office, House of Commons Paper (1999-2000) 28-II, 1, at para. 13.

[13] The FRY Government refused to renew the mandate of this mission in 1993, despite a call to do so from the Security Council in resolution 855 (1993).

[14] On the right to self-determination in the various republics and questions of statehood, see Opinions Nos 1-10 of the Arbitration Commission of the Peace Conference for Yugoslavia ('the Badinter Commission') in 92 *International Law Reports* 162-211.

[15] 35 *International Legal Materials* (1996) 75.

[16] Human Rights Watch, *Humanitarian Law Violations in Kosovo* (1998).

> the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training.

The resolution imposed an arms embargo on all parts of the FRY (thus prohibiting the supply of weapons to the KLA as well as the FRY and Serbian authorities). While affirming 'the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia', the resolution called for a substantially greater degree of autonomy and self-administration for Kosovo. Although it did not contain a formal determination that the situation in Kosovo constituted a threat to international peace and security, it was adopted under Chapter VII of the Charter of the United Nations and such a determination must, therefore, be deemed to be implicit.[17]

During the next few months, however, the United Nations Secretary-General reported that violence in Kosovo intensified and that the numbers of Kosovars becoming refugees in neighbouring States or displaced persons within the FRY had increased to 230 000 (out of a total population of approximately 2 000 000). The Secretary-General warned that, if the FRY Government persisted with its policies, it could 'transform what is currently a humanitarian crisis into a humanitarian catastrophe.'[18] The gravity of the situation was noted by the Security Council in a Presidential Statement of 24 August 1998.[19] A further report by the Secretary-General in September 1998 commented that there had been 'a sharp escalation of military operations in Kosovo, as a result of an offensive launched by the Serb forces.'[20]

On 23 September 1998 the Security Council adopted resolution 1199 (1998) (again by fourteen votes to none with China abstaining). Like resolution 1160 (1998), it was adopted under Chapter VII and the decisions which it contained were legally binding. This time, the recognition that there was a threat to international peace and security was explicit. The Security Council stated that it was:

> *Gravely concerned* at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and,

[17] The Security Council seems to have assumed that it had made such a determination, because its next resolution on Kosovo – SC Res. 1199 (1998) – affirmed the existence of such a threat.

[18] UN Doc. S/1998/834, at para. 11.

[19] UN Doc. S/PRST/1998/25.

[20] UN Doc. S/1998/834 Add. 1.

according to the estimate of the Secretary-General, the displacement of over 230 000 persons from their homes,

and

Deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe as described in the report of the Secretary-General, and emphasising the need to prevent this from happening.

The Council required that both sides establish a ceasefire and that the FRY:

(a) cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression;

(b) enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the Federal Republic of Yugoslavia, including access and complete freedom of movement of such monitors to, from and within Kosovo unimpeded by government authorities, and expeditious issuance of appropriate travel documents to international personnel contributing to the monitoring;

(c) facilitate, in agreement with the UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organisations and supplies to Kosovo;

(d) make rapid progress, to a clear timetable, in the dialogue referred to in paragraph 3 with the Kosovo Albanian community called for in resolution 1160 (1998), with the aim of agreeing confidence-building measures and finding a political solution to the problems of Kosovo.[21]

Three days after the adoption of this resolution, however, eighteen Kosovo civilians were reportedly killed when FRY forces used mortars against the village of Gornje Obrinje[22] and the fighting continued. On 13 October 1998, therefore, the North Atlantic Council issued activation orders for air strikes against the FRY to commence four days later unless the FRY complied with the requirements of resolution 1199.

The air strikes did not take place, because of a package of agreements negotiated at the last minute between Richard Holbrooke of the United States of America and Slobodan Milosevic, then President of the FRY. The main features of

[21] SC Res. 1199 (1998), at para. 4.

[22] *Kosovo Report*, *supra* note 7, at 75.

this package were an undertaking by the FRY to withdraw some of its forces from Kosovo, agreement between the FRY and the OSCE for the deployment to Kosovo of the Kosovo Verification Mission (KVM), an unarmed civilian mission from the OSCE[23] and an agreement between NATO and the FRY for aerial verification by NATO of the situation in Kosovo.[24] The conclusion of these two agreements was welcomed by the Security Council in resolution 1203 (1998) (adopted by thirteen votes to none with China and the Russian Federation abstaining). The resolution referred to 'the continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe' and emphasised 'the need to prevent this from happening'.

On 15 January 1999 the KVM reported that FRY soldiers and Serbian special police had been responsible for a massacre at the village of Racak in Kosovo, in which forty-five Albanian civilians were killed.[25] The FRY refused to allow the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Judge Louise Arbour, access to Kosovo to investigate the massacre, even though resolution 1203 (1998)[26] required it to do so. In addition, the FRY Government declared the head of the KVM, Mr Walter Walker, persona non grata, a decision which was later suspended.

These developments led to what became known as the Rambouillet/Paris talks between the FRY/Serbian authorities and the Kosovo Albanian parties under the auspices of the international 'Contact Group' (France, Germany, Italy, the Russian Federation, the United Kingdom and the United States of America).[27] The Contact Group put forward proposals for an agreement which would provide for a ceasefire, a peace settlement in Kosovo involving a large measure of autonomy, and the presence of an international military force to guarantee that settlement.[28] The first round of these talks appeared to produce a broad measure of agreement on a package which was known as 'the Rambouillet Accords'.[29] The text of the Accords was endorsed by the Contact Group foreign ministers on 23 February 1999. The FRY/Serbian delegation wrote to the negotiators on that day in the following terms:

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[23] UN Doc. S/1998/978.

[24] UN Doc. S/1998/991.

[25] The report was noted and the action of the FRY and Serbian authorities condemned in a Security Council Presidential Statement on 19 January 1999; UN Doc. S/PRST/1999/2.

[26] Para. 14.

[27] See Weller, 'The Rambouillet conference on Kosovo', 75 *International Affairs* (1999) 211. For documents relating to the talks, see Weller (ed), *The Crisis in Kosovo: 1989-1999, from the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (1999), vol. I, 392 et seq.

[28] The decision to hold the talks was welcomed by the Security Council, UN Doc. S/PRST/1999/5.

[29] The text of the Accords is published in UN Doc. S/1999/648.

