

# International Law and the War in Kosovo

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On 24 March 1999, NATO launched air strikes against the Federal Republic of Yugoslavia. The previous day, NATO Secretary General Javier Solana had justified the action by pointing to the refusal of Yugoslav President Slobodan Milosevic to accept the proposals negotiated in Rambouillet and to abide by previously agreed limits on Serb Army and Special Police Forces in Kosovo. Thus, the use of force was the only way to 'prevent more human suffering and more repression and violence against the civilian population of Kosovo'.<sup>1</sup> The argument, obviously, was more political than legal, as were the justifications invoked at the time by the various NATO capitals. Apart from the debate on the political wisdom of military action, reactions ranged from simple scepticism to vehement condemnation of the legality of the campaign. NATO's unilateral use of force, critics argued, was, at best, a significant departure from classic international legality. At worst, it jeopardised the international order based on the UN Charter which entrusts the Security Council with the responsibility to monitor and guarantee international peace and security.

Criticising NATO's decision on legal grounds after the operations were under way may seem beside the point. This author, for one, believes that the Alliance's military action was necessary on moral and political grounds. The legal question, however, is important. It goes, indeed, to the foundation of the international order established since 1945 on the basis of the UN Charter. By and large, despite their criticism of the UN as an organisation, the countries of NATO have stood staunchly against 'rogue' and other lawless states that threaten to upset that order. More significant perhaps, NATO regards itself as an alliance of democratic nations, whose political system is based on the rule of law – and it has certainly been accepted as such by the new members eager to join the 'club of democracies'. Presumably, respect for the rule of law domestically should be joined by a similar respect for the rule of law on the international scene. However they assess the wisdom of using force in Kosovo, the NATO nations cannot but face this difficult question of legal standards.

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The solution to the dilemma, however, is not to argue, as most NATO governments have argued, that the military action against the Federal Republic of Yugoslavia is an exception which will not be repeated. Rather, the solution is to acknowledge that international law has serious gaps in matters of humanitarian intervention. Instead of looking for convoluted and unconvincing justifications on the one hand, or issuing blatant condemnation on the other, advocates and adversaries of the NATO operations should focus on consolidating embryonic practices into a clear and strong body of law to allow intervention on humanitarian grounds.

### **Human rights versus state sovereignty**

The use of force is governed in international law by the UN Charter. At the root of that Charter is the principle of the sovereignty and integrity of states. As a result, the Charter sets clear prohibitions on 'the threat or use of force against the territorial integrity or political independence of any state' (article 2 §4), allowing for two exceptions only. The first is 'individual or collective self-defence' (art. 51), when a member state is the victim of aggression. Called to rule on attempts by some states to justify encroachment on other states' sovereignty by claims of self-defence, the International Court of Justice (ICJ) has confirmed that this notion should be understood restrictively (most clearly in its ruling *Nicaragua vs. United States*, 1986). In particular, the Court has confirmed the principle set by the UN General Assembly in a landmark 1970 resolution (Resolution 2625) that assistance to either party in a civil war is prohibited.

The second exception is when, acting under Chapter VII, the Security Council determines 'the existence of any threat to the peace, breach of the peace, or act of aggression' (art. 39) and decides on coercive measures to bring an end to the situation (art. 42). It is important not to equate Chapter VII and the use of force. Chapter VII allows for many other options. For example, Chapter VII, article 41 provides for a series of sanctions (such as various forms of embargoes) which falls short of the use of force. Indeed, in a number of instances in the past the Security Council has invoked Chapter VII, characterising a situation as 'a threat to peace', without calling for the use of force as a solution.<sup>2</sup>

As the Charter system was firmly upholding the sovereignty and integrity of states, a parallel but contradictory trend developed in international law since 1945, setting the priority on human rights. Human-rights instruments have multiplied, giving substance to the 1948 UN Declaration of Human Rights, and individual states have consequently undertaken legal commitments to uphold these rights. The process has reached an even more advanced stage at the European level, where all members of the Organisation for Security and Co-operation in Europe (OSCE) have accepted that 'the commitments undertaken in the field of the human dimension of the [OSCE] are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned'.<sup>3</sup>

Even if such a far-reaching recognition of human-rights obligations does not exist at the universal level, the trend goes in the same direction, with international human-rights law being considered as entailing *erga omnes* obligations (that is, obligations that states must respect in all circumstances without any contractual exception or requirement of reciprocity) in an increasing number of instances.

