

# LESSONS FROM KOSOVO: TOWARDS A MULTIPLE TRACK SYSTEM OF HUMAN RIGHTS PROTECTION

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The NATO intervention in Kosovo has raised questions regarding the authority of regional security bodies such as NATO to enforce universally recognized human rights norms without authorization from the United Nations. There appears to be little question that, from a strictly legal perspective, the NATO military intervention in Kosovo violated the United Nations Charter.<sup>1</sup> The counter-argument may be made that NATO's enforcement of peremptory norms, such as those prohibiting genocide, relied on a higher level of international law, known as *jus cogens*. Because of their peremptory nature, *jus cogens* norms arguably trump even the United Nations Charter. It is not the purpose of this article to argue that the NATO intervention was either legal or illegal under international law. Rather, it is the purpose of this article to suggest that the world is increasingly moving towards a system of human rights protection in which global bodies of human rights enforcement exist and function concurrently with regional human rights enforcement bodies. These regional human rights bodies have the capacity to enforce human rights in a manner consonant with the level of human rights development in those countries belonging to such a regional grouping. This developing system of enforcement can be referred to as a "Multiple Track System of Human Rights Protection."

The first track of global governance is universal, and it incorporates the United Nations and its associated institutions. The United Nations system is the only truly global body with a mandate to develop and implement international law, including international human rights law. As such, it has adopted a comprehensive normative framework for human rights protection, even if the

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1. See U.N. Charter, Article 53:

1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .

mechanisms for enforcement of those norms are frequently lacking.<sup>2</sup> Nevertheless, cognizant of its global role as a representative body of liberal and illiberal states, it has adopted a procedurally statist approach with considerable deference towards state sovereignty and a strong bias against coercive intervention.<sup>3</sup> Accordingly, consistent with its normative embrace of human rights, the United Nations has frequently condemned human rights abuses in member nations, but has only infrequently authorized coercive intervention in response to those violations with economic sanctions<sup>4</sup> or military force.<sup>5</sup> It is this lacuna between the normative human rights frame-work of the United Nations, and its inability or unwillingness to enforce those rights in a more assertive manner, which provides the justification and need for regional human rights and security bodies to fill that gap. The implications of this still largely aspirational development are manifold.

First, the development of a Multiple Track System of Human Rights Protection avoids the problem of human rights protection being subject to the

2. The term "human rights" is mentioned in the preamble and Articles 1, 13, 55, 62, 68 of the United Nations Charter. Article 1 of the Charter provides that a purpose of the United Nations is to: "... achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms . . ." The term "human rights" is itself defined by the Universal Declaration of Human Rights, to which almost every state in the world is a signatory. The United Nations has also interpreted the violation of human rights as a "threat to international peace and security," as provided in Article 1 of the Charter, and has used this interpretation to justify military intervention in cases of largely domestic violations of human rights, such as Haiti. In addition, of course, the United Nations has promulgated numerous human rights treaties covering a vast array of human rights. *See generally* U.N. CHARTER (last visited Mar. 25, 2000) <<http://www.un.org/>>.

3. *See, e.g.*, U.N. CHARTER, art. 2, para 7:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII (Actions with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression). To the extent violations of the human rights of a country's people constitutes a "threat to the peace" intervention may be permitted under the Charter.

4. Examples of such intervention include the authorization of economic sanctions and an arms embargo against Rhodesia and South Africa. As noted by Louis Sohn:

Apartheid in South Africa became transformed through interpretations of United Nations law from a social evil, to a repugnant practice, to a crime under international law, to a threat to the peace that must not be tolerated by the international community and which warranted the imposition of mandatory economic sanctions against the deviant government.

LOUIS SOHN, *Interpreting the Law, in UNITED NATIONS LEGAL ORDER* 169, 211 (Oscar Schachter and Christopher Joyner, ed. 1995).

5. Examples of such intervention include Security Council authorization of military intervention in Haiti and the Serbian province of Kosovo.

lowest common denominator. In other words, the level of enforcement in a Multiple Track System would be predicated upon the ability of smaller groups of countries agreeing on a common set of norms, permitting the greatest possible promulgation and enforcement of human rights norms within any regional grouping of countries. Thus, for example, the European Union has created political, civil, social, cultural, and economic rights that surpass the globally articulated norms in those United Nations human rights conventions that have been ratified by a great majority of the world's countries.<sup>6</sup> These regional political, economic, and/or military associations have also created disincentives, of varying degrees of effectiveness, for deviation from these associations' human rights norms. At least some of these associations have demonstrated a growing willingness and ability to intervene in countries where human rights norms have not been respected. For example, compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms is a necessary precondition for admission to the Council of Europe, and by extension, the European Union. The Council, through its human rights bodies and rapporteurs monitors, criticizes, condemns, adjudicates cases against, and even "ex-communicates" members who do not continue to adequately recognize and protect human rights norms. Other entities such as MERCOSUR and NAFTA are already tentatively moving towards basing their regional groupings on mutual respect for certain fundamental human rights norms, particularly those human rights encompassing labor rights and other social and economic rights.<sup>7</sup> For example, NAFTA, through its labor side

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6. See, e.g., the European Convention and the decisions of the European Court of Human Rights.