> The delegation of the Government of the Republic of Serbia wishes to emphasize that major progress has been achieved in the talks in Rambouillet in defining political solution on substantial self-government of Kosovo and Metohija respectful of sovereignty and territorial integrity of the FR of Yugoslavia.
>
> We would particularly like to emphasise, the same as the Contact Group, that there can be no independence of Kosovo and Metohija nor the third republic.[30]
>
> Therefore all elements of self-government at the time of defining of the Agreement have to be known and clearly defined. In further work, this should be adequately addressed and consistently resolved. In that sense, we are ready to participate in the next meeting on the issue.
>
> The FRY agreed to discuss the scope and character of international presence in Kosmet [Kosovo and Metohija] to implement the agreement to be accepted in Rambouillet.
>
> The FR of Yugoslavia and the Republic of Serbia are fully ready to continue the work, in line with the positive spirit of this meeting. We therefore consider that it would be extremely useful to set a reasonable deadline to create appropriate conditions and different approach to successfully resume the work and successfully address those questions. In that connection, we would like to point out that direct talks between the two delegations would be very useful.[31]

When the talks reconvened in Paris on 15 March 1999, however, the FRY/Serbian delegation put forward a proposal for radical changes to the Accords.[32] At the same time, FRY armoured forces advanced into the Podujevo region of Kosovo and the numbers of refugees and displaced increased. The negotiators from the European Union, the Russian Federation and the United States of America responded that 'the unanimous view of the Contact Group' was that only technical adjustments could be made at that stage.[33] On 19 March 1999 the co-chairmen of the conference (France and the United Kingdom) announced that the attitude of the FRY/Serbian delegation meant that there was no purpose in continuing with the talks.[34] On the same day, the OSCE Chairman decided to withdraw the KVM because the security

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[30] I.e. the creation of Kosovo as a third republic of the FRY alongside Serbia and Montenegro, which would have meant the separation of Kosovo from Serbia, though not its independence.

[31] Weller, *The Crisis in Kosovo*, *supra* note 27, at 470.

[32] See Weller, *The Crisis in Kosovo*, *supra* note 27, at 480 et seq.

[33] See Weller, *The Crisis in Kosovo*, *supra* note 27, at 490.

[34] See Weller, *The Crisis in Kosovo*, *supra* note 27, at 493.

situation in Kosovo had deteriorated to such an extent that it was becoming increasingly difficult for the KVM to carry out its operations in safety.

On 22 March 1999, Richard Holbrooke paid a last visit to Belgrade to attempt a negotiated solution. When that failed, the NATO Secretary-General, Dr Javier Solana, announced that he had given authority for air strikes to begin. In his Press Statement, Dr Solana stated that:

> We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands:
>
> Acceptance of the interim political settlement which has been negotiated at Rambouillet;
>
> Full observance of limits on the Serb Army and Special Police Forces agreed on 25 October 1998;
>
> Ending of excessive and disproportionate use of force in Kosovo [. . .]
>
> This military action is intended to support the political aims of the international community.[35]

Although not directly connected with the Kosovo crisis, one other event during the period preceding this announcement had significant implications for the development of that crisis. On 28 February 1999 the mandate for the United Nations force in the former Yugoslav Republic of Macedonia, expired. China had used its veto power as a permanent member of the Security Council to block renewal of the mandate in protest at Macedonian links with Taiwan. The use of the veto power in this way, for reasons which had nothing to do with the conduct of what had been an exceptionally effective United Nations operation, graphically illustrated the difficulties which would be faced if NATO sought authorization for action from the Security Council in the Kosovo crisis. The response to China's action was also significant. Most of the troops remained in Macedonia, with the consent of the Macedonian Government, as a peacekeeping operation outside the United Nations framework.

Events subsequent to 24 March 1999

The NATO air campaign commenced on 24 March 1999 and lasted until 10 June 1999. Three developments during this period require brief comment. First, on 26 March 1999 the Russian Federation, together with Belarus and India who were not

[35] NATO Press Release (1999) 040; <www.nato.int/docu/pr/1999/p99-040e.htm>.

members of the Security Council, proposed that the Council adopt a resolution which would have characterised the NATO resort to force as 'a flagrant violation of the United Nations Charter, in particular Articles 2(4), 24 and 53' and determined that the NATO action constituted a threat to international peace and security.[36] The draft resolution was defeated by twelve votes (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom and United States of America) to three (China, Russia and Namibia).

Secondly, on 28 April 1999 the FRY filed with the International Court of Justice applications against ten NATO States, accusing them of the illegal use of force and violations of, inter alia, the Genocide Convention 1948. The FRY also asked the Court for provisional measures of protection which would have amounted to a call for an immediate cessation of NATO military action. Those requests were refused by the Court on 2 June 1999 on the ground that the FRY had failed to establish a prima facie case that the Court had jurisdiction on the merits in the ten cases.[37]

Thirdly, on 10 June 1999 the Security Council, by fourteen votes to none with China abstaining, adopted resolution 1244 (1999).[38] The adoption of this resolution followed the acceptance by the FRY of principles for a settlement drawn up by the Group of Eight countries ('the G8': Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom and the United States of America) in May 1999 and the principles drawn up by the European Union envoy, Mr Ahtisaari, and the Russian envoy, Mr Chernomyrdin,[39] and marked the end of the conflict. The resolution welcomed the G8 principles and effectively adopted them. In paragraph 3 of the resolution, the Security Council demanded:

> [. . .] that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.

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[36] UN Doc. S/1998/328.

[37] See *supra* note 1.

[38] The Council had also adopted resolution 1239 (1999) on 14 May 1999. Resolution 1239 expressed the grave concern of the Council with the humanitarian aspects of the Kosovo crisis, especially the plight of refugees and displaced persons.

[39] These principles are attached as Annexes 1 and 2 (respectively) to SC Res. 244 (1999).

The resolution also created a United Nations civil administration (UNMIK) and authorized the deployment to Kosovo of an international military force, described as an 'international security presence' (KFOR).

Part III: The Legal Framework

The central principle of international law regarding the use of force is, of course, codified in Article 2(4) of the United Nations Charter, which provides as follows:

> All Members [of the United Nations] shall refrain in their international relations from 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.

Article 2(4) states one of the principles on which the United Nations operates. It must, however, be read in context, for the Charter also gives as one of the purposes of the United Nations the promotion of human rights.[40] The development of international human rights law since 1945, through global agreements, such as the Genocide Convention and the International Covenant on Civil and Political Rights, and regional instruments, such as the European Convention on Human Rights, has reached the point where the treatment by a State of its own population can no longer be regarded as an internal matter.[41] In particular, widespread and systematic violations of human rights involving the loss of life (or threatened loss of life) on a large scale are now well established as a matter of international concern.[42]

The Charter expressly provides for two situations in which the use of force is lawful. First, Article 51 preserves the inherent right of individual or collective self-defence in the face of an armed attack against a State. Secondly, the Charter provides for the use of force by the Security Council or by a regional organization or group of States authorized to use force by the Security Council. Neither of these provisions directly covered the use of force in Kosovo.

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[40] See Preamble to the Charter and Article 1.

[41] It is noticeable that scarcely any government now argues otherwise, although China's statements during the Security Council debates on Kosovo at times came close to such a position.

[42] It is now accepted by almost all States and commentators, for example, that serious violations of human rights do not fall within the domestic jurisdiction exception in Article 2(7) of the United Nations Charter.