From a legal point of view, it is essential to distinguish between international human-rights law and humanitarian law, even if the two are often confused in public discourse. International human-rights law is an offshoot of the UN's Declaration of Human Rights, and consists of a body of rules adopted either at the universal level (for example, the 1966 Covenants on International Civil and Political Rights, and on Economic and Social Rights; and the 1984 Convention against Torture), or the regional level (the 1949 European Convention on Human Rights). These provide for a set of political or judicial procedures to monitor respect for the rights involved. Some of these rights, such as the prohibition of torture, have been confirmed as having *erga omnes* quality. One of the weaknesses of human-rights law, however, is that, apart from genocide – which is the object of a specific convention (1948 Convention on the Prevention and Punishment of the Crime of Genocide) – a definition of 'gross and massive violations of human rights' is nowhere to be found. Even in the case of genocide, which each state is obliged to 'prevent' and 'punish', the Convention does not have an enforcement mechanism, and is virtually silent on means to prevent the crime.<sup>4</sup>

International humanitarian law is much more ancient, and has evolved from incremental efforts by theologians, lawyers and politicians to 'humanise' war by defining rules for *jus in bello*. Its fullest expression can be found in the Geneva Conventions (1949) and their additional protocols (1977). Article 1, common to all these texts, uniquely specifies that the signatories 'undertake to respect and to ensure respect for the present Convention[s] in all circumstances', with this principle applying both to international and domestic conflict. International humanitarian law sets the rules against which some war crimes are prosecuted. Other war crimes susceptible to universal jurisdiction are war crimes and crimes against humanity as consolidated in the 1950 Charter of the Nuremberg Tribunal and its judgements, later confirmed by a UN General Assembly resolution (1968).

A major difference between international human-rights law and humanitarian law is that respect for the former is considered the responsibility of states, whereas violations of the latter entail the criminal prosecution of individuals. However, in conditions combining civil war with massive violations of human rights or genocide, international human-rights law and humanitarian law tend more and more to intersect. Common to these two bodies of rules is that they increasingly provide for precise sanctions for their violation and that, slowly but surely, there is universal acceptance that this should be so: thus the creation of the international tribunals on Former Yugoslavia (1993) and Rwanda (1994), and of the International Criminal Court

(1998).<sup>5</sup> All of these courts base their work on a combination of the material law laid out in the Geneva Conventions, the Convention against genocide, and the codification of war crimes and crimes against humanity. But what is also common to international human-rights law and humanitarian law is that however sophisticated they are becoming in laying out sanctions, they are silent on preventive measures. Yet, it is precisely the prevention of massive human-rights violations or humanitarian catastrophes that has become the basis of 'humanitarian intervention' practices in recent years. These practices have not yet been codified into law. The only certainty about them is that, increasingly, they give primacy to human rights over the sovereignty of states when the two principles conflict.

At the root of humanitarian intervention is the recognition that populations in danger of starvation, massacre or other forms of massive suffering have the right to receive assistance. That principle – set out by the General Assembly's Resolution 43/131 (8 December 1988), reaffirmed and specified in the General Assembly's Resolution 45/100 (14 December 1990) – has been confirmed by many subsequent Security Council resolutions.<sup>6</sup> Therefore, the right of the victims of natural or man-made catastrophes to receive assistance can nowadays be considered part of customary international law.

On the basis of, and confirming, such a right, the UN Security Council has adopted a series of resolutions that amount to the Security Council availing itself of a right of humanitarian intervention. That self-empowerment has been gradual, but nevertheless quite fast, developing through a number of steps:

- Resolution 688 (5 April 1991) on Iraq marked the first time that the Security Council authorised a humanitarian relief operation by invoking a threat to peace and international security under Chapter VII. The resolution, however, remained ambiguous as to whether the threat to peace stemmed from the domestic situation itself (para. 1) or from the consequences on neighbouring countries of massive flows of refugees (Preamble). In addition, Resolution 688 did not authorise coercive measures. Nevertheless it was used by the Western allies to declare humanitarian enclaves off-limits to Baghdad, and to launch *Provide Comfort*, a humanitarian relief operation to benefit the Kurds in northern Iraq. Once established, however, the humanitarian enclaves were transferred to the management of the UN, demonstrating thereby the uneasiness of the Gulf War allies regarding their legal grounds.<sup>7</sup>
- Resolution 770 (13 August 1992) on Bosnia-Herzegovina went further in two ways. First, the Security Council was clear in its qualification of the internal situation in Bosnia as a 'threat to peace and international security' (Preamble). Second, the resolution seemed to suggest that force could be used to facilitate the provision of humanitarian relief to embattled Bosnians. However, the phrase 'all measures necessary' contained in paragraph 2 was not interpreted by states as authorising the use of force in this case.<sup>8</sup>

- Resolution 794 (3 December 1992) on Somalia laid out the Security Council's clear right to intervene in support of humanitarian objectives. First, it confirmed that the domestic situation in Somalia could be considered a threat to peace and international security (Preamble). Second, it resolved to authorise member states to 'use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia' (para. 10), leading to operation *Restore Hope*, conducted by the US.

