catastrophes with a minimum of geopolitical supervision. At this point, such an approach may seem far-fetched, given the hostility to the United Nations that persists in Washington, but over time the efficiency and legitimacy of global governance would seem to depend on just such a capability.

RICHARD A. FALK

## LESSONS OF KOSOVO

On June 10, 1999, the United Nations Security Council adopted Resolution 1244. Acting under Chapter VII of the Charter,[1] the Council required the withdrawal of all Yugoslav military, police and paramilitary forces from Kosovo,[2] authorized NATO military deployment,[3] and created a UN civil administration to develop "provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections."[4] This regime was imposed[5] for a period of twelve months and indefinitely thereafter, until a majority of the Council, including the permanent members, agrees to terminate it.[6]

In effect, Resolution 1244 imposes a peace treaty on Yugoslavia. The only precedent for such a radical move is Resolution 687,[7] which eight years earlier had ended Operation Desert Storm against Iraq. In that instance, the Council used its Chapter VII powers to demarcate an international boundary, establish and monitor a demilitarized zone, and impose an open-ended prohibition on possession by Iraq of chemical, biological and nuclear weapons.[8] It required Iraq to submit to on-site weapons inspection and pay compensation to the victims of its aggression.[9] The resolution is based not on Iraq's agreement but on its submission.[10]

While both Resolutions 687 and 1244 ritually reaffirm the sovereignty, independence and territorial integrity of the affected states,[11] it is clear that they significantly revise and diminish this traditional attribute of statehood. In the instance of Resolution 1244, Professor Antonio Cassese has concluded that it evidences an important evolution in international law:

> Human rights are increasingly becoming the main concern of the world community as a whole. There is a widespread sense that they cannot and should not be trampled upon with impunity in any part of the world.
>
> . . . .
>
> . . . [T]he international community is increasingly intervening, through international bodies, in internal conflicts where human rights are in serious jeopardy.[12]

[1] SC Res. 1244, preambular para. 13 (June 10, 1999).

[2] *Id.*, para. 3.

[3] *Id.*, paras. 7–9.

[4] *Id.*, para. 11(c).

[5] Yugoslavia "agreed" to this settlement. *See id.*, Annex 2. However, the resolution is mandatory under Chapter VII of the Charter and is not based on consent.

[6] SC Res. 1244, *supra* note 1, para. 19.

[7] SC Res. 687, UN SCOR, 46th Sess., Res. & Dec., at 11, UN Doc. S/INF/47 (1991), *reprinted in* 30 ILM 846 (1991).

[8] *Id.*, paras. 1–3, 5–6, 7–10, 12–13.

[9] *Id.*, paras. 7–10, 16–19.

[10] Iraq "has no choice but to accept this resolution." Identical letters from the Minister for Foreign Affairs of the Republic of Iraq addressed respectively to the Secretary-General and the President of the Security Council (Apr. 6, 1991), UN Doc. S/22456 (1991).

[11] SC Res. 687, *supra* note 7, preambular para. 3; SC Res. 1244, *supra* note 1, preambular para. 10.

[12] Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23, 26 (1999) (the author was then Presiding Judge, Trial Chamber II, International Criminal Tribunal for the former Yugoslavia).

Movement in this direction is surely discernible, beginning with hesitant efforts in 1946 to impose sanctions on the Spanish Fascist regime of Francisco Franco[13] and gaining momentum through the use of Chapter VII to end racist policies in Rhodesia[14] and South Africa.[15] In the case of Haiti, in 1993, Chapter VII was used to end the junta's gross violations of the democratic entitlement.[16] Not everyone welcomes the evolution of such broad global jurisdiction at the expense of state sovereignty,[17] but a trend is unmistakable.

This conclusion becomes compelling when comparing the two resolutions, 687 and 1244, separated by less than a decade. Despite their similarities, there is a remarkable difference in subject matter. While both, uniquely, impose a mandatory international regime on a sovereign state, in the former case it was traditional cross-boundary international aggression that precipitated the bold global response. Moreover, while UN authorization of collective military action did break new ground,[18] there was little new about armed response to outright aggression. Resolution 1244, on the other hand, endorses the deployment of collective (regional) armed force to counteract not aggression, but gross violations of humanitarian law and human rights. In that sense, as Cassese indicates, the resolution marks a significant progression in international jurisprudence. Never again will it be possible to argue that serious mistreatment of minorities is privileged by the oft-cited (and much misquoted) reservation of Charter Article 2(7) regarding "matters which are essentially within the domestic jurisdiction of any state."[19]