Self-defence

Kosovo was not an independent State and the use of force by the FRY against the population in Kosovo was not an armed attack upon a State. The FRY did not attack any of the NATO States or the neighbouring States of Albania or Macedonia before the NATO operation commenced. It was not suggested that the NATO operation was designed to pre-empt an imminent attack by the FRY on another State. The NATO action cannot, therefore, fall within the scope of the right of self-defence and no NATO State sought to argue that it did. Nor did any NATO State rely upon a right to use force in support of self-determination. Whether such a right exists has been the subject of some controversy and it is also open to question whether the population of Kosovo constitutes a 'people' for the purpose of the right of self-determination. It is noticeable that neither the Security Council nor the NATO States have referred to a right of self-determination as such in Kosovo.[43]

Security Council Authorization

The position regarding authorization by the Security Council is more complicated. The Security Council can, of course, authorize military intervention in situations in which there is a threat to the peace.[44] While the Charter appears to envisage the Council taking military action through forces under its own command, nothing in the Charter precludes the Council authorizing military action by others and Articles 48 and 53 clearly envisage it. The practice of the 1990's has been that enforcement action of a military character has generally been carried out by ad hoc coalitions of States (as in the Gulf War where resolution 678 (1990) authorized military action by States co-operating with the Government of Kuwait) or standing alliances (as with the use of NATO to give air support to UNPROFOR in Bosnia-Herzegovina during 1994-95 under the provisions of resolution 836 (1993) and subsequent resolutions).

Especially in recent years,[45] the Council has been prepared to determine – as it did, for example, in the cases of Somalia and Haiti – that the situation *within* a State has reached the point at which it has become a threat to *international* peace and security. Thus, in resolution 794 (1992), the Security Council determined that :

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[43] See *supra* text accompanying notes 14 to 15.

[44] For discussion, see Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999).

[45] The Council had, however, taken such action in the 1960's and 1970's in relation to Southern Rhodesia (SC Res. 232 (1966)) and South Africa (SC Res. 418 (1977)).

> [T]he magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.

Resolution 794 went on to authorize military action in Somalia. Indeed, whatever the controversy about unilateral humanitarian intervention, it now seems to be widely (if not, perhaps, universally) accepted that the Security Council may take, or authorize others to take, military action on humanitarian grounds.

However, none of the three resolutions on Kosovo adopted before 24 March 1999 authorized, either expressly or impliedly, military action to enforce their provisions. The closest which any of them came to doing so was the blessing given by resolution 1203 (1998) to the air verification mission conducted by NATO following the conclusion of the Holbrooke-Milosevic agreements in October 1998, which might have been invoked to justify continuing aerial monitoring by NATO, even if the FRY had withdrawn its consent.

Nor do the actions of the Security Council after the start of the NATO campaign amount to retrospective authorization of the military action. The defeat of the Russian draft resolution which would have condemned the NATO action is important as evidence of international reaction to the operation and the justifications advanced by the NATO States but non-condemnation is not the same as authorization.

Similarly, resolution 1244 (1999), while again a significant part of the reaction to the NATO action and of great significance in determining the legal basis for the subsequent military presence in Kosovo, does not amount to retrospective authorization of the military action by NATO.[46] Nothing in the text of the resolution approves the NATO military action and it is difficult to see the resolution as implicit authorization of what had taken place before its adoption when none of the States which spoke in the debate in the Council[47] saw it as such and the Russian Federation[48] and China[49] continued to characterize the NATO action as unlawful. There is certainly force in the argument that, by authorizing an international security presence in Kosovo which was essentially NATO-led and by authorizing the achievement of what had been NATO's goal throughout the military operation, the Council was taking action which is difficult to reconcile with the view that NATO's

[46] For an eloquent statement of the contrary argument, see Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *European Journal of International Law* (2000) 385.

[47] UN Doc. S/PV.4011.

[48] UN Doc. S/PV.4011, at 7.

[49] UN Doc. S/PV.4011, at 8.

operations had been a serious international wrong[50] (a point developed in Part V, below). That is not the same, however, as saying that the resolution converted what had been an unlawful action into one which was legal.

To say that the Security Council resolutions did not by themselves provide a separate basis for the legality of the NATO action does not mean, however, that the Security Council resolutions on Kosovo were irrelevant to the question of whether NATO acted lawfully. On the contrary, they form an important part of the legal framework within which NATO acted. The three resolutions on Kosovo adopted prior to 24 March 1999 were adopted under Chapter VII of the Charter, which deals with threats to international peace and security and their principal provisions were legally binding on all States, including the FRY. The resolutions thus determined that the situation in Kosovo was a threat to international peace and security[51] and could not be considered an internal matter for the FRY alone, notwithstanding the status of Kosovo as part of the FRY. They also constituted an authoritative determination that the situation in Kosovo involved serious violations of human rights by the FRY and that there was an impending humanitarian catastrophe well before the NATO action began. Thus, resolution 1160 (1998), adopted nearly a year before the NATO action, condemned the use of excessive force by the Serbian forces as well as acts of terrorism by the KLA.[52] Resolution 1199 (1998), adopted in September 1998, referred to 'the excessive and indiscriminate use of force by Serbian security forces and the Yugoslavian Army'[53] and demanded 'immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe'.[54] Resolution 1203 (1998) and the Presidential Statements quoted in Part II, above, also indicate the clearly held view of the Council that the situation in Kosovo was a humanitarian crisis well before the start of the NATO action.

The resolutions also imposed a number of obligations on the FRY and the KLA, requiring, inter alia, the withdrawal of Serbian security forces from Kosovo.[55] The FRY failed to comply with its obligations under these resolutions (a fact confirmed by the preamble to resolution 1244 (1999)). That failure is important, because the NATO action was designed to compel compliance by the FRY with the

[50] Pellet, *supra* note 46.

[51] SC Res. 1199 (1998), penultimate paragraph of the Preamble; SC Res. 1203 (1998), penultimate paragraph of the Preamble. A determination of a threat to international peace was also implicit in SC Res. 1160 (1998); see *supra* text accompanying note 17.

[52] Third paragraph of the Preamble.

[53] SC Res. 1199 (1998), sixth paragraph of the Preamble.

[54] SC Res. 1199 (1998), operative paragraph 2.

[55] SC Res. 1199 (1998), operative paragraph 4.

obligations laid down by the Security Council. That point was emphasized by Dr Solana in his press statement announcing that military action had started[56] and by a number of NATO States in the justification which they offered for that action.[57] Nevertheless, those resolutions did not authorize military action and it was clear, from the negotiations which led to their adoption and from other signs (such as China's action in blocking the renewal of the mandate for the United Nations force in Macedonia in February 1999) that any draft resolution to provide such authorization would be vetoed by Russia and China. The legal justification for NATO intervention in Kosovo accordingly had to be sought elsewhere.

