

## **KOSOVO: A POWERFUL PRECEDENT FOR THE DOCTRINE OF HUMANITARIAN INTERVENTION**

*Fernando R. Tesón\**

The most important precedent supporting the legitimacy of unilateral humanitarian intervention was established by the events that transpired in Kosovo between March and June of 1999.<sup>1</sup> NATO's intervention in Kosovo has confirmed the doctrine of humanitarian intervention as legal custom. The Kosovo incident also gave expression to the moral consensus in the international community that severe tyranny should not be tolerated.

The facts are well known and have been extensively documented. The government of Yugoslavia exercised tyrannical rule over the Kosovars over many years, to such an extent, and reaching such gravity, that it can plausibly be argued that the people of Kosovo acquired a right to resistance to tyranny.<sup>2</sup> As a result, NATO's intervention can be naturally interpreted as assistance to a justified revolution. This is the correct way to understand humanitarian intervention: not as a unilateral decision unrelated to the wishes of the victimised population, but as assistance to revolutionaries seeking freedom from tyranny.

The Serb forces perpetrated ethnic cleansing later in the war (March-June of 1999).<sup>3</sup> Because this campaign mostly occurred after the beginning of NATO's intervention, observers debated whether NATO had provoked the ethnic cleansing. The Kosovo Report concludes that the responsibility for those crimes rests with Belgrade, but that perhaps the bombing created an internal environment (especially because internal monitors were removed) that made such an operation feasible.<sup>4</sup> The horror of this 'cleansing' has been amply documented, and no more can be added here than referring to the account and supporting documentation compiled by the Kosovo Commission. Suffice it to say that (approximately) 1 million people were displaced, more than 10 thousand were killed, many were raped and tortured, and many saw their property destroyed or pillaged.<sup>5</sup>

On March 24, 1999, NATO initiated air military operations against Yugoslavia.<sup>6</sup> The mission was criticised from all sides. Some thought that it was ineffectual (as apparently Milosevic had seen through NATO's bluff); others, like Russia and China, thought it was illegal and demanded that the NATO military campaign cease immediately.<sup>7</sup> The last phase of the campaign finally brought the desired aim. On June 3, Milosevic capitulated and Yugoslavia withdrew from Kosovo, paving the way for NATO forces to occupy the province. The air-campaign had lasted eleven weeks, and the Kosovars jubilantly received their liberators. As of this writing, Kosovo (although still claimed by Serbia as part of its territory) has declared its independence, though remains heavily supervised by the UN and EU.<sup>8</sup>

The United Nations Security Council was involved throughout the crisis, but had been unable to agree on a military response. Resolution 1199 laid down a

number of requirements for Yugoslavia and for the improvement of the 'humanitarian situation' generally, and decided, "should the concrete measures demanded [here] not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region."<sup>9</sup> The Security Council later endorsed agreements between NATO and Yugoslavia for an 'air verification' mission, but without authorising the use of force.<sup>10</sup> China and Russia had apparently made clear that they did not regard the Council's action as authorising the use of force, and that they would veto any such attempt.<sup>11</sup> In the end, NATO decided to go ahead without Security Council authorisation.

NATO's intent and motive were to counter the ongoing repression of the Kosovars. The humanitarian rationale was repeatedly offered by NATO leaders and others.<sup>12</sup> In the words of Czech President Vaclav Havel, "If one can say of any war that it is ethical, or that it is being waged for ethical reasons, then it is true of this war"<sup>13</sup>. In the Security Council, which had been paralysed by the threat of a Russian (and possibly a Chinese) veto, governments opposed to the intervention either denied the validity of the humanitarian intervention under international law or questioned NATO's motives – and they did not hesitate to call the intervention an act of aggression.<sup>14</sup> Others were cautiously sympathetic to the intervention.<sup>15</sup> On the whole, the intervention was not overtly condemned by any international organisation or human rights NGO, although many deplored that NATO had been unable to secure Security Council authorisation.<sup>16</sup>

