

**MA International and Comparative Legal Studies**

***International Protection of Human Rights***

**Is humanitarian intervention, without explicit Security Council authorization,**

**lawful? The Case of Kosovo**

(3011 words in main text)

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## Introduction

International law prohibits violations of human rights and humanitarian law by states against their own citizens. These duties are owed *erga omnes*<sup>1</sup> and it is therefore incumbent upon all states to respond, individually or collectively and through legal and peaceful means, when these violations occur. However, undertaking military action in order to intervene to end violations being perpetrated against a civilian population, is not a straight forward issue. Indeed, the prohibition of the threat or use of force is embedded in Article 2(4)<sup>2</sup> of the UN Charter and was reaffirmed in the General Assembly's Declaration of 'Friendly Relations' of 1970<sup>3</sup> which outlawed in absolute terms, forcible intervention as a countermeasure to violations.

Humanitarian intervention, for the purposes of this paper, is defined as "the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied"<sup>4</sup>. The debate that surrounds NATO's unsanctioned intervention focuses on whether states have the right to transgress the sovereignty of other states and use force in order to protect the human rights of individuals other than their own citizens without Security Council authorization. The scope of arguments on the subject range

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<sup>1</sup> Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole.

<sup>2</sup> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purpose of the United Nations"

<sup>3</sup> GA Resolution 2625 (1970)

<sup>4</sup> Holzgrefe, J.L. & Keohane, R.O., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), p.18

from whether a new right humanitarian intervention is indeed lawful, to qualifying NATO's 1999 military intervention in Kosovo as a blatant breach of Article 2(4) and of the UN Charter.

This paper will explain why, increasingly, humanitarian intervention is being used as a method to contain humanitarian disasters and what the implications of unsanctioned unilateral intervention are. Crucial to the debate is whether international law permits armed humanitarian intervention when exercised without Security Council authorization.

### **Why Humanitarian Intervention**

Seeking to achieve global dominance, international politics during the Cold War period was governed by the confrontation between Soviet and US ideologies. The end of the Cold War saw the international community favouring political solutions to conflicts, rather than military ones. However, with the demise of the USSR, a power vacuum in global politics emerged and in the face of increasing state-fragmentation, achieving success in containing conflicts through diplomatic and political means, proved to be problematic. Weak global institutions that lacked developed political systems capable of managing conflicts and a military policy and force necessary to contain wars exacerbated the deterioration of domestic tensions into violent internal conflicts, resulting in catastrophic humanitarian conditions and severe human rights violations committed by states against their own citizens. This further exerted pressure on the internal and regional stability of neighbouring countries.

The 1990s witnessed some of the most appalling human rights abuses in the name of genocidal expansion, the former Yugoslavia and Rwanda being the primary conflicts that come to mind. What has been a characteristic feature of these events has been the UN Security Council's repeated lack of cohesion and its inability to form a consensus with regard to a timely and effective action plan to halt the unfolding events on the ground. While an indecisive international community debated as to the course of action to be taken, a near million people died during the Rwandan genocide and an estimated 200,000 were killed in Bosnia. Thousands of refugees fled from the conflict areas into neighbouring countries, creating a humanitarian disaster of monumental proportion that will take decades to resolve. The international community has been widely criticized for defaulting on its *erga omnes* duties by failing to halt the violations that were being committed. It was against this setting that NATO intervened militarily in Kosovo in 1999.

### **Humanitarian Intervention in Kosovo**

Following Tito's death in 1981, Kosovo became a bed of unrest as a result of Serb oppression, which turned to outright discrimination and persecution by the 1990s. While hundreds of thousands of Albanian Kosovars fled the country, the government of Yugoslavia promoted the immigration of ethnic Serbs into Kosovo<sup>5</sup>, exacerbating the confrontation between Serb forces and the KLA<sup>6</sup>. In March 1998 the Security Council passed Resolution 1160, pushing for a political

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<sup>5</sup> Hilpold, P., *Humanitarian Intervention: Is there a Need of a Legal Reappraisal?*, (2001) 12 EJIL, p. 438

<sup>6</sup> Kosovo Liberation Army

dialogue between the concerned parties, while emphasizing "that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo (would) lead to the consideration of additional measures". The situation in Kosovo worsened and by September 1998 the Security Council passed Resolution 1199, in which it stated that "should the concrete measures demanded in this Resolution and Resolution 1160 not be taken, (it would) consider further action and additional measures to maintain or restore peace and stability in the region".

