

INTERNATIONAL LAW: A DISCIPLINE OF CRISIS*DIREITO INTERNACIONAL: UMA DISCIPLINA DA CRISE*

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ABSTRACT

This article examines the way that international lawyers tend to focus on crises for the development of international law. It uses the reactions of international lawyers to NATO's intervention in Kosovo in 1999 as a case study of this tendency and argues that the crisis focus impoverishes the discipline of international law. The article proposes the idea of an international law of everyday life as an alternative.

KEYWORDS

International law – NATO's intervention in Kosovo – Crisis.

RESUMO

Este artigo examina a forma com que os juristas internacionalistas tendem a focar em crises para o desenvolvimento do direito internacional. Utiliza as reações dos juristas internacionalistas à intervenção da OTAN no Kosovo em 1999 como um estudo de caso dessa tendência e argumenta que o foco na crise empobrece a disciplina do direito internacional. O artigo propõe a ideia de um direito internacional da vida cotidiana como uma alternativa.

PALAVRAS-CHAVE

Direito internacional – Intervenção da OTAN no Kosovo – Crise.

SUMÁRIO

Introduction. 1 What is the 'Kosovo crisis'?. 2 International lawyers on Kosovo. 3 The limitations of the crisis model. 4 The contentious construction of crises. 4.1 The negotiability of facts. 4.2 Lack of analytic progress. 4.3 Thin description. 5 The ethical cost of crises. 5.1 Narrowing the agenda of international law. 5.2 The heroic mission of international lawyers. 5.3 Silences of crises. 5.4 Restricting the substance of international law. Conclusion.

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INTRODUCTION

International lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance. Many contemporary teaching texts in international law employ the study of crises as a counterweight to the formalism of the study of rules. Indeed Michael Reisman has argued that crises or 'incidents' – defined as 'overt conflict[s] between two or more actors in the international system'² – should be at the heart of teaching and scholarship in international law. Reisman has proposed that incidents should become the 'basic epistemic unit of international law' in the way that appellate cases are the basic unit of Langdell's case method.³ In this article, I question this focus through examining the way crises mould, and are moulded by, international law.

The paper takes 'the Kosovo crisis' as a case study. I am interested in how international lawyers analysed Kosovo as a crisis and the type of assumptions typically made in thinking about such events. By now the Kosovo crisis has almost a stale and passé air for

² Michael Reisman and Andrew Willard (eds), *International Incidents: the law that counts in world politics* (Princeton: Princeton University Press, 1988) 15.

³ *ibid* viii.

most international lawyers, its importance diminished by the more recent crisis of the events of 11 September 2001 and their aftermath. Kosovo however has been discussed at great length in the international legal literature and offers a lens through which a disciplinary pattern can be observed. I am concerned with what we tend to include and exclude from this form of debate and discussion about crises. My argument is that using crises as our focus means that what we generally take for ‘fundamental’ questions and enquiries are very restricted. This shackles international law to a static and unproductive rhetoric.

1 WHAT IS THE ‘KOSOVO CRISIS’?

The ‘Kosovo crisis’ has by now become a staple of the international legal literature, although the term is an umbrella for a range of phenomena. It can mean the long history of Kosovo, or political tensions in Yugoslavia/Serbia over the status of the province of Kosovo in the 1990s, which boiled over in late 1998 and early 1999. It can mean the North American Treaty Organisation (NATO) air campaign against Serbia in mid-1999. It can mean the current situation in Kosovo, with the presence of a NATO force and considerable social and political unrest and violence. It can also mean the debate among international lawyers over the legality of the NATO intervention.

The version of the Kosovo crisis that most international lawyers are interested in goes along the following lines. The Federal Republic of Yugoslavia (FRY) (an entity created after the break up of the former Yugoslavia comprising Serbia and Montenegro) took action against moves by Albanian Kosovars to regain some form of independence for their province, incorporated in Serbia in 1989. Kosovo has great symbolism for Serbians as the location of a fourteenth century defeat by the Turks. With increasing reports that President Slobodan Milosevic of the FRY was forcing ethnic Albanians to leave Kosovo in large numbers through violence and threats of violence, and after failed negotiations with the FRY and the Kosovo Liberation Army, the United States persuaded the regional defence alliance, NATO, to mount a lengthy program of air-strikes against the FRY. ‘Operation Allied Force’, initiated on 24 March 1999, was begun without taking the matter to the United Nations Security Council under Chapter VII of the United Nations Charter, which sets out the international legal regime to respond to matters threatening international peace and security. The campaign continued for two and a half months. 500 Serbian and Kosovar civilian deaths caused by NATO have

been confirmed and 6000 wounded.⁴ No casualties were sustained by the NATO forces. The bombing ended with the conclusion of an agreement between NATO's special security force, KFOR, and the governments of the FRY and Serbia allowing the deployment of an international civil and security presence in Kosovo under UN auspices.⁵ The United Nations Interim Administration Mission in Kosovo (UNMIK), which includes a Mission of the Organisation for Security and Cooperation in Europe, provides an interim administration for Kosovo, under which some autonomy can be exercised. Elections for a Kosovo Assembly were held in November 2001.