There is, however, another notable distinction between Resolutions 687 and 1244. The former established an international regime for Iraq wrought by the triumph of Security Council–authorized forces.[20] The latter imposed a regime on Yugoslavia after an aerial campaign by NATO that the United Nations had not authorized. Although the Council had previously invoked Chapter VII[21] and "stresse[d]" the need for a "negotiated political solution,"[22] it had stopped short of authorizing NATO to bring about the results it later embraced in Resolution 1244.[23]

This has made it difficult to disagree with the disquieting conclusion of Professor Bruno Simma:

> [I]f the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a "humanitarian intervention" by military means is permissible. In the absence of such authorization, military coercion . . . constitutes a breach of Article 2(4) of the Charter. Further, as long as humanitarian crises do not transcend borders . . . and lead to armed attacks against other states, recourse to Article 51 [self-defense] is not available.[24]

He concludes that NATO's military action was in breach of international law.[25]

[13] UN SCOR, 1st Sess., 1st series, 25th–26th mtgs., 34th–40th mtgs. (1946).

[14] SC Res. 217, UN SCOR, 20th Sess., Res. & Dec., at 8, UN Doc. S/INF/20/Rev.1 (1965).

[15] SC Res. 418, UN SCOR, 32d Sess., Res. & Dec., at 5, UN Doc. S/INF/33 (1977).

[16] The Security Council authorized use of force against the Haitian junta, having found a "humanitarian crisis" and a "climate of fear of persecution." SC Res. 841, UN SCOR, 48th Sess., Res. & Dec., at 119, 119, UN Doc. S/INF/49 (1993).

[17] *See* Edward Luttwak, *Give War a Chance*, FOREIGN AFF., July/Aug. 1999, at 36.

[18] SC Res. 678 (Nov. 29, 1990), *reprinted in* 29 ILM 1565 (1990).

[19] The misquotations often result from overlooking the exception to this exception: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." UN CHARTER Art. 2(7).

[20] SC Res. 678, *supra* note 18.

[21] SC Res. 1160, preamble (Mar. 31, 1998); SC Res. 1199, preamble (Sept. 23, 1998); and SC Res. 1203, preamble (Oct. 24, 1999).

[22] SC Res. 1203, *supra* note 21, para. 5.

[23] SC Res. 1244, *supra* note 1.

[24] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 5 (1999).

[25] *Id.* at 6.

This conclusion has led some to celebrate, mourn, or merely predict the deconstruction of the UN system, expecting it to be replaced by a regime better able to promote "justice."[26] However, a new, improved global security organization is, at best, a long-shot option. It is true, nevertheless, that the future of the United Nations we have is darkly clouded, among other things by Resolution 1244, which, on the one hand, seems to usher in a new era of legally sanctioned intervention on behalf of globally recognized humanitarian and human rights law and, on the other hand, seems resigned to having such intervention conducted by states in disregard of the United Nations itself.

In one sense, this dissonance reifies deep, long-running discourse about means and ends. NATO's action—the means—may have been technically illegal, as Simma suggests; yet, as Cassese claims, in the end they served to protect human rights and buttress humanitarian law. If NATO had not acted, would the consequences not have been as catastrophic as those resulting from the world's long inaction vis-à-vis the Bosnian debacle?

But what about costs to the system of deploying unauthorized means, even in pursuit of good ends? Undoubtedly, the UN Charter has taken a hit, but perhaps not a very major one. Even an illegal action, if instrumental in bringing about results widely desired by a community, will not seriously undermine a resilient legal system, one with the elasticity to make allowances for mitigating circumstances. It is important, however, to distinguish between mitigation and justification. Neither the U.S. Department of State nor NATO seriously attempted to justify the war in international legal terms. They clearly did not want their actions to legitimate a reversion to the pre-Charter era when states or regional organizations could claim an uncircumscribed right of unilateral recourse to military force. Such revisionism would have been fraught with potential for even greater mischief than Yugoslavia's policies in Kosovo. Every nation has an interest in NATO's actions' being classified as the exception, not the rule.