After several failed attempts to find a political solution to the conflict, the international community began to express deep concern at the threat posed by Serb military build-up, the arming of ethnic Serb civilians in Kosovo and an imminent possibility of a conflict that could spill over into neighbouring countries, threatening an already precarious regional stability. The Security Council passed Resolution 1203 in October 1998, in which it welcomed NATO's involvement through its provision of air verification missions, and demanded that all parties on the ground cease hostilities, emphasizing that the Security Council still remained seized of the matter.

By January 1999, the situation rapidly worsening, the North Atlantic Council issued an initial authorization for air strikes, stating that the Kosovo crisis formed a threat to the peace and security of the region and that NATO's strategy would be to halt the violence in Kosovo and avert a humanitarian crisis<sup>7</sup>. NATO countries on the Security Council were concerned that a Russian and Chinese veto on a resolution requesting authority for using force would have complicated

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<sup>7</sup> NATO Press Release 99/12, 30 January 1999

diplomatic efforts to address the crisis and would have rendered politically problematic any subsequent military action taken. NATO's air campaign against Yugoslavia began in March 1999 and ended in June of the same year. A Security Council Resolution authorizing the air strikes was never sought for.

### **International Law and the Use of Force**

The legality of the use of force by states or international organizations is determined by the norms of international law, both in treaty and customary law. While an explicit treaty prevails over an ambiguous rule of customary law, the UN Charter, prevails above all other treaties<sup>8</sup>.

Article 2(4) of the UN Charter, which prohibits the use of force, is part of *jus cogens*<sup>9</sup> and has only two exceptions to it. The first, Article 51<sup>10</sup> of the Charter, which gives leave from Article 2(4), to use force in exercising the right of individual or collective self-defence in the event of an armed attack by a state. "Individual self-defence" refers to a state's right to defend itself when under armed attack and "collective self-defence" refers to other states helping the state in its defence, either on request of the state or on the basis of a prior agreement. The second, Articles 39<sup>11</sup> and 42<sup>12</sup>, give the UN Security Council the authority to

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<sup>8</sup> Holzgrefe, J.L. & Keohane, R.O., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), p.180

<sup>9</sup> A rule or principle in international law that is so fundamental that it is binding to all states and from which no derogation is permitted and which can be modified only by a subsequent norm of international law that possesses the same peremptory character.

<sup>10</sup> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security"

<sup>11</sup> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures

mandate the use of force, through a resolution, in the event of a threat to or a breach of international peace, or an act of aggression.

In placing a high threshold for the justification of the use of force, the Charter aims to maintain stability by minimizing the resort to force as a means of conflict resolution. The non-opposition by the permanent members of the Security Council, when authorizing the use of force, is designed to ensure an acceptance amongst key states of a decision to take military action. These mechanisms have as a goal to protect state sovereignty from unwarranted external military interference.

While the articles in the UN Charter clearly delineate what is considered within the boundaries of international law, there is nevertheless a debate as to the exact scope of the prohibition. Indeed the question that is posed in the context of humanitarian intervention is whether Article 2(4), when calling for refrain "...from the threat or use of force against the territorial integrity of political independence of any State.." should be construed as a strict prohibition or whether the use of force, when its goal is humanitarian and not the deposing of a government and territorial appropriation is not "...inconsistent with the purpose of the United Nations" and therefore not unlawful<sup>13</sup>

International law has dealt with previous breaches by States, of Article 2(4) and the prohibition of the use of force. In the 1949 *Corfu Channel* case, the United

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shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"

<sup>12</sup> "Should the Security Council consider that measures provided for in Article 41 would be inadequate or would have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations"

<sup>13</sup> Gray, C., *International Law and the Use of Force* (2000), p. 24

Kingdom defended its intervention in Albanian territorial waters on the basis that no one else was prepared to deal with the threat of the mines planted in the international straight. The ICJ<sup>14</sup> rejected this line of defence and stated that it regarded "...the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."<sup>15</sup>

In the 1986 *Nicaragua v. United States*<sup>16</sup> case the ICJ considered whether the protection of human rights, although not invoked by the US, could provide a legal justification for its use of force in Nicaragua. The Court stated that the provision of strictly humanitarian aid to persons or forces in another country was not regarded as an unlawful intervention or contrary to international law<sup>17</sup>. However, it did hold the position that should the aim of the US indeed have been the safeguard of human rights in Nicaragua, in itself a humanitarian objective, the use of force was neither the appropriate method to ensure its protection nor a method compatible with the objective<sup>18</sup>.

