political relationship. It will be difficult to rebuild Kosovo's economy while Serbia is excluded from regional economic plans, and the displacement of an oppressive provincial *apparat* will seem a mixed success if NATO police power cannot reverse the retaliatory actions that have driven out most of Kosovo's Serb minority. The consistency of the air campaign with the traditional protection given to civilian objects and the problem of dual-use targets are also open to reflection. Some will wonder whether the more flexible terms allowed by NATO to end the conflict should not have been offered before.

At the same time, it is important to acknowledge that the Kosovo intervention may represent a sea change in the responsibility of multilateral organizations to attempt to thwart ethnic slaughter—even if multilateralism takes a different form. Kosovo did not happen in isolation, but after the United Nations was unable to act effectively in Rwanda and Bosnia. The veto of the permanent members of the Security Council has often thrown a monkey wrench in the machinery of collective security, and a mature judgment is required to test whether strict proceduralism should be applied. The Secretary-General's call for Council action to meet future humanitarian crises may inspire unified support for the "developing international norm in favour of intervention to protect civilians from wholesale slaughter."[27] Even after the Cold War, one wants to avoid undue provocation of major powers, and to preserve the centrality of the Council as a forum for the resolution of security disputes. But the admonition to "never say never" must apply as well. Legitimacy—and legality—represent a complex cultural process not confined to the Council chamber.

RUTH WEDGWOOD

ANTICIPATORY HUMANITARIAN INTERVENTION IN KOSOVO

I. INTRODUCTION

The intervention by the North Atlantic Treaty Organization (NATO) in Kosovo during the spring of 1999 aroused controversy at the time and still provokes questions about the legality of the action, its precedential effect, and procedures for developing new international law. The participants faced a legal and moral dilemma between international law prohibitions on the use of force and the goal of preventing or stopping widespread grave violations of international human rights. This editorial seeks to chart a course for the future in light of the current legal and moral environment.

Many individuals on all sides of the Kosovo crisis maintained the highest standards of law and morality. Regrettably, others, particularly political leaders, fell short of their moral and/or legal obligations. Of the latter, the leadership of the Federal Republic of Yugoslavia (FRY) headed by Slobodan Milošević stands out. The FRY committed grave international crimes against the ethnic Albanians in Kosovo. However, both the ethnic Albanians and the Serbs in Kosovo engaged in aggressive and brutal actions against each other and both were at fault, legally and morally. The Kosovo Liberation Army (KLA) has also committed terrorist and other brutal acts against the Yugoslav Serbs and the FRY forces. As for the United Nations, though perhaps not morally at fault, it did not address the Kosovo problem in a timely and effective manner, as is its responsibility.

Indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and international law. As a result, the intervention risked destabilizing the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorization by the UN Security Council or a situation of

[27] *Secretary-General Presents His Annual Report to General Assembly, supra* note 20.

self-defense. The NATO actions, regardless of how well-intentioned, constitute an unfortunate precedent for states to use force to suppress the commission of international crimes in other states—grounds that easily can be and have been abused to justify intervention for less laudable objectives. As now conceived, the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord and disorder, and diminish protections of human rights worldwide. If current international law and organizations are inadequate to solve problems like the Kosovo situation, better rules of law and improved organizations might be developed to avoid these terrible risks and properly protect human rights.

II. UN Charter Law and General International Law

Contemporary international law prohibits violations of human rights and humanitarian law committed by a state against its own citizens. These duties are owed *erga omnes*, to all the world. Every state is obliged to respond to those violations, individually and collectively, by the use of nonforcible actions and countermeasures. A variety of intergovernmental and nongovernmental organizations may also take part in combating such violations. The NATO actions in Kosovo, however, raise the question whether international law permits the use of force by foreign states, individually or collectively, to stop violations of international human rights and humanitarian law committed within a single state. The answer turns on UN Charter law and contemporary international law derived from it.

The Security Council was involved in the Kosovo matter for some time. It adopted three resolutions under Chapter VII of the Charter prior to the NATO bombing campaign. These resolutions laid out a plan of action that authorized the Organization for Security and Co-operation in Europe (OSCE) to place an observer force, the Kosovo Verification Mission, in Kosovo to monitor the situation. The resolutions also called upon the FRY, the KLA and all other states and organizations to stop using force and called for a halt to violations of human rights. The resolutions did not authorize the use of force by any outside entity. Rather, they reaffirmed the sovereignty and territorial integrity of the FRY. In this situation, outside entities had no authority to take forcible actions. To avoid a veto, the Council resolution adopted subsequent to the bombing did not retroactively legalize NATO's actions but only prospectively authorized foreign states to intervene in the FRY to maintain the peace.

