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Kosovo: An Assessment in the Context of International Law

Richard J. Goldstone

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Richard J. Goldstone

Nineteenth Morgenthau Memorial Lecture
on Ethics & Foreign Policy



Carnegie Council
ON ETHICS AND
INTERNATIONAL AFFAIRS

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Introduction

The Morgenthau Memorial Lecture on Ethics & Foreign Policy is, without doubt, the highlight of the Carnegie Council's program year. This event is, in itself, a statement of affirmation. When it began, it was something of a curiosity—just what could be said about the relationship between ethics and international affairs? Weren't these two ideas somehow mutually exclusive? And why, some people wondered, would you attach the name of Professor Hans Morgenthau to such a program? After all, Morgenthau was well known as the paragon of realism, the idea that national interests are defined in terms of power. His classic textbook, *Politics Among Nations*, in addition to his scholarly writing and political commentary, established him as an ardent advocate of peace through strength.

To the surprise of many, although not to those who knew him well, Morgenthau was also deeply interested in the moral dimensions of international relations. He was so interested, in fact, that he spent a lot of his precious time serving as an adviser and a trustee of our Council. He also delivered the Council's first Distinguished Lecture on Ethics & Foreign Policy, with the title "Human Rights and Foreign Policy," in 1977. Upon his death in 1980, the Council renamed this lecture in his honor.

We return year after year to affirm the idea that international affairs is more than just the notion that the strong do what they will and the weak do what they must. We return to inquire about the choices that are made and the decisions that are taken on matters of international public policy, and to ask how power might be made to serve justice rather than to stand against it.

Morgenthau was trained as an international lawyer, and as such, he recognized the very real weight that morality, mores, and law have upon the struggle for power and peace among nations. Among his most quotable passages on this theme is from *Politics Among Nations*:

When a society or certain members are unable to protect themselves with their own strength against the power drives of others—when, in other words, the mechanics of power politics are found wanting, as sooner or later they must be—the normative systems of ethics, mores, and law try to supplement power politics with their own rules of conduct. This is the message the normative systems give to the strong and weak alike. Superior power gives no right, either moral or legal, to do with that power all that it is physically capable of doing.¹

For all of his celebrated emphasis on power and power politics, Morgenthau always returned to a simple and basic question: How can power be harnessed to serve the best, and not the worst, elements of human experience?

Perhaps no one today understands this question better than Justice Richard J. Goldstone. He is not only a theorist, but a practitioner. Justice Goldstone brings to his topic a unique experience, as a sitting justice on the Constitutional Court of South Africa, the former chief prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, chairman of the committee that drafted the 1998 Declaration of Human Duties and Responsibilities, and current chairman of the International Independent Inquiry on Kosovo.

As I wrote in my introduction to the most recent issue of our Council's journal, *Ethics & International Affairs*, sometimes a single word captures the essence of an era. I think the signature word of the moment is Kosovo. The shadow of Kosovo lingers over the end of one century into the beginning of another, and perhaps this is because Kosovo is both symbol and symptom of our current condition.

—Joel H. Rosenthal
President
Carnegie Council
on Ethics and International Affairs

¹ Hans J. Morgenthau, *Politics Among Nations*, 6th ed. (New York: Knopf, 1986), p. 244.

Kosovo: An Assessment in the Context of International Law



Richard J. Goldstone

Hans Morgenthau would have been fascinated by the political events and developments that dominate the international community as we enter a new millennium, events and developments that even Morgenthau's agile mind could not have conceived. He would, of course, not have been surprised that those events concern the Balkans, a region that has spawned problems, conflicts, and violence for centuries.

The problems the United Nations faces today in Kosovo are too complex and the time we have is too short to allow for a detailed historical analysis. However, let me set the context by giving you a telegraphic history of the more recent events, and perhaps begin with a not-so-recent event.

In any discussion about Kosovo, note must be taken of the presence of Serb resentment of the Albanians in that province since at least the nineteenth century. It was exacerbated by the terrible atrocities and counter-atrocities committed by Albanians and Serbs in the course of the two world wars.

In 1945, against the wishes of the Albanian population of Kosovo, that small province was incorporated into the new Yugoslavia—one should note, the second new Yugoslavia of the twentieth century. It was given some autonomy over its cultural, political, and economic development. That autonomy was confirmed and expanded by Tito in the 1974 Constitution of Yugoslavia. Kosovo was given the same status as Vojvodina with its majority of Hungarians, but it was not accorded the status that was given to the five federal units of Yugoslavia, and, in particular, it was not given the right, as were the others, to secede from the federation.