NATO's unauthorized aerial campaign was not the first exception to the strictures of Articles 2(4) and 51 of the Charter. The UN system has survived other instances of unilateral or regional use of force unauthorized under Chapter VII, silently condoning them in mitigating circumstances, as when India invaded Pakistan to end the agony of Bangladesh. But none of these exceptional cases have altered the Charter-based normative expectation that states should usually refrain from the self-judging deployment of force. There is no evidence, however, that any states wish to be unleashed and empowered to police the world. The costs are too high and so are the risks of conflict between rival police forces. NATO's action in Kosovo is thus best seen as an exception from which may be derived a few useful lessons for the future, rather than as the future itself.

What lessons? One is that egregious repression of minorities is not a risk-free venture, particularly for smallish states. That cannot be a statement of law, but, like law, it *is* a fairly accurate predictor of state behavior. Another is that states, even when pursuing worthy ends, should strive to exhaust lawful universal means before resorting to regional or unilateral action. That the Russians and Chinese were isolated in the Security Council when they tried to condemn NATO suggests that there were reserves of outrage toward Belgrade that might have been tapped by convening the General Assembly.

Another lesson concerns the limits of ad hoc-ery. If the world is to take responsibility for the condition of oppressed people, it must be given the means promptly to effect the civil reconstruction of destroyed civic cultures. That requires a dedicated, rapidly deployable reserve of police, judges, magistrates, health care providers and administrators. The limits of an ad hoc approach, already apparent in Cambodia, became manifest in Kosovo.

[26] *See* Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, FOREIGN AFF., May/June 1999, at 2.

A final lesson of Kosovo is that, in the end, the United Nations—albeit disdained and circumvented—again became an essential facilitator in ending the conflict. It is not the only forum for the exercise of creative, sustained multilateral diplomacy, but it remains a resilient and irreplaceable one. That, in the end, may be the clearest lesson.

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## KOSOVO'S ANTINOMIES

The insistence on the integrity of procedures is not arid formalism. Lawyers know that however noble the impulse, action in the common interest that is taken without formal authority may have incalculable public costs. Group security and individual liberty depend, in no small part, on orderly decision preceded by due deliberation; actions inconsistent with the procedures of the law erode their authority and increase the probability of abuse. But lawyers also know that legal procedures do not always work and that sometimes decisions have to be taken without regard to them. As Justice Holmes said, "a constitution is not a suicide pact."

Faced with such antinomies, no lawyer, whatever his or her conclusion as to the lawfulness of NATO's action in Kosovo, can look back at the incident without disquiet. While some in our profession will strain to weave strands from various resolutions and *ex cathedra* statements of UN officials into a retrospective tapestry of authority (unintentionally contributing to bases for other claims and actions), all appreciate that NATO's action in Kosovo did not accord with the design of the United Nations Charter. The question is whether Kosovo comes under the "suicide pact" rule, the *exceptio* for that very small group of events that warrant or even require unilateral action when the legally designated institution or procedure proves unable to operate. That is a judgment that must be made in light of the law at stake, the facts and feasible alternatives at the moment of decision.

One can reasonably criticize many of the international actions and inactions during and after the dissolution of Yugoslavia and deplore the fact that some of those earlier international choices may have actually exacerbated ethnic tensions and conflicts. But decision makers must act on current facts, not on wishful if-onlys and wistful might-have-beens. The facts were alarming. As always, information was imperfect, but enough was available to indicate that bad things were happening, things chillingly reminiscent of some earlier as well as, lamentably, more recent events in this century; and it was reasonable to assume (and, to some, irresponsibly naive not to assume) that, given the people involved, worse things were in store. Economic sanctions and diplomacy were failing to dissuade the officials ordering and carrying out the bad things. In the post–Cold War world, responsible leaders properly turn to the Security Council. But the Security Council was paralyzed. Hence, the feasible options were to forgo formally lawful action under the Charter or to forgo the lives and human rights of the Kosovars. NATO states chose the first.

Military action is a blunt instrument and, no matter how careful operators are, some innocent people get killed or hurt. But the other instruments of strategy had failed, so it was either military action or self-righteous public hand-wringing with improbable (and, to most of the victims, probably irrelevant) assurances—even as the crimes continued to be committed—that someday their killers and rapists would be put on trial. When military force was brought into play, the ensemble of strategies that until then had failed, finally worked. That is not to say that NATO's action transformed Kosovo into a paradise. No reasonable person expected that it would. But it achieved its objective: Kosovars are back in their homes. Serb oppression has ceased and there is now an opportunity, which one hopes will not be squandered, to plan and implement a reconstruction program. Skilled diplomacy has incorporated Russia in the solution and in the peace-maintenance operation. There are,