7. See, e.g., NORTH AMERICAN AGREEMENT ON LABOR COOPERATION ("NAALC") (last visited Mar. 25, 2000) <<http://www.naalc.org/english/infocentre/NAALC/NAALC2.htm>>.

Art. 1 of the NAALC, provides that "[t]he objectives of this Agreement are to . . . (b) promote, to the maximum extent possible, the labor principles set out in Annex 1 . . ." Annex 1, in turn, provides eleven labor principles that the parties to NAFTA and the NAALC are obligated to respect:

1) Freedom of association and protection of the right to organize.

The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.

2) The right to bargain collectively.

The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.

3) The right to strike.

The protection of the right of workers to strike in order to defend their collective interests.

4) Prohibition of forced labor.

The prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labor not for private purposes, and work exacted in cases of emergency.

5) Labor protections for children and young persons.

agreement, provides a mechanism for labor unions or government bodies to bring complaints against another NAFTA member for violations of labor rights, many of which are universally recognized human rights.<sup>8</sup> MERCOSUR has begun discussions towards creating association-wide labor and other standards, although these discussions are only at the most preliminary stage. Nevertheless, it would be reasonable to expect that, as economic integration in MERCOSUR and other regional organizations progresses, social and political harmonization will follow as a means of reducing economic externalities with respect to investment decisions within the economic associations. It is particularly notable that the members of MERCOSUR took a joint position regarding the cooperation among the military regimes of southern South America during the

The establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental, and moral development of young persons, including schooling and safety requirements.

6) Minimum employment standards.

The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.

7) Elimination of employment discrimination.

Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.

8) Equal pay for women and men.

Equal wages for women and men by applying the principle of equal pay for equal work in the same establishment.

9) Prevention of occupational injuries and illnesses.

Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.

10) Compensation in cases of occupational injuries and illnesses.

The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.

11) Protection of migrant workers.

Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions. *Id.*

With respect to MERCOSUR, the progress towards recognizing labor and other human rights has been somewhat less advanced, although there has been a recognition that progress in this area is essential for the full realization of MERCOSUR's potential. *See generally* (last visited Mar. 25, 2000) <<http://www.rau.edu.uy/mercursosur/faq/pre25.merco.htm>> ("Fue bajo el influjo de las Administraciones del Trabajo y de los sectores sindicales de los cuatro países, que se constituye el Sub Grupo Nro. 11 dedicado a las Relaciones Laborales, Empleo y Seguridad Social. Se asumía así el tratamiento de "las ineludibles cuestiones laborales y sociales que traerá consigo la puesta en marcha del MERCOSUR.") *Id.*

8. *See generally* LANCE COMPA, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, 10 CONN. J. INT'L L. 337 (1995).

1970's and 1980's in the abduction and murder of political opponents of the military regimes of those six countries. This cooperation is frequently referred to as the "Condor Plan." Those countries consist of the MERCOSUR members plus associate members Chile and Bolivia. Indeed, the South American press "has christened cooperation between the dictatorships the "Mercosur of Terror."<sup>9</sup> This is but one example of cooperation in MERCOSUR beyond strictly economic issues.<sup>10</sup>

Moreover, the actions of these associations of liberal, democratic states are not simply limited to addressing human rights violations within the borders of their member states. NATO's intervention in Kosovo are examples of the "democratic alliance's" refusal to recognize absolute state sovereignty in the face of systematic human rights violations occurring near the association's borders. Of course, the willingness of NATO and other democratic governments to negotiate with Slobodan Milosevic for as long as they did demonstrates that the realization of a Kantian world order, even in the limited European sphere, is far from complete.

Second, a strong argument can be made that the relatively weaker systems of human rights protections contained in the United Nations system of human rights protection serve different functions than do the human rights systems of the regional groupings and may, in fact, be more appropriate for a system that contemplates protecting human rights for the entire world community. This argument takes some of the sting out of the widespread criticism of the ineffectiveness of the United Nations human rights system and enforcement mechanisms.<sup>11</sup> To the extent the global system of human rights enforcement serves as an enforcement mechanism for the entire world community (except those few countries that have been expelled for particularly egregious human rights abuses or threats to the peace), its enforcement mechanisms and norms are necessarily subject to a much "lower" common denominator. This is not to say that the system should not constantly strive to strengthen its mechanisms

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9. See Agence France Presse, Brazil lawmakers seek to prosecute Paraguayan ex-dictator for condor plan (May 18, 2000); see also Mario Osawa, Latin America: The "Mercosur of Terror" or Integrated Repression, Inter Press Service (Jan. 10, 1999).

