



by Jeremy Rabkin

# A New World Order

## The Clinton Doctrine could be turned against the U.S.

**A**s Kosovar refugees began streaming back to their homes in June, critics of the NATO "air campaign" had to acknowledge that it accomplished more than we expected. But along with the human misery and physical devastation, there are some shredded legal principles that still need tending.

There is, to start with, the question of whether we now understand international law to give open license to this sort of humanitarian intervention, when the intervening power makes no claim to be acting in self-defense nor to be repelling aggression across an international boundary. President Clinton seems to think it does. "But never forget if we can do this here," he told an audience of American troops preparing to enter Kosovo in late June, "we can then say to the people of the world, whether you live in Africa or Central Europe or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it's within our power to stop it, we will stop it."

The implication of this Clinton Doctrine is that it is all a matter of power—"our power," as he put it. The qualification may mean that we will only act when we have the "power" to do so without taking many (or any?) casualties of our own. That, in turn, may mean we will rely on high-level bombing regardless of the "collateral damage" that might result. Oddly, much of the world now seems prepared to embrace this open-

ended bombing commitment from Washington.

By endorsing the NATO occupation of Kosovo, the U.N. Security Council resolution of June 10 appeared to ratify the Clinton Doctrine. A month earlier, the International Court of Justice rejected Serbia's plea for condemnation of NATO. The World Court invoked rather technical, jurisdictional grounds for its ruling, but it had ignored the very same jurisdictional obstacles when it condemned U.S. interventions against the Sandinista regime in Nicaragua in 1986. Our Balkan intervention, in short, has provided strong support for what most legal scholars acknowledge is a new and controversial principle—that national sovereignty must take second place when outside intervention is needed to protect human rights.

The Clinton administration seems determined to make this an *international* doctrine. Though it doesn't trust the U.N. to authorize humanitarian interventions, it still wants to have international sanction for them and international standards for their conduct. Not only did the administration seek and win Security Council endorsement for the Kosovo occupation, a move that implies that the continuation of NATO's role in Kosovo will be subject to continuing U.N. approval. The same resolution also "demands full cooperation by all concerned, including the international security presence [i.e., the NATO occupation force], with the International Tribunal for the Former Yugoslavia."

This last item is particularly notable because, by the terms of its charter, this tri-

bunal in the Hague has jurisdiction over all forces in the region—including NATO's. In mid-May, as the bombing intensified, Mary Robinson, the U.N.'s high commissioner for human rights, pointedly noted that excessive NATO bombings might well constitute war crimes. The decision on whether to prosecute is in the hands of an independent prosecutor, over whom NATO has no direct control. High Commissioner Robinson claimed that in her warnings she was simply relaying the official view of the independent prosecutor, Louise Arbour.

Only a few days later, a group of Canadian lawyers and law professors submitted a well-argued brief to the prosecutor, calling for indictments of top NATO officials and top officials of the NATO member states. The charter of the Hague Tribunal for Yugoslavia specifically directs that the prosecutor "shall initiate investigations on the basis of information obtained from any source, particularly [including]...non-governmental organizations." And the Canadian lawyers do present a plausible case for their charges.

As the air war continued without success, NATO became more aggressive in its targeting. It dropped cluster bombs from high altitudes, which guaranteed civilian casualties. Dozens of hospitals, schools, and churches were hit, so many as to raise reasonable questions about NATO strategy. Oil refineries and chemical plants were also bombed, allowing toxic wastes to spill into rivers and farm fields, again raising questions about the degree of caution in NATO targeting. In deliberately destroying electric power plants and water pumping stations, NATO seemed to be pursuing a strategy designed to impose suffering on civilians—knowing

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that such hardships could have particularly devastating consequences for children, the ill, and the elderly.

The Geneva Convention on protection of civilians in wartime (signed by all NATO states) clearly condemns such actions. Drawn up after World War II, principally by the Allied powers, the Geneva Convention codified long-standing laws of war. Unlike so many subsequent human-rights treaties, they are not empty appeals to sentiment. When three American soldiers were captured early in this war, the U.S. was quick to insist that the Serb government accord them all the rights stipulated in the Geneva Convention on the treatment of prisoners of war—and the Serbs largely did so.