In the 1976 *Israel-Entebbe Incident*<sup>19</sup>, the self-defence of Israeli nationals was the justification offered to the Security Council by Israel with respect to its role in the incident. As further support to its argument, Israel brought forward O'Connell's interpretation of Article 2(4) which argues that limited use of force is

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<sup>14</sup> International Court of Justice

<sup>15</sup> ICJ Reports, 1949, p.4 at p.35

<sup>16</sup> Nicaragua claimed that the US has supported the contras, mined Nicaraguan ports, bombed oil installations and a naval base in an attempt to overthrow the government of Nicaragua.

<sup>17</sup> *Nicaragua* case para 242

<sup>18</sup> *Nicaragua* case para 268

<sup>19</sup> An Air France airliner carrying Israeli passengers was hijacked to Entebbe, Uganda. Israel flew transport aircraft and soldiers to Uganda, without Ugandan permission, to rescue the



permitted in the event of UN ineffectiveness<sup>20</sup>. This line of argument was rejected and the majority of the states speaking at the debate condemned Israel's action as having breached Article 2(4), while those that abstained from condemnation refrained any attempt at advocating the legality of Israel's intervention.

The UN Charter clearly prohibits unilateral intervention and international law defines unauthorized use of force by states as unlawful, irrespective of the circumstances and reasons for the actions undertaken. Even if a Security Council Resolution were sought to sanction humanitarian intervention it would be necessary to demonstrate that the situation on the ground constituted a threat to international peace and stability.

### **The Debate at the Security Council**

A clear tension exists within international law with respect to humanitarian intervention. On the one hand an individual state or a regional organization, such as NATO, is prohibited from using force without a UN mandate, while on the other the neglect of human rights violations and its humanitarian consequences is not permissible.

NATO's justification for its intervention was that the violence in Kosovo posed a threat to the peace and security of the region and that it needed to be halted to avert a humanitarian catastrophe. In the Security Council meetings a number of arguments were presented against the NATO strikes. The accusations alleged

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hostages by force. During the operation the hijackers, some Ugandan and Israeli soldiers were killed.

<sup>20</sup> SC 1942nd meeting, para 102; 1976 UNYB 315

that NATO's actions breached Article 2(4); NATO's actions had disregarded that the principal responsible for maintaining peace and security as stated in Article 24<sup>21</sup>, was the Security Council; NATO's unilateral action had contravened the requirement of Security Council authorization under Chapter VII of the Charter, and in particular Article 53<sup>22</sup> which specifies this requirement for regional organizations<sup>23</sup>.

At the first emergency meeting of the Security Council after the start of the air strikes<sup>24</sup>, states in favour of NATO action defended it by emphasizing that all diplomatic avenues had failed and that military intervention had been the last resort to avert a humanitarian disaster. The US stated that NATO had acted to prevent a humanitarian catastrophe and discourage any future aggression and repression in Kosovo. The UK went further in its legal argument and asserted that the intervention was an exceptional measure in an exceptional situation and that, in line with the principle of proportionality, the force used was the minimum necessary to achieve the objective<sup>25</sup>. Another argument put forward in defence of NATO's action was that the previous resolutions, passed with respect to the situation in Kosovo, while not authorizing the use of force did seem to indicate that it would condemn it. Indeed, France, The Netherlands and Slovenia noted that the three resolutions adopted in relation to the situation in Kosovo were

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<sup>21</sup> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

<sup>22</sup> "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..."