The death of Tito in 1980 ushered in a period of greater instability in Kosovo. This was exacerbated by the rise of Serb nationalism. It came to a head with the infamous address by Slobodan Milosevic at Kosovo Polje in 1989, on the 650th anniversary of the Battle of Kosovo. Albanian autonomy was withdrawn soon after. The Albanian response was to create their own shadow institutions, their own university, their own schools, and their own parliament.

That was followed by the war in Bosnia and Croatia, and the status of Kosovo as a province of rump Yugoslavia continued. Ibrahim Rugova's political party, the Democratic League of Kosovo (LDK), sought independence through peaceful means, and the shadow parliament continued to operate and to organize many spheres of Albanian life. There was generous support given to those shadow institutions by many Albanians living in the United States, and from those located elsewhere in the Albanian diaspora.

However, peaceful attempts by the LDK bore no fruit, and increasing numbers of Kosovar Albanians began to support violence to achieve what they wanted, namely independence for the Albanians of Kosovo. One of the lessons to be learned in this new century and this new millennium is that the lack of really important support for the peaceful aims of the LDK had consequences. When those peaceful attempts came to nothing, more and more Kosovar Albanians resorted to violence.

From Dayton to NATO Intervention

Dayton was a watershed event for Kosovo. Yet Kosovo was not mentioned. It was not on the agenda. The price that the Western powers were willing to pay for getting Milosevic to the table at Dayton was the issue of Kosovo. There can be no question that Milosevic would not have been at Dayton if Kosovo had been on the agenda, and if Milosevic had not been at Dayton, there would have been no cease-fire, there

would have been no pause in the war. I say "pause" advisedly because the end of the story has yet to be written. However, for the people of Bosnia the war came to an end.

Dayton was followed by consistent human rights violations directed at the Albanian population in Kosovo. These have been well documented by international and local human rights organizations and monitors and are reflected in many resolutions of the General Assembly of the United Nations.

By early 1998, there was a state of war—certainly of armed conflict—in Kosovo. There were egregious violations of humanitarian law by the Serbs and counterattacks by the Kosovo Liberation Army (KLA), an armed organization set on liberating Kosovar Albanians from Serbia. Support for the organization grew as Albanians became discouraged over the seemingly ineffectual tactics of the LDK.

On September 23, 1998, the Security Council demanded that the Federal Republic of Yugoslavia "cease all action by the security forces affecting the civilian population" and referred to the possibility of "further action" if it did not comply. This resolution (1199) has been misapplied by some international lawyers who have attempted to use it as an implicit authorization for the NATO military intervention. Its terms clearly do not support that interpretation, and such use is calculated to make members of the Security Council chary of supporting resolutions that stop short of authorizing military intervention. This would further weaken the role of the Security Council.

On October 16, 1998, there was an agreement between Milosevic and Ambassador Richard Holbrooke for a cease-fire and the entry into Kosovo of unarmed European OSCE (Organization for Security and Cooperation in Europe) monitors. The key points of that agreement were also reflected in a resolution of the Security Council on October 24, 1998 (1203).

Nonetheless, there was renewed fighting in December 1998 and January 1999, which, according to the UNHCR (United Nations High

Commission for Refugees), forced more than 20,000 Albanians in Kosovo to flee from 23 villages. Then came another watershed event, the massacre of 45 ethnic Albanians, including one woman, two children, and dozens of elderly men, in the village of Racak. This was an apparent retaliation for the murder of three Serb police officers in the area a week earlier.

Although the recent history of Kosovo has been one of action and reaction, certainly from my reading the reaction on the Serb side has been out of proportion to any of the acts that might have been committed by the Albanian population and any organization said to act on their behalf.

Racak was followed by more diplomacy and, in particular, the meeting at Rambouillet, outside Paris, where the primary demand made by the Western powers was an armed NATO presence in Kosovo to enforce the peace. Neither the Serbs nor the Kosovar Albanians would agree. The Rambouillet talks were suspended in February 1999 and resumed in Paris on March 14. Under tremendous pressure in Paris, the Albanians accepted the NATO terms.