10. See Federico Luis Larrinaga, 53 *Naval War College Review* 11 (April 1, 2000). In that article, the author notes that "For example, five countries (Argentina, Brazil, Paraguay, Uruguay, and the United States) joined forces in a peacekeeping exercise. Since then, multinational training and exercises have started in different countries. In the present environment, defense agreements within the structure of MERCOSUR are likely to succeed, particularly in the fields of peacekeeping, environmental protection, and humanitarian relief (search and rescue, for instance)." In addition, regionally, Argentina has joined with Brazil in creating a Nuclear Material and Policy Control Agency; with the Southern Cone Common Market nations in declaring MERCOSUR a "peace zone"; and with Brazil and Chile forming confidence-building-measures committees on combined exercises, defense and security issues analysis, and information sharing on new weapons." *Id.*

11. See, e.g., DOUGLAS DONOHO, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 *MICH. J. INT'L L.* 851 (1993).

and norms, but rather that it is necessarily limited in the extent to which it can do so given the extraordinarily diverse constituency it serves.

Third, the development of a Multiple Track System serves as a valid alternative to the approach of those international law commentators who have advocated the articulation of a universal set of human rights standards applicable to all countries and denying participation in the international community to those countries that fail to fulfill those global standards.<sup>12</sup> This could be considered the "all-or-nothing" approach.

The normative justification for such an approach is quite obvious: human rights are good. There are, nevertheless, other justifications for such an approach that are based on rather traditional views of the function of international law. It has been argued by many philosophers and international legal scholars, from Kant to Tesón, that a philosophy or system of international law based on Kant's categorical imperative, and an alliance of liberal states embracing human rights norms, has an empirical benefit in terms of preserving world order.<sup>13</sup> The empirical benefit for world order results from the tendency of democratic republics *not* to engage in war with each other. Kant predicted this tendency of liberal states not to make war with each other, and there is considerable empirical evidence to support Kant's original hypothesis.<sup>14</sup> Thus, it arguably follows that international law should demonstrate a clear preference for liberal democracies rather than authoritarian states. This preference should be recognized even within the context of a traditional view of international law, whereby the primary function of international law is the preservation of world order.

The problem with this approach, which admittedly enjoys an attractive philosophical clarity, is that it does not resolve what system of human rights protection, or even world order, would exist to regulate the conduct of those countries that do not comply with those global standards, but are short of constituting true international "outlaws." This all-or-nothing approach runs the risk of expelling these human rights violators out of the only international body that incorporates the vast majority of the world's nations: the United Nations. It certainly may be appropriate to expel certain countries from the United Nations that engage in systematic and severe human rights violations. Nevertheless, for the "all-or-nothing" approach to mean anything other than the system that is already in place, a substantially greater number of countries

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12. For example, Fernando Tesón would argue that international law can only be based upon an alliance of states that respect the human rights of their own citizens. In his opinion, states must "respect human rights as a precondition of joining the international community." FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 2 (Transnational 1997).

13. *See id.*

14. *See, e.g.*, BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (Princeton University Press 1993).

would have to be expelled from the United Nations. A truly useful institution for world dialogue among vastly different countries would then lose much of its original purpose.

The all-or-nothing commentators may be correct that the contemporary approach of international law, focusing almost entirely on preserving a world order of sovereign states, is empirically ineffective and normatively wrong. Nevertheless, the all-or-nothing approach does little to further human rights in those countries that opt out of the rigid universal human rights system that these legal commentators advocate. These all-or-nothing legal commentators arguably underestimate the importance of maintaining a system of global relations which permits liberal and illiberal countries to coexist peacefully and to maintain communication and dialogue. In other words, even if one assumes the underlying normative and empirical assumptions of these advocates of creating a much more rigid and demanding universal system of human rights protection, as this author would, the all-or-nothing approach still leaves unanswered the question of what the international community's strategy should be with respect to those countries that are *not* eligible to "join the international community." Those countries that are ineligible will continue to exist, and unless a system of international relations provides rules that allow all of the countries of the world to coexist, the potential for conflict can only increase.

Fourth, to the extent that the Multiple Track System recognizes a deeper integration and harmonization of the human rights norms existing in the member countries, it helps to protect, in a dialectical fashion, the domestic system of human rights protection already existing in those countries. As Tesón himself argues, "international law and *domestic* justice are fundamentally connected."<sup>15</sup> However, a just system of international law will only be correlated with domestic justice, and vice versa, as long as countries are willing to recognize the authority of international law in their domestic legal systems. This recognition of the authority of international law is much more likely to occur in a regional context than in a global one. In part, this is because the economic integration that frequently accompanies the creation of these regional groupings of countries provides a clear economic incentive for members of regional groupings not to stray from their human rights commitments.

#### CONCLUSION

While international law is far from attaining a world order based on respect for human rights norms, the world's institutions are, haltingly and unevenly, establishing the precedents on a regional and global level to realize that vision. In creating a Multiple Track System of Human Rights Protection,

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15. TESÓN, *supra* note 10, at 1.

the world legal order is increasingly providing mechanisms for dealing with those nations who refuse to recognize the fundamental human rights of their citizens.

We must rethink and reconstruct international law in a way that incorporates and recognizes that “the ultimate aim of international institutions is to foster the development of each individual’s full potential as an autonomous human being, to protect freedom.”<sup>16</sup> Fortunately, a second track of global governance has emerged, creating the alliance of free states envisioned by Kant and creating, to varying degrees, persuasive economic and political incentives for a world order wherein countries respect the fundamental human rights of their citizens.

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16. TESÓN, *supra* note 10, at 26.