Humanitarian Intervention

The United Kingdom Government consistently took the position that the NATO action was justified on the ground that international law recognizes an exceptional right to take military action in a case of overwhelming humanitarian necessity. In October 1998 the United Kingdom Foreign and Commonwealth Office circulated a note among the NATO States in the following terms:

> Security Council authorization to use force for humanitarian purposes is now widely accepted (Bosnia and Somalia provide firm legal precedents). A UNSCR would give a clear legal base for NATO action, as well as being politically desirable.
>
> But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied:
>
> a. that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
> b. that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
> c. that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim – ie it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.
>
> There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and the UNSG's and UNHCR's reports). We judge on the evidence of

[56] See *supra* text accompanying note 35.

[57] See, e.g., the statement of France in the debate in the Security Council on 24 March 1999, UN Doc. S/PV.3988, at 8-9 and that of the Netherlands on 26 March 1999, UN Doc. S/PV.3989, at 4.

> FRY handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milosevic is dissuaded from further repressive acts, and that only the proposed threat of force will achieve this objective. The United Kingdom's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.[58]

On 24 March 1999 the United Kingdom Permanent Representative to the United Nations told the Security Council that:

> The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.
>
> Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.[59]

Similarly, after the conflict, the paper by the Secretary of State for Defence, *Kosovo: An Account of the Crisis*, stated:

> The UK was clear that the military action taken was justified in international law as an exceptional measure to prevent an overwhelming humanitarian catastrophe and was the minimum necessary to do so.[60]

This justification was thus very similar to that put forward in respect of the interventions in northern and southern Iraq in 1991 and 1992 to prevent further

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[58] Quoted in Roberts, 'NATO's 'Humanitarian War' over Kosovo', 41 *Survival* (1999) 102 at 106.

[59] S/PV.3988, at 12; 24 March 1999. See also the statement by the Secretary of State for Defence in the House of Commons on 25 March 1999 (the Hansard Debates text at <www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990325/debtext/90325-09.htm#90325-09_spmin0>).

[60] Page 10.

repression of the civilian population there by the Saddam Hussein Government[61] and more general statements, such as the reply given by Baroness Symons, then a Minister at the Foreign and Commonwealth Office, to a parliamentary question on 16 November 1998. In that answer, Baroness Symons said:

> There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[62]

While the United Kingdom was particularly forthright in advancing a case based upon humanitarian intervention, it is clear that other NATO States also relied upon humanitarian considerations. Thus, in the debate in the Security Council on 24 March 1999, the United States Representative stated that:

> [W]e believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo – all of which foreshadow a humanitarian catastrophe of immense proportions. . . . In this context, we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster.[63]

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[61] See, e.g., the evidence given to the House of Commons Foreign Affairs Committee by Mr Tony Aust, Legal Counsellor, Foreign and Commonwealth Office (HC Paper 235-iii, p. 92); reproduced in 63 *British Year Book of International Law* (1992) 827.

[62] HL Debs (1998-99) WA 140, 16 November 1998, reprinted in 69 *British Year Book of International Law* (1998) 593.

[63] UN Doc. S/PV. 3988, pp. 4-5. See, however, the reservations expressed by Matheson, then Acting Legal Adviser at the Department of State, 'Justification for the NATO Air Campaign in Kosovo', 94 *Proceedings of the American Society of International Law* (2000) 301, about humanitarian intervention as a freestanding legal justification. Matheson preferred to base his defence of NATO's action on 'the unique combination of factors that presented itself in Kosovo' which included 'the failure of the FRY to comply with Security Council demands under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to make a clear decision adequate to deal with that disaster; and the serious threat to peace and security posed by Serb actions.'

The Canadian Representative stated:

> Humanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted and a population is denied its basic rights merely because the people concerned do not belong to the 'right' ethnic group.[64]

The Netherlands Representative took a similar line:

> It goes without saying that a country – or an alliance – which is compelled to take up arms to avert a humanitarian catastrophe would always prefer to be able to base its action on a specific Security Council resolution. The Secretary-General is right when he observes in his press statement that the Council should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot simply sit back and let the humanitarian catastrophe occur. In such a situation we will act on the legal basis which we have available, and what we have available in this case is more than adequate.[65]

Belgium, which was not a member of the Council at that time, took a similar approach before the International Court of Justice in resisting the FRY's request for provisional measures of protection.[66]

To determine whether the case thus advanced to justify the NATO action holds good in international law involves the consideration of two questions:

a. Does international law recognize a right of humanitarian intervention in cases of overwhelming humanitarian necessity?

and

b. If so, were the circumstances in Kosovo as at 24 March 1999 such that this right became applicable?

These two questions will be examined in Parts IV and V, respectively.

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[64] UN Doc. S/PV. 3988, at 6.

[65] UN Doc. S/PV. 3988, at 8.

[66] CR 99/15 (10 May 1999), <www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>. Since all ten respondent States denied that the FRY had established a prima facie basis for the jurisdiction of the Court (a submission which the Court accepted) and each respondent was allotted only a very short time in which to make its submissions, it is not surprising that no other State raised the question of the legal basis for the military action in its arguments before the Court.

Part IV: Is there a Right of Humanitarian Intervention?

In considering whether there is a right of humanitarian intervention[67] in international law, it is first necessary to clarify what is meant by 'humanitarian intervention'. That term is used to describe a wide range of conduct from diplomatic representations through economic measures to the use of force and in a variety of circumstances. This article, however, will consider only intervention of a military character (involving either the actual use of force or action in which military forces are deployed to a State with an implied threat of force if they are resisted). In addition, discussion will focus upon cases in which a substantial part of the population of a State is threatened with death or suffering on a grand scale, either because of the actions of the government of that State, or because of the State's slide into anarchy. The situation in the Kurdish and Shiite areas of Iraq following the Kuwait conflict falls into the first category, while Liberia and Somalia are examples of the second. In each case, however, the avowed purpose of intervention in the State concerned was the protection of the citizens of that State. It is therefore quite different from the case of a State intervening to protect its own nationals from ill-treatment in the territory of another country or the supposed right of pro-democratic intervention advanced when the United States intervened in Panama.

It has been argued that, because the United Nations Charter contains a prohibition of the use of force and no express exception for humanitarian intervention, there can be no question of international law recognizing a right of humanitarian intervention.[68] That is, however, to take too rigid a view of international law. In particular, it overlooks both the underlying principles on which the United Nations Charter is based and the development of customary international law, particularly during the last decade or so. It is important to remember that international law in general and the United Nations Charter in particular do not rest exclusively on the principles of non-intervention and respect for the sovereignty of the State. The values on which the international legal system rests also include respect for human rights and 'the dignity and worth of the human person'.[69] Upholding those rights is one of the purposes of the United Nations and of international law. It is not, therefore, a case of a single, dominant principle of the

[67] For discussion of this question, see, in particular, Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed., 1998); Murphy, *Humanitarian Intervention: the United Nations in an Evolving World Order* (1996); and Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001).