The logic of Resolution 794 was subsequently confirmed by Resolution 929 (22 June 1994), enabling France to lead *Operation Turquoise* to rescue Rwandan refugees in eastern Zaire and Rwanda; Resolution 940 (31 July 1994) permitting the US to put together a multinational force to restore the legitimate government of Haiti; and Resolution 1101 (28 March 1997) allowing Italy to assemble a multinational coalition (*Operation Alba*) to bring humanitarian relief to the people of Albania under military protection.

However, the combined right of victims to assistance and the right of the Security Council to authorise humanitarian intervention with military means do not amount to a right of humanitarian intervention by states, individually or collectively. Indeed, the overwhelming majority of international lawyers consider that such a right cannot be recognised because it would violate the Charter's prohibition of the use of force. This prohibition would hold even in the case in which international law recognises most clearly the absolute character of the rights protected, that is humanitarian law (the obligation of states not only to respect, but also to ensure the respect of humanitarian international law in all circumstances according to the Geneva Conventions).<sup>9</sup> *A fortiori*, the same prohibition on the use of force must apply in cases of 'massive violations of human rights' which are much less well-defined legally and do not fall under a specific regime of sanctions.

One therefore has to agree with French lawyer Mario Bettati that there is a certain 'hypocrisy' in international law: despite the now-recognised right of victims to assistance, it is not possible to derive a right of states to bring this assistance by all means, including military force.<sup>10</sup> At best one has to consider that states face a moral obligation which consists, for the state where a humanitarian disaster is occurring, in refraining from obstructing relief operations, and, for other states, in bringing assistance to those in need.

### **The unsatisfactory state of international law**

We need not stop at Bettati's conclusion, however, for at least two reasons: the unfinished state of international law, and its strong political coloration. As stressed above, there is increasing recognition that human rights do not belong exclusively to the domestic affairs of states. In addition, since the early 1990s it has become the practice of the Security Council, supported by international opinion, to allow military intervention to rescue the victims of domestic conflicts. There is no reason why this situation should not evolve further in the years to come. It is, after all, a characteristic of international law that precedent

is important; the law evolves as practices become acceptable to most states in the international community.

One option to allow for such an evolution would be to advocate a new interpretation of Article 2 §4 of the UN Charter, which prohibits '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'. It is indeed possible to argue that humanitarian assistance or rescue is not directed against the territorial integrity or political independence of the state in which it takes place, and even less that it is incompatible with the goals of the UN. Rather, it would aim to ensure the respect of rights that international law has recognised as embedding *erga omnes* obligations. At this stage, however, such an interpretation, although promoted by some lawyers and humanitarian practitioners,<sup>11</sup> is far from universally accepted.

Specialists argue – with good reason – that a right to humanitarian intervention by states acting independently would have to meet very strict conditions.<sup>12</sup> The first of these would be that the matter has been brought to the attention of the Security Council and that it has been unable to agree, so that the system as foreseen by the Charter has proved non-operational. It remains essential not to undermine the primacy of the Security Council in the maintenance of international peace and security. A second set of conditions would be no different, in essence, from those governing the use of force in general international law. Thus, according to well-established rules of *jus ad bellum*, intervention would have to be a solution of last resort, all other means of peaceful resolution and unarmed coercion having been exhausted and the use of force being the only way to avert a major humanitarian disaster. Intervention should have a limited duration and use means that are strictly proportional to the humanitarian goal. Further, it should not be aimed at a permanent transformation of pre-existing legal arrangements – for example the secession of a province.<sup>13</sup> Finally, to these classical conditions one might add at least two additional criteria. First, any humanitarian military intervention should be carried out by a group of states – whether they act in the context of an alliance, a regional organisation, or a 'coalition of the willing' – so as to dispel the suspicion that intervention is undertaken for the sake of narrow national interest. The second criterion would be that the participating states should act in close coordination with the UN, demonstrate a clear readiness to obtain *post facto* legitimisation by the Security Council and, when possible, to hand the matter back to the UN. In every instance, the burden of demonstrating the legality of military action would have to be borne by the group undertaking the operation, the presumption being in favour of the sovereign right of states to their political and territorial integrity.

In any case, attempts to legitimise intervention outside Security Council resolutions should be pursued with great care. Any country or group of countries contemplating such an intervention should consider that other states or coalitions with less lofty motives might claim a similar right in different circumstances. Unless intervention is regulated by a strict checklist of criteria –

the fulfilment of which could be submitted to the jurisdiction of the ICJ – one risks enhancing the danger of confrontation between power blocs and increasing world anarchy. This would make the planet a more dangerous and lawless place, and would result in more, not fewer, civilian victims. It is important that NATO countries keep this in mind when developing a rationale for intervention in Kosovo and elsewhere.