In the face of Serb intransigence, the talks finally broke down on March 19, 1999. By then, more than 400,000 people had been driven from their homes. More than 60,000 of them had been displaced after late December 1998, including some 30,000 between the time the Rambouillet talks ended and the resumption of negotiations in Paris. It is important to bear these figures in mind; there are reasons to criticize NATO intervention, but no one can suggest that egregious human rights violations did not take place in the months preceding and in the weeks following Rambouillet.

The day after the collapse of the talks, March 20, the OSCE monitors were withdrawn from Kosovo in the face of a seriously deteriorating security situation. The NATO air strikes began on March 24.

What is too frequently forgotten is that the purpose of the NATO strikes was not to protect the Albanian population of Kosovo. Indeed,

General Wesley Clark, in a very frank BBC interview, admitted quite freely—and it was fairly obvious, I suppose—that there was no question of the NATO military intervention having been designed to protect the human rights of the Albanian population of Kosovo. The purpose of the NATO intervention was to force Milosevic back to the negotiating table.

It was widely assumed that Milosevic would capitulate within a few days. That was a costly miscalculation. Seventy-eight days of war ensued, with NATO flying more than 37,000 missions, of which over 14,000 were strike missions.

The bombing was suspended on June 10 and finally halted ten days later, when Milosevic accepted the terms laid down by NATO. They were reflected in Security Council Resolution 1244, which has become, as it were, the constitution of the UN protectorate for Kosovo. There were compromises. The most important was that it would not be NATO, but the United Nations, that would run this protectorate on behalf of the international community, and that the Russian Federation would participate in the peacekeeping role that was accepted by the United Nations.

There was also explicit recognition—and this is a problem if one looks to the future—that Kosovo was an integral part of the Federal Republic of Yugoslavia, as well as recognition of the principle that the people of Kosovo should enjoy substantial autonomy within the Federal Republic of Yugoslavia. Like most compromises, there were parts of it that were completely unacceptable both to the Serbs and to the Kosovar Albanians.

The direct result of the bombing was that almost one million people fled Kosovo into neighboring countries and about 500,000 people were displaced within Kosovo itself, a tremendous catastrophe for the people of Kosovo. NATO commentators, and particularly NATO supporters, have had to console themselves with the belief that “Operation Horseshoe,” the Serb plan of ethnic cleansing directed against the

Albanians in Kosovo, had been set in motion before the bombing began, and not in consequence of the bombing.

UNMIK, the United Nations Mission in Kosovo, was established on June 13, 1999. It is responsible for the interim civil administration of Kosovo. It has been joined by three other international organizations—UNHCR, responsible for humanitarian affairs; the OSCE, responsible for institution building; and the European Union, responsible for economic reconstruction. Since the establishment of this international administration, the difficulties and complexities have become legion.

The foregoing events in Kosovo have created serious problems for the international community. In my opinion, three important issues need to be addressed:

- first, looking ahead, the legality of the military intervention by NATO;
- second, the ability of the United Nations to administer Kosovo; and
- third, the future status of Kosovo.

Answers to the questions presented by these issues will have significant impact on the international community.

Independent International Commission on Kosovo

In mid-1999 after the intervention, Swedish prime minister Goran Persson was concerned over what he considered to be the lack of objective analysis, particularly in the major capitals of the world, in relation to what had happened in Kosovo. He discussed with major governments in Europe and in North America, and with the secretary-general of the United Nations, Kofi Annan, his idea of setting up an independent international commission to look at these events and to issue a report. It would be an experiment. He received warm support for it, particularly from Annan, and, in light of that support, the Swedish government

decided to put up some \$4 million to launch the Independent International Commission on Kosovo.

Since then, the commission has received financial support from the Canadian government and private funding in the United States from New York University Law School, which hosted an excellent seminar at the time of the second meeting of the commission in December 1999. In April 2000, we had the third meeting and also an outstanding seminar in Europe, at the Central European University in Budapest, hosted by the Open Society Fund of George Soros.

The Swedish prime minister decided that the chair of the commission should not be European and should not be North American. Who would have thought a few years ago that a South African would have been approached to act as a chair of the commission? Certainly ten years ago this would have been quite a fantastic scenario.