Reactions from legal scholars varied. Of those who believed the intervention had been unlawful, many also expressed the belief that the intervention was morally or politically wrong.<sup>17</sup> Others thought the intervention was unlawful, but that institutional structures should be reformed to be more responsive to humanitarian crises.<sup>18</sup> Another group believed that the intervention had been illegal in a technical sense, but so morally appropriate as to be otherwise justified.<sup>19</sup> Yet others saw Kosovo as an instance of legitimate humanitarian intervention.<sup>20</sup> Finally, some opined that *the Kosovo incident itself* marked a move toward the formation of a customary rule of humanitarian intervention.<sup>21</sup> It was, for them, a case that expanded, rather than breached, the law, similar to the Truman proclamation about the continental shelf. Scholars other than legal academics, however, by and large found the intervention justified.<sup>22</sup> A striking feature of the Kosovo incident is the relative *purity* of the incident as an instance of humanitarian intervention. There were no strategic or material interests of NATO nations in Kosovo. Some critics of the intervention recognise this fact and bite the bullet: they admit that human rights considerations are important in international law (and that those considerations were part of the motivation of NATO), but that international law at the moment (perhaps imperfectly) does not permit the use of force to protect human rights.<sup>23</sup> But others deny that the intervention was humanitarian; they characterise the incident differently. According to one critic of humanitarian intervention, for example, NATO "deemed fit to compel Yugoslavia...to accept a settlement of the issue of Kosovo"<sup>24</sup>. Thus the perpetrators are recast as victims, the rescuer as the bully, and the real victims are not even mentioned. The fact was that a dictatorial régime was committing heinous ongoing atrocities against an ethnic group, and that an alliance of democracies acted to stop them. It is unreasonable

to label these actions, in this context, as anything other than a humanitarian intervention.

The scholarly reaction to Kosovo exposes a pathology that I call, for want of a better name, ‘positivist stubbornness’. Most critics of humanitarian intervention are positivists. For them, state practice, and only state practice, is the touchstone of international law. Their opposition to humanitarian intervention results, in part, from their hostility to philosophy or any other technique that introduces values into the ascertainment of international law. As I indicated earlier, positivism is a controversial jurisprudential stance. There is no ‘norm’ hidden within diplomatic history to be discovered by objective legal analysis. To be sure, responsible legal analysis must start with state practice, and only then should analysts *interpret* that practice. But then, why refuse the status of ‘state practice’ to the Kosovo precedent? If critics had doubts before Kosovo, why not recognise that international law *might* be changing? Other scholars skeptical about humanitarian intervention have nonetheless conceded that Kosovo might be a turning point and that a dispassionate assessment of practice indicates, at the very least, that the law is in flux.<sup>25</sup> This suggests (at least, to me) two things. First, for writers like Ian Brownlie (who was counsel for Yugoslavia in the applications against NATO members with the International Court of Justice)<sup>26</sup> and his disciple Simon Chesterman, non-interventionism is *unfalsifiable*. To them, no amount of state practice can change the law, because each new instance of intervention is branded as a violation of the law. This is another example of the fundamental deficiencies of international law doctrine. Custom appears and disappears; sometimes practice creates law, sometimes it does not.

Some have pointed out to the fact that Belgrade perpetrated the ethnic cleansing in Kosovo *after* NATO started bombing Serb positions as evidence of the flaws of the doctrine of humanitarian intervention.<sup>27</sup> For them, this shows that humanitarian intervention is essentially counterproductive. In the Kosovo case, the intervention simply exacerbated the conflict and created incentives for the Milosevic régime to intensify the repression, to “get things done” before the NATO alliance drove him from power. I have three replies. First, the premise is dubious, as there is reason to believe that ethnic cleansing was part of the Serbian régime’s strategy all along. Second, even if the intervention did intensify the repression, *that is more of a reason to* intervene. Hitler also intensified the killing of Jews when he was cornered, and no reasonable person argues that this should have been a reason to stop the advance on Berlin. Finally, as the Kosovo Commission accurately observes, the intervention was justified, independent of issues relating to genocide, “because it had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”<sup>28</sup> The intervention, then, ended tyranny exercised over a relatively long period of time; it did not merely relate to a discrete act of violence in the context of a civil war. When and why ethnic cleansing started, therefore, is irrelevant.

A central point of contention surrounding the Kosovo incident is that NATO was unable to secure Security Council authorisation. Yet even writers who praise the intervention have regretted, with varying degrees of intensity, the fact

that the established procedures to authorise force proved unworkable in the case of Kosovo.