Politics is present in international law at another level: except in cases of self-defence, the current international legality of the use of force is determined by the UN Security Council, where the five veto-wielding permanent members have the final word. This makes the legality of the use of force ultimately dependent on the political atmosphere prevailing at any moment among those five powers. In 'fair weather conditions', such as prevailed in the early 1990s, agreement among the five permanent members could easily be reached, permitting action in Iraq, Somalia, Bosnia and Rwanda (at least China abstained rather than wielding its veto when it could not agree). However, when these relations deteriorate, as is the case at the end of the 1990s, international law becomes ineffective. From the point of view of the victims, the situation is unacceptable: why should they be less entitled to protection when the permanent members are unable to agree? It would thus seem necessary to review the composition and rules governing the Security Council in such a way as to protect international law from the vagaries of the relationship among its members. The large states of Asia, Africa and Latin America have long demanded such a review, pointing to the inadequacy of a structure inherited from the Second World War. Because of the sensitivity of the issue, no agreement has been reached despite long and detailed discussions in UN circles in the mid-1990s. Nevertheless, two reforms seem overdue: increasing the representation of Asia, Africa and Latin America on the Security Council; and replacing the right of veto by a system of qualified majority voting. If three-quarters of the members of the Council approved a military action, that action could legitimately be considered as enjoying the support of the international community, regardless of the possible disagreement of one of the current permanent members.

### **Intervention in Kosovo: the legal argument**

Most of the NATO debate on the use of force against Yugoslavia took place between the Security Council vote on Resolution 1199 on 23 September 1998 and NATO's brandishing the threat of force on 12 October. That threat took the form of an Activation Order (ACTORD) authorising the Supreme Allied Commander in Europe (SACEUR) to launch air strikes within four days if Milosevic did not comply with the provisions of the UN resolution.<sup>14</sup> Little was added to the debate when NATO actually launched its attack in March 1999.

Resolution 1199 was spurred by a major sweep of Yugoslav forces across Kosovo in summer 1998, under the guise of fighting back the Kosovo Liberation Army (KLA). That sweep had resulted in the eviction from their homes of more than 250,000 Kosovar Albanians, some 80,000 of whom sought

refuge in neighbouring countries or regions. The resolution mandated the cessation of acts of violence against civilians and the withdrawal of Yugoslav security units used for civilian repression; the safe return of refugees and displaced persons; and the free and unimpeded access of humanitarian relief organisations to persons in need. It also condemned acts of terrorism performed in pursuit of political goals.

NATO's threat to use force coincided with a trip by US Special Envoy Richard Holbrooke to Belgrade, during which he extracted from Milosevic agreement for the OSCE to deploy a monitoring mission in Kosovo (the 'Kosovo Verification Mission') and for NATO to operate an aerial surveillance system over the province (the so-called 'Eagle Eye' operation). By all accounts, the NATO threat was instrumental in securing that agreement.

Even though, by autumn 1998, all NATO nations agreed that there was a moral and political imperative to act, the members of the Alliance could not easily and unanimously find a legal ground for military action against Serbia. Six countries at least – Belgium, France, Germany, Greece, Italy and Spain – had political and legal misgivings reflecting the unfinished state of international law concerning humanitarian intervention.<sup>15</sup>

One of the most assertive proponents of military action was the US. Washington's argument, however, was based more on political than legal arguments. Indeed, answering a journalist's question on 8 October, Secretary of State Madeleine Albright said that she did not think she had to answer international legal questions in detail.<sup>16</sup> When pressed to argue on legal grounds, US officials called upon existing UN resolutions – Resolution 1160 (31 March 1998) and especially Resolution 1199. That Serbian forces were in blatant violation of that resolution's requirements and the resolution being based on Chapter VII of the UN Charter provided sufficient ground for NATO to undertake military action, Washington argued.<sup>17</sup>

Without rejecting the US interpretation, UK Foreign Office lawyers were seeking legal grounding in the 'right of intervention' that they believed had been pioneered by the 1991 Gulf War allies when they declared the no-fly zones over Iraq in the absence of a Chapter VII resolution.<sup>18</sup> However, even if the declaration of no-fly zones by the allies did not raise protests at the time, it still did not set a precedent for the recognition of a new 'right of intervention'.<sup>19</sup>