Nevertheless, Carl Tham—a leading Swedish politician, former cabinet minister, and presently the secretary-general of the Olaf Palme International Center—and I were asked to set up the commission. The Swedish government, with its typical generosity, told us we could appoint anybody we wished from around the world to the commission and we could set our own agenda.

Carl Tham and I met with Kofi Annan at the end of July and, with the courage that Annan has exemplified during his period of office, he agreed to accept the report—not knowing what would be in it, and not even knowing then what our terms of reference would be. He recognized that, as he put it, the United Nations could end up “with egg on its face,” but he added that it was important for civil society to sit in judgment of government. He thought that if he accepted the report, it would be debated at an appropriate level in the international community.

Carl Tham and I approached eleven other people from ten countries—the United States, Canada, Benin, Palestine, Japan, the Czech Republic, the United Kingdom, France, Germany, and Russia. We have an array

of experts—on international law, political theory, economics—sitting with us and debating the report.

We are looking at a number of questions, starting with the legality of the military intervention. There can be no question that the military intervention in Kosovo by NATO constituted a breach of the United Nations Charter. Article 2(4) prohibits “the threat or use of force against the territorial integrity or political independence of any state.” There are only two exceptions to that recognized by the Charter: one is where a nation acts in self-defense, and the other, where the use of force has been authorized by the Security Council under Chapter 7 of the Charter. Now, clearly, neither of those two exceptions applied in this case.

There are serious and important reasons for questioning the appropriateness and the applicability of that Charter provision at the beginning of the twenty-first century. Let me refer to a few of them.

- First, there has been an erosion of national sovereignty with the internationalization of human rights.
- Second, national boundaries have become more porous, especially in consequence of human rights violations.
- Third, there is a vastly changed political map and distribution of power in the world today in comparison to the world that emerged from World War II in 1945.

Let me briefly touch on these changes.

International Jurisdiction

The internationalization of human rights really began with the recognition at Nuremberg of a new legal animal, crimes against humanity. The category recognized that some crimes are so egregious, are so shocking to the conscience of mankind, that they truly are crimes against all of humankind—not only against the immediate victims, and not even against the people of the country where the crimes were committed.

That was the birth of universal jurisdiction, which has resulted in substantial changes both in domestic law and international law.

As far as the jurisdiction of domestic courts is concerned, in 1949 the Geneva Conventions recognized a new species of crime. The conventions obliged all governments that ratified them—and we are talking about virtually every member of the United Nations—to investigate, put on trial in their own courts, and punish any people who committed the most serious war crimes, no matter where these crimes were committed. This was something new. If a grave breach of the Geneva Conventions was committed in Africa, the people who committed it could be put on trial in the United States or in Canada or in Europe or in any of the Asian or African countries.

This approach was followed in the Apartheid Convention in 1973, when apartheid in my own country was declared to be a crime against humanity. Member states that ratified that convention were obliged to bring to justice people who committed the crime of apartheid. Unfortunately, no Western nation ratified that convention. If they had and if the convention had been implemented, I would suggest that apartheid would have come to an end a lot earlier than it did.

International jurisdiction was also reflected in the Torture Convention that resulted directly in the arrest of General Augusto Pinochet in London not too many months ago. Again, this was something new. International lawyers five years ago—certainly ten years ago—would have been astounded at the thought of a former head of state from Latin America being arrested in London at the request of a Spanish judge for crimes committed twenty years ago in Chile. It was a scenario that had not been contemplated.

And it has gone further. The former head of state of Chad, Hissene Habre, has been arrested in Senegal and is being brought to trial for human rights atrocities committed during his term of office in Chad.

Recently Mengistu Haile Mariam, the former dictator of Ethiopia, was in South Africa for medical treatment. Because of Human Rights

Watch in New York, there was increasing public demand for his arrest, and Mengistu beat a hasty retreat to Zimbabwe where, inappropriately, he has been granted asylum. It is a matter for regret that the South African authorities did not attempt to indict him in South Africa.

Until very recently, it was unheard of to indict former heads of state, let alone those still in office. Yet, both of those things have happened—Pinochet first and, not long after, Slobodan Milosevic, the latter for alleged crimes against humanity committed in Kosovo.

The establishment by the Security Council of the Criminal Tribunals for the Former Yugoslavia and Rwanda was again something that had not been contemplated before 1993, even by imaginative international lawyers. There has been turmoil in the international and domestic legal scenes of many countries in light of these events.

