# EDITORIAL COMMENTS: NATO'S KOSOVO INTERVENTION

## KOSOVO AND THE LAW OF "HUMANITARIAN INTERVENTION"

### I.

"Kosovo" has compelled us to revisit the troubled law of "humanitarian intervention." The terrible facts in and relating to Kosovo in 1998–1999 are known and little disputed. The need to halt horrendous crimes against humanity, massive expulsions and war crimes, was widely recognized. NATO intervention by military force was widely welcomed, but it was also sharply criticized. And it inspired much searching of soul by students of international law.

Now that the *fait* of the NATO bombing is *accompli*, and has been assimilated into a political resolution blessed by the Security Council, the legal issues of humanitarian intervention can be addressed in comparative tranquility, and the legal lessons pursued with less urgency, and with greater wisdom.

Was military intervention by NATO justified, lawful, under the UN Charter and international law?[1] Does Kosovo suggest the need for reaffirmation, or clarification, or modification, of the law as to humanitarian intervention? What should the law be, and can the law be construed or modified to be what it ought to be?

### II.

Before the Second World War, international law prohibited "intervention" by any state within the territory of another without that state's consent: international law prohibited unilateral intervention in internal wars; international law prohibited intervention even for agreed, urgent humanitarian purposes. In 1945 the UN Charter reaffirmed those prohibitions as part of a general prohibition on the use of force.

Article 2(4) of the Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state" (subject only to the right of self-defense, Article 51). Article 2(4), it has been accepted, prohibits intervention by a state in internal war in another state by military support for either side. It has been commonly accepted, too, that the prohibition on intervention applies regardless of the political (democratic or less-than-democratic) ideology or the moral virtue of the government of the target state or of either side in the internal war. War apart, there was general agreement, too, that the Charter prohibits intervention by any state for humanitarian purposes.

### III.

In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect a conclusion that the "sovereignty" of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be

[1] I do not address here whether the execution of the military intervention was subject to and may have violated any of the laws of war.

protected from genocide and massive crimes against humanity. The law that prohibits unilateral humanitarian intervention rather reflects the judgment of the community that the justification for humanitarian intervention is often ambiguous, involving uncertainties of fact and motive, and difficult questions of degree and "balancing" of need and costs. The law against unilateral intervention may reflect, above all, the moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely.

But, as Professor Richard Falk wrote long ago: "The renunciation of [unilateral] intervention does not substitute a policy of nonintervention; it involves the development of some form of collective intervention."[2] The need for intervention may sometimes be compelling, and the safeguard against the dangers of unilateral intervention lies in developing bona fide, responsible, collective intervention.

Serious efforts to develop "some form of collective intervention" began soon after the end of the Cold War, when it ceased to be hopeless to pursue collective intervention by authority of the UN Security Council. In 1991 and 1992, the Security Council authorized military intervention for humanitarian purposes in Iraq and Somalia. In principle, those interventions were not justified as "humanitarian" (a term that does not appear in the UN Charter); the theory supporting such actions was that some internal wars, at least when accompanied by war crimes, and massive human rights violations and other crimes against humanity even if unrelated to war, may threaten international peace and security and therefore were within the jurisdiction and were the responsibility of the Security Council under Chapters VI and VII of the Charter. Of course, under Article 27(3) of the Charter, a Security Council resolution to authorize intervention, like other "nonprocedural" matters, was subject to veto by any permanent member. Thus, by the sum (or product) of law and politics, humanitarian intervention by any state was prohibited; humanitarian intervention was permissible if authorized by the Security Council, but a single permanent member could prevent such authorization.

Kosovo surely threatened international peace and security, as the Security Council had held in several prior resolutions. And, in 1998–1999, when negotiation and political-economic pressures appeared futile, for many Kosovo begged for intervention by any states that could do so, and by any means necessary. NATO heeded the call. It did not ask leave or authorization from the Security Council.[3]

The reason why NATO did not seek explicit authorization from the Security Council is not difficult to fathom. Even after the Cold War, geography and politics rendered unanimity by the permanent members in support of military action (especially in the Balkans) highly unlikely. Evidently, NATO decided that not asking for authorization was preferable to having it frustrated by veto, which might have complicated diplomatic efforts to address the crisis, and would have rendered consequent military action politically more difficult.