The NATO action appeared to violate international law as set out in the UN Charter, because the Charter requires that any regional action be undertaken only with the authorisation of the Security Council.⁶ The political reality was that Russia, as a permanent member of the Security Council, was likely to use its veto power against any Security Council action.⁷ In response to criticism of the NATO action on the basis that it breached the terms of the UN Charter, the United States President, Bill Clinton, and British Prime Minister, Tony Blair, argued that the NATO bombing was in fact deeply consistent with the humanitarian impulses of the Charter. Their contention was that armed intervention in another state was acceptable at international law if the aim of the intervention was to protect the population from massive breaches of human rights. In other words, the protection of human rights justified the otherwise central principle of international law of respect for national sovereignty. The NATO intervention in Kosovo was presented as a watershed in international relations. Robin Cook, the British Foreign Secretary, indeed described it as comparable to the fall of the Berlin wall in 1989.⁸

The NATO bombing raised many questions for international lawyers. Did the pursuit of human rights justify the breach of the United Nations Charter provisions on the use of force? If human rights trump the Charter provisions, do they place any limits on the type of

⁴ *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, para 1 (available at <<http://www.un.org/icty/pressreal/nato061300.htm>>).

⁵ Military-Technical Agreement, 9 June 1999. Security Council Resolution 1244, 10 June 1999, effectively ratified the Military-Technical Agreement.

⁶ Article 53.1. The Security Council later adopted Resolution 1244, 10 June 1999, in which it acknowledged the non-UN 'international security presence' and resolved to coordinate closely with it.

⁷ Russia unsuccessfully introduced a resolution in the Security Council condemning the NATO action: UNSCOR 54th Session, 3989th meeting at 5.

⁸ Ken Booth, 'Introduction: Still Waiting for the Reckoning' (2000) 4 *The International Journal of Human Rights* 1, 2.

force that was used? Thus, if the human rights abuses by the Serbs required immediate action, why did the NATO campaign consist of bombing from 20,000 feet up in the air, and last so long? For a long time, indeed, this was a very unsuccessful strategy, resulting in the deaths of many Kosovar refugees, and causing serious tensions in the NATO allies' relationship with China through the mistaken bombing of the Chinese embassy in Belgrade on 7 May 1999. The campaign also resulted in the destruction of much civilian infrastructure in Serbia. While it placed serious pressure on President Milosevic, the campaign did not succeed in its aim of removing him from office nor slacken the great exodus of refugees from Kosovo. Although the deal ultimately brokered by NATO with Milosevic allowed for an international presence in Kosovo and the return of many of the Kosovars, this has been accompanied by much violence, a great deal of it revenge attacks against Serbs in Kosovo.

2 INTERNATIONAL LAWYERS ON KOSOVO

The events in Kosovo in 1998–99 have been a big occasion for international lawyers. They have allowed a variety of performances of our art. There has been an outpouring of conferences, articles, books and exam questions on the topic. Kosovo is a paradigm of a meaty international law crisis, a real-life Jessup moot problem. It has involved both the institutions and the substantive principles of international law. A case on the legality of the NATO intervention was brought by the FRY before the International Court of Justice in April 1999.⁹ Milosevic was indicted in May 1999 by the International Criminal Tribunal for the Former Yugoslavia for war crimes.¹⁰ In June 2001, he was surrendered to the Tribunal by the Serbian government and is currently awaiting trial. Carla del Ponte, the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, announced in June 2000 that she had considered, but ultimately dismissed, prosecutions of NATO actors over the bombing.¹¹

There is intense debate in the international legal community about what Kosovo stands for. Some international lawyers read the NATO intervention in Kosovo as strong support for a principle of humanitarian intervention. At last it seems that there is evidence of state practice and *opinio juris* for a principle of custom that intervention is permissible where

⁹ *Case Concerning the Legality of the Use of Force (Yugoslavia v United States et al)* 1999 ICJ Rep.

¹⁰ <www.un.org/icty/indictment/english/24-05-99milo.htm>.

¹¹ n 3 above.

massive human rights violations take place. It points to a way around the problems of the veto of the permanent members of the Security Council.¹²

Other international lawyers have seen Kosovo as a much more problematic development in international law. Some have read it as a symbol of all that is inadequate in respect for and implementation of international law, as proof that legal principle is hopelessly limited by bureaucracy and corrupted by politics. They have condemned the NATO intervention in the FRY as completely outside the United Nations Charter system of security and a threat to global stability.¹³ For example Simon Chesterman and Michael Byers have said of the NATO bombing:

The global situation has begun to resemble that of previous centuries, where military force was the preferred tool of the powerful, and the less powerful sought protection in alliances of convenience rather than international institutions and international law. Most disturbingly, the system created in 1945 to preserve peace and security has been seriously compromised.¹⁴

A variation on this type of approach is illustrated in Jonathan Charney's analysis.¹⁵ He regards the NATO intervention as 'indisputably' illegal, an 'unfortunate precedent' and likely to escalate international violence and discord.¹⁶ At the same time, he sees Kosovo as a useful catalyst for the development of an international legal principle that, properly qualified, would allow humanitarian intervention in cases of 'widespread and gross violations of human rights'.¹⁷ He writes 'If current international law and organisations 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.'¹⁸ So, Kosovo, read as a violation of international law nevertheless can make a contribution to the discipline by exposing the gaps in international law and encouraging us to fill them.¹⁹

¹² Michael Glennon, 'The New Interventionism: The Search for a Just International Law' (May/June 1999) 78 *Foreign Affairs* 2; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828.

¹³ e.g. Richard Bilder, 'Kosovo and the "New Interventionism": Promise or Peril?' (1999) 9 *Journal of Transnational Law and Policy* 153; Abdullahi An-Na'im, 'NATO on Kosovo is Bad for Human Rights' (1999) 17 *Netherlands Quarterly of Human Rights* 229.

¹⁴ Simon Chesterman and Michael Byers, 'Has US power destroyed the UN?' *London Review of Books* (29 April 1999), 30.

¹⁵ Jonathan I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231.

¹⁶ *ibid* 1232.

¹⁷ *ibid* 1242.

¹⁸ *ibid* 1232.

¹⁹ See also Mary-Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo' (2000) 22 *Human Rights Quarterly* 57, 85–88.

