

INTERVENTION IN KOSOVO: LEGAL? EFFECTIVE?

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A retrospective look at the 1999 war in Kosovo is in order. What Bishop Butler called a "cool calm hour" is now upon us and we are well placed to make some comments, however brief, on the authority and modalities of intervention by North Atlantic Treaty Organization (NATO) and the United Nations in what had formerly been an autonomous province of Serbia, and to make some comments on efforts made in the aftermath of the intervention by way of holding individuals accountable for atrocities committed.

The Kosovo war of 1999 must be seen against the background of the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY), a state that had been severely affected by the foreign debt crisis of the 1980s.¹ The precipitous recognition by Germany of both Slovenia and Croatia, coupled with the subsequent recognition of these two states by western powers,² virtually guaranteed that the Republic of Bosnia Herzegovina would explode and that the region of Krajina in Croatia would erupt in violence and ethnic cleansing by Croats of Serbs. Several factors in addition to the recognition contributed to the turmoil in the former Yugoslavia, and these included the country's foreign debt crisis, the absence of democratic institutions, fervent nationalism, and the

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1. See Michael McGwire, *Why Did We Bomb Belgrade*, *INT'L AFFAIRS*, Jan. 1, 2000, at 2, for the development of this line of thinking. For an extended discussion of the impact of the foreign debt crisis on Yugoslavia, see SUSAN L. WOODWARD, *THE BALKAN TRAGEDY* ch. 3 (1995).

2. See the comments of Ivo Daalder that it was well understood by the United States that the disintegration of Yugoslavia would probably be violent as well as his comment that "political settlement in the former Yugoslavia was doomed by Germany's oft-repeated intention to recognize the independence of Slovenia and Croatia unconditionally." See Ivo Daalder, *Fear and Loathing in the Former Yugoslavia*, in *THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT* 50, 63 (Michael E. Brown ed., 1996). See also the comments of Stevan Lilic, University of Belgrade Law School and 1993 Visiting Researcher, University of Pittsburgh, when he said "As argued by many experts on the matter, the premature recognition of certain republics of the former Yugoslavia as independent states (Slovenia, Croatia, and Bosnia, and Herzegovina) was the cause of, or at least helped to create, the existing conflicts in the former Yugoslavia, particularly in Bosnia." See Stevan Lilic, *Remarks on Yugoslavia: A Case Study of International Consequences of Independence Movements*, 87 *ASILPROC* 205, 213 (1993).

absence of any regional solution to the problems developing in the SFRY.³ When Bosnia Herzegovina exploded in 1991-1992 tragedy ensued with Serbs ethnically cleansing and seizing control of parts of the country and culminating in the horrific events in Srebrenica in 1995 in which 7,000 Bosnian Muslims were slaughtered by Serbs in a United Nations safe haven. In the same year the Croatian army drove Serb forces from Krajina and compounded the misery by cleansing the area of 200,000 Serbian inhabitants.⁴

The failure to incorporate regional considerations into the Dayton Peace Agreement of 1995, an agreement which resulted in the cessation of hostilities in Bosnia Herzegovina, meant that Kosovo was left out of the equation. The effect of this was that the frustration among Kosovar Albanians, which had been building in Kosovo since 1989 when Serbian President Slobodan Milosevic pressured the Kosovo Assembly into abolishing the province's autonomous status, simply increased. Kosovar Albanians who became progressively disillusioned with the peaceful approach adopted by their leader Ibrahim Rugova in dealing with Serbia, threw their support behind the Kosovo Liberation Army (KLA). This organization was, as Falk says, "dedicated to waging an armed struggle to achieve an independent Kosovo" and by 1996 it carried out "a variety of violent provocations that provided an ongoing pretext and rationale for harsh Serb security measures."⁵

From 1996 to 1999 hostilities tended to escalate between Serbians inside and outside of Kosovar and Kosovar Albanians. Even with the presence of the Kosovar Verification Mission (KVM) mandated by the United Nations and headed by Ambassador William Walker, forty-five Kosovar Albanians were massacred in Racak on January 15, 1999. This attack on alleged civilians was 'the final warning bell' and initiated considerable political activity in European capitals and in Washington. The upshot was the convening of talks in France at Chateau Rambouillet under the auspices of the Contact Group. The terms of the agreement struck at Rambouillet were, it appears, excessive as made evident by Appendix B, article 8 which gave NATO unimpeded access throughout the Federal Republic of Yugoslavia (FRY). In the event, the exaggerated conditions of the drafted agreement meant that a dark shadow was cast over the line of authority pursued by NATO in justifying its subsequent military intervention. It therefore seems unsurprising that the FRY delegation did not agree to the terms of the Rambouillet Agreement. On March 18, 1999, the talks, having shifted to the Kleber Centre in Paris, were suspended when the Serbian

3. For an excellent discussion of these and other points, see WOODWARD, *supra* note 1.

4. According to MccGwire, "The Croatian *modus operandi* was so effective that the Serbs adopted the same approach when they occupied Kosovo in March 1999." See MccGwire, *supra* note 1, at 3.

5. Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 849 (1999).

delegation "refuse[d] to budge."⁶ On March 19, the KVM withdrew from Kosovo and on March 20, Yugoslav armed units launched an offensive against the Kosovar Albanians. Finally, on March 24, NATO airstrikes began.

So much for a brief historic background to NATO intervention in Kosovo. What line of authority is there to support this intervention? And what modalities did NATO use to intervene in Kosovo?

The starting point of this discussion is the United Nations Charter. NATO's own North Atlantic Treaty turns us towards this document for it says in its Preamble: the Parties to this Treaty reaffirm their faith in the purposes and principles of the United Nations Charter and their desire to live in peace with all peoples and all governments. More needs to be said later about NATO, its treaty, and the Charter. For the moment it suffices simply to hold the Charter front and center in any discussion of NATO's authority for military engagement in Kosovo.

Under the Charter there are only two permissible uses of force in international relations, both found in Chapter VII, Article 51. The first is enforcement action by the Security Council aimed at maintaining international peace and security, and the second is self-defense if an armed attack occurs against a Member of the United Nations. The second of these justifications cannot function as a rationale for NATO involvement in Kosovo,⁷ and therefore only the first remains as a way of making right the conduct of NATO.

Even allowing that the purposes of the United Nations as given in the Charter include not only maintaining peace and security but also achieving international cooperation in promoting and encouraging respect for human rights,⁸ they do not provide a wedge for legalizing NATO's unilateral action in Kosovo. The reason for saying this lies in Article 2(4) which prohibits threats

6. See *Kosovo Chronology*, available at http://www.state.gov/www/regions/eurl/fs_kosovo_timeline.html (last visited Mar. 17, 2001).

7. Article 51 reads in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Clearly, NATO was not under attack and so it could not claim self-defense. Moreover, Kosovo was not a member of the United Nations and so the Province of Kosovo could not claim a right of self-defense under Article 51. Here, I take issue with the suggestion of Ruth Wedgwood that, in the context of Article 51, "surely self-defense of a population warrants as much consideration as defense of a political structure." See Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 833 (1999). Clearly, Article 51 applies only to the juridical state.

8. To concede this is to concede a lot, for as Charney has persuasively argued, though protection of human rights is among the purposes of the United Nations Charter, it is "subsidiary to the objective of limiting war and the use of force in international relations, as found in the express Charter prohibitions on the use of force. This interpretation is supported by the *travaux preparatoires* of the Charter." See Jonathan I. Charney, *Anticipatory Humanitarian Intervention*, 93 AM. J. INT'L L. 834, 835 (1999). Charney's view would seem to support the view that Article 1 (1) dominates Article 1 (3), i.e. that the objectives of peace and security dominate the objective of human rights.

or the use of force by any members against the “territorial integrity or political independence of any state,” and in Article 2(7) which prohibits United Nations intervention in matters which are “essentially within the domestic jurisdiction of any state.” Article 2(4) itself would seem to render illegal any unilateral action by any member state, acting alone or in concert with some other member states without the blessings of the Security Council, against the territorial integrity or political independence of any state. This would imply that NATO’s military actions in Kosovo were illegal. And while Article 2(7) might well allow for United Nations intervention inside a state on the grounds that human rights violations are not solely a matter of domestic jurisdiction, this does nothing to justify unilateral NATO action, action which was undertaken without the blessings of the Security Council. And although Article 52 states that nothing in the Charter precludes regional arrangements for peace and security, these arrangements and activities must be “consistent with the Purposes and Principles of the United Nations.” This means that Article 52 has to be read alongside of the “territorial integrity” provision of Article 2(4). And this would seem sufficient to make unilateral action by NATO in Kosovo illegal.⁹

Furthermore, Article 53 of the Charter does not afford a legal justification for NATO’s intervention in Kosovo. First of all, though the article provides that the Security Council shall utilize regional arrangements for enforcement action under its authority, it also provides that no enforcement action shall be taken without the authorization of the Security Council. So even if NATO were a regional organization, the absence of any Security Council authorization for NATO intervention is sufficient to remove its legal justification in the case of Kosovo. But, as Bruno Simma has argued successfully, NATO is not a regional organization but an international one.¹⁰ In the result the requirement found in Article 53 is not ‘formally applicable’ to NATO.

Against the foregoing, it is difficult to see any authority based on the Charter for NATO military intervention in Kosovo. This is a conclusion that is

9. Something should be said here about Article 24 of the Charter. This article confers on the Security Council “primary responsibility for the maintenance of international peace and security.” The secondary responsibility impliedly referred to here applies, it would seem, to regional arrangements already discussed, which are in turn subject to the Purposes and Principles of the United Nations including Article 2 (4), the territorial integrity provision. It would seem, therefore, that the effect of Article 24 is not to spawn other agencies which can maintain peace and security independently of the Security Council, but to structure the process of conflict resolution so that regional agencies attempt pacific settlements “before referring them to the Security Council.” U.N. CHARTER art. 24, 25, available at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/ibasicunchart.htm> (last visited Mar. 17, 2001). There is nothing in any of this which implies that by conjoining Article 24 with Article 52 that regional agencies such as NATO have a legal right to initiate unilateral intervention.