The then German Foreign Minister, Klaus Kinkel, declared himself unsatisfied with the US and British arguments, and sought alternative legal ground. Kinkel first pointed out that the reference to Chapter VII in Resolutions 1160 and 1199 was insufficient in that Russia and China both had accompanied their votes by legally valid declaratory statements spelling out that the resolutions should not be interpreted as authorising the use of force. Indeed, on Resolution 1199 China had abstained on the ground that the text constituted encroachment on Yugoslavia's sovereignty – thereby preventing any kind of action, military or otherwise – while Russia had pointed out that both resolutions stated that if they were not complied with, the Council would have to consider further action. No measures of force and no sanctions were being



introduced at this stage by the Council.<sup>20</sup> Both resolutions contain important clauses in this respect. In Resolution 1160, the Security Council ‘emphasises that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures’ (para. 19); in Resolution 1199, the Council ‘decides [that] should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, [it will] consider further action and additional measures to maintain or restore peace and stability in the region’ (para. 16). Resolutions including such wording have usually been interpreted as requiring further action by the Security Council to allow military action. Such was the case in Bosnia where a long series of texts was considered necessary between the mandating of humanitarian assistance, and the declaration of safe havens and the authorisation of their military enforcement.<sup>21</sup>

Kinkel tried to develop a different argument, relying on a cluster of conditions that combined, in his view, to make a military threat legitimate. These conditions included the inability of the Security Council to act in what was an emergency situation; the fact that a military threat was in the ‘sense and logic’ of Resolutions 1160 and 1199 (although, he conceded, the latter did not provide direct legal ground); and the particular high standards for the protection of human rights reached by European states in the OSCE context, in particular regarding the protection of minorities.<sup>22</sup> The position of the incoming Social Democratic Party (SPD)–Green German government, taking over at the time, was less clear. Then-SPD Chairman Oskar Lafontaine declared that the new majority had endorsed the position of the outgoing government, without specifying whether this applied to the legal grounding or the political decision.<sup>23</sup> Chancellor Gerhard Schröder contradicted himself to some extent by arguing that, in referring to UN Resolution 1199, NATO was ‘not [giving] itself a mandate, it [was] acting within the reference framework of the United Nations’; yet at the same time Schröder reasserted the ‘UN monopoly on the use of force and the responsibility of the Security Council for the preservation of world peace and international security’.<sup>24</sup> Incoming Defence Minister Rudolf Scharping came perhaps closest in spirit to Kinkel’s argument in stating that he considered it essential that international law be further developed so that massive human-rights violations could be considered as legitimate ground for military intervention.<sup>25</sup>

Like the former German Foreign Minister, NATO Secretary General Javier Solana relied on a cluster of reasons to justify the threat of military action in October 1998. These reasons included:

- the failure of Yugoslavia to fulfil the requirements set out by Resolutions 1160 and 1199, based on Chapter VII of the UN Charter;
- the imminent risk of a humanitarian catastrophe, as documented by the report of the UN Secretary-General Kofi Annan on 4 September 1998;
- the impossibility to obtain, in short order, a Security Council resolution mandating the use of force; and

- the fact that Resolution 1199 states that the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region.<sup>26</sup>

These reasons are close to those listed by the government of the Netherlands, which also added a reference to a 'checklist' for military action adopted by the Dutch parliament in 1994. That 'checklist' in turn refers back to a parliamentary motion offered in 1991 by the late MP Martin van Traa stating that 'gross violations of human rights, such as genocide, can be a reason for military intervention by the international community' (the text does not specify whether that intervention must be based on a UN mandate).<sup>27</sup>

The French government was equally torn. On 7 October, answering a parliamentary question, Foreign Minister Hubert Védrine responded that a possible military action had to be authorised by the Security Council, although he had earlier declared to the press that 'it [was] open to interpretation' whether Resolution 1199 was moving NATO towards military action. Addressing the Senate on 17 March 1999, Védrine seemed more convinced that Resolution 1199, taken in the context of Chapter VII, warranted military action.<sup>28</sup> As for French President Jacques Chirac, in a statement reminiscent of Chancellor Schröder's, he had declared on 6 October that France:

considers that any military action must be requested and decided by the Security Council. In this particular case, we have a resolution which does open the way to the possibility of military action. I would add, and repeat, that the humanitarian situation constitutes a ground that can justify an exception to a rule, however strong and firm it is. And if it appeared that the situation required it, then France would not hesitate to join those who would like to intervene in order to assist those that are in danger.<sup>29</sup>

Unlike Kinkel, Chirac did not attempt to bridge the legal gap between the 'resolution which opens the way to the possibility of military action' and military action itself. Speaking at a seminar a few days later, a senior official from the Foreign Ministry confirmed the French misgivings about using such justifications as the right to self-defence or the right to humanitarian intervention as a basis for a military action in Kosovo.<sup>30</sup>

Even greater uncertainty reigned in the position of the Italian government. In late September 1998, then Defence Minister Benjamino Andreatta hinted that the danger of humanitarian catastrophe caused by Belgrade created the 'conditions for the application of article 51', meaning, presumably, the right to collective self-defence.<sup>31</sup> According to the UN Charter, however, this right only applies to states – not entities such as Kosovo. Speaking to parliament a few days later, then Prime Minister Romano Prodi said that, first, there was no ground for military action in Kosovo as all means to reach a peaceful solution had not been exhausted and, second, that military action would have to be legitimised by the Security Council.<sup>32</sup> But by 12 October, no further objection was heard from the Italian government regarding the NATO decision to threaten the use of force.