In between the legal/illegal poles of the debate we find a number of international lawyers clustered about the unfamiliar position that the NATO campaign was, strictly speaking, illegal but that it can be morally justified. A prominent example of this approach is the report of the Independent International Commission on Kosovo, a body initiated by Swedish Prime Minister Göran Persson. The Commission's legal members included Justice Richard Goldstone of South Africa, a former Chief Prosecutor of the ICTY, Richard Falk and Martha Minow. The Commission concluded that the NATO intervention breached international law because it was not authorised by the UN Security Council, but that it was morally and politically legitimate as a response to the serious level of human rights violations by the FRY.²⁰ At the same time, the Commission criticised some aspects of the intervention, particularly its methods and the lack of anticipation of its consequences for civilians.²¹ It believed that 'there is an urgent need to clarify the conditions under which justifiable humanitarian intervention in UN member states can be undertaken in the future' and it recommended amendment of the UN Charter to avoid the paralysis of the veto power in the Security Council. The Commission proposed a 'code of citizenship' which would both protect states from undue interference from outside powers and yet guarantee remedies for their inhabitants in cases of systematic abuse of human rights.²² The Commission's distinction between legality and legitimacy is also found in much of the commentary on Kosovo.²³

Characteristic of much international legal writing on Kosovo is a self-conscious agonising by its authors, whatever side they end up on. Thus Bruno Simma writes that:

unfortunately there do occur 'hard cases' in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.²⁴

And Christine Chinkin asks:

How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing, rape and other forms of systematic and widespread abuse,

²⁰ *The Kosovo Report* (Oxford: Oxford University Press, 2000) 288–289. A House of Commons Foreign Affairs Select Committee reporting in May 2000 reached a similar conclusion. See <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaaff/28/2802.htm>>.

²¹ *ibid* 289–290.

²² *ibid* 291.

²³ eg Nicholas Wheeler, 'Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo' (2000) 4 *International Journal of Human Rights* 145.

²⁴ Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 22.

regardless of what the Charter mandates about the use of force and its allocation of competence?²⁵

This unusual airing of professional anxiety can be contrasted to the debate on Kosovo in the international relations literature. Generally, scholars in this discipline appear less exercised by taking a position on the NATO campaign, perhaps because it is more easily interpreted in the paradigm of power politics than in the international lawyers' world of objective legal principles.

Whatever our views on the formal 'legality' of the NATO intervention, the Kosovo crisis seemed to distill many of the big questions of international law. International lawyers grasped at the NATO campaign in the FRY as an event that, properly unpacked and legally theorised, could rejuvenate our often overlooked discipline. Kosovo offered questions about sovereignty and self-determination, grave human rights abuses and expulsions, condemnation by international institutions, failed peace negotiations, military intervention by a regional alliance, international peace keeping and the role of international criminal tribunals. It was a contemporary Cuban missile crisis. Kosovo gave international lawyers a sense of relevance, of being exhilaratingly close to the heart of grand and important issues of our time.

3 THE LIMITATIONS OF THE CRISIS MODEL

The events in Kosovo and the way that international lawyers have seized on them illustrate how 'crises' structure our thinking about international law. Crises are not of course the only catalyst for the development of international law, but they dominate the imagination of international lawyers. Many scholars find a focus on crises uncontroversial, indeed a useful pedagogical and jurisprudential technique. Michael Reisman, for example, justified the study of incidents as a counterweight to the lack of empirical reliability of much international law doctrine.²⁶ He has argued that a focus on incidents (as opposed to a study of international case law) makes international jurisprudence 'more congruent with contemporary elite expectations that are reflected in practice'. This approach however has two types of limitations: it is

²⁵ Christine Chinkin, 'Kosovo: A "Good" or a "Bad" War?' (1999) 93 *American Journal of International Law* 841, 843.

²⁶ n 1 above, 263.

technically limited because it rests on truncated and selective understandings of events; it also diverts attention from structural issues of global justice.

4 THE CONTENTIOUS CONSTRUCTION OF CRISES

4.1 The negotiability of facts

An initial problem with the crisis model of international law is that it assumes that the elements of the crisis are uncontroversial, that the ‘facts’ are ripe for picking by analysts. Thus Louis Henkin starts off an editorial in the *American Journal of International Law* with the assertion that ‘[t]he terrible facts in and relating to Kosovo in 1998–1999 are known and little disputed’.²⁷ In the case of Kosovo, however, there is considerable dispute on the nature of the crisis. For example, there is much contention on the seriousness of the human rights violations invoked by NATO to justify intervention. In the same set of editorials as Louis Henkin’s, Jonathan Charney argues that we cannot characterise the human rights violations prior to the withdrawal of the Organisation for Security and Cooperation in Europe (OSCE)’s observer force as ‘massive and widespread’ because the verification mission had prevented such breaches.²⁸ Indeed, Charney contends that it was NATO’s forced withdrawal of the OSCE observers that encouraged large-scale abuses. Analysis of NATO’s claims preceding the bombing also indicates that there was routine inflation of the numbers of those killed and deported by the FRY government.²⁹

Another contested issue of ‘fact’ is the significance of the failure of the talks between the Contact Group (the United States, The United Kingdom, France, Italy and Russia), the Serbian government and Albanian Kosovars at Rambouillet in February 1999. Many international lawyers read the collapse of the negotiations as the result of Serbian intransigence. They accept that the convening of the session as proof that all peaceful means to resolve the dispute had been exhausted and that the only option remaining was the use of force.³⁰ However, the story is more complex. The Rambouillet proposals can be viewed as

²⁷ Louis Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 *American Journal of International Law* 824.

²⁸ n 14 above, 1245.

²⁹ *Le Monde Diplomatique* March 2000.