10. See Bruno Simma, *NATO, the UN and the Use of Legal Force: Legal Aspects*, EUR. J. INT’L L. 10 (1999). Suggestions in conversation by Professor Mary Ellen O’Connell encouraged me to reconsider this aspect of the Charter and the relevance of it to the Kosovo conflict.

not eroded by three resolutions passed by the Security Council under Chapter VII prior to NATO's bombing campaign or by one resolution passed after the cessation of hostilities. Here, I am referring to Resolution 1160 (March 1998), Resolution 1199 (September 1998), Resolution 1203 (October 1998) and Resolution 1244 (June 1999).¹¹ None of these resolutions authorized NATO bombing, nor "retroactively legalized" them. The Council for its part, in addition to passing three resolutions to reign-in the FRY prior to the bombing and one resolution to authorize a peace mission after the cessation of bombing, on the third day of the bombing refused to condemn NATO bombing. By a vote of 12-3, the resolution proposed by Russia, India, and Belarus charging that NATO in its bombings violated Articles 2(4), 24, and 53 of the Charter, failed. And the Secretary-General, finding himself in the unenviable position of attempting to make credible the organization he headed notwithstanding its inaction when faced with a humanitarian catastrophe, went on to assert that it was tragic that diplomacy had failed but there are times when the use of force "may be legitimate in the pursuit of peace."¹² Regrettably, scour though we do these collective resolutions of the Security Council and the comments of the Secretary-General, there is nothing which legalizes and thereby authorizes NATO's military intervention in Kosovo.

Some might be tempted to think that, regardless of the foregoing, the international legal system has changed owing to the erosion of state sovereignty and that this erosion is predicated on the growth of human rights, environmental concerns, and globalization. Those so thinking might conclude that there is no real legal impediment to NATO-like intervention in so-called sovereign states in defense of human rights. To this it seems fair to say that while state sovereignty may have experienced some diminution, those who make this claim tend to overplay their hand. Geoffrey Garrett has argued convincingly that the policy constraints on governments generated by global trade, multinationalization of production and the internationalization of financial markets are "weaker and less pervasive than is often presumed."¹³ Moreover whatever erosion of state sovereignty that might have occurred it is difficult to

11. These resolutions dealt with, respectively: the imposition of an arms ban on the FRY and the withdrawal of special police units, the cessation of the use of force and the violation of human rights, the authorization of an observer force called the KVM, and authorization of an international civilian and security presence after the cessation of the war. Wedgwood, *supra* note 7, at 833; Charney, *supra* note 8, at 835; *Kosovo: A Human Tragedy: United Nations Efforts Aim to Alleviate Suffering of 80,000*, U.N. CHRONICLE, Jan. 1, 1999, at 5.

12. *Id.* Later before the General Assembly he added "the imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences" is an "equally compelling interest." Press Release, United Nations, Secretary General Presents His Annual Report to the General Assembly (Sept. 20, 1999) (on file with author).

13. Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?*, 52 INT'L ORG. 787, 805 (1998).

see a consensus emerging at the international level authorizing this kind of intervention. The absence of widespread state practice and *opinio juris* as well as the condemnation of the General Assembly of specific interventions, e.g., India's intervention in East Pakistan in 1971 to protect Bengalis, make clear that such consensus does not now exist. In addition, it seems that important international players such as Russia and China, and possibly some NATO countries as well,¹⁴ would oppose a development of international law in such a direction. One may fairly conclude from this that no new general law or customary law of intervention has emerged nor is likely to in the near future.¹⁵

The legality of NATO's military intervention in Kosovo aside, what can be said of the modalities of NATO's involvement? The modalities of this military involvement included initially the use of "smart weaponry" which was "confined to military targets,"¹⁶ but when this failed to produce the desired results NATO extended its targets. This resulted in damage to manufacture enterprises, power supply, transportation facilities, agriculture and forestry, water management, construction industries, trade, catering, and banks.¹⁷ Over 27,000 sorties¹⁸ (including sorties of B-52s) were flown and 23,000 bombs (including cluster bombs and depleted uranium ordnance) and missiles, 35% being smart weapons,¹⁹ were dropped. It is believed that a quarter of the SAM radar sites were destroyed and there have been reports of "significant collateral damage to civilian facilities including two hospitals and several schools."²⁰ The dollar value of the total damage is estimated by European Union officials to be in the neighborhood of United States \$30 billion and by Yugoslav officials to be between United States \$30 and 100 billion.²¹

I want now to pass on to consider a different aspect of the war in Kosovo. Previously I focused on the authority, if any, NATO had in intervening in what was otherwise an internal conflict. In what follows, I wish to look at the efforts made to bring about peace and security in Kosovo as well as the efforts to secure accountability for the atrocities the intervention intended to end.