[68] See, e.g., M. Littmann, *Kosovo: Law and Diplomacy* (1999).

[69] Preamble to the United Nations Charter.

non-use of force, but rather a case of two different, but equally important, principles of international law each of which has to be considered. While nobody would suggest that intervention in the sense in which that term is used here is justified whenever a State violates human rights, international law does not require that respect for the sovereignty and integrity of a State must in all cases be given priority over the protection of human rights and human life, no matter how serious the violations of those rights perpetrated by that State.

The evolution of international law in this regard was emphasised by the Representative of the Netherlands in his speech in the Security Council on 10 June 1999 when he said that:

> We sincerely hope that the few delegations which have maintained that the North Atlantic Treaty Organization (NATO) air strikes against the Federal Republic of Yugoslavia were a violation of the United Nations Charter will one day begin to realize that the Charter is not the only source of international law.
>
> The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens. Only if that shift is a reality can we explain how on 26 March the Russian-Chinese draft resolution branding the NATO air strikes a violation of the Charter could be so decisively rejected by 12 votes to 3.[70]

Moreover, international law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of State practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights. Where the threat to human rights has been of an extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort.

It is true that, until quite recently, the body of State practice which could be invoked in support of a right of humanitarian intervention was not great.[71] Nineteenth century interventions are scarcely a useful guide in the era of the Charter and, in any event, were at best equivocal instances of humanitarian intervention in

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[70] UN Doc. S/PV.4011, at 12.

[71] For an excellent review of the State practice, see Murphy, *supra* note 67. Murphy's latest writings suggest that he considers the law may have evolved beyond what he thought at the time of writing his book, cf. his 'The Intervention in Kosovo: A Law-Shaping Incident?', 94 *Proceedings of the American Society of International Law* (2000) 302-4.

any case. The three instances usually invoked by supporters of humanitarian intervention in the period 1945-90 are also an uncertain guide. India's intervention in East Bengal in 1971,[72] Tanzania's overthrow of the Amin Government in Uganda in 1979[73] and Vietnam's use of force against the Pol Pot regime in Cambodia in the same year all raised the question of humanitarian intervention and certainly contribute something to the evolution of the law on this subject. In each case, however, the intervening State and its supporters rested their case primarily upon the right of self-defence.

Tanzania initially resorted to force after it was itself attacked by Uganda and President Nyrere denied that it was for him to effect a change in the government of Uganda. Similarly, in the Security Council debate on Cambodia, Vietnam distinguished between its own border conflict with Cambodia and the rebellion against Pol Pot within Cambodia, basing its justification for the invasion upon the former.[74] Moreover, most of the States taking part in the debates on these interventions rejected the notion of humanitarian intervention, at least when it took the form of overthrowing a government even if that government had been responsible for massive human rights violations.

Even so, the practice of this period cannot be dismissed out of hand. By not merely repelling the attack on its territory but invading Uganda and overthrowing the Idi Amin Government, Tanzania went far beyond the confines of self-defence yet attracted very little criticism from the international community. India's intervention in Bangladesh certainly had strong elements of humanitarian intervention about it and the condemnation of Vietnam's action had more to do with hostility towards Vietnam and its purposes in installing a subordinate government in Cambodia than a rejection of the principle of humanitarian intervention. Another case which is of some interest is India's action in dropping relief supplies to the Tamil population in northern Sri Lanka in 1985. This action was undertaken against the wishes of the Sri Lanka Government and although it involved no use of force, there was an implied threat to use force if Sri Lankan forces interfered with the Indian Air Force operation.[75]

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[72] Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *American Journal of International Law* (1973) 275.

[73] Chatterjee, 'Some Legal Problem of Support Role in International Law: Tanzania and Uganda', 30 *International and Comparative Law Quarterly* (1981) 755.

[74] Klintworth, *Vietnam's Intervention in Cambodia in International Law* (1989).

[75] Arulpragasam, 'Indo-Sri Lanka Agreement to Establish Peace and Normality in Sri Lanka', 29 *Harvard International Law Journal* (1988) 178.

Nor is the decision of the International Court of Justice in the *Nicaragua* case the compelling precedent which the critics of humanitarian intervention suggest.[76] Although the Court rejected the idea that violations of human rights by the Government of Nicaragua could justify the military actions undertaken by the United States, it was not concerned with a case in which those violations took the form of the large-scale threat to life which was evident in cases where an argument of humanitarian intervention has been relied upon.

Another source which tends to be misrepresented is the study conducted for the United Kingdom Foreign and Commonwealth Office in 1984. That study concluded that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'.[77] In itself, that statement is scarcely a conclusive rejection of humanitarian intervention. Moreover, the full text of the document makes clear that it is a discussion paper, produced by research staff, not an instance of United Kingdom State practice.[78]

International law is not static, as the International Court recognized in its *Nicaragua* decision. Although the Court held that the United States action in that case was not justified, it did not reject the possibility that the practice of States could develop a right to intervene in extreme humanitarian cases.[79] Moreover, practice since the enigmatic statement contained in the Foreign and Commonwealth Office research paper was published suggests that a different view is merited today.

Two instances of State practice since the end of the Cold War are particularly important in this respect. First, in the summer of 1990, the Economic Community of West African States (ECOWAS) intervened in Liberia in an attempt to put a stop to appalling violations of human rights occurring in the civil war there. The objectives of the ECOWAS operation, as set out in a declaration issued by the ECOWAS Heads of State and Government on 9 August 1990,[80] were the establishment and supervision of an immediate cease-fire and the establishment of an interim government to prepare for elections. The declaration emphasized that the peace-keeping force was going to Liberia

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[76] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986) 3; 76 *International Law Reports* 1, para. 268.

[77] FCO Planning Staff, 'Is Intervention ever Justified?' (Foreign Policy Document 148, para. II.22). Parts of this document are reproduced in 'United Kingdom Materials on International Law', 57 *British Year Book of International Law* (1986) 614.

[78] See para. II.2. Unfortunately, this paragraph is not amongst those reproduced in 'United Kingdom Materials on International Law', *ibid.*

[79] See *supra* note 76, at para. 207..

[80] UN Doc. S/21485.

> [. . .] first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions. ECOWAS intervention is in no way designed to save one part or punish another.

It is unclear whether the government of President Doe, which by then controlled very little of Liberia, consented to the deployment of the ECOWAS force. If it did, then the initial deployment could be seen as peace-keeping by consent, undertaken by a regional organization, although the main rebel group in Liberia was opposed to the deployment.