³⁰ n 11 above.

drafted to ensure their rejection. They created a Kosovo Force (KFOR) accountable to NATO rather than the United Nations.³¹ KFOR was accorded freedom of movement, action and access not just in Kosovo, but throughout FRY territory. The proposals, presented as interim, also were ambiguous about the terms of a final settlement, particularly whether it would require full independence for Kosovo or a lesser form of autonomy. The prospect that Kosovo's independence would be imposed on the FRY three years after the Rambouillet proposals were adopted was completely unacceptable to the Serbian government.³² A move to full Kosovo independence also went much further than previous United States proposals.³³ International lawyers pay little attention to the legal significance of the counter-proposal made by the Serbian National Assembly on the eve of the NATO campaign.³⁴ This proposal rejected the deployment of foreign troops, but contemplated an international presence in Kosovo leading to a 'wide-ranging autonomy' in Kosovo. It was not considered by NATO.

The epithet 'humanitarian' is often used by international lawyers to describe the NATO intervention in Kosovo as though it were an uncontroversial and factual description. The idea seems to be that it must be humanitarian because there were no obvious economic or strategic stakes in Kosovo. The nature of the intervention, however, raises questions about its humanitarian character. The NATO bombing campaign was conducted at high altitude to prevent NATO casualties. This led to considerable problems of accuracy, with many of the civilian deaths and injuries being caused by technical errors. The eagerness to intervene at no cost to the intervenor undermines NATO's humanitarian credentials. As Jean Elshtain has pointed out, this tactic replaces the traditional international humanitarian law concept of civilian immunity with a principle of combatant immunity.³⁵

Another way in which the international legal literature on Kosovo privileges particular facts over others is the characterisation of the parties in the conflict. The Serbian government, particularly as personified by Slobodan Milosevic, is presented as an evil

³¹ Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, available at <<http://www.monde-diplomatique.fr/dossiers/kosovo/rambouillet.html>>.

³² Eric Herring, 'From Rambouillet to the Kosovo Accords: NATO's War against Serbia and its Aftermath' (2000) 4 *International Journal of Human Rights* 225, 226–227.

³³ *ibid* 227.

³⁴ Proposal of the Parliament of Serbia for Self-Governance in Kosovo and Metohija, 20 March 1999, reprinted in (2000) 4 *International Journal of Human Rights* 363.

³⁵ Jean Bethke Elshtain, 'Kosovo and the Just-War Tradition' in William J Buckley (ed), *Kosovo: Contending Voices on Balkan Interventions* (2000) 363, 365 quoted in Tania Voon, 'Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict' (2001) 16 *American University International Law Review* 1083, 1099.

violation of human rights, while the Albanian Kosovars are regarded as noble victims fighting for freedom. Again, the picture is more complex than these images. The Serbian historic attachment to Kosovo provides at least some explanation of the determination not to accord it independence, while some groups of Albanian Kosovars have participated in significant violence against other ethnic groups.³⁶

Any account of a crisis will of course be partial. In his advocacy of an ‘incidents’ focus in international law, Michael Reisman acknowledges the inevitable selectivity involved and indeed celebrates the virtue of ‘cultivated astigmatism’.³⁷ The selection of facts is for Reisman a critical aspect of legal science, distinguishing it from disciplines such as history and sociology. However, international lawyers are not trained to reflect on the politics of their choice of facts or the nature of the facts’ sources. International lawyers typically do not report on the basis of their own experiences and lives, and the ‘facts’ we deal with are gathered from the media, government reports and other sources. Our discipline does not encourage the weighing up of competing versions of events. What we glean then as ‘facts’ may be inaccurate or partial and the way we report and emphasise them is an act of political interpretation. We do not acknowledge this in the way we write.

4.2 Lack of analytic progress

A second technical flaw in the crisis model of international law is that it leads us to rediscover an issue constantly and to analyse it without building on past scholarship.³⁸ For example, reading the spate of articles that appear in our journals after each purported occasion of humanitarian intervention, it is difficult to observe any real progression of thought or doctrine. Our analysis tends to be very specific and tailored to particular immediate circumstances. The Kosovo literature makes little reference to previous asserted cases of humanitarian intervention, as though each aspect of Kosovo was unique. Our task thus seems quite journalistic – reporting on a phenomenon before it goes stale and disappears from our radar screens. As Gerry Simpson has observed ‘By the time we have put some distance

³⁶ n 31 above, 233.

³⁷ n 1 above, 19.

³⁸ Philip Alston, remarks at the ANZSIL/ASIL joint meeting, Canberra, 29 June 2000.

between ourselves and a particular human tragedy, we have moved on to the next ‘international incident’. This is a discipline that leaves you jet-lagged, breathless and numb’.³⁹

4.3 Thin description

A third issue in international law’s obsession with crises is that it leads us to concentrate on a single event or series of events and often to miss the larger picture. We have a penchant for cutting crises down to bite-size pieces.⁴⁰ One element of the thinness of international legal analysis is its vocabulary. We typically use general, sanitised language that reduces the messiness of the reality. Just as the term ‘collateral damage’ became popular to describe civilian deaths during the 1990–1 Gulf war, the use of the term ‘humanitarian intervention’ in Kosovo obscures the actuality of the devastating and often inaccurate high altitude aerial bombing campaign. It also glosses over the great increases in refugee numbers caused by the campaign.