Neither of the permissible uses of force in international relations under the UN Charter—enforcement actions by the Security Council under Chapter VII and self-defense—provides a legal justification for the NATO action. The International Court of Justice (ICJ) acknowledged this problem (without purporting to decide the merits) in its decision refusing to grant the FRY's request for interim measures of protection.

Various scholars and diplomats have searched for exceptions to the UN Charter prohibition on the use of force, principally through liberal interpretations of the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" contained in Article 2(4). But those arguments are unfounded. The use of force by bombing the territory of a state violates its territorial integrity regardless of the motivation. Furthermore, the first purpose of the Charter is "to save succeeding generations from the scourge of war" by "maintain[ing] international peace and security." The protection of human rights is also among the primary purposes of the Charter but 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 préparatoires* of the Charter. They establish that the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" were added to Article 2(4) to close all potential loopholes in its prohibition on the use of force, rather than to open up new ones. Neither the use of force

by regional organizations against nonconsenting states nor intervention to support domestic insurrections is permitted absent authorization by the Security Council or resort to self-defense. Any other uses of force that may have been legal under pre-Charter law ended when the Charter entered into force.

III. HUMANITARIAN INTERVENTION

Despite the limitations in the text of the UN Charter, humanitarian intervention arguably provides a lawful foundation for the NATO actions. Unfortunately, humanitarian intervention is not an exception to the Charter prohibitions on the use of force. No reference to such a right is found in the Charter. The doctrine of "humanitarian intervention" is not well-defined and the evidence does not establish a rule of law permitting the use of force against a state in situations like that of Kosovo.

Most situations in which this theory is arguably applied actually involve actions by states to protect their citizens abroad from alleged mortal danger. Such intervention probably falls under the doctrine of self-defense. Examples include actions in the Congo, the Dominican Republic, Entebbe, Grenada and Panama. With the apparent sole exception of the Entebbe raid, however, many consider that the justifications given for those interventions were actually ruses to conceal the fact that they were conducted for other political objectives. This risk of abuse points to the need to adhere closely to the core Charter prohibitions on the use of force, even though it may be lawful to intervene to protect a state's own nationals. Other situations invoked as solidly supporting the theory of humanitarian intervention also fall short. For example, India intervened in East Pakistan allegedly to protect the ethnic Bengalis during the 1971 civil war in Pakistan. This action was condemned by a large majority in the UN General Assembly and India clearly had objectives other than merely humanitarian ones. The resolution adopted by the General Assembly in response to this incident makes clear that the international community opposed the doctrine. Intervention carried out apparently for humanitarian reasons has often been justified as a matter of law on the basis of an alleged request to intervene by the government of the state concerned, e.g., Czechoslovakia, the Dominican Republic, Grenada and Hungary. Not only were the requests of dubious legitimacy, but the humanitarian grounds put forward were designed to mask other political objectives. Some situations have involved the collapse of a state's effective government and intervention was allegedly undertaken to restore order, such as in Cambodia, the Congo, Liberia and Uganda. Again, other political interests have often animated the intervening states.

Finally, few, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.

IV. NEW LAW

Perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights. After all, general international law may change through breach of the current law and the development of new state practice and *opinio juris* supporting the change. The Kosovo intervention, however, presents problems in this regard. In the *Nicaragua* case, the International Court of Justice found that, to challenge a rule of international law, the state practice relied upon must be clearly predicated on an alternative rule of law; but NATO has not justified its actions on the basis of a specific rule of law—even humanitarian intervention—new or old. Throughout the campaign, NATO offered no legal justification for it. Only in the recent suits against the intervening NATO states before the

ICJ did the respondents begin to articulate legal justifications. Nevertheless, only Belgium even mentioned humanitarian intervention, and then merely as a possible legal justification.

Another obstacle to changing the existing international law is that the rule prohibiting the use of force is derived from the UN Charter. Charter law may very well not be subject to change by new general international law. By its terms, the UN Charter overrides all inconsistent treaties, regardless of the date of their entry into force. One would expect the same rule to apply to developments in general international law, especially since treaties supersede all but *jus cogens* norms. Furthermore, because the Charter restrictions on the use of force are themselves *jus cogens* norms, it would take a new norm of that quality to override them. The only clearly effective solution would be to amend the United Nations Charter on the basis of a norm of equal status.