In September 1990, however, Doe was killed by one of the rebel groups. An interim government was then established largely at the instigation of ECOWAS. Despite the protests of Doe's vice-president, who claimed that under Liberia's constitution he automatically assumed the functions of President on Doe's death, this government was headed by Dr Amos Sawyer, a figure from outside the Doe regime who owed his position to ECOWAS. Moreover, during 1991 and 1992 it became clear that the interim government was being actively opposed by the largest rebel group, headed by Charles Taylor. It seems, therefore, that the legal basis for the ECOWAS intervention cannot rest on the consent of the original Liberian Government, as that government soon ceased to exist and was replaced by the interim regime created by ECOWAS. As a regional arrangement, ECOWAS can take enforcement action only with the consent of the United Nations Security Council,[81] something which was not formally given in the summer of 1990. The intervention seems, therefore to involve the assertion of some kind of right of humanitarian intervention.

International reaction to the intervention was generally supportive of ECOWAS, although there was criticism from some members of that organization of an operation which involved intervention in the affairs of a State. In January 1991 and again in May 1992 the President of the Security Council issued a Statement to the effect that the members of the Security Council commended the ECOWAS effort 'to promote peace and normalcy in Liberia'.[82] During 1992, however, fighting took place between ECOWAS troops and forces loyal to Charles Taylor in Liberia. Taylor's forces were also involved in fighting with government forces in neighbouring Sierra Leone. ECOWAS requested assistance from the Security Council, a request endorsed by the Foreign Minister of the interim government in Liberia, and on 19 November 1992 the Council unanimously adopted resolution 788 (1992). That resolution formally determined that 'the deterioration of the situation

[81] United Nations Charter, Article 53.

[82] UN Docs. S/22133 and S/23886.

in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole' and condemned the attacks on ECOWAS by Taylor's forces. The Council then went on to impose a mandatory arms embargo under Chapter VII of the Charter, prohibiting all deliveries of weapons and military equipment to Liberia, other than for the sole use of the ECOWAS forces.

The second case was that of Iraq. Following Iraq's defeat in the Kuwait conflict, there were risings against Saddam Hussein in the Kurdish north of the country and in the predominantly Shiite south of Iraq. By the end of March 1991 it was clear that those risings had been defeated and that the Iraqi armed forces were engaged in a particularly brutal campaign of suppression, which was being conducted without any regard for the requirements of common Article 3 of the Geneva Conventions of 1949 (on armed conflicts within a State) or the human rights agreements to which Iraq was party, such as the International Covenant on Civil and Political Rights, 1966. Hundreds of thousands of Kurds and Shiites fled their homes. The plight of the Kurdish refugees attracted particular attention. Many of them were stranded in the mountains near the border with Turkey in appalling winter conditions. Turkey closed its border after thousands of refugees had crossed over from Iraq and on at least one occasion Turkish troops crossed into Iraq in an attempt to force refugees away from the border.

The Security Council's response was to adopt resolution 688 (1991). In paragraph 1 of that resolution, the Council condemned

> [. . .] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security.

While it was the situation in the Kurdish north which was uppermost in everyone's minds at the time, the wording of this paragraph makes clear that the resolution was equally applicable to the repression of the Shiites in the south. Resolution 688 went on to demand that Iraq 'as a contribution to removing the threat to international peace and security in the region' immediately cease this repression. The Council insisted that Iraq allow 'immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq.' The resolution also appealed to all Member States to contribute to the relief effort.

Resolution 688 broke new ground in the degree to which it involved the Security Council in taking a stand against a State's ill-treatment of its own people. It was described by the United Kingdom Foreign Secretary, the Rt Hon Douglas

Hurd, as having 'pushed forward the boundaries of international action'.[83] As such, it went too far for some members of the Council. The resolution was carried by ten votes in favour to three against (Cuba, Yemen and Zimbabwe) with two abstentions (China and India), a lower level of support than that for any of the resolutions on the Iraqi invasion of Kuwait. It was, moreover, a milder resolution than those relating to Kuwait. Unlike the principal Kuwait resolutions, it was not based on Chapter VII.[84] Moreover, although some of its language is reminiscent of Chapter VII, it did not make a formal determination that there was a threat to international peace and security but merely described the situation in Iraq as having created such a threat. Above all, resolution 688 contained no express provision regarding the enforcement of the resolution either by the United Nations or by individual Member States.

Nevertheless, the United Kingdom, the United States and a number of other countries deployed air and ground forces to northern Iraq as part of a policy of creating 'safe havens' for the Kurdish refugees. Iraq was told not to use military aircraft and helicopters in the Kurdish areas and was eventually forced to withdraw its ground forces from a large tract of territory in the north. The purposes of this operation were described by the Foreign Secretary in the following terms:

> We are vigorously pursuing this proposal for safe havens. Our aim is to create places and conditions in which the refugees can feel secure. We are not talking of a territorial enclave, a separate Kurdistan or a permanent UN presence. We support the territorial integrity of Iraq. But we have to get the refugees off the mountains.[85]

So far as the legal basis for the intervention is concerned, it was repeatedly said that the measures taken were consistent with resolution 688 (1991). That resolution was undoubtedly an important part of the background to the intervention. Its recognition that the situation in Iraq threatened international peace and security made clear that the western States were not intervening in a purely domestic matter, since the situation had already been 'internationalized'. Moreover, the humanitarian objectives of the intervention were the same as those of the resolution. Nevertheless, resolution 688 could not, on its own, furnish a legal basis for the intervention. It contained no equivalent of the authorization given to the coalition

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[83] Speech given at the Lord Mayor's Banquet on 10 April 1991. Transcript provided by the Foreign and Commonwealth Office.

[84] See the answer given by Mr Tony Aust, of the Foreign and Commonwealth Legal Advisers, to the House of Commons Foreign Affairs Committee, 63 *British Year Book of International Law* (1992), at 827.

[85] 189 *House of Commons Debates* (15 April 1991) col. 21.

States in resolution 678 (990) to use 'all necessary means' to end Iraq's occupation of Kuwait. Nor was the operation undertaken with the consent of the Iraqi Government. Although Iraq did not resist and complied with the demand that it remove its forces from the main Kurdish areas, it repeatedly protested against what it described as an infringement of its sovereignty.[86]

It is difficult, therefore, to resist the conclusion that the intervening States were in practice asserting a right of humanitarian intervention of some kind. That conclusion is reinforced by statements made in August 1992 when a new 'no fly' zone was imposed in southern Iraq. This new measure was taken after a report from Dr van der Stoel, the United Nations Special Rapporteur, had painted a bleak picture of human rights violations in the Shiite areas. The United Kingdom, the United States and France responded by issuing a demand that Iraq cease all military flights south of the 32nd parallel and announced that they would enforce this ban by flying patrols of their own over southern Iraq. When the Foreign Secretary was asked in a radio interview about the legality of this action, given that there was no specific authorization for it in any Security Council resolution, he replied:

> But we operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognizes extreme humanitarian need . . . We are on strong legal as well as humanitarian ground in setting up this 'no fly' zone.[87]

The actions in Iraq received widespread international support. Moreover, with the exception of Iraq, very few States challenged the assertion of a right of humanitarian intervention in this case or attacked the underlying claim that a right of intervention existed in an extreme humanitarian case. The Iraq and Liberia cases thus contain a substantial body of State practice in support of the existence of a right of intervention in an extreme case of humanitarian need.