The NATO allies' position was vehemently rejected by Russia and China. Speaking at a time when the NATO allies were studying their military and diplomatic options in response to the increasing crackdown by Serb forces against the KLA and Albanian civilians (the Racak massacre was discovered on 15 January 1999), the Russian Ambassador to the UN, Sergei Lavrov, asserted that only the UN Security Council can 'decide the use of force or authorise resort to the use of force under the authority of the UN Charter'. He claimed that to invoke 'a humanitarian crisis in a country as a sufficient reason for a unilateral armed intervention' would be 'unacceptable and contrary to the foundations of the contemporary system of international relations and to the Charter of the United Nations'.<sup>33</sup> In October 1998, the Chinese Foreign Minister, Tang Jiaxuan, had said his government 'resolutely [opposed] the use of force or the threat to use force in international relations', adding that it was 'disturbed' by the fact that 'some countries are now threatening to use force against Yugoslavia'.<sup>34</sup> The positions of both countries were confirmed by their votes on UN Resolution 1203 (24 October 1998), which endorsed the agreement reached by Holbrooke and Milosevic on 12 October. Both abstained, on the ground that the resolution left some room for the use of force.<sup>35</sup> They probably were most concerned about paragraph 9 which stipulates that 'action may be needed to ensure [the OSCE monitors'] safety and freedom of movement'. This would be consistent with NATO's own interpretation which saw in this clause the legal authorisation to rescue the monitors by force. What was clear, however, from Russia's and China's voting statements on Resolution 1203 is that they opposed the use of force in Kosovo, whatever the scenario. Obviously, they could only reassert this position more forcefully when NATO actually resorted to force. Russia's Foreign Minister Igor Ivanov called the bombings 'a crude violation of the UN Charter' and 'an act of open aggression against a sovereign member state of the UN', as his government announced that it interrupted all cooperation with NATO in the context of the Founding Act and the Partnership for Peace.<sup>36</sup> Chinese officials condemned the NATO operation in even stronger terms, calling it 'unacceptable' and warning of 'serious consequences' if the bombing did not stop immediately.<sup>37</sup>

## Conclusion

International law governing the right of humanitarian intervention is incomplete. International practice has evolved swiftly during the 1990s. Yet the incipient political and moral consensus that intervention is sometimes necessary to prevent human-rights violation on a major scale has not been formalised into a set of rules of international law. It is now urgent that this consensus should be transformed into law.

The position advocated by Kinkel looks the most promising, although it has several weaknesses. Its major shortcoming, which is also apparent in a number of statements by German and other Western officials, is the assumption that Kosovo is a special case and should not be considered as constituting a precedent.<sup>38</sup> Intervention should be the exception rather than the rule. But

arguing that Kosovo does not constitute a precedent undermines the argument that it is possible to develop new legal rules for intervention relying on a combination of general international law and specific rules valid in the European area.

Legally, it is debatable whether the principles established and agreed within the OSCE justify rules for humanitarian intervention that differ from those applied in other parts of the world. Positively, it can be argued that OSCE human-rights principles allow states to interfere with one another's affairs well beyond what general international law permits. Negatively, one may object that fundamental human rights that entail *erga omnes* obligations (the prohibition of torture, of genocide, of mass killings and so on) are no more strongly protected in Europe than elsewhere, as rules prohibiting their violation have universal validity.

Politically, developing specific rules for humanitarian intervention in the European area would have the advantage of enabling European nations to bypass Chinese obstruction in the Security Council. But the agreement of Russia would still have to be obtained. Indeed, the subject of humanitarian intervention may be a good basis for re-starting the interrupted NATO–Russia dialogue once the fallout of the Kosovo crisis has been absorbed. The goal then would be to define a set of agreed rules so that the next crisis is not again a cause for a major rift between the Atlantic Alliance and Russia, but rather an opportunity for common action.

Whether or not specific rules for intervention without a Security Council resolution are developed at the European level, a parallel effort must be carried out at the global level. In both cases, the principles for intervention should come close to the criteria spelled out above, the original premise being that the UN Security Council should keep its primacy in the guaranteeing of international peace and security. Otherwise, there will be increasing temptations for states or groups of states to take the law into their own hands. At some stage, should all OSCE states agree on common rules for intervention that would be more 'advanced' than the global equivalent (in that they would be more protective of human rights), the Security Council might grant a general authorisation for European states to enforce those specific rules in the OSCE area. But such a prospect belongs to the more distant future.