One might argue, of course, that the doctrine of humanitarian intervention is merely a new and improved interpretation of the human rights provisions already in the Charter. This view might be supported by reference to the Vienna Convention on the Law of Treaties, which gives an agreement of treaty parties persuasive value in regard to its interpretation. But no such agreement of UN members can be shown.

Alternatively, one might argue that the international legal system has radically changed since the founding of the United Nations, resulting in the development of a right of humanitarian intervention. At the time the Charter entered into force, international law centered on state sovereignty. The independence of states, especially with respect to matters of domestic concern, was of foremost importance. New developments in international human rights law, particularly with regard to international crimes, authorize, if not require, all states to take action in the face of widespread grave violations of human rights amounting to such crimes. Thus, one might argue that contemporary public international law and a proper contemporary interpretation of the UN Charter permit pure humanitarian intervention without Chapter VII authorization by the Security Council or a situation of self-defense.

But has the law changed so radically? Does the international community wish to authorize individual states or groups of states, by themselves, to use force against a nonconsenting state in such situations? It is hard to find an international consensus to support this proposition, even among the NATO states. Certainly, it is not supported by widespread state practice and *opinio juris*. Past resolutions by the General Assembly that condemn specific interventions and other resolutions and declarations addressing broad subjects like intervention, the use of force, self-determination and human rights foreclose such actions, demonstrating international opposition to such a rule. Furthermore, the statutes of none of the existing or proposed international criminal tribunals—the Tribunals for Yugoslavia and Rwanda and the international criminal court—authorize such interventions. Accordingly, a doctrine of humanitarian intervention that would legitimate NATO's Kosovo actions cannot be found.

One might further ask whether, as a policy matter, international law should make humanitarian intervention legal. One could argue that this step is morally and ethically required. Public international law, as all law, should conform to the highest ideals. Humanitarian intervention would also protect human rights already encompassed by international law and the law of the Charter. This aspect is particularly important since the situations concerned may pose risks to international peace and security that might be stopped only by forcible intervention.

On the other hand, humanitarian intervention presents grave risks of abuse, as illustrated by virtually all of the past actions put forward in its support. Once established, such a right would be difficult to check, thwarting containment of those unacceptable risks. It is clear, therefore, that humanitarian intervention raises serious difficulties despite its noble

objectives. That was the judgment of states participating in the San Francisco Conference when they negotiated the UN Charter after World War II and it remains unchanged.

V. DEVELOPING THE LAW

Despite these limitations and risks, support for a doctrine of humanitarian intervention may be growing. Whether many states would endorse such a rule remains to be seen. Weak states may fear such interventions. The strongest states may wish to retain the option of using their veto in the Security Council, as well as their power to take actions for political reasons notwithstanding the law. Thus, keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit abuse, despite not being a perfect solution.

If the international community does wish to establish new law permitting humanitarian intervention, it should apply only to situations of widespread and gross violations of human rights and the necessary remedial actions. Sufficient support for such new law was lacking in the past. Arguably, the Kosovo events and other similar developments have changed the situation.

Let us consider how one might develop international law to attain the objectives that humanitarian intervention is supposed to serve, while also avoiding risks of abuse and excessive damage. The existing law of the UN Charter gives the Security Council the right to authorize such interventions. But that authority requires an affirmative vote by a three-fifths majority of the fifteen Council members and no veto by any of the five permanent members. With the exception of the early years of the United Nations and the early 1990s, this procedure has not proved efficacious. One could imagine other procedures that the United Nations or other global organizations could adopt that might provide a legitimate basis for humanitarian intervention. In my opinion, however, the development of such mechanisms will not be politically feasible in the foreseeable future. Nor is it likely that any such changes would adequately balance the need to restrict the use of force with the ability to engage in humanitarian intervention in justifiable circumstances.

If humanitarian intervention outside the traditional interpretation of the UN Charter is to be sought, it should be based on principles that build upon arguments in its favor. That new law should be clear and limit the potential for abuse. The necessary international consensus might be established either by superseding general international law at the level of a *jus cogens* norm or by reinterpreting the UN Charter on the basis of agreement of the UN member states. One should not underestimate the difficulty of accomplishing this objective. Nevertheless, several approaches might balance the interests well. Perhaps the following procedural and factual requirements could form the basis for an appropriately balanced regime.

Proof. Publicly available evidence must establish that widespread and grave international crimes, as defined in the Rome Statute of the International Criminal Court, are being committed in a state and that this state supports these criminal activities, acquiesces in them, or cannot control them.