14. Germany would probably oppose such development. See the comments on Germany's reluctance to make NATO's decision to intervene a precedent in Bruno. Simma, *supra* note 10, at 13.

15. This does not augur well for what I call the Blair Doctrine: acts of genocide can never be a purely internal matter, and reform of the Security Council needs to reflect the "propriety of intervention to stop genocide." See Michael J. Glennon, *The Charter: Does It Fit?*, U.N. CHRONICLE, Jan. 1, 1999, at 33.

16. Falk, *supra* note 5, at 851.

17. *Economic, Humanitarian and Ecological Consequences of NATO Aggression against Yugoslavia - Basic Facts and Appraisals*, 40 YUGOSLAV SURV. 9, 10 (1999).

18. See also McGwire, *supra* note 1, at 10.

19. See Martin L. Cook, *Immaculate War: Constraints on Humanitarian Intervention*, 14 ETHICS & INT'L AFF. 55, 64 (2000).

20. See McGwire, *supra* note 1, at 11.

21. *Economic, Humanitarian and Ecological Consequences of NATO Aggression Against Yugoslavia - Basic Facts and Appraisals*, *supra* note 17.

On June 3, 1999, a peace plan was brokered which was expanded on a week later in United Nations Resolution 1244. This resolution included three principles: 1) the deployment of an international security and civil presence (KFOR) in Kosovo under United Nations rather than NATO auspices; 2) the omission of any reference to KFOR's right to unrestricted passage and unimpeded access to Serbia; and 3) the omission of any reference to a referendum to decide Kosovo's future. More now needs to be said about the first of these points.

Security Council Resolution 1244 provided for the presence of 50,000 KFOR international troops. Their deployment has for the most part met with success, for it has brought peace and a measure of security. But it has faced and continues to face difficulties. Retaliation by Albanian Kosovars against Serbs and Gypsies has been an issue with which KFOR has had to contend. Some have claimed that this has "made a mockery of any attempt to build a multi-ethnic Kosovo."²² There is still concern that extremists, called the Liberation Army of Presevo, Medvedja and Bujanovac (UCPMB), are "bent on stirring up trouble in southern Serbia."²³ In addition, there has been considerable displacement of Serbs from Kosovo; "it appears that well over 164,000 Serbs fled Kosovo since early June [1999]."²⁴ Perhaps the condemnation on August 4, 2000 by the Interim Administrative Council for Kosovo of the recent spate of violence there²⁵ is sufficient to make clear that what exists in Kosovo is an uneasy peace and incomplete security. That this is still very much a problem was made evident in an open meeting between Dr. Bernard Kouchner, the head of UNMIK, and the Security Council. There he said on September 27, 2000 that the situation of non-Albanian communities is the biggest problem in Kosovo. He maintained "Serbs and Roma, in particular are often still excluded from daily life and are under great personal security risks."²⁶ Unease and apprehension remain in Kosovo notwithstanding the very great efforts of KFOR and UNMIK to make the situation better.²⁷ The issue of peace and security now

22. Michael Gove, *Only Now Can We See How We Lost In Kosovo*, TIMES (London), Mar. 14, 2000, at 22.

23. Ed Vulliamy & Helena Smith, *US Faces Rebel War in Kosovo: Pentagon Braced for Bloodshed After Raids on Guerillas*, OBSERVER, Mar. 19, 2000, at 22.

24. *Humanitarian Law Violations in Kosovo*, Human Rights Watch 81 (1998).

25. *Kosovo News*, available at <http://www.un.org/peace/kosovo/news/kostor.htm> (last visited Mar. 17, 2001).

26. *Complete Kosovo Coverage*, available at <http://www.un.org/peace/kosovo/news/99/kosarc.htm> (last visited Mar. 17, 2001).

27. It is obvious why this unease and apprehension should remain. Sher has remarked "There have been more than 330 serious ethnic crimes in Kosovo since January 2000, two-thirds committed by ethnic Albanians against Serbs and other minorities." Julian Sher, *Ethnic Albanians Use Web in Fight Against Serb Control*, GLOBE & MAIL, Oct. 12, 2000, at A14.

treated, I should like to turn attention to the issue of justice and the role of the International Criminal Tribunal for the Former Yugoslavia.

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was unanimously adopted on May 25, 1993 through Resolution 827 of the Security Council acting under Chapter VII of the United Nations Charter. The Tribunal's statute conferred jurisdiction of subject matter over the following crimes: Article 2: Grave Breaches of the Geneva Conventions of 1949, Article 3: Violations of the Laws or Customs of War, Article 4: Genocide, and Article 5: Crimes Against Humanity. According to Article 8, the territorial jurisdiction of the ICTY shall extend to the territory of the former Yugoslavia and apply to actions carried out since January 1, 1991. National courts and the ICTY are to have, according to Article 9, concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, though according to Article 9(2) the Tribunal shall have primacy over national courts.