In the Kosovo literature in international law very little attention is paid to the complex history of Kosovo and Serbia, not only over the past centuries but also in the 1990s. All eyes are on the NATO intervention in 1999. In all the words written about Kosovo by international lawyers, very few have examined why and how the Serbian actions against the Kosovars took place. The standard explanation for all the trouble after the break up of the former Yugoslavia is that it was caused by ‘ancient hatreds’, without any deeper analysis of the role of shifting political alliances, international institutions and economic systems in the conflict.⁴¹ The causes of the Serbia/Kosovo conflict are very complex, but at least one aspect of the answer is the system of power-sharing established by the Dayton Accords in 1995⁴², which gave power and stature to President Milosevic, endowing his autocratic government with a claim to legitimacy. The status of Kosovo was specifically excluded from the Dayton

³⁹ Gerry Simpson, ‘Kosovo Imprints: International Law at the Fault-Line’ (unpublished paper given in New York, Fall 1999) 1, (copy held by author).

⁴⁰ Analysis of the Gulf war in 1990–1991 is another example of this tendency. Thus Australian Foreign Minister, Gareth Evans, could describe the Allies’ intervention against Iraq’s invasion of Kuwait as ‘short, sharp and successful’, ignoring the complex social and political aftermath of Operation Desert Storm. *Cooperating for Peace* (Sydney: Allen & Unwin, 1995) 147–148.

⁴¹ Misha Glenny, *The Balkans 1804–1999: Nationalism, War and the Great Powers* (London: Granta, 1999); Anne Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’ (1999) 10 *European Journal of International Law* 679, 681.

⁴² General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 14 December 1995, reprinted in (1996) 35 *International Legal Materials* 75.

agenda.⁴³ In this sense, the international community itself set up a system that ultimately contributed to the persecution of the Albanian Kosovars. When things went too far, the tactic of force was produced – like a rabbit out of the hat – to ‘solve’ the problem. NATO members themselves had undermined the non-violent Albanian Kosovar movement and sanctioned the increasing militance of the Kosovo Liberation Army (KLA) and its attacks on other ethnic groups living in Kosovo.

We find it hard to contemplate that an international agreement (the form of international law we know and understand so well) that was meant to have stitched up one set of problems could in turn have nurtured violence and disorder. In general, we tend to sound quite definitive about the power of international law with very little information about context. International lawyers writing two years after NATO’s bombing campaign still focused on the legality of the NATO intervention and did not consider in any detail its aftermath. Little attention is given to the destruction of many basic civilian structures and services by the conflict, the territorial ambitions and violence of Albanian militants in Kosovo, the failure of KFOR to disarm the KLA and to control crime, the often forced return to Kosovo of Kosovars who were given temporary refuge in other countries, the violence against Serbian residents of Kosovo as the Albanian Kosovars return to their devastated homes, or the temporary revitalisation of Slobodan Milosevic’s rule through his capacity to withstand the military might of the west.⁴⁴

Moreover, international lawyers tend to hone in on isolated aspects of selected crises. For example, little attention has been paid to the legality of the methods used in the NATO campaign.⁴⁵ Thus the (aptly named) International Crisis Group’s lengthy report on violations of international humanitarian law in Kosovo in 1999 is devoted almost entirely to Serbian actions. The report explains that it could not examine KLA atrocities against Kosovar Serbs, nor NATO breaches of the laws of armed conflict because the investigation was too difficult.⁴⁶ The Independent International Commission on Kosovo alluded to some criticisms of NATO’s methods but did not analyse them in any detail because of a lack of evidence. It noted that it

⁴³ n 24 above, 846.

⁴⁴ See ‘West struggles to contain monster of its own making’ *Guardian Weekly* 21 March 2001, 1–2 (vol 164, no 12).

⁴⁵ Exceptions include Dino Kritsiotis, ‘The Kosovo Crisis and NATO’s Application of Armed Force against the Federal Republic of Yugoslavia’ (2000) 49 *International and Comparative Law Quarterly* 330, 355–357 (listing attacks on civilian targets during the NATO campaign); Tania Voon, n 34 above.

⁴⁶ *Reality Demands: Documenting Violations of International Humanitarian Law in Kosovo 1999* (Brussels: International Crisis Group, 2000) 4–5.

was ‘impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration’. It concluded that NATO had committed ‘relatively minor’ breaches of international humanitarian law, which were reasonable interpretations of the concept of ‘military necessity’.⁴⁷

The ‘crisis’ of Kosovo (meaning the NATO intervention) has become an international legal trope for the whole confusing history of the region. ‘Kosovo’ is a synecdoche, a figure of speech in which the part stands for the whole. The problem with this approach is that international lawyers are not accustomed to unpacking the layers of meaning of the synecdoche and understanding the ideas and references contained within the thing mentioned. We stay glued to specific, climactic events and fail to see the larger picture.

5. THE ETHICAL COST OF CRISES

5.1 Narrowing the agenda of international law

The crisis orientation of our discipline promotes a narrow agenda for international law. If we focus on a snapshot in time of long-simmering disputes, it allows us to present our task as a straightforward, if agonising, choice between two competing principles. Much of the writing about the NATO intervention by international lawyers has a portentous and dramatic tone. For example, Jonathan Charney’s lengthy analysis begins: ‘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’.⁴⁸ Kosovo, the crisis, thus becomes a microcosm of the much-analysed tension between the UN Charter’s dual commitments to the prohibition on the use of force and to the protection of human rights.

The international law literature on Kosovo presents the issue as balancing respect for the Charter system of collective security on the one hand and the protection of human rights on the other. The scholarly pattern is to focus on interpretations of the words of the UN Charter, to refer to its *travaux préparatoires*, and then to consider the conditions for the creation of norms of custom. Plausible international law arguments can be made for both

⁴⁷ n 19 above, 183–184.