I disagree with the view that UN Security Council approval was necessary to legitimise NATO's actions. NATO has, in my view, a *stronger* claim to legitimacy in authorising humanitarian intervention in Kosovo than the Security Council, because it comes closest to representing the liberal alliance, the community of nations committed to the values of human rights and democracy.<sup>29</sup> The Security Council suffers from a legitimacy deficit, not because it is dominated by western powers (that is one of the *good* things about the Council), but because one oppressive régime has veto power, and because several of the non-permanent members have dubious moral credentials, to say the least. We should not worship process for process' sake. The United Nations (and the Council in particular) is *not* a democratic body. The Security Council may well be the only thing we have in the times to come, but it is certainly not a reliable guardian of human values.

## References

\* Tobias Simon Eminent Scholar, Florida State University. This article is excerpted from my book *Humanitarian Intervention: An Inquiry into Law and Morality*, 3<sup>rd</sup> edition fully revised and updated, Transnational Publishers 2005. Copyright 2008 Fernando R. Tesón.

<sup>1</sup> Few international incidents have generated more writing than Kosovo, and I cannot do justice to all of it. Two indispensable works are The Independent International Commission on Kosovo, *The Kosovo Report*, Oxford: Oxford University Press 2000; and H. Krieger, ed., *The Kosovo Conflict and International Law: An Analytical Documentation, 1974-99*, Cambridge, UK: Cambridge University Press 2001. A selection of readings includes: A. J. Bacevich & E. A. Cohen, eds., *War over Kosovo: Politics and Strategy in a Global Age*, New York: Columbia University Press 2001; M. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York: Palgrave 2001; M. Ignatieff, *Virtual War: Kosovo and Beyond*, London: Vintage 2001; D. Wippman, 'Kosovo and the Limits of International Law', *Fordham International Law Journal* 25 (2001): p. 129; J. Mertus, 'Legitimizing the Use of Force in Kosovo', *Ethics and International Affairs* 15 (2001): p. 133; A. D. Sofaer, 'International Law and Kosovo', *Stanford Journal of International Law* 36 (2000): p. 1; M. E. O'Connell, 'The UN, NATO, and International Law after Kosovo', *Human Rights Quarterly* 22 (2000): p. 57; J. Lobel, 'American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter', *Chicago Journal of International Law* 1 (2000): p. 19; D. Kristiotis, 'The Kosovo Crisis and Nato's Application of Armed Force against the Federal Republic of Yugoslavia', *International and Comparative Law Quarterly* 49 (2000): p. 330; I. Brownlie, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', *International and Comparative Law Quarterly* 49 (2000): p. 878; V. Lowe, 'International Legal Issues Arising in the Kosovo Crisis', *International and Comparative Law Quarterly* 49 (2000): p. 934; J. Solana, 'Nato's Success in Kosovo', *Foreign Affairs* 78 (1999): p. 114; L. Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', *American Journal of International Law* 93 (1999): p. 824; M. G. Kohen, 'L'emploi De La

Force Et La Crise Du Kosovo: Vers Un Nouveau Desordre Juridique International', *Revue Belge de droit international* (1999): p. 122; T. M. Franck, 'Lessons of Kosovo', *American Journal of International Law* 93 (1999): p. 857; R. A. Falk, 'Kosovo, World Order, and the Future of International Law', *American Journal of International Law* 93 (1999): p. 847; A. D'Amato, 'International Law and Kosovo', *Transnational Legal Exchange* 2 (1999): p. 1; C. M. Chinkin, 'Kosovo: A "Good" or "Bad" War?', *American Journal of International Law* 93 (1999): p. 841 and J. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', *American Journal of International Law* 93 (1999): p. 834. For a complete bibliography, see International Commission on Intervention and State Sovereignty, Supplementary Volume (2001), at <[www.iciss.ca/menu-en.asp](http://www.iciss.ca/menu-en.asp)>, pp. 333-336 (accessed at 14 January 2009).

<sup>2</sup> The Independent International Commission on Kosovo 2000, *supra* note 1, p. 29.

<sup>3</sup> *Idem*, p. 88.

<sup>4</sup> *Idem*, pp. 88-89.

<sup>5</sup> *Idem*, pp. 88-92, and Appendix I, pp. 301-318.

<sup>6</sup> Unless otherwise noted, the factual account that follows draws from W. M. Arkin, 'Operation Allied Force: 'The Most Precise Application of Air Power in History'', in: A. J. Bacevich & E. A. Cohen, eds., *War over Kosovo: Politics and Strategy in a Global Age*, New York: Columbia University Press 2001, pp. 1-37.

<sup>7</sup> Some of NATO's mistakes are summarised in Kosovo, The Independent International Commission on Kosovo 2000, *supra* note 1, pp. 92-93.