The work of the International Tribunals for the Former Yugoslavia and Rwanda was most relevant to the decision by the United Nations to host a diplomatic conference in Rome in June and July 1998, to consider a treaty for an International Criminal Court. At that conference, 120 nations voted in favor of the treaty. It is a matter for deep regret to supporters of international justice that the United States, together with six other nations, voted against that treaty.

What will be interesting in the coming two or three or four years will be the way in which that court comes into being, because I am confident that that will happen. Sixty nations will ratify that treaty. It is the human rights movement in the United States that is pushing for it to become a working institution. The irony, and perhaps the strength, of this country is that, notwithstanding the attitude of Senator Jesse Helms and the administration, there are enough people in this country who respect the rights of individuals and who stand by the standards and the morality of the United States and are pushing for the establishment of the International Criminal Court.

My prophecy is that the International Criminal Court will come into being. Of the 120 nations that voted in favor of the treaty, more

than 90 have already signed the text. Many of these countries are in my region of the world, in southern Africa; France has just amended its constitution in order to enable its government to ratify the treaty; Italy has ratified it; a number of southern African countries are bringing about their own domestic legislation to enable them to ratify the treaty; every member of the European Union is working in that direction; and so too are all of the Scandinavian countries.

The Changing Political Map

Borders have become porous. If one looks at Rwanda, the effect of a terrible genocide there in 1994 has destabilized the whole of the Great Lakes region of central Africa. Civil wars, unfortunately, spill over borders that are not capable of containing them.

The events in Kosovo have disrupted and destabilized its neighbors. The genocide in Bosnia resulted in 300,000 refugees in Germany alone and many hundreds of thousands of refugees in other European countries.

No longer can countries turn around and say, "What happens in our neighbor's territory is its internal affair; it doesn't affect us." It affects immediate neighbors, and it affects the important members of the international community, particularly the leader of the international community, the United States of America.

And then, there are the effects of globalization: other forms of international crime such as drug trafficking and money laundering. Today contracts are being entered into in cyberspace—it is becoming very difficult for lawyers to determine where contracts are entered into, where taxes should be paid. So sovereignty is no longer what it was. Whether it is the U.S. government or other governments that safeguard their sovereignty as something precious, sooner rather than later they are going to have to accept that international intervention and international

organizations are going to become more and more important and, I would suggest, indispensable.

What about the growth of new powers and the changed political map since 1945—the growth of Germany and Japan? On what basis should the permanent members of the Security Council from Europe be France and the United Kingdom to the exclusion of Germany? On what basis should India not be involved as a permanent member of the Security Council? On what basis should there be not a single Latin American or African country as a member of the Security Council? And unfortunately, there are new members of the “nuclear club,” a number of them, but particularly India and Pakistan.

In 1945, there were fewer than 50 members of the United Nations. Today, that figure is approaching 200. The Charter simply does not reflect the political reality as we enter the twenty-first century and the third millennium.

But it is not going to change. If we are realistic about it, the permanent members, whether the United States or China or France or Britain or Russia, are not going to agree to give up the powers conferred on them by the Charter. Of course, the danger is that this state of affairs is likely to encourage other nations or groups of nations to supersede and bypass the Security Council. That, indeed, is what happened when NATO intervened militarily in Kosovo.

It is no solace, and it is no use for members of NATO to say that this was an aberration, a special circumstance that it is not going to happen again. It is too important a precedent, and there are too many problems on other continents, to avoid its being used as a precedent—for other regional groups to say that what NATO did in Kosovo, we can do in Asia or in Africa or in the Middle East or anywhere else. And if Milosevic decides to invade Montenegro tomorrow, you can be sure that NATO is again going to make threats and, if they are not effective, again going to resort to military power.

The UN Administration in Kosovo

I was in Kosovo in November and had discussions with many people—with the Albanians, with Serb representatives, and particularly with the international representatives. I do not know how Bernard Kouchner is able to head an administration—and it is to his credit that he does so—not knowing what the end result is supposed to be. Is there going to be autonomy? Is there going to be partition? Is Kosovo going to be given independence? These are vitally important decisions, not only for the people within Kosovo, but also for the people in the surrounding areas. I would not know how to begin making decisions, even about what to teach children at school, not knowing what the ultimate objective is to be.