⁴⁸ n 14 above, 1231–1232.

sides. Critics of the NATO intervention linger over the words of the Charter and deconstruct evidence of state practice of ‘humanitarian intervention’ to show its flimsy nature. Supporters of the intervention make arguments about the failure of the UN system of collective security, the weight of state practice allowing intervention when human rights are at stake and the need for progressive development of the law. Although some of the comments were nuanced, the *American Journal of International Law*’s editorial symposium on Kosovo allowed a type of score board assessment of the NATO intervention: 4 in favour, 3 against. For most of the contributors, it was good or bad, right or wrong, justifiable or unjustifiable and in one case, right but wrong. But, is this type of assessment useful? We need a more complex reading of the Kosovo crisis, less certain and more qualified.

In the international legal literature on Kosovo, the most common pattern is to note that a self-respecting international lawyer must concede that the NATO intervention is outside the traditional boundaries of international law, but then to appeal to our sense of morality, ethics or humanity to argue that we must find a way to explain it legally. Whatever the legal niceties, the argument goes, at the end of the day something just had to be done to resolve the crisis.⁴⁹ Thus Antonio Cassese, observing that the NATO intervention violated the UN Charter, however reflects:

Faced with such an enormous human-made tragedy and given the inaction of the Security Council . . . should one sit idly by and watch thousands of human beings . . . slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?⁵⁰

Cassese’s response is to argue that a certain type of breach of *lex lata* can itself give rise to *lex lata*.⁵¹ Louis Henkin questions ‘Is it better to leave the law alone, while turning a blind eye (and a deaf ear) to violations that had compelling moral justification?’⁵² And Michael Reisman asks ‘what would the situation now be in Kosovo, and in human rights law, if the NATO states had concluded that, without Security Council authorisation, they could not act?’⁵³ Richard Falk argues that, while the NATO intervention was illegal and indeed unjust in

⁴⁹ eg House of Commons Foreign Affairs Select Committee Report, n 19 above.

⁵⁰ Antonio Cassese, ‘*Ex iniuria ius oritur*: are we moving towards international legitimization of forcible countermeasures in the world community?’ (1999) 10 *European Journal of International Law* 25, 25.

⁵¹ *ibid* 30.

⁵² n 26 above, 827.

⁵³ Michael Reisman, ‘Kosovo’s Antinomies’ (1999) 93 *American Journal of International Law* 860, 861.

its commission, ‘to regard the textual barriers to humanitarian intervention as decisive in the face of genocidal behaviour is politically and morally unacceptable’.⁵⁴

This angst of international lawyers interprets intervention as in itself almost automatically active and productive, while non-intervention is inactive and negative.⁵⁵ The only possible courses of action in the face of a crisis are to act or not to act. This approach mimics the rhetoric of politicians who are keen to truncate the range of policy options that seem available. Thus just before the NATO bombing began, the British Prime Minister Tony Blair declared that the world must do something or do nothing.⁵⁶ The form of the intervention is left unarticulated and unjustified. Blair’s proposition leaves no room for interrogation of why the ‘something’ must be bombing from 20,000 feet, or indeed why the ‘something’ must inevitably involve the use of force.

5.2 The heroic mission of international lawyers

The use of crises as the crucible of international law encourages international lawyers to cast ourselves grandly in an heroic mould; it allows international law to be ‘an arena of desire and fantasy’.⁵⁷ We develop a deep personal and professional investment in crises. Enthusiasm for the abstract concept of ‘humanitarian intervention’ in Kosovo to a large extent depends on a perception of ourselves as active and the Albanian Kosovars as passive.⁵⁸ Horrendous human rights abuses have been perpetrated on unnamed, inactive victims and it is our destiny as international lawyers to act to articulate these wrongs. Anne Orford observes this tendency generally in international legal texts:

The passive victim exists in these texts in order to constitute the hero or internationalist as the holder of those values which the victim lacks. . . . The reader who identified with those heroes comes to form his or her sense of self at least partly

⁵⁴ Richard Falk, ‘Kosovo, World Order, and the Future of International Law’ (1999) 93 *American Journal of International Law* 847, 853.

⁵⁵ Anne Orford, ‘The Making of International Lawyers’ (1998) 19 *Australian Year Book of International Law* 1, 12.

⁵⁶ Quoted in Simon Chesterman and Michael Byers, n above, 29. This phrase was used again by the Prime Minister in a speech justifying the United States bombing campaign in Afghanistan after 11 September 2001 to the Welsh Assembly on 30 October 2001. See <<http://www.number-10.gov.uk/news.asp?NewsId=2872&SectionId=32>>.

⁵⁷ David Kennedy, ‘Autumn Weekends: An Essay on Law and Everyday Life’ in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993) 191, 231.

⁵⁸ n 52 above, 13.

around that identification. That pleasurable process allows the reader to imagine himself or herself to be on the side of the good and the just.⁵⁹

Orford has examined the enthusiasm for both military and monetary intervention since the end of the Cold War. She argues that '[t]he narratives of the new interventionism are premised on an image of international law and institutions as agents of freedom, order, democracy, liberalisation, transparency, humanitarianism and human rights'.⁶⁰ This gives international lawyers the self-image of problem-solvers and cool professional realists imbued with humanitarian motives ('muscular humanitarianism').⁶¹ International law becomes the voice of civilisation, of universal humanism against the underdeveloped, squabbling, rest of the world.⁶²

The atmosphere of muscular humanitarianism is bred and reinforced in legal education. Many casebooks are organised around crises of one sort or another.⁶³ This allows us to shore up the image of international lawyers as tough humanitarians capable of pragmatic yet principled responses to restore freedom and order. The romantic style of teaching in international law reinforces this image.⁶⁴ The identity of international lawyers is built upon a separation between the world of activism (where we may actually encounter victims of human rights abuses and be required to engage with them) and our professional, legal world where we are the handmaidens, or advisers, to power.⁶⁵ We do not reflect on the way we are ourselves exercising a form of power. While international lawyers may be in reality now marginal to political decisions about the international order, we see as our ultimate aim the reorientation of governance 'so that the stark desert of politics can bloom with the flowers of law, reason, and order'.⁶⁶ This affects the way we construct and interpret crises and we need to scrutinise this process much more closely.