<sup>8</sup> Reality is never simple, and one should not romanticise the Albanian Kosovars either. Unfortunately, there are indications of retaliatory behavior by ethnic Albanians against the ethnic Serbs living in the province. See Amnesty International Report (2004), at: <<http://web.amnesty.org/report2004/>> (accessed at 14 January 2009) (Serbia and Montenegro). The International Criminal Court for the Former Yugoslavia has indicted both Serbs (notably Milosevic himself) and ethnic Albanians for war crimes.

<sup>9</sup> Resolution 1199, Sept. 23, 1998.

<sup>10</sup> Resolution 1203, Oct. 24, 1998. See also S. Chesterman, *Just War or Just Peace?*, Oxford: Oxford University Press 2001, pp. 209-210. A relatively minor point: Chesterman suggests that these agreements might have been invalid under the Vienna Convention because they were coerced, and that NATO's threat itself may have been unlawful. That view is false, among other things because it begs the question. It assumes that tyrants have a right to continue killing people, and that governments cannot even threaten them to try to get them to desist. So Chesterman not only opposes humanitarian intervention: he opposes *nonforcible* attempts to end massacres. As a legal matter, the illegality of the agreements and the threats is parasitic on the illegality of humanitarian intervention --precisely the point that Chesterman wants to prove.

<sup>11</sup> R. A. Falk, 'Kosovo, World Order, and the Future of International Law', *American Journal of International Law* 93 (1999), p. 850 ("In the months before the war, China and Russia appeared ready to veto any call for UN intervention, as well as any mandate that conferred upon NATO or any other entity such a right."); see also W. Drozdiak, 'U.S., European Allies Divided Over NATO's Authority to Act', *Washington Post*, November 8, 1998, p. A33.

<sup>12</sup> For a balanced survey of the arguments given by governments, see C. Gray,

*International Law and the Use of Force*, Oxford: Oxford University Press 2004, pp. 37-45.

<sup>13</sup> Vaclav Havel, address to the Canadian legislature, April 29, 1999, quoted in Falk 1999, *supra* note 11, p. 848.

<sup>14</sup> Thus, for example, Russia and China. See the statements by the Russian delegate in the debate in the UN Security Council, March 24, 1999, in: Kieger 2001, *supra* note 1, pp. 424-425; and the Chinese delegate, Kieger 2001, *supra* note 1, pp. 429-430.

<sup>15</sup> See, e.g., the statements by the representatives of Slovenia and Bahrain, Kieger 2001, *supra* note 1, pp. 425-426.

<sup>16</sup> See the balanced and interesting report on the wake of Kosovo by Pierre Sané, Secretary-General of Amnesty International, available at:

<<http://web.amnesty.org/report2000/fore>> (accessed at 14 January 2009) (AI neither supports nor opposes humanitarian intervention; but challenges the view that one has to choose between intervention and inaction).

<sup>17</sup> Thus, e.g.: Chesterman 2001, *supra* note 10, p. 218; Brownlie 2000, *supra* note 1, ; Lowe 2000, *supra* note 1; R. B. Bilder, 'Kosovo and the "New Interventionism": Promise or Peril?', *Florida State Journal of Transnational Law and Policy* 9 (1999); Y. Dinstein, *War, Aggression, and Self-Defense*, Cambridge: Cambridge University Press 2001, pp. 271-272; Lobel 2000, *supra* note 1, Charney 1999, *supra* note 1 (but proposing reform for regulating humanitarian intervention); D.H. Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm,' *European Journal of International Law* 13 (2002); E. Suy, 'NATO's Intervention in the Federal Republic of Yugoslavia', *Leiden Journal of International Law* 13 (2000); Kohen 1999, *supra* note 1; P. Picone, 'La 'Guerra Del Kosovo' E Il Diritto Internazionale Generale', *Revista de diritto internazionale* 83 (2000).

<sup>18</sup> Thus, Henkin 1999, *supra* note 1; O'Connell 2000, *supra* note 1, and N. Valticos, 'Les Droits De L'homme, Le Droit International Et L'intervention Militaire En Yougoslavie' *Revue générale de droit international public*, no. 1 (2000).