**T**he case against NATO's bombing campaign doesn't rest merely on a hostile interpretation of small details in the relevant Geneva Convention. By the end of the air campaign, Serb authorities reported at least 2,000 civilian deaths, with many thousands more injured. That is greater than the number of Albanians killed in Kosovo in the months preceding the air war. Serb forces committed many more murders under cover of the air campaign, perhaps over 3,000. But deaths attributable to NATO bombing are at least as many as the initial killing NATO intervened to stop. It is hard to dismiss demands for international scrutiny of NATO tactics as a mere propaganda ploy.

Now that NATO forces are on the ground in Kosovo, their conduct in fire-fights (even when acting in self-defense) will also come under the jurisdiction of the war crimes prosecutor at the Hague. Should American marines act with what some observers regard as excessive force or reckless disregard for civilian casualties, they may have to answer to international authorities.

The Clinton administration has both offered up American forces to humanitarian missions around the world and submitted those forces (and, in principle, their civilian chiefs) to international supervision for their conduct of these missions—including even liability to criminal trials before foreign judges in the Nether-

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lands. We have promised full cooperation with the tribunal, which means in principle that we should deliver up any Americans who are indicted.

It's not likely that Louise Arbour will indict President Clinton himself. The Canadian jurist could not indict American leaders without indicting their Canadian counterparts. Ottawa found her reliable enough to announce in June that she would be appointed to the Canadian Supreme Court. Even if her successor should decide to make an example of Sandy Berger or Madeleine Albright, there is not much danger that U.S. authorities will hand them over.

Yet the prosecutor did indict President Milosevic during the war, when there wasn't much likelihood that Serbs would turn him in. Not only does Milosevic control the army and the police, but the country's constitution—in common with many Western constitutions—prohibits extradition of Yugoslav citizens to foreign tribunals. NATO seized on the indictment as a propaganda coup anyway. Could such a gesture be used against the United States?

Perhaps quite easily. Consider the strains in the NATO alliance as the air campaign escalated. Are we certain that Greece or Italy or Hungary, for example, would still have swallowed all their doubts if an independent prosecutor had handed down indictments for the conduct of the war? Had some NATO allies broken ranks, would the U.S. have maintained its resolve? In a future humanitarian intervention, the U.S. may not act with NATO but on its own or in a smaller coalition. Even so, if indictments of the U.S. and its allies help to mobilize critics in other

countries, will we continue to press forward to liberate threatened people?

The international criminal tribunal for the former Yugoslavia is only one of two such existing bodies. (The other is for Rwanda, where the war is over and the new government is quite happy to cooperate with U.N. investigations of its genocidal predecessor.) But the U.S. took the lead in getting the Security Council to establish these earlier tribunals. Now, when most countries have sought to establish a truly International Criminal Court, potentially reaching any country for war crimes anywhere, the Clinton administration has been isolated in its opposition to this larger venture. We are simultaneously urging more support for the local model while resisting the global extension. It is not clear we can now prevent the global criminal court from coming into force. We have, in any case, established the precedent that the Security Council can put down courts whenever it wants to (as it did in Yugoslavia) and it is not clear we even have the will to stop new ventures of this kind.

We may think we can keep these tribunals within safe limits, but they were set up without any mechanism of control. They're set up to spin out their own rules of procedure—rules quite remote from our own notions of due process. The tribunal for Yugoslavia, for example, has allowed prosecutors to introduce evidence from unnamed witnesses, not available for cross-examination, which any American court would instantly reject as improper “hearsay” evidence. If the tribunal demands the delivery of a U.S. soldier indicted for war crimes, do we hand him over? Do we prefer to risk mocking our own creation—or our own Constitution? The charter of the tribunal stipulates that it is to have “primacy over national courts,” which seems to give it jurisdiction even over soldiers acquitted in American proceedings.

There are many legal issues here to think through. Too bad it has to be done by an administration that regards law as nothing more than a game to be mastered by spin control. On these matters, the administration now seems to be thinking about as far ahead as when it launched the air war on March 24, promising it would be over in a few days. ❧



# West Point Recognition

*Tuesday*  
**W**e've not much longer here to stay, / For in a month or two, / We'll bid farewell to cay-det grey, / And don the Army Blue.