Resolution 827 established the ICTY. The legal issues surrounding the authority of this tribunal are the following: 1) does the Security Council have authority to establish tribunals?; and 2) even if the ICTY has authority over humanitarian law in the former Yugoslavia as it applies to the independent republics which have exercised their right to self-determination under the Constitution of the SFRY, does the ICTY have authority over humanitarian law inside Serbia, i.e. inside Kosovo? The answer to the first of these questions is generally thought positive.²⁸ The second question is more problematic not because the terms of the Statute of the ICTY leaves any doubt about its authority, but because the ICTY has justified its authority to try individuals in Bosnia Herzegovina on the grounds that Serbia enforced the Dayton Agreement of 1995.²⁹ And clearly the Dayton Agreement has nothing to do with the Kosovo war apart from contributing to its development.

But there is no need to predicate the Tribunal's authority in the former Yugoslavia on the Dayton Agreement for it can be predicated on Security

28. There are issues worth discussing here. As Bodley points out, "Chapter VII makes no explicit provision for the establishment of international tribunals. A literal reading of the Chapter permits the conclusion, therefore, that the Security Council was acting *ultra vires* in creating the International Tribunal. This was precisely the argument put forward by the Federal Republic of Yugoslavia (Serbia and Montenegro) against its establishment." See Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 13 N.Y.U.J. INT'L.L. & POL. 417, 428 (1999). But it would appear that the Security Council did act within its mandate by satisfying Article 39 of the Charter "in determining that the international humanitarian law violations in the former Yugoslavia constituted a threat to peace and security. It then properly invoked Article 41 to employ measures short of the use of armed force in attempting to restore international peace and security." *Id.* at 440.

29. Bodley points out that in its 1996 submission to the *United Nations Yearbook*, the ICTY said: "By signing the [Dayton] Accord, the parties thereto, the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . have formally recognized the Tribunal . . ." *Id.* at 449.

Council Resolution 827. In this way the problem of the authority of the ICTY in Kosovo vanishes which it does not do if the Dayton Agreement is relied upon. This agreement was meant to apply to problems in Bosnia Herzegovina. It has no bearing on Kosovo and certainly does not give authority over humanitarian law to the ICTY in Kosovo. What gives authority to the ICTY is Security Council Resolution 827.

As indicated above, the Statute of the International Criminal Tribunal for the former Yugoslavia gives the tribunal jurisdiction of subject matter over grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity. However, the distinction in international law between international and non-international (internal) armed conflicts³⁰ means that some of these have application in Kosovo and some do not. The Kosovo war was an internal armed conflict: internal because it took place in an autonomous or formerly autonomous province of Serbia³¹ and armed because it was so declared by the ICTY on July 7, 1998.³² Therefore, the Tribunal's jurisdictional subject matter in Kosovo is limited to crimes committed in an internal armed conflict. Accordingly, grave breaches of the

30. See the comment made by Human Rights Watch, "International humanitarian law makes a critical distinction between international and non-international (internal) armed conflicts, and a proper characterization of the conflict is important to determine which aspects of international humanitarian law apply." *Humanitarian Law Violations in Kosovo*, *supra* note 24.

31. Whatever its status, Kosovo was not a republic and did not have a constitutional right to self-determination, a right possessed by all the republics until 1994. The 1946 Constitution of the Federal Peoples Republic of Yugoslavia in Article 1, says "The Federal Peoples Republic of Yugoslavia is a federal people's state, republican in form, a community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state." CONSTITUTIONS OF NATIONS 522 (Vol. III 1950). See also The Constitution of the Socialist Federal Republic of Yugoslavia, Basic Principles No. I, "The nations of Yugoslavia, proceeding from the rights of every nation to self-determination, including the right to secession . . ." See also Article 1 which reads, "The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntarily united nations and their Socialist Republics." *The Constitution of the Socialist Federal Republic of Yugoslavia; The Constitution of the Federal Republic of Yugoslavia*, available at http://www.uni-wuerzburg.de/law/sr00000_.html (last visited Mar. 17, 2001). See also Constitution of the Federal Republic of Yugoslavia 1994, which says nothing at all about the right of nations to self-determination. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD vol. XX (Albert P. Blaustein & Gisbert H. Flanz eds. 2000). What these suggest is that republics in the form of nations, not nationalities, had the right to self-determination until 1994. For a discussion of the national question in Yugoslavia, see Banac's seminal work, IVO BANAC, THE NATIONAL QUESTION IN YUGOSLAVIA (Ithaca, N.Y. Cornell University Press, 1984), especially Part VI. It should be pointed that he does not seem to preserve the distinctions which the various constitutions make between "nation" and "nationality."