⁵⁹ Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679, 699.

⁶⁰ n 54 above, 2.

⁶¹ *ibid* 5, 8–10.

⁶² David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 *New York University Journal of International Law and Politics* 335, 359.

⁶³ n 1 above; Burns H. Weston, Richard A. Falk and Hilary Charlesworth, *International Law and World Order* 3rd ed. (St Paul: West Group, 1997).

⁶⁴ Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 *European Journal of International Law* 70, 72.

⁶⁵ n 54 above, 9.

⁶⁶ n 61 above, 347.

5.3 Silences of crises

The lens of crises in our discipline means that international lawyers concentrate on the public realm, of war and conflict and violence, where crises now occur under the glare of television lights. A parallel can be drawn between the international law attachment to crises and the way that traditional forms of history have concentrated on ‘great men’ and narrative representation of short-term political conflicts and crises.⁶⁷ One influential group of critics of this approach was the French Annales school. Fernand Braudel wrote that the historical tradition offered ‘a gleam but no illumination; facts but no humanity’. He went on:

To the narrative historians, the life of men is dominated by dramatic accidents, by the actions of those exceptional beings who occasionally emerge, and who often are the masters of their own fate and even more of ours. And when they speak of ‘general history,’ what they are really speaking of is the intercrossing of such exceptional destinies, for obviously each hero must be matched against another. A delusive fallacy, as we all know.⁶⁸

While international lawyers are generally not obsessed with great men as individuals, we are preoccupied with great crises, rather than the politics of everyday life. In this way international law steers clear of analysis of longer-term trends and structural problems.

One major silence is the position of women in the representation of crises. The players in international law crises are almost exclusively male. Men are the protagonists, men are at the negotiating table, men are making threats, retaliating, intervening. The lives of women are considered part of a crisis only when they are harmed in a way that is seen to demean the whole of their social group. For example, international law regards massive and organised rapes of women in times of armed conflict as illegal because they affect the honour of a community.⁶⁹ Other forms of systemic violence, or structural discrimination against women, do not constitute a crisis for international lawyers. This is rather seen as part of the status quo and not truly the business of international law. The general social position of women in Kosovo before or after the ‘Kosovo crisis’ is not regarded as in any way connected with the main crisis game.

⁶⁷ Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987) 31–32.

⁶⁸ Fernand Braudel, *On History* (Chicago: University of Chicago Press 1980) 11.

⁶⁹ Hilary Charlesworth, ‘Feminist Methods’ (1999) 93 *American Journal of International Law* 379.

Such a silence was also evident after the Gulf war in 1990–1. That crisis consisted of the act of invasion of Kuwait by Iraq. It was ‘resolved’ by the UN- sponsored intervention and the withdrawal of Iraqi troops. The problems of women in Kuwait before, during and after the crisis have been paid little attention by international lawyers. We know that the Gulf war action was accompanied by significant sexual assault and abuse of women both in Iraq and Kuwait and within the United States military forces.⁷⁰ The economic sanctions placed on Iraq at the end of the war, devastating to Iraqi society, have had particularly bad effects on Iraqi women and children.⁷¹ The aftermath of the Gulf war also gave new life to militarism in the United States, which had direct and deleterious impact on women’s lives.⁷² We also know that the ‘liberation’ of Kuwait re-installed an autocratic government of men that denied women the vote. There is evidence that the position of women in Kuwait, particularly foreign workers, deteriorated sharply after the allied action.⁷³

Another silence in international law is related to the gendered nature of its building blocks. The international legal discourse of crises rests on a series of distinctions, for example: objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence. Feminist scholars have drawn attention to the gendered ‘coding’ of these binary oppositions with the first term (objective, legal, logical, order etc) signifying ‘male’ characteristics and the second (subjective, political, emotional, nature etc) signifying ‘female’.⁷⁴ Like many other systems of knowledge, international law typically values the first terms more than their pairs. The marking of particular concepts and strategies as feminine devalues them and makes them problematic to articulate. They seem illegitimate, embarrassing and irrelevant.⁷⁵

We can see a gendered system of symbols at work in a complex way in Kosovo. The management of a crisis is taken as a test of manhood. Intervention is action, coded as

⁷⁰ Anne Orford, ‘The Politics of Collective Security’ (1996) 17 *Michigan Journal of International Law* 373, 377–379. On the abuse of Cambodian women and children during UNTAC’s tenure see Judith Hicks Stiehm, ‘Peacekeeping and Peace Research: Men’s and Women’s Work’ (1997) 18 *Women & Politics* 27, 44–45.

⁷¹ Lori Buck et al, ‘Sanctions as a Gendered Instrument of Statecraft: the Case of Iraq’ (1998) 24 *Review of International Studies* 69.

⁷² Anne Orford, n 69 above, 381–382. See also Linda Boose, ‘Techno-muscularity and the “Boy Eternal”’: From the Quagmire to the Gulf’ in Miriam Cooke and Angela Woollacott (eds), *Gendering War Talk* (Princeton: Princeton University Press, 1993) 67.

⁷³ See Human Rights Watch, *Punishing the Victim: Rape and Mistreatment of Asian Maids in Kuwait* (New York: Human Rights Watch, 1992).

⁷⁴ eg Carol Cohn, *War, Wimps and Women: Talking Gender and Thinking War* in Cooke and Woollacott n 71 above, 227.