That practice is reinforced by the reaction to the Kosovo intervention. As shown in Part III, above, the principal justification advanced for the NATO action was based upon humanitarian intervention. Neither the Security Council nor the General Assembly condemned the action and the Russian proposal to do so was

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[86] Cf. Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992), vol. I, at 443, note 18, which suggest that intervention might be justified in 'a compelling emergency, where the transgression upon a State's territory is demonstrably outweighed by overwhelming and immediate considerations of humanity and has the general support of the international community.'

[87] 63 *British Year Book of International Law* (1992) 824.

defeated in the Council by twelve votes to three, the majority including seven States which had no connection with those taking the action. Moreover, the adoption of resolution 1244 (1999), even though it does not amount to retrospective authorization of the NATO action, is difficult to reconcile with the view that NATO had committed an egregious violation of a fundamental rule of international law.

Against that, it has to be admitted that there is reluctance amongst many governments, particularly amongst the non-aligned, to accept the principle of humanitarian intervention.[88] Nevertheless, it is the practice of States in respect of concrete situations in which that principle is at stake, rather than in abstract statements, which speaks loudest. In my opinion, there is enough of the former practice to support the existence of a right of humanitarian intervention in extreme cases (the limits of which are considered below).

Critics of this position have advanced a number of objections to humanitarian intervention which must now be considered. First, there is a substantial body of opinion which maintains that humanitarian intervention can be lawful only if undertaken by, or at least with the authority of, the Security Council. The growing importance of human rights has been reflected in the willingness of the Security Council in recent years to characterize the most serious violations of human rights, in which widespread loss of life occurred or was threatened, as a threat to international peace and security. Under international law it is the Security Council which has the primary responsibility for maintaining international peace and security. That does not mean, however, that if the Security Council is unable to take action in a particular case – for example because of a veto, or the threat of a veto, by a permanent member of the Council – no action is possible. As demonstrated above, States have intervened on humanitarian grounds without the authorization of the Security Council in extreme cases and their action has been accepted by the majority of States and, in some cases, subsequently approved by the Security Council. Furthermore, an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last fifty years.

Secondly, it has frequently been objected that there is no consensus about the existence of a right of humanitarian intervention or the conditions in which such a right exists. This objection has some force in that there is undoubtedly controversy about the existence of a right of humanitarian intervention, as reaction to NATO's

[88] See United Nations Press Release GA/SPD/164 (18 October 1999).

action in Kosovo has demonstrated. Nevertheless, it is not a persuasive objection. International law does not require unanimity amongst States, let alone amongst writers, and there is controversy about many principles of international law. There has always been, for example, considerable debate over whether the right of self-defence extends to pre-emptive action in the face of an imminent armed attack or permits military action by a State only once it has actually been subjected to attack. Yet the practice of a majority of States and considerations of common sense strongly suggest that a limited right of anticipatory self-defence exists. In the case of humanitarian intervention, the logic of the principles on which international law is based and the preponderance of modern practice strongly favours the view that such a right is part of contemporary international law. It is noticeable that many of the expressions of opinion hostile to the existence of a right of humanitarian intervention predate the important practice of the 1990s, such as the Liberian and Iraqi interventions,[89] or are based upon excessively broad interpretations of what might constitute humanitarian intervention. In practice, States have asserted a right of humanitarian intervention only in the most extreme circumstances of human rights violation and the United Kingdom practice makes clear that the United Kingdom Government considers that this right exists only in such circumstances.[90]

Thirdly, a further objection often raised to humanitarian intervention is that it would be open to abuse. This is, of course, a policy objection, rather than a reason for asserting that there is no right of humanitarian intervention in existing law. Moreover, it is not persuasive. All rights are capable of being abused. The right of self-defence has undoubtedly been the subject of abuse but it is never seriously suggested that international law should not include the right of a State to defend itself.[91] The fact that a State may make an unfounded claim to intervene in a bad case is not a sufficient reason for denying all States the right of intervention in cases where the objective conditions for intervention are met. Moreover, those who dwell upon the risks attached to intervention tend to neglect the risks of not intervening – the appalling events in Rwanda in 1994 stand as a powerful warning in this respect.

In my opinion, modern customary international law recognizes a right of military intervention on humanitarian grounds by States, or by an organization like NATO. It does, however, treat the right of humanitarian intervention as a matter of

[89] The United Kingdom Foreign and Commonwealth Office Planning Staff study, *supra* note 77, for example, was written in 1984, during the Cold War and long before the Liberian and Iraqi interventions.

[90] See, e.g., the statement of Baroness Symons, *supra* note 62.

[91] See Higgins, *Problems and Process: International Law and How We Use It* (1994) 247.

last resort and confines it to extreme cases. The cases in which that right has been exercised suggest the following conditions:

a. that there exists – or there is an immediate threat of – the most serious humanitarian emergency involving large scale loss of life;

b. military intervention is necessary, in that it is the only practicable means by which that loss of life can be ended or prevented; and

c. the Security Council is unable to take such action, for example because of the exercise or threatened exercise of the veto.

Moreover, as with self-defence, the action taken must be proportionate to the end to be achieved and must comply with the requirements of the law of armed conflict in respect of matters such as targeting. These are objective criteria and, in determining whether they are met in any individual case, the existence of authoritative and impartial acceptance of the existence of an emergency and the need for military action is obviously of great importance. It is therefore necessary to consider whether they were met in Kosovo.

Part V: Did the Kosovo Case Meet the Criteria of Humanitarian Intervention?

If one applies the above criteria to the case of Kosovo, my opinion is that they were met by the time the NATO intervention commenced.

With regard to the first condition, there is no doubt that there was a humanitarian emergency in which large-scale loss of life was threatened. While some of the worst atrocities in Kosovo occurred immediately after the outset of the NATO campaign, it is evident that these were the product of a campaign by the Yugoslav forces which had been planned before the intervention of NATO. Moreover, the existence of a grave humanitarian crisis in Kosovo had been objectively verified well before the intervention. As was demonstrated in Part II, above, as early as 23 September 1998 the United Nations Security Council expressed alarm at what it described as 'the impending humanitarian catastrophe'. The Council also referred to the 'extensive civilian casualties' and the displacement of 230 000 people from their homes as a result of the fighting.[92] It repeated these expressions of concern in October 1998[93] and in the Presidential Statement in January 1999 condemning the

[92] SC Res. 1199 (1998).