<sup>19</sup> The most noticeable position in this regard is the now famous *dictum* of the Kosovo Commission that the intervention was "unlawful but legitimate." The Independent International Commission on Kosovo 2000, *supra* note 1, p. 4. Similarly: B. Simma, 'NATO, the UN, and the Use of Force: Legal Aspects', *European Journal of International Law* 10 (1999) (but present law should not be changed); T. M. Franck, 'Interpretation and Change in the Law of Humanitarian Intervention', in: J.L. Holzgrefe & R.O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, UK; New York: Cambridge University Press 2003, p. 226 (formally unlawful but result more in conformity with law's intent).

<sup>20</sup> N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford: Oxford University Press 2000, pp. 281-299; B. S. Brown, 'Humanitarian Intervention at a Crossroads', *William & Mary Law Review* 41 (2000); J. Mertus, 'Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo', *William & Mary Law Review* 41 (2000); Sofaer 2000, *supra* note 1; W. M. Reisman, 'Kosovo's Antinomies', *American Journal of International Law* 93 (1999); D'Amato 1999, *supra* note 1; P. Williams & M. P. Scharf, 'NATO Intervention on Trial: The Legal Case That Was Never Made', *Human Rights Review* 1 (2000) p. 102; A. Roberts, 'NATO's "Humanitarian

War" over Kosovo', *Survival* 41 (1999): pp. 106-09.

<sup>21</sup> Glennon 2001, *supra* note 1, pp. 181-198; A. Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', *European Journal of International Law* 10 (1999); Suy 2000, *supra* note 1; R. Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention,' *Virginia Journal of International Law* 41 (2001); Wippman 2001, *supra* note 1; J. Stromseth, 'Rethinking Humanitarian Intervention: The Case for Incremental Change', in: J.L. Holzgrefe & R.O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, UK; New York: Cambridge University Press 2003, p. 232.

<sup>22</sup> See, *inter alia*, C. Brown, 'A Qualified Defence of the Use of Force for "Humanitarian" Reasons', *International Journal of Human Rights* 3/4 (2000); A. Pasic & T. Weiss, 'The Politics of rescue: Yugoslavia's Wars and the Humanitarian Impulse', in: A. F. Lang (ed.), *Just Intervention*, Washington D.C.: Georgetown University Press 2003, p. 107; A. Buchanan, 'Reforming the International Law of Humanitarian Intervention', in: J.L. Holzgrefe & R.O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, UK; New York: Cambridge University Press 2003, p. 130; R. Caplan, 'Humanitarian Intervention: Which Way Forward?', in: A.F. Lang (ed.), *Just Intervention*, Washington D.C.: Georgetown University Press, p. 131; A. Coll, 'Kosovo and the Moral Burdens of Power', in: A. J. Bacevich & E. A. Cohen, eds., *War over Kosovo: Politics and Strategy in a Global Age*, New York: Columbia University Press 2001, p. 124.

<sup>23</sup> See, e.g., Kohen 1999, *supra* note 1, pp. 123-124.

<sup>24</sup> Y. Dinstein, *War, Aggression, and Self-Defense*, Cambridge: Cambridge University Press 2001, pp. 271-72.

<sup>25</sup> Notably Stromseth 2003, *supra* note 21; Franck 2003, *supra* note 19; Kristiotis 2000, *supra* note 1, pp. 353-54. See also the Draft Report of NATO's Civilian Affairs Committee, 'Kosovo as a Precedent: Towards a Reform of the Security Council?' International Law and Humanitarian Intervention, para. 38, NATO Civilian Affairs Committee (Sept. 16, 1999), available at: <http://www.naa.be/publications/comrep/1999> (accessed at 14 January 2009).

<sup>26</sup> As he disclosed in Brownlie 2000, *supra* note 1, p. 878.

<sup>27</sup> See J. I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 93 *Am. J. Int'l L.* 19 (1999): 839-40 ("The FRY's behavior changed only after NATO forced the withdrawal of the OSCE observers."); also see R. Hayden, "Humanitarian Hypocrisy" (visited Apr. 1, 2000) <[http://www.jurist\\_law.pitt.edu/hayden.htm](http://www.jurist_law.pitt.edu/hayden.htm)>.

<sup>28</sup> The Independent International Commission on Kosovo 2000, *supra* note 1, p. 4.

<sup>29</sup> For a development of this idea, see my *Philosophy of International Law*. For the suggestion that preventive war (including preventive humanitarian intervention) should be subject to authorisation by a group of democratic governments, see A. Buchanan & R. O. Keohane, 'Governing the Preventive Use of Force', *Ethics and International Affairs* 18, no. 1 (2004).