And of course, there is the lack of resources, the insufficient number of police officers who have been sent by the United Nations. Now, I say the United Nations, but I mean the member states. The United Nations, in this context, to an extent does not really exist. The secretary-general cannot do what he is not authorized to do by the member states. It is unfair to blame the United Nations. It is the major members of the Security Council who must accept the responsibility.

The future status of Kosovo, as I have said, is a very difficult question. If Kosovo is given independence, what is the effect going to be? What will be the attitude of the Albanians in neighboring states such as Macedonia, or in Albania itself? What will be the effect on Hungarians in Vojvodina? What is going to be the attitude of people in some of the Indonesian islands? What is going to be the attitude of people in many parts of Africa—minorities who want to secede?

I do not wish to be misunderstood. It is a difficult problem. But difficult problems, whether in our personal lives or in the lives of nations or the international community, do not disappear by being brushed under the rug. They grow and become more difficult to resolve.

Conclusion

Let me conclude by talking about the lessons that need to be learned.

First, and I referred to this earlier, there is the danger of ignoring problems. There is a danger of putting them off. There is a danger too for the whole international community, and particularly in the non-European and non-Northern parts of the world, in paying too much attention to Europe, to the Northern Hemisphere, and not to the developing world. People in the part of the world in which I live, as in Asia and in the Middle East, find disturbing the huge resources and the concerns that are being given to a situation in Europe when similar situations have been ignored, and are still being ignored, in their parts of the world.

There is also concern about what appear to be double standards that are applied depending upon the strategic importance of rogue regimes. East Timor is an example. Within six months after the war in Kosovo, different rules were applied to East Timor. The consent of the Indonesian government had to be obtained before the United Nations Security Council authorized a force to go into East Timor. Why? In the case of Serbia, it was easier. It is not a powerful nation, not a populous nation. Indonesia has an importance that Serbia does not have. Its consent had to be obtained before the international community did anything to stop equally serious human rights abuses in Indonesia.

These problems arise from the double and triple standards that apply in the international community. It is the reason, incidentally, that we need a permanent international criminal court. It is unsatisfactory that the Security Council decides we will impose international humanitarian law in Rwanda and in the former Yugoslavia but nowhere else, because one or other permanent member has a particular interest and is inclined to use the veto power to safeguard that particular interest.

Another lesson is the need for objective analysis of human rights abuses. The American Bar Association, and particularly its Central and

East European Law Initiative (CEELI), has been extremely generous to the Kosovo Commission. They seconded to us as our legal adviser Mark Ellis, who is the executive director of CEELI. He has put together an outstanding team in Washington that is gathering the details of atrocities committed in Kosovo. They are reducing to a common database the reports of UNHCR, international NGOs, and local NGOs. We will have for our report an important new contribution—an objective analysis of the atrocities and their effects before, during, and after the bombing. We hope certainly that this will be a lesson for the future, and that human rights organizations will adopt a common method of reporting that will facilitate that sort of objective analysis.

We should have learned too the need for more effective appreciation of early warnings and for the political will to act before military intervention becomes necessary. It is fundamentally important that military intervention should be a last resort. It should not be just one of the options of the international community.

As I have said, it would be dangerous in the extreme to assume that the intervention in Kosovo is an aberration. At the beginning of this new century, state sovereignty is being redefined. It is being redefined in the face of globalization and the resolve by the majority of the peoples of the world that human rights have become the business of the international community.

When I was a young student, South Africa could turn to the international community and say, "How we treat our black majority is our internal affair; it's not your business." That is not the law and it is not the political situation today, as much as China and other abusers of human rights may wish to think and may say.

Let me close by quoting the secretary-general of the United Nations, Kofi Annan:

Kosovo has cast in stark relief the dilemma of what has been called humanitarian intervention: on the one side, the question of the legitimacy of an action taken by a regional organization without a UN

mandate; on the other, the universally recognized imperative of effectively halting violations of human rights with grave humanitarian consequences. The inability in the case of Kosovo to unify these two equally compelling interests of the international community—universal legitimacy and the effectiveness in defense of human rights—can only be viewed as a tragedy.¹

¹ "Secretary-General Presents His Annual Report to General Assembly," UN Press Release SG/SM/7136, GA/9596, September 20, 1999.

Discussion

Question: Justice Goldstone, would you please say a few more words about the objectives of the Independent Commission on Kosovo? More specifically, is the commission going to consider issues such as governance in Kosovo by the United Nations?