Subsequent events confirmed that fear of the veto had not been unfounded. After the NATO action was begun, the representative of the Russian Federation proposed a resolution in the Security Council to declare the NATO action unlawful and to direct that it be terminated.[4] In the vote, the proposed resolution was supported by three states, including Russia and China, two of the permanent members. It was not implausible for NATO to have assumed that Russia, or China, would have vetoed a resolution authorizing military intervention by NATO.

[2] RICHARD A. FALK, LEGAL ORDER IN A VIOLENT WORLD 339 (1968).

[3] The United Kingdom apparently thought that authorization by the Security Council was not necessary. The United States apparently considered that the Council had provided the necessary authorization by implication, in the earlier resolutions on Kosovo, Resolutions 1160 (Mar. 31, 1998), 1199 (Sept. 23, 1998), and 1203 (Oct. 24, 1998).

[4] *See Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia*, UN Press Release SC/6659 (Mar. 26, 1999) <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>.

## IV.

Was the NATO action unlawful?

The Charter prohibition on intervention, even for humanitarian ends, is addressed to individual states, but what the Charter prohibits to a single state does not become permissible to several states acting together. Intervention by several states is "unilateral," i.e., "on their own authority," if not authorized by the Security Council. Was NATO intervention in Kosovo authorized? Was it a justifiable exception?

The argument for NATO might go something like this.

Human rights violations in Kosovo were horrendous; something had to be done. The Security Council was not in fact "available" to authorize intervention because of the Veto. Faced with a grave threat to international peace and security within its region, and with rampant crimes reeking of genocide, NATO had to act.

NATO intervention was not "unilateral"; it was "collective," pursuant to a decision by a responsible body, including three of the five permanent members entrusted by the UN Charter with special responsibility to respond to threats to international peace and security. NATO did not pursue narrow parochial interests, either of the organization or of any of its members; it pursued recognized, clearly compelling humanitarian purposes. Intervention by NATO at Kosovo was a "collective" humanitarian intervention "in the common interest,"[5] carrying out the responsibility of the world community to address threats to international peace and security resulting from genocide and other crimes against humanity. The collective character of the organization provided safeguards against abuse by single powerful states pursuing egoistic national interests. And action by NATO could be monitored by the Security Council and ordered to be terminated. The NATO action in Kosovo had the support of the Security Council. Twelve (out of fifteen) members of the Council voted to reject the Russian resolution of March 26, thereby agreeing in effect that the NATO intervention had been called for and should continue. And on June 10, the Security Council, in Resolution 1244 approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council's support.

## V.

In my view, the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council. Some—governments and scholars—thought that NATO too needed, but had not had, such authorization, at least ab initio. But many—governments and scholars—thought that something had to be done to end the horrors of Kosovo, that NATO was the appropriate body to do it, and perhaps the only body that could do it, and that the law should not, did not, stand in the way.

In 1991 Professor Oscar Schachter wrote:

> Even in the absence of such prior approval [by the Security Council], a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.[6]

[5] *Compare*: "to ensure, by the acceptance of principles and the institution of methods, that armed force *shall not be used, save in the common interest.*" UN CHARTER, Preamble (emphasis added).

[6] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 126 (1991).

Does that apply to Kosovo? Is it better to leave the law alone, while turning a blind eye (and a deaf ear) to violations that had compelling moral justification? Or should Kosovo move us to push the law along, to bring it closer to what the law ought to be?

Humanitarian intervention on the authority of the Security Council recognizes that the Charter prohibition on the use of force does not apply to the use of force "in the common interest"; it also recognizes that intervention authorized by the Security Council affords the strongest safeguard against abuse of humanitarian intervention that the contemporary political system provides. But, as Kosovo illustrated, the Council, as presently constituted and under prevailing procedures, remains seriously defective and may sometimes be unavailable for that awesome responsibility.

NATO did not seek the Council's mantle, presumably because of the fear of the veto. We are not about to see a major restructuring in the composition of the Security Council, and we are not likely soon to see an end to the veto generally. But might we pursue an exception to the veto, as regards humanitarian intervention, in practice if not in principle?