I know that song well. My father-in-law was in the West Point Class of 1944. When my wife and I got married, he gave me, among many other things, a record of Army songs like "Army Blue" and "Benny Havens, Oh!" and I listened to them. It's all on my mind because my wife, Tommy, and I are on our way in a huge GMC Yukon to Mahwah, New Jersey, to join the class of 1944 for their 55th reunion.

We're staying at the Mahwah Crossroads Sheraton, which is a far cry from the world's classiest hotel, New York's Essex House, which put us up during the Emmies. But we're here not for the hotel, but to see the class of 1944, their wives and children and grandchildren, and to add our homage to that of a grateful nation.

The first event was a barbecue. The food was nondescript, but the grads of 1944 looked great. Trim, fit, enthusiastic, alert, well-dressed. They looked, in fact, like an ad for a military academy. I sat with my father-in-law, who is, as usual, the handsomest fellow in the room, and his former roommate, and a man named Colonel Farris. He seemed to be there alone, and indeed he was, since he was a widower.

To make a long story short, Colonel Farris went into the Army Air Corps when he left West Point in the summer of 1944. He was sent to a small island called, if I have the spelling right, Ieshima, right next to Okinawa, where there was a fine airfield for use in attacking the Empire of Japan.

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"One day we had quite an adventure," he told me. "We got word that the Japanese had built some airfields near Seoul, Korea, or Kanjung, as the Japanese called it." (I hope I'm spelling this right.)

"Isn't that a long way from Okinawa?" I asked.

"They gave us extra fuel tanks," he said, "and we flew seven hours to Seoul. We caught a whole squadron of Japanese planes in mid-air. We shot down thirty-seven of them in about fifteen minutes."

"Wow," I said.

"Well, they were on a training mission," said Colonel Farris. "Most of them or at least some of them didn't even have ammunition for their guns. But some did and we got them, too. It was such a big haul that we got a Presidential Unit Citation."

"Amazing. And then you flew back?"

"Seven hours back, and we had to do it fast because we didn't have enough fuel to hang around the target for long. That was the problem. When I was on my way back, something went wrong with a gasket, and oil started spewing out all over the cockpit and all over my face. I couldn't see through the windscreen, and I had to slide back the canopy and waggle the plane from side to side so I could see out to land."

"Why didn't you parachute out?"

"Because I was so covered with oil that I figured that my chute would be soaked with oil, too, and I would just sink. So I got talked in by radio and then landed and got out and kissed the ground."

"Amazing. Just incredible," I said. "Weren't you terrified?"

Colonel Farris shrugged and smiled. "We were well trained," he said, "and I was very busy trying to see, so I didn't really feel any way but that I wanted to get that thing on the ground."

"I cannot even imagine such bravery," I said.

"It was standard," he said, and then he started to talk about his daughter in New England, who was obviously very important to him. I wandered from table to table looking at the men and their families. No one was bragging. No one was wearing huge jewelry. People were demure and well behaved. Good Lord, I thought to myself. This is America the way it was when it all worked right. This is the America of Gary Cooper, of *The Best Years of Our Lives*.

I think even Tommy senses the gravitas of the room. He's listening, respectful, actually taking it all in with wonder.

*Wednesday*  
**W**hat a day. We drove from Mahwah to West Point along windy, confusing roads, got lost once, and then came to West Point. I had on a large pin that said BEN STEIN—USMA CLASS OF 1944. My wife had on a similar pin. When we got out of our car and started to walk towards the parade grounds, cadet after cadet snapped off a crisp salute and many said, "Wow, I had no idea you were a grad."

"I'm not," I kept saying to them. "My father-in-law is and we're here visiting him."

Frankly, I was a little upset that they thought I was twenty-two years older than I am. But I was so proud and happy in my subterfuge that I, terrified even of loud noises, might be thought of as a USMA grad, that I secretly gloated.

Anyway, we rushed over to the parade ground just as Colonel Denman, my father-in-law, and his class were marching in wearing blazers and slacks and black cotton hats, and looking extremely distinguished. There were also men there from the class of 1939, the class of 1949, the