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## Notes

<sup>1</sup> Press statement by Dr Javier Solana, Secretary General of NATO, 23 March 1999 (NATO Press Release (1999)040); see <http://www.nato.int/docu/pr/1999/p99-040e.htm>

<sup>2</sup> For example, in reference to the 1965 Indo-Pakistani conflict; during the 1967 Arab–Israeli ‘Six Day War’; in the 1980–88 Iran–Iraq conflict; and earlier in resolutions related to the issues of Palestine, Rhodesia, apartheid in South Africa and so on; Jean Combacau and Serge Sur, *Droit international public*, 3rd edn (Paris: Monchrestien, 1997), p. 645.

<sup>3</sup> Helsinki Summit Declaration, 1992, paragraph 8.

<sup>4</sup> Malcom Shaw, *International Law*, 4th edn (Cambridge: Cambridge University Press, 1997), p. 210.

<sup>5</sup> *Ibid.*, pp. 471–72.

<sup>6</sup> A study by French lawyer Mario Bettati lists 65 resolutions of the Security Council between April 1991 and December 1995 insisting that warring states should allow access to humanitarian organisations, urging parties to a conflict to refrain from obstructing humanitarian relief, demanding at times that they facilitate such relief, condemning actions hampering assistance, and so on. These resolutions concern Iraq, Liberia, Angola, Georgia, Nagorno-Karabakh, Mozambique, Yemen, Somalia, Rwanda, and former Yugoslavia; see Mario Bettati, *Le droit d’ingérence* (Paris: Odide Jacob, 1996) pp. 329–40.

<sup>7</sup> Pierre-Marie Dupuy, ‘Après la guerre du Golfe ...’, *Revue générale de droit international public*, 1991, pp. 629, 630.

<sup>8</sup> Arthur Paecht, *Humanitarian*

*Intervention between Politics and International Law*, Draft General Report, North Atlantic Assembly, Civilian Affairs Committee, 20 March 1999, pp. 14–15.

<sup>9</sup> Laurence Boisson de Chazournes and Luigi Condorelli, ‘Quelques remarques à propos de l’obligation de “respecter et faire respecter” le droit international humanitaire “en toutes circonstances”’, *Mélanges Pictet* (Genève/La Haye: CICR/Nijhoff, 1984), pp. 17–36; Combacau and Sur, *Droit international Public*, p. 666; Olivier Corten and Pierre Klein, *Droit d’ingérence ou obligation de réaction?* (Bruxelles: Bruylant, 1996) pp. 221–51; Yves Sandoz, ‘Droit ou devoir d’ingérence, droit à l’assistance; de quoi parle-t-on?’, *Revue internationale de la Croix-Rouge*, no. 795, May–June 1992, pp. 225–37.

<sup>10</sup> Bettati, *Le droit d’ingérence*, p. 171.

<sup>11</sup> See for example, Fernando Teson, *Humanitarian Intervention. An Inquiry into Law and Morality* (New York, Transnational Publishers, 1988); Bernard Kouchner, *Le malheur des autres* (Paris: Odide Jacob, 1991); Anthony d’Amato, ‘Trashing Customary International Law’, *American Journal of International Law*, 1987, pp. 101–5.

<sup>12</sup> See, for example, the efforts to codify humanitarian intervention by the Subcommittee on the International Protection of Human Rights by General International Law of the International Law Association, 56th Conference, New Delhi, 1974, as discussed by Richard B. Lillich, ‘Humanitarian Intervention Through the United Nations: Towards the Development of Criteria’, *Zeitschrift für ausländisches und öffentliches Recht*, vol. 53, no. 3, 1993, pp. 557–75.

<sup>13</sup> Combacau and Sur, *Droit international public*, pp. 628–29; Dominique Carreau, *Droit international public*, 5th edn (Paris: Pédone, 1997), pp. 543–44.

<sup>14</sup> The deadline was then postponed

twice (17 October; 27 October) and then temporarily suspended, following more positive developments on the ground. ACTORD remained in force, nevertheless.

<sup>15</sup> Michael Binyon and James Bone, 'Yeltsin Veto Threat Stalls Kosovo Raids', *The Times*, 7 October 1998; Michael Evans, 'NATO Puts Airstrike Decision On Hold', *ibid.*, 8 October 1998; 'Jean-Pol Poncelet: une 'mission humanitaire'', *Libre Belgique*, 8 October 1998; Michael Evans and Tom Walker, 'NATO Bombers on Alert for Order to Hit Serbs', *The Times*, 12 October 1998.