32. *Humanitarian Law Violations in Kosovo*, *supra* note 24, at 89. This is important because the ICTY Statute says that the Tribunal shall have the power to prosecute persons for crimes committed in armed conflict, whether the conflict is international or internal.

Geneva Conventions are not within the purview of the Tribunal in Kosovo for such breaches presuppose an international conflict.³³

It is, however, within the purview of the Tribunal to prosecute cases arising from the Kosovo war based on Article 3: Violations of the laws or customs of war, Article 4: genocide, and Article 5: crimes against humanity. In the matter of violations of the laws or customs of war, the Tribunal could turn to Common Article 3 of the Geneva Conventions of 1949, which is really a convention within a convention, and could turn to Protocol II which supplements Common Article 3.³⁴ In the matter of genocide, the Tribunal could in turn assert that “customary law establishes universal jurisdiction over genocide”³⁵ and maintain that the International Court of Justice has claimed that the principles behind the Genocide Convention “are recognized by civilized nations as binding on States, even without any conventional obligation.”³⁶ And in the matter of crimes against humanity, the Tribunal could confidently maintain that since Nuremberg, crimes against humanity have been universally enforceable against authorities inside the state in which they were committed. So notwithstanding the internal nature of the Kosovo armed conflict, the Tribunal has three arrows in its quiver.

It is from this quiver that on May 22, 1999 Louise Arbour Prosecutor of the International Criminal Tribunal pulled out two arrows and, pursuant to her authority under Article 18 of the Statute of the Tribunal, charged Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vljajko Stojiljkovic with crimes against humanity and violations of the laws or customs

33. A similar point in a different context is made by two commentators. In discussing *Tadic*, they have remarked, “In order for grave breaches to have been committed, the conflict in the Prijedor region would have to be characterized as an international armed conflict.” See Marco Sassoli & Laura M. Olson, *International Decision: Prosecutor v. Tadic*, 94 AM. J. INT’L L. 571, 572 (2000).

34. Common Article 3 is the only part of the Geneva Convention that applies to internal armed conflicts. This article protects persons who take no active part in the hostilities and expressly prohibits violence to life and person; in particular murder, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; and the passing of sentences and the carrying out of executions without proper judicial involvement. Protocol II, which also applies to internal armed conflict, prohibits the following: orders that there shall be no survivors; acts of violence against all persons captured; torture; pillage and destruction of civilian property; and the desecration of corpses.

35. See Diane F. Ortellicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2565 (1991). It is crucial that jurisdiction be rooted in some customary law basis since the Genocide Convention, Article VI claims that persons charged with genocide shall be tried in the state in which they have committed the act or by an international tribunal which has its jurisdiction accepted by the contracting parties. The FRY has not accepted the ICTY’s jurisdiction in Kosovo. This would mean that acts of genocide could only be tried in the FRY, hardly an acceptable position for either the Kosovar Albanians or the United Nations.

36. Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28), available at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ipccgsummary510528.htm> (last visited Mar. 17, 2001).

of war.³⁷ Four counts were brought against these individuals. Three of these were for crimes against humanity including deportation, murder, and persecutions. One of these was for a violation of the laws or customs of war, namely murder. To date, there have been no convictions in this case. Indeed, down to March 21, 2000, very little had happened by way of indicting persons for violations of humanitarian law in connection with the Kosovo conflict. Of the thirty-seven indictments against individuals by the ICTY, only one of these had any connection with Kosovo.

It seems that in response to a perceived need to handle more cases related to war and ethnic crimes in Kosovo, by way of supplementing the work done by the ICTY, the United Nations Mission in Kosovo headed by Dr. Bernard Kouchner decided in the spring of 2000 to "create an internationally run court to try war and ethnic crimes in the province."³⁸ The new court, called the Kosovo War and Ethnic Crimes Court, was to be a specialized agency with "precedence over local courts" and would have a mandate to cover war crimes committed by Serbs during the war and to try Albanians for abductions and killings of Serbs after and during the war. The Court was to be comprised of an international judge, an ethnic Albanian, and a Serb.³⁹ It appears however that up to the present, nothing has come of Dr. Kouchner's suggestion. Nothing is said of it in UNMIK Regulations for 2000,⁴⁰ and this would imply the Court has yet to be established.

Although the above suggests a slow start to prosecution of war crimes in Kosovo, with most attention given to the "big fish" (Milosevic et al), some attention is now being given to the "small fry." The approach UNMIK is now taking in this matter is trying individuals for war crimes in district courts with internationally appointed prosecutors. Evidence for this is found in the commencement of a trial, of a man charged with committing acts of genocide, in Mitrovica district court with the international prosecutor Michael Hartmann.⁴¹ In trying an individual for this offense, the court reached into the quiver referred

37. *The Prosecutor of the Tribunal Against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlatko Stojiljkovic*, at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> (last visited Mar. 17, 2001). The International Criminal Tribunal for the Former Yugoslavia. The charges filed in this case relate to events in Racak, Bela Crkva, Velika Krusa/Krushe e Mahde - Mali Krusa/Krushe e Vogel, Dakovica/Gjakove, Crkolez/Padalishte, Izbica, and (for a second time) Dakovica/Gjakove. Only the events in Racak on January 15, 1999, occurred prior to the bombing on March 24, 1999.