Notice. A regional intergovernmental organization in the same area as the state where the crimes are being committed must call upon that state to take action itself or with the help of others to stop those crimes, but they continue to be committed.

Exhaustion of remedies. The regional group must exhaust all reasonably available means to stop the criminal behavior, including negotiations, political initiatives, nonforcible countermeasures (such as economic sanctions), among others, without success.

UN role. If those countermeasures fail to produce the necessary results, the regional organization, acting through its UN member states, must formally bring the matter to the attention of the General Assembly and the Security Council on an emergency basis. It

should seek Chapter VII authorization from the Security Council to take appropriate action to stop the crimes. If the Council authorizes such action, the matter must remain under its control. But if the Council fails to approve such action and neither it nor the General Assembly adopts a resolution expressly forbidding further action by the regional organization, recourse to a UN-based remedy will be deemed exhausted.

Regional action. The regional organization could then lawfully take forcible action to stop continuing, widespread grave violations of international criminal law in the target state subject to the following limitations:

Warning. The target state must be notified in advance of the impending use of force.

Court jurisdiction. Before intervening, the states that are to participate must consent both to suit in the ICJ by any directly injured state for violations of international law committed in the course of the humanitarian intervention, and to the jurisdiction of the international criminal court (once established) over their nationals for crimes within that court's reach that might be committed in the course of the intervention.

Purpose and means. Force must be used only to stop the widespread and massive violations of international criminal law. To this end, the targets must be limited, collateral damage minimized, unrelated effects on the state's legitimate functions avoided, and other requirements of international humanitarian law strictly observed.

Withdrawal. Once the use of force has accomplished the appropriate objectives and the future is secured, the foreign forces must withdraw, absent the target state's consent to their remaining or the adoption of Security Council authorization under Chapter VII.

The purpose of these requirements is to limit the use of humanitarian intervention to the gravest of cases in which no alternative is available and to limit the effects on the target state and the risks of abuse. Such actions could be taken only by a regional organization, which necessitates multiple state support as opposed to unilateral action. The stated goals would be accomplished by requiring specific conditions and giving the target state and the United Nations opportunities to prevent intervention. The inclusion of a judicial role may further remove such actions from international politics by strengthening the salience of international law.

This approach might appropriately balance the desire to protect human rights and the need to minimize the use of force in international relations. If recent developments in international relations do reflect a watershed change in attitude by the international community, a rule of law permitting some form of humanitarian intervention, such as the above proposal, might be feasible. The most appropriate, but also the most difficult, way to accomplish this objective would be to amend the UN Charter. Other solutions are troublesome for the reasons discussed above. However, one might credibly argue that this plan would conform to the Charter: (1) by clearly promoting human rights, (2) by minimizing the potential and degree of intervention (some argue that it is not intervention), including prejudice to the territorial integrity of the target state, (3) by implicitly earning UN authorization, and (4) by building on ambiguities some find in the Charter with regard to the authority of regional organizations.

VI. KOSOVO

Unfortunately, it is hard to justify the NATO intervention in Kosovo even on these suggested grounds, if one focuses on the situation at the time the intervention began, as should be the case. A review of some of the above requirements proves this conclusion.

Proof. The extent of the human rights violations in Kosovo prior to the withdrawal of the OSCE's observer force was not massive and widespread. In fact, the Security Council had

authorized the deployment of the verification mission, which had effectively prevented the commission of widespread atrocities. The FRY's behavior changed only after NATO forced the withdrawal of the OSCE observers. These facts are apparent in the indictment of President Milošević on May 22, 1999, by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. Other than general accusations, the specific charges document only one situation involving a significant number of deaths caused by FRY forces in the months prior to the start of the NATO bombing campaign on March 24, 1999. That incident, during which forty-five persons were killed, took place in Racak more than two months before the NATO action, on January 15, 1999. There were also reports of displacements of Albanian Kosovars within the FRY. This is not a circumstance involving ongoing widespread grave violations of international criminal law. All the remaining counts concern events that occurred after the bombing commenced. Those do involve substantially larger numbers of persons. But they cannot serve as a legal justification for the earlier beginning of the NATO campaign.

Exhaustion of remedies. It is hard to find exhaustion of nonforcible remedies. Some questionable efforts were made to negotiate with the FRY, but only after the bombing started was an oil embargo considered.