⁷⁵ *ibid.*

masculine and virtuous; hesitation is passive, coded as feminine. For example, decisive, aggressive action was needed to reassert order, and that consultation and dialogue were not useful after a certain stage. Indeed the staff of United States Supreme Allied Commander General, Wesley K. Clark, at one stage blamed the lack of success of NATO bombing missions on the fact that the United States had to consult too widely with its allies. This rhetoric of action rather than talk derives its power in part from its association with male behaviour and it makes it difficult to contemplate an order that is not achieved through the use of force. There is also an interesting inversion of traditional gender associations of law with masculinity and concern for humanity with femininity in the Kosovo crisis literature. Much analysis relies on a distinction between the prescriptions of international law (which would prohibit the NATO intervention) and the demands of humanity (which would justify the NATO actions). The latter is presented as a preferable course because it is associated with firm action, while recourse to the strict letter of international law in this context is read as feminine and passive.

5.4 Restricting the substance of international law

A focus on crises produces an impoverished set of substantive principles in international law. Take the idea of collective security. The notion of a crisis allows us to factor out ambiguities and complex contexts. The NATO bombing campaign in the FRY reinforced the idea that collective security and the international order, at the end of the day, are based on the threat of the use of force. There has been by contrast little investigation of the way that power relations work within states and how these power relations affect a state's 'external' activities.

The idea that responsibility for maintaining security rests essentially with states means that little attention is paid to the role that non-state actors, such as multinational corporations, and the international monetary institutions play in generating insecurity. The international law system of collective security assumes that there will be an active, finite, episode of 'collective' intervention (by sanctions or by military force) in response to a

security crisis.⁷⁶ This model both obscures and legitimates much more pervasive forms of intervention, for example those inherent in the international economic system.

CONCLUSION

A concern with crises skews the discipline of international law. Through regarding ‘crises’ as its bread and butter and the engine of progressive development of international law, international law becomes simply a source of justification for the status quo. The framework of crisis condemns international lawyers, as David Kennedy puts it, to ‘a sort of disciplinary hamster wheel’.⁷⁷

One way forward is to refocus international law on issues of structural justice that underpin everyday life. What might an international law of every day life look like? At the same time that the much-analysed events in Kosovo were taking place, 1.2 billion people lived on less than a dollar a day.⁷⁸ We know that 2.4 billion people in the developing world do not have access to basic sanitation, and that half of this number are chronically malnourished; we know that the developed world holds one quarter of the world’s population, but holds 4/5 of the world’s income; we know that military spending worldwide is over \$1 billion a day and that alternative uses of tiny fractions could generate real change in education, health care and nutrition; we know that almost 34 million people worldwide live with HIV/AIDS;⁷⁹ we know that violence against women is at epidemic levels the world over. Why are these phenomena not widely studied by international lawyers? Why are they at the margins of the international law world?

An international law of everyday life would require a methodology to consider the perspectives of non-elite groups. For example, we should be able to study ‘humanitarian intervention’ from the perspective of the people on whose behalf the intervention took place. International lawyers’ accounts of humanitarian intervention prompted by Kosovo do not take the views of the objects of intervention into account. If they did so, we would be likely to end

⁷⁶ Anne Orford, ‘Locating the International: Military and Monetary Interventions after the Cold War’ (1997) 38 *Harvard International Law Journal* 443.

⁷⁷ n 61 above, 407.

⁷⁸ United Nations Development Programme, *Human Development Report 2001* (New York: Oxford University Press, 2001) 9–10.

⁷⁹ *ibid.*

up with a much more contradictory, complex and confusing account of humanitarian intervention than international lawyers have thus far produced.

We should also enlarge our inquiries. For example, with respect to the idea of collective security, how can we think about the global security more broadly? Johan Galtung has developed the notion of structural violence that highlights causes other than warfare, for example poverty, as the major cause of death and suffering.⁸⁰ Other scholars have identified the interconnections of poverty, environmental degradation, discrimination, exploitation, militarisation and violence as the causes of insecurity.⁸¹ Feminist scholars have drawn attention to the threats posed, to women not by foreign states, but by more local actors, including the men in their families. On this analysis security would mean the absence of violence and economic and social justice. If the idea of security is understood more broadly, the futility of the standard form of international collective action becomes clear. Military intervention is an inappropriate mechanism if the causes of insecurity are poverty, discrimination and violence protected by structures within the state.

What if we were to change the type of questions we ask? For example, David Kennedy has pointed out that the work of international lawyers typically focuses on humanitarian objectives (such as environmental protection or protection of human rights). We could begin from the opposite end and examine what international law has to offer to the person who wants to pollute the environment or violate human rights. I imagine this as an international lawyer's version of C.S. Lewis' *Screwtape Letters* in which cheery letters from the Devil mock the ease of corrupting humans. Such a technique would destabilise the idea that international lawyers have a stable and common set of values.⁸² Kennedy proposes 'extra-vernacular projects', slowing the emergence of a disciplinary middle (or third) way and encouraging dissent and disagreement.⁸³ For example, how often have 'reforms' in international law obscured deep injustices? How are spatial and conceptual boundaries we take for granted made real by the law?

Finally, we should consider our own personal and professional investment in crises. We need to analyse the way we exercise power, and who wins and who loses in this operation.

⁸⁰ Johan Galtung, *Peace: Research, Education, Action* (Copenhagen: Ejlers, 1975).

⁸¹ eg Gita Sen and Caren Grown, *Development, Crises and Alternative Visions: Third World Women Perspectives* (New York: Monthly Review Press, 1987).

⁸² n 61 above, 346.

⁸³ *ibid* 475.

In asking this question, we will undermine that pleasurable sense of internationalist virtue that comes with being an international lawyer, but perhaps in the end contribute something to countering the injustices of everyday life.