Justice Goldstone: The main purpose of the Independent Commission on Kosovo is to see what lessons there are to be learned for the international community. Our purpose is forward—rather than backward—looking. It is not a war crimes tribunal; we are not looking at that question—it would be inappropriate, in any event, to do that, having regard to the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia in The Hague. Success for this commission is that its report should encourage more objective debate on the kinds of issues that I have spoken about. That is really the purpose, and I think it is the only purpose that the Swedish prime minister had in mind, and it is the purpose which all thirteen members of the commission have.

Certainly we are going to look at the problems of governance facing UNMIK—the lack of an adequate police force, as well as other resource problems. There is a fundamental problem with the structure of the United Nations. The body that makes the decisions is the Security Council. Yet, it has no control over a single penny. That is for the General Assembly. The Security Council comes up with all sorts of excellent resolutions; for example, it sets up an international criminal tribunal, and when the first prosecutor arrives there fifteen months later, there is no budget. I was told that if there was not an indictment

by November 1994, three months later, we could not get any money. That was serious advice, and I took it seriously.

The result was that the first person we indicted in that tribunal was a man called Nikolic. He was really a comparatively small fish and certainly did not justify being the first indictee of the Yugoslavia Tribunal. He was the bait to get money from the ACABQ, the Budget Committee of the General Assembly.

This is the problem that Bernard Kouchner and UNMIK are having in Kosovo. Resolution 1244 may be excellent. It set up an administration. But Kouchner arrived and he has to beg for money, he has to beg for resources, for police officers to enable him to keep the peace in Kosovo.

So certainly, we are going to look at that. The Security Council needs, I think, to be more realistic in acknowledging that its resolutions are not automatically capable of implementation because there simply are not the resources to do so.

Question: Do you believe that a body will be set up to deal with the current events in Zimbabwe?

Justice Goldstone: There are serious human rights violations being committed in Zimbabwe, and law and order in some areas has broken down. This situation calls for the attention of the international community. Whether yet another African disaster will receive that attention is open to doubt. We have to be realistic. Why was the first International Criminal Tribunal set up for Yugoslavia? Why not for Cambodia? Why not for Iraq? Why not for Angola or Mozambique or any of the many other terrible human rights situations? Why was it Yugoslavia? There can be no question, and I will say it without any joy as an African, that it was set up for Yugoslavia because it was in Europe. It was set up because European nations said this would never happen again after the Holocaust, and here it was happening in their

own backyard, and it was people with fair skins and blue eyes and blond hair who were ethnically cleansing in Bosnia in the 1990s.

Certainly, as I said, that is one of the issues that the Kosovo Commission is going to look at. The last meeting of the Kosovo Commission will be held at Witwatersrand University in Johannesburg. The main thrust of that last meeting—and we will have a seminar—will be on the lessons to be learned for the non-European regions of the world, for Asia, Africa, and the Middle East.

Question: The world is watching with fascination the Pinochet case, which you alluded to, the attempt in London to respond to the summons of the justice in Spain. Could you take that a step further in terms of some of the questions that have been raised here in the United States on the Vietnam War? What if some tribunal in some country tried to arrest the U.S. president, secretary of state, or secretary of defense? What if that was to occur in the Middle East, in Israel, for terrorism in the past in its struggles for security? How do you address those issues in terms of these kinds of incidents that may occur in other parts of the world?

Justice Goldstone: Again let me say that is one of the justifications for an international criminal court. There obviously are problems in having a chaotic situation where every country is free to make arrests when people come into their jurisdiction whom they may regard, rightly or wrongly, as war criminals.

However, I think it is a very good thing that former and present dictators have to spend their vacations at home. It may be unfortunate for their travel agents, but it is a good thing for the international community. I think it is a good thing that General Momir Talic, the deputy head of the Bosnian Serb Army, is picked up when he is attending an OSCE meeting in Vienna by the Austrian police on a sealed indictment issued by the prosecutor of the Yugoslavia Tribunal.

I think it is a good thing that the former dictator and human rights abuser of Ethiopia, Mengistu, is not able to receive medical treatment in South Africa and has to go back to Zimbabwe. That is a good thing. It is a warning and it must be some sort of deterrent.