UN role. Although neither the Security Council nor the General Assembly forbade the intervention, the Council did retain jurisdiction over the matter and was involved in efforts to prevent human rights abuses (particularly through the use of the verification mission), albeit without complete success. One might argue that the rejection of the Security Council resolution introduced by Russia and the failure of Secretary-General Kofi Annan to condemn the NATO actions in an informal statement on the subject, both of which took place shortly after the NATO campaign began, proved the acquiescence of the United Nations in the intervention. On the other hand, its prior resolutions on Kosovo support the view that the Security Council was addressing the problem, though not to everyone's satisfaction.

Purpose and means. The NATO action did not stop the commission of widespread grave violations of international criminal law (even if one assumes that they were taking place just prior to the bombing). The intervention clearly did not protect the ethnic Albanians in Kosovo. Instead, by removing the OSCE observers, NATO allowed the FRY to commence a campaign of widespread grave violations of international criminal law. We will never know if those violations would have taken place in the absence of the removal of the observer mission and the initiation of the NATO campaign. The military campaign itself was not tailored to protect the ethnic Albanians in Kosovo but, rather, had the broader objective of undermining the FRY Government to force its capitulation, together with the collateral objective of freeing some or all of Kosovo from FRY control by partition or independence. As of today, the success one can speak of is the cessation of the massive Serbian violations commenced after the bombing began and the de facto partition of the FRY.

Court jurisdiction. Finally, consent to the jurisdiction of the ICJ and the international criminal court was not given by all the participating states, but since this part of the proposal is particularly novel and the latter court has not yet been established, such consent could not have been expected.

VII. CONCLUSION

The international community has moved toward the creation of stronger international human rights law, including greater enforcement and protection measures. It has not, however, authorized some states to intervene by the use of force in third states to protect those rights, absent Chapter VII authorization by the Security Council or a situation of self-defense—moral and ethical arguments in favor of humanitarian intervention notwithstand-

ing. Because the Council neither authorized NATO's actions before they commenced nor approved them subsequently in its resolution of June 10, 1999, their legality remains questionable, at best. In fact, the Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was actually an "anticipatory humanitarian intervention" based on past actions of the FRY regime and future risks. Such intervention, like "anticipatory self-defense," is a particularly dangerous permutation of an already problematic concept. Although many will share the view that the intervention was morally just in light of subsequent developments, it presents an unfortunate precedent. If this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law.

Perhaps the example of Kosovo may stimulate the development of a new rule of law that permits intervention by regional organizations to stop these crimes without the Security Council's authorization, while limiting the risks of abuse and escalation. That is the task for the future.

JONATHAN I. CHARNEY*

KOSOVO: A "GOOD" OR "BAD" WAR?

Operation Allied Force, the use of force by NATO in the name of peace and human rights, began on March 24, 1999, just as members of the American Society of International Law were gathering in Washington for its Annual Meeting. Coincidentally, on that same day, the House of Lords in London determined that Senator for Life Augusto Pinochet could not claim absolute sovereign immunity from extradition proceedings in the United Kingdom for torture committed in Chile while he was head of state, after the coming into force of the Torture Convention for Chile, Spain and the United Kingdom.[1] The juxtaposition of the two events seemed to signal a change in international law, in particular through a message of rejection of the impunity for gross human rights abuses that has too long been the expectation of their perpetrators. Dictators and their willing thugs could no longer expect to shelter behind the twin shields of sovereignty and immunity.

However, the aerial bombing of the Federal Republic of Yugoslavia, which lasted for over two months, and its aftermath must make this conclusion questionable. The waves of refugees from Kosovo gave a human face to this tragedy and evidence of atrocities has mounted. Civilians have been killed and their property destroyed by those wreaking "ethnic cleansing" and then vengeance by those returning, and inevitably also by NATO bombs. Victims of the bombing included refugees seeking safety, television station workers, journalists and, notoriously, occupants of the Chinese Embassy in Belgrade. NATO repeatedly regretted such incidents but continued its action, first to ensure its own five objectives,[2] and subsequently to secure the peace settlement agreed to by the Serb parlia-

* An early version of this paper was presented at the Canada Institute for Advanced Legal Studies, Panel on the Legality of Humanitarian Intervention in Kosovo—A Case Study, Cambridge, England (July 14, 1999).

[1] Regina v. Bow Street Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [1999] 2 W.L.R. 827.

[2] NATO's five objectives were stipulated as non-negotiable: an end to the killing by Yugoslav army and police forces in Kosovo, withdrawal of those forces, the deployment of a NATO-led international force, the return of all refugees, and a political settlement for Kosovo. *See* GUARDIAN, May 11, 1999, at 2. For the principles for a political settlement adopted by the Group of Eight Foreign Ministers on May 6, 1999, see SC Res. 1244, Annex 1 (June 10, 1999).