[93] SC Res. 1203 (1998).

massacre of civilians at the village of Racak.[94] The Council also determined that the situation in Kosovo amounted to a threat to international peace and security.

Those determinations were not made on the basis of material submitted only by the NATO States. The scale of the humanitarian crisis before the NATO intervention was demonstrated in a briefing given to the Security Council by the United Nations High Commissioner for Refugees, who explained that by 23 March 1999 UNHCR was providing assistance to 490 000 refugees and displaced persons from Kosovo (a quarter of the population of the province).[95] The OSCE Report, based upon the eye-witness accounts of the 2 000 KVM monitors in Kosovo also testified to the existence of a humanitarian catastrophe by 24 March 1999.[96] In these circumstances, there was well documented evidence that the requirement of a grave humanitarian emergency was met and an objective determination by the Security Council that that was so. It is also relevant that the actions of the FRY were in clear breach of its obligations under binding decisions of the Security Council.

The second requirement – that military action offered the only practicable option for dealing with that emergency – involves a more complex judgement. Nevertheless, the NATO intervention occurred only after the repeated violations by the FRY of its obligations under the Security Council resolutions and its undertakings to withdraw forces from Kosovo, the failure to secure an agreement at Rambouillet and Paris and the withdrawal of the OSCE verification mission in the face of an offensive by the FRY forces which was itself in violation of international law. The reaction of the majority of the non-NATO States on the Security Council to the commencement of the NATO military action suggests that they considered that this requirement too was satisfied.[97] The defeat of the Russian draft resolution by the large margin of twelve votes to three was particularly significant in this respect.

The third requirement, that the Security Council was unable to take the necessary action, is again a difficult matter of judgement. Nevertheless, once it is accepted that military action was necessary, the implacable opposition of the Russian Federation and China to the military action which did occur, in the face of clear majority support in the Council, and the Chinese veto of the renewal of the

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[94] UN Doc. S/PRST/1999/2.

[95] Briefing by Mrs Ogata to the Security Council, 5 May 1999 (the text can be found at <www.unhcr.ch/refworld/unhcr/hcspeech/990505.htm>).

[96] OSCE, *Kosovo/Kosova: As Seen, As Told: an analysis of the human rights findings of the OSCE Kosovo Verification Commission October 1998 to June 1999* (1999).

[97] See, in particular, the views expressed in the debate on 24 March 1999 (UN Doc. S/PV. 3988) by Bahrain (at 7), Malaysia (at 9-10), and Slovenia (at 19).

mandate for Macedonia strongly suggest that the Council could not have taken a decision to authorize military action.[98]

Finally, it is necessary to consider whether the use of force by NATO met the requirement of proportionality recognized by, e.g., the United Kingdom in its 1998 memorandum to the NATO members.[99] As a matter of general principle, the use of force for humanitarian purposes must be limited to what is necessary and proportionate to achieving the humanitarian goals of the operation, in this case halting the violations in Kosovo and reversing the effects of the ethnic cleansing there so that the refugees and displaced could return home in safety. This principle, together with the rules of international humanitarian law applicable to the conduct of all international armed conflicts,[100] necessarily restricts the range of what may lawfully be attacked. They do not, however, mean that NATO action should have been confined to Kosovo itself. Targets many miles from Kosovo were capable of making an effective contribution to FRY military action. It was legitimate to attack such targets so long as the principles set out above were respected.

The hard truth which has to be faced is that the use of force cannot be a half-hearted matter. Faced with a major humanitarian catastrophe in Kosovo, neither NATO nor anyone else had ground troops available in the region which could be deployed in sufficient numbers and with sufficient speed to force an entry into Kosovo against what would almost certainly have been powerful opposition from the Yugoslav Government forces. The result was that the only realistic option was the use of air power, at least initially. Moreover, the capacity of air power to stop the ethnic cleansing in Kosovo in its tracks was extremely limited. The only hope lay in seeking to coerce the Milosevic Government into stopping its actions in Kosovo by inflicting a heavy price on its military infrastructure across the entire country.

Part VI: Conclusions

The NATO operation in Kosovo raised fundamental questions about the nature of modern international law and the values which it is designed to protect. Since it involved the application of a principle of last resort in circumstances of considerable difficulty, it is not surprising that there has been controversy about its legality. Nevertheless, for the reasons set out above, the resort to force in this case was a

[98] That was the view expressed by Malaysia (S/PV.3988, at 10; S/PV.3989, at 9) and evidently accepted by the majority which voted against the Russian draft resolution.

[99] See *supra* text accompanying note 58.

[100] As explained in Part I, above, these principles are not the subject of the present article.

legitimate exercise of the right of humanitarian intervention recognized by international law and was consistent with the relevant Security Council resolutions.

The more difficult question, however, is where does the world go from here? Two comments seem appropriate by way of conclusion. First, the Kosovo case reinforces the message that an oppressive government can no longer violate the most basic tenets of human rights and international humanitarian law, inflict loss of life and misery on a huge scale upon part of its population and expect to hide behind the concept of State sovereignty in order to escape the consequences of its actions. It makes clear that we are no longer living in a legal system which effectively makes intervention to prevent a holocaust a greater crime than the holocaust itself.

Secondly, Kosovo forces us all to think carefully about the relationship between the role of the Security Council and that of States in the protection of international peace and security. The Secretary-General has warned about the tension between the need to prevent grave violations of human rights and the need to preserve the primacy of the Security Council.[101] That is obviously right and it is indeed greatly to be regretted that the threat of a veto prevented the Security Council from following through on the logic of its earlier decisions in relation to Kosovo. But we should not exaggerate the scale of that tension. Kosovo was not a case in which the Security Council was passive and NATO acted entirely on its own initiative. As I have tried to show, the Security Council did take a number of important steps and its resolutions on Kosovo identified the problem, the responsibility for causing that problem and the objectives of the international community, as well as making clear that that situation constituted a threat to international peace and security. In resorting to force, NATO acted not in opposition to those objectives but precisely in order to further them. Moreover, at the end of the conflict, the intervening States went to the Security Council to establish the terms of a settlement for the immediate future, something which States that had violated the most fundamental principles of international law would not have done. The gap between the operation in Kosovo and the one in East Timor is real but it is not the chasm which is sometimes suggested and it is not one which cannot be bridged in the future.

As the Secretary-General has said:

> [I]n cases where forceful intervention does become necessary, the Security Council – the body charged with authorising the use of force under international law – must be able to rise to the challenge. The choice must not be between

[101] *The Economist*, 18 September 1999, at 81.

> unity and inaction in the face of genocide – as in Rwanda – and council division but regional action, as in the case of Kosovo. In both cases the UN should have been able to find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.[102]

The existence of a right on the part of a group of States to intervene in support of that common humanity in an extreme case should make it more likely, not less so, that the Security Council will in future be able to find that common purpose and will to act.

[102] *Ibid.*, at 82.