The problem, of course, as your question recognizes, is what happens when other world leaders travel to countries where they may be regarded wrongly, unjustifiably, as war criminals? Well, the only advice I can give them is, choose your destinations carefully. That is not too difficult.

But again, it points to the need for some order to be brought to what is increasingly an aberrational world. It can get worse, to the extent that the Security Council of the United Nations is superseded and bypassed. We need some sort of rule of law in the international community.

We need some order. If there were a permanent international criminal court, I think it would set the standards, and it should have the first call on whether war crimes are being committed and whether people should be picked up or they should not be picked up. It should not be left to rogue governments—or, indeed, any national government—to make that call.

Question: I spent two years at the Norwegian delegation to NATO from 1995 to 1997 during the formation of IFOR (Implementation Force) and later SFOR (Stabilization Force). In my experience, what materialized was a conflict, a tug-of-war for the scarce military resources that could be allocated to various aspects of the multifunctional operation, as IFOR was, as SFOR was, and certainly as KFOR (Kosovo Force) is, a very multifunctional operation. At various stages of the conflict, there was a certain amount of criticism leveled against NATO for not providing enough support to the War Crimes Tribunal. To what extent do you feel that in Kosovo today the cooperation between NATO and international human rights organizations is working along the lines that you would wish?

Justice Goldstone: Well certainly, it is a very different situation today than it was just a few years ago. I think it was significant that it was the French NATO forces that arrested, and used violence to arrest, Krajесnic in Bosnia. This was something new, and it is likely that the criticism by the international human rights community had some effect on the attitude and the political resolve of the French leaders who were being criticized for offering a safe haven to people who had been indicted.

Of course, it is not enough. This was one of the huge frustrations for many of us who were working in the International Criminal Tribunal for the Former Yugoslavia. On the other hand, it is important to recognize that African governments were prepared to respect their international obligations to arrest and hand over people indicted by the Rwanda Tribunal, whether it was Kenya (albeit with reluctance), the Cameroons, Zambia, or South Africa.

For the Yugoslavia Tribunal, it was different. It was different mainly because of the lack of political will in the major European capitals, and even more so in Washington, D.C. The U.S. military was simply not prepared to put any U.S. troops at risk in going to arrest war criminals. It was a lack of courage, it was a lack of resolve, it was a lack of political will. If I may be permitted to say so as a guest in your country, it was a lack of courage on the part of the administration, and it was a decision by the administration not in any way to buck the wishes of the military. That should not happen in a democracy. Political decisions should be taken by politicians and not by military generals, and that was not happening.

But it is changing, and for the Yugoslavia Tribunal, it is a different world from the one that I left in 1996. There were the very few indicted who had been arrested and brought to The Hague. What the United States did, to its credit, was to impose so much pressure on the Croatian government that it virtually coerced its own indicted citizens voluntarily to hand themselves over. But arrests did not take place.

Now that arrests are being made, the worst fears of the Pentagon have not materialized. They said, "If we start arresting people, there will be retaliation, there will be hostage taking, grenades will be thrown into camps." It has not happened, and it would not have happened in 1995 and 1996, when certainly Karadzic and Mladic could and should have been picked up.

About the Speaker

Richard J. Goldstone graduated from the University of the Witwatersrand with a B.A. LL.B. cum laude. He practiced as an advocate at the Johannesburg Bar until 1976, when he was appointed senior counsel. In 1980 he was made judge of the Transvaal Supreme Court, and in 1989 he was appointed judge of the Appellate Division of the Supreme Court. Since 1994 he has been a justice of the Constitutional Court of South Africa.

From 1991 to 1994 Justice Goldstone served as chairperson of the Commission of Inquiry Regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission. He is also chairperson of the Standing Advisory Committee of Company Law.

From 1994 to 1996 he served as the chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. During 1998 he chaired a high-level group of international experts that met in Valencia, Spain, and drafted a Declaration of Human Duties and Responsibilities for the director general of UNESCO (the Valencia Declaration). Since August 1999 he has been chairing the International Independent Inquiry on Kosovo.

Justice Goldstone's other responsibilities include serving as chancellor of the University of the Witwatersrand, Johannesburg; as a member of the board of its School of Law; and as a governor of the Hebrew University, Jerusalem. He is a member of the international panel established in 1997 by the Government of Argentina to monitor the Argentinian Inquiry to Elucidate Nazi Activities in the Argentine Republic since 1938.

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