That may be what Kosovo in fact achieved, in some measure. For Kosovo, Council ratification after the fact in Resolution 1244—formal ratification by an affirmative vote of the Council—effectively ratified what earlier might have constituted unilateral action questionable as a matter of law. Unless a decision to authorize intervention in advance can be liberated from the veto, the likely lesson of Kosovo is that states, or collectivities, confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto: instead of seeking authorization in advance by resolution subject to veto, states or collectivities will act, and challenge the Council to terminate the action. And a permanent member favoring the intervention could frustrate the adoption of such a resolution.

## VI.

Neither one state nor a collectivity of states should be encouraged to intervene on its own authority in expectation, even plausible expectation, of subsequent ratification or acquiescence by the Security Council. But that is likely to happen, as it did as regards Kosovo, unless the Security Council and the permanent members in particular are prepared to agree to adapt their procedures to permit the Council's consideration in advance, with the understanding that the veto would not be operative.

Changes in the law and in UN procedures and understandings to that end might begin with Chapter VIII of the Charter.

Article 52(1) provides:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Article 53(1) adds: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority."

Article 52 readily lends itself to using NATO and similar regional bodies, for pacific settlement of disputes within their region. Article 53 also contemplates that the Security Council might use regional arrangements for "enforcement action under its authority." It is unrealistic, and perhaps undesirable, to ask the Security Council to give general approval in advance for regional groupings to engage in military humanitarian intervention. But should the law and practice be that a recognized, responsible regional collective body may intervene for bona fide humanitarian purposes unless the Security Council orders it to cease and desist—by a vote not subject to the veto? Or, better, might there be agreement that

recognized regional bodies may intervene if authorized in advance by vote of the Security Council not subject to veto?

Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the UN Charter. The sometimes-compelling need for humanitarian intervention (as at Kosovo), like the compelling need for responding to interstate aggression (as against Iraq over Kuwait), brings home again the need for responsible reaction to gross violations of the Charter, or to massive violations of human rights, by responsible forces acting in the common interest. We need Article 43 agreements for standby forces responsible to the Security Council, but neither action by the Security Council under Article 42, nor collective intervention as by NATO at Kosovo, can serve without some modification in the law and the practice of the veto. The NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step toward a change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council. That may be a desirable change, perhaps even an inevitable change. And it might be achieved without formal amendment of the Charter (which is virtually impossible to effect), by a "gentlemen's agreement" among the permanent members, or by wise self-restraint and acquiescence. That, some might suggest, is what the law ought to be, and proponents of a "living Charter" would support an interpretation of the law and an adaptation of UN procedures that rendered them what they ought to be. That might be the lesson of Kosovo.

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## NATO'S CAMPAIGN IN YUGOSLAVIA

The North Atlantic Treaty Organization's seventy-eight-day bombing campaign in Yugoslavia, the first large-scale military action by the alliance in its history, has given rise to a casuist's dilemma. How can an effort so broadly supported in its objectives—to stem Belgrade's expulsion of ethnic Albanians from Kosovo and block a gross violation of international law—be so uncertain in its legal basis?

The lack of any simple precedent for the air campaign is only a starting place in deciding upon legality, for the formal system of international law cannot claim a monopoly on generative power. The lack of any single source of rules or ultimate arbiter of disputes in international affairs means that state practice remains key to the shaping of legal norms. When an action is deemed morally urgent by a majority of states—even an action involving the use of force—it is likely to shape a legal justification to match.

The war over Kosovo may mark the end of Security Council classicism—the common belief that all necessary and legitimate uses of force outside the Council's decision can necessarily be accommodated within the paradigm of interstate self-defense. It may also mark the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action.

The circumstances that gave rise to the Kosovo intervention are familiar. Kosovo gained autonomy within the state of Serbia in 1946, and this special status was confirmed in Marshal Tito's 1974 Yugoslav Constitution. In 1989, Belgrade revoked the province's autonomy, following the assertion by Serbian President Slobodan Milošević that the Serb minority in Kosovo was at risk. Kosovo Albanians, facing discrimination in public and private employment and in the exercise of civil rights, resorted to the development of parallel national institutions and many sought independence using the familiar techniques of