<sup>16</sup> Press Conference of Secretary of State Madeleine K. Albright, London, UK, 8 October 1998; see <http://secretary.state.gov/www/statements/1998/981008a.html>

<sup>17</sup> Press Conference of Secretary of State Madeleine K. Albright, Brussels, Belgium, 8 October 1998; see <http://secretary.state.gov/www/statements/1998/981008.html>

<sup>18</sup> Binyon and Bone, 'Yeltsin Veto Threat'.

<sup>19</sup> For details see Paecht, *Humanitarian Intervention*, pp. 15–16.

<sup>20</sup> Security Council, Press Release SC/6577, 3930th Meeting, 23 September 1998.

<sup>21</sup> Resolutions 770 (1992), 819 (1993) and 824 (1993), 816 (1993) and 836 (1993) respectively. See Paecht, *Humanitarian Intervention*, p. 14.

<sup>22</sup> Claus Gennrich, 'Im Angesicht der Not im Kosovo baut Kinkel neue juristische Brücken', *Frankfurter Allgemeine Zeitung*, 14 October 1998; also 'Bonner Kabinett stimmt Nato-Einsatz im Kosovo zu', *ibid.*, 13 October 1998; Interview with Foreign Minister Klaus Kinkel, *Südwest-Rundfunk* for the programme 'SWR 1 – Tagesgespräch', 24 September 1998; see <http://www.bundesregierung.de>

<sup>23</sup> 'Bonner Kabinett stimmt Nato-Einsatz im Kosovo zu', *Frankfurter Allgemeine Zeitung*, 13 October 1998.

<sup>24</sup> 'Schroeder Addresses Bundestag on Kosovo', Foreign Broadcast Information Service, Western European Union 98-289, translated from ZDF broadcast, 16 October 1999.

<sup>25</sup> Bundespresse Amt Dokumentation, *Frankfurter Allgemeine Zeitung*, 17 October 1998; see <http://www.bundesregierung.de/OS/themenf.html>

<sup>26</sup> Summary of the North Atlantic Council consultations of 9 October 1998 by NATO Secretary General Javier Solana, as given in the statement of Foreign Minister Dr Klaus Kinkel following the special session of the Bundestag in Bonn on 16 October 1998; see <http://www.bundesregierung.de/OS/themenf.html>

<sup>27</sup> Report signed by the Minister of Foreign Affairs, J. J. van Aartsen and the Minister of Defense, F. H. G. de Grave, to the presidents of the *Tweede Kamer* and the *Eerste Kamer*, 8 October 1998; Dutch version at <http://www.minbuza.nl/factsheets/niews/147.htm>

<sup>28</sup> Reuters, 23 September 1998, reprinted in the NATO Press Service, *Latest News*; Assemblée nationale, Compte-rendu analytique, Questions au gouvernement, mercredi 7 octobre 1998, 1ère séance, p. 6; Sénat, Commission des Affaires étrangères, défense et forces armées, compte-rendu de la séance du 17 mars 1999, Audition de M. Hubert Védrine, Ministre des Affaires étrangères.

<sup>29</sup> Press conference at Palais Vecchio, Florence, 6 October 1998, quoted by Patrice Despretz, 'Le droit international et les menaces d'intervention de l'OTAN au Kosovo', *Actualité et droit international*, 1998; see <http://www.ridi.org/adi/1998/199811a4.html>

<sup>30</sup> Friederike Bauer, 'Mehr Druck vom Sicherheitsrat verlangt', *Frankfurter Allgemeine Zeitung*, 26 October 1998.

<sup>31</sup> Agence France Presse, reprinted in NATO Press Service, *Latest News*, 28 September 1998.

<sup>32</sup> Associated Press, *ibid.*, 8 October 1998.

<sup>33</sup> Declaration of Ambassador Sergei Lavrov, AFP, quoted by Service de Presse de l'OTAN, *Dernières nouvelles*, 22 January 1999.

<sup>34</sup> Quoted by Tim Young, *Kosovo: The Diplomatic and Military Options*, House of Commons Library, Research Paper 98/93, 27 October 1998, p. 14.

<sup>35</sup> Security Council, Press Release SC/6588, 3937th Meeting, 24 October 1998.

<sup>36</sup> Quoted by *RFE/RL Newswire*, 25 March 1999.

<sup>37</sup> 'Beijing Assails Air Raids', *International*

*Herald Tribune*, 26 March 1999, p. 5.

<sup>38</sup> Statement of Foreign Minister Dr Klaus Kinkel following the special session of the Bundestag, 16 October 1998, Bonn; see <http://www.bundesregierung.de/OS/themenf.html>;

Statement by incoming Foreign Minister Dr Joschka Fischer to the Bundestag, 16 October 1998, FBIS-WEU-98-289, translated from ZDF broadcast, 16 October 1999. For other French and German positions, see Bauer, 'Mehr Druck vom Sicherheitsrat verlangt'.