<sup>23</sup> Gray, C., *International Law and the Use of Force* (2000), p. 33

<sup>24</sup> SC 3988th meeting, 24 March 1999

<sup>25</sup> Gray, C., *International Law and the Use of Force* (2000), p. 33 & 34

done under Chapter VII, that Resolution 1199 had affirmed that the deteriorating situation was a threat to the peace and security of the region, while Resolution 1203 had been adopted as a result of Yugoslavia's flagrant non-compliance. Given these facts, it was their contention that NATO had responded because the resolutions had failed, that given the complexity of the situation the action could not be described as a unilateral use of force, that the resolutions having stated that there was a threat to regional security and peace this was legitimate act for its safeguard, and that the responsibility in this area was lay indeed primarily, but not exclusively, with the Security Council.

Shortly after the air strikes began in March 1999 there was an attempt to pass a Security Council resolution condemning NATO's use of force. The resolution was rejected by three votes in favour (China, Namibia and Russia) and 12 against<sup>26</sup>. In June 1999, the Security Council passed Resolution 1244, which dealt with the post-war rebuilding of Kosovo. The resolution made no mention of NATO's intervention and has been interpreted to mean that this effectively ratified the action with the Council's support<sup>27</sup>.

### **The Case before the International Court of Justice**

On the 29th of April 1999, Yugoslavia presented an application before the ICJ against ten of the nineteen NATO member states which it accused of breaching the obligation to refrain from using force and from intervening in the affairs of another state. In its request for provisional measures, Yugoslavia submitted to the Court that no right to humanitarian intervention existed within international

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<sup>26</sup> SC 3989th meeting, 26 March 1999

law. It asserted that Article 2(4) was categorical and supported this argument by bringing forward the *travaux préparatoires* of the Charter that indicated that intervention for special motives was excluded by the phrase "against the territorial integrity or political independence of any State". This position, they stated, was further reinforced by both the *Friendly Relations Declaration* which bars the right to intervene in absolute terms, and the *Definition of Aggression* provision which states that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". Yugoslavia went on to state that even if a right to humanitarian intervention existed, the methods used by NATO did not correspond with their declared intent. Indeed, it was their contention that air bombings of populated areas in Yugoslavia, the disproportionality and intensity of the bombing campaign which put at risk the majority population for the alleged protection of a minority, and the geographical extent and the targeting indicated a political design rather than a humanitarian one.

The ICJ refused provisional measures in all ten cases brought by Yugoslavia before the Court. While it did not pronounce itself on the legality of NATO's action based, on the grounds that it did not have *prima facie* jurisdiction on the merits of the case, it did however indicate concern at the unfolding situation in Kosovo as well as at NATO's use of force in Yugoslavia and emphasized the need that all parties needed to conform with their obligations under the UN Charter.

## **Conclusion**

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<sup>27</sup> Henkin, L., *Kosovo and the 'Law of Humanitarian Intervention'*, 93 AJIL (1999) 824, p. 826

Two stances have emerged with respect to humanitarian intervention as a result of NATO's intervention in Kosovo, that indicate the tensions that exist within international law in defining its legality. The first, the position held by Russia and China, adheres strictly to Article 2(4) and contends that military intervention is lawful only if it is authorized by the Security Council or if it qualifies as a right to self-defence. This position is backed by an absence of consistent practice of humanitarian intervention and a lack of international customary law.

However, in light of the fact that NATO responded to an unfolding humanitarian crisis that the Security Council recognized as a threat to peace and security, this rigid approach was opposed by the stance taken by France, Slovenia and The Netherlands. These countries' approach claims that while humanitarian intervention without a UN mandate is technically unlawful, it is morally and politically justified in exceptional cases. While states that undertake action in such situations will most likely not be condemned, they do so at their own risk and in full knowledge that these actions are in violation of international law.

The position that an exception to the rule can be invoked highlights the tensions that exist between the law that governs the use of force and the protection of fundamental human rights. It has been suggested that in order to bridge the existing gap a focus should be placed on developing international customary law supporting humanitarian intervention, based on legal exceptions and justifications for humanitarian intervention, issuing from particular situations. Emerging customary law, instead of characterizing humanitarian intervention as illegal or an "excusable" breach of the UN Charter, would provide a more solid

legal basis for its justification. Another approach would be to develop the emerging doctrine that advocates a new "right" to humanitarian intervention. This approach contends that humanitarian intervention should be codified, either through an amendment of the UN Charter or through a General Assembly Declaration, placing it on an equal level of legitimacy with the right of self-defense. Fixed criteria and principles would govern the legitimacy to appeal to the right, which would prevent abuses and a legal open-endedness.

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