38. Carlotta Gall, *U.N. Mission in Kosovo Proposes to Set Up a War Crimes Court*, N.Y. TIMES, June 6, 2000, at A3.

39. Alexandra Poolos, *Kosovo: War Crimes Court to Be Established*, at <http://www.rferl.org/nca/features/2000/04/F.RU.000427133027.html> (last visited Mar. 17, 2001).

40. See *UNMIK Regulations*, available at <http://www.un.org/peace/kosovo/pages/regulations/regs.html>. (last visited Mar. 17, 2001).

41. *UN Mission In Kosovo*, at <http://www.un.org/peace/kosovo/news/kostor.htm> (last visited Mar. 17, 2000).

to above and pulled out the third arrow, the crime of genocide.⁴² By early September, 2000, UNMIK had appointed three prosecutors (Hartmann of Germany, Garland of the United Kingdom, and one other) and seven international judges (including Ingo Risch of Germany)⁴³ in Kosovo.⁴⁴ In addition, a two-day seminar organized by the Kosovo Judicial Institute (run by OSCE) took place in Pristina on September 5, 2000 to introduce Kosovo judiciary to international humanitarian law.⁴⁵ On August 10, 2000, UNMIK appointed 139 local judges and prosecutors bringing the total to 405.⁴⁶ And on September 5, 2000, UNMIK dismissed the director of the Mitrovica Detention Center from which fifteen Kosovo Serbs, most charged with war crimes, escaped.⁴⁷ What all of this suggests is that UNMIK is attempting to use domestic courts topped up with a few international judges and prosecutors to facilitate the prosecution of cases dealing with humanitarian law.⁴⁸ In this way, the action of UNMIK to utilize domestic courts for the prosecution of war crimes complements the work of the ICTY.

The foregoing has explored two different kinds of intervention by the international community in Kosovo, first military intervention by NATO and secondly legal intervention in the form of the ICTY. The first was judged by me to be illegal and the second legal. As for the effectiveness of these two forms of intervention, one may say the following.⁴⁹

It appears that over the short-run NATO achieved what it wanted in Kosovo: it stopped the displacement of persons, rapes and atrocities. Accordingly, it appears as if NATO intervention was effective. However, this might be a less compelling virtue than first meets the eye. If, for instance, it

42. Other events in Kosovo under UNMIK have occurred recently that reflect on a changing judicial environment there. Dr. Bernard Kouchner has recently announced the appointment of an additional 139 judges and prosecutors and 309 lay judges "as part of his effort to improve the functioning of the judicial system in Kosovo." See *Kosovo News*, at <http://www.un.org/peace/kosovo/news/kostor.htm>. (last visited Mar. 17, 2001).

43. See *id.*

44. *Kosovo Swears In New International Prosecutor and Judge*, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).

45. See *Kosovo News*, *supra* note 42. The focus of the seminar was on the legal concepts of war crimes, crimes against humanity, genocide and individual criminal responsibility. *UN Mission Rejects Belgrade-Organized Elections in Kosovo as "Farce"*, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).

46. *Kosovo Swears in New International Prosecutor and Judge*, *supra* note 44.

47. *UN in Kosovo Dismisses Director of Detention Centre Following Escape of Prisoners*, at <http://www.un.org/peace/kosovo/news/kosovo2.htm> (last visited Mar. 17, 2001).

48. Cases pertaining to humanitarian law are coming before the domestic courts of Kosovo. See *Kosovo Hosts Seminar On International Humanitarian Law*, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).

49. The effectiveness of United Nations intervention in Kosovo is a separate topic to be treated on another occasion.

could be shown that the Serbian attack on Kosovo was intended as a preemptive strike in anticipation of NATO bombing, especially in light of the Rambouillet Agreement, then NATO intervention would turn out to be effective in bringing to a close the very actions it helped cause. So the virtue of effectiveness might turn out to be gratuitous and hardly deserving of praise. Preliminary evidence suggests, however, that this interpretation of events is incorrect. Serbian practice in Bosnia provides inductive support for the proposition that Serbian forces were capable of committing atrocities without being under the threat of NATO bombing. But admittedly the evidence is incomplete with respect to Kosovo and one will not know with certainty the answer to the counterfactual—what the Serbians would have done in Kosovo if NATO had not threatened bombing—until archival records are examined in Belgrade in future years. The evidence that one does have suggests that this counterfactual would be answered: the Serbians would have done exactly what they did though on an even larger scale. With this in mind the effectiveness of NATO intervention can be provisionally asserted.

One may also say that over the short-run the ICTY did not achieve very much apart from the indictment of Milosevic and his associates. In the result and taking into consideration only what has thus far transpired, the military intervention has proven to be illegal but effective, while the legal intervention has proven to be legal but ineffective. With these in mind, I wish to conclude with a consideration of two residual issues.

First, in assessing NATO's intervention, arguably unilateral intervention in Kosovo,⁵⁰ one cannot help but be struck by the dissonance between NATO's actions and the preamble to the North Atlantic Treaty which reads: the Parties to this Treaty reaffirm their faith in the purposes and principles of the United Nations Charter and their desire to live in peace with all the peoples and governments. And one cannot help but be struck by the dissonance between NATO's actions and Article 7 of the Treaty which states: "This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security."⁵¹ It is worth noting that, though western writers made virtually nothing of it, this dissonance was noted

50. Wedgwood takes issue with the claim that NATO's actions were unilateral when she alleges that NATO is "close to an objective regime." She reasons "NATO's decision deserves greater deference than purely unilateral action." Wedgwood, *supra* note 7, at 833. It is difficult to see how this line of reasoning would not have applied to the Warsaw Pact when it acted in 1968 in Czechoslovakia.

51. ESCOTT REID, *TIME OF FEAR AND HOPE* app. 2 (Toronto: McClelland and Stewart, 1977).

separately first by Yugoslav authorities and then by France at the NATO fiftieth anniversary in Washington in April 1999.⁵²

Secondly, given the illegality of NATO's actions, is there room for the argument that its actions were nonetheless justified on moral grounds, say on grounds of justice? Those answering in the affirmative would presumably argue that NATO had to intervene to prevent another Bosnia and to prevent regional instability.⁵³ Since there was deadlock in the Security Council, no relief could be expected from that quarter and the result was that NATO was the only game in town. Therefore, NATO action was morally justified. But this argument is persuasive only if a capacious utilitarianism or far-sighted consequentialism is employed to measure the long-term effects of NATO action. Setting aside lingering doubts concerning NATO action in the first place, objections turning on the severity of the Rambouillet Agreement and on the premature withdrawal of KVM personnel, a capacious utilitarianism would demand that any moral assessment of NATO's actions be forward-looking and directed at the commitments of the United Nations and KFOR to Kosovo in the future. What I am suggesting here is that a moral assessment of NATO's actions requires a careful analysis not only of what harm it prevented in the short run but of what harm it prevents in the long run.

Relevant to the foregoing observation are the following comments of two military figures with experience in the Balkans. The remark of retired Admiral Leighton W. Smith Jr. who commanded the NATO forces in Bosnia in 1996 is in order. He said in the spring of 2000 "I don't think we are going to get out of Kosovo for a while unless we are willing to allow the Kosovar Albanians to declare independence and take over Kosovo in its entirety and run all the Serbs out, and then forment trouble in Macedonian which I am convinced they will do."⁵⁴ And the former supreme commander in NATO in Europe, General Wesley Clark, said while talking generally of the NATO mission in the Balkans, "But that mission requires a vital political component, a long-term strategy for the region."⁵⁵ So if the effect of NATO's intervention is to set the stage for an apologetically and rhetorically clothed exit that results in more civil strife, regional instability and ethnic cleansing, the moral argument from justice seems paper thin.

52. See *International Law and Order and NATO Aggression Against Yugoslavia*, in 40 YUGOSLAV SURV. 5 (1999); Richard Caplan, *Humanitarian Intervention: Which Way Forward?*, 14 ETHICS AND INT'L AFF. 23, 31 (2000).

53. At least for NATO supporters, it is important that there be a conjunction of reasons here to block critics of NATO from saying the West's indifference to the tragedy in Rwanda in which 800,000 people perished is evidence of racism.

54. George C. Wilson, *Kosovo Has Been Hard on NATO*, INT'L HERALD TRIB., Apr. 21, 2000, at 6.

55. *Preparing to Step Down, Clark Warns NATO Needs New Strategy*, INT'L HERALD TRIB., Apr. 28, 2000, at 12.

A capacious utilitarianism requires something quite different to make acceptable the interventionist argument on moral grounds. What it requires is a long-term commitment, or at least the willingness for a long-term commitment, from the United Nations and KFOR and possibly NATO for peace and security in Kosovo. Those who shun this and wish to exit in a moment of triumphalism grounding their convictions on justice are in effect echoing the views of the deontological tradition in ethics, a tradition which emphasizes non-negotiables like truth, promise-keeping, and justice. The high-minded who are fond of rights-talk probably fall well within this tradition. But there remains the utilitarian tradition of Hume, Bentham and John Mill and J.S. Mill, and this tradition looks at things in terms of where they might lead. It is this tradition which I am suggesting needs once again to be heard in the case of Kosovo. A capacious utilitarianism or far-sighted consequentialism would hold off delivering its final moral judgment of NATO's intervention in Kosovo, waiting to see where NATO and KFOR go from here.