After Kosovo: NATO Should Formulate a Doctrine on Humanitarian Intervention?

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Introduction

During the Allied bombing campaign against strategic targets in the Federal Republic of Yugoslavia, there was a conspicuous absence of legal argumentation in defense of the NATO position from NATO itself. When a group of international law students from Stockholm University visited the NATO headquarters in Brussels in April 1999, they were told that there was no consolidated NATO position, but that it was up to the governments and capitals of the participating member states to assess the international law situation and produce the justification(s) they saw fit.

From a political and legal point of view, this was not satisfactory at the time, nor is it now–when the NATO campaign has achieved its goal of establishing an international presence in Kosovo for the protection of human rights in the province. NATO as an organization, or its members acting jointly, should–for the benefit of the international community–formulate the rationale behind this collective action, which probably will go down in history as a case of humanitarian intervention.

Any group of states that detracts from the fundamental non-use of force principle of the United Nations Charter will find itself under a legal expectation to explain its position. The question is whether the NATO type of action should be looked upon as illegal, or as (1) an exceptionally admitted deviation from international law, (2) an action based upon a new interpretation of the UN Charter in line with modern international law, or (3) as an attempted shift of international law to a position where, in humanitarian crises, the sovereignty of states has to yield to the protection of peoples. The first approach is tainted by political realism and is very

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close to a finding of illegality. The second one is a bold *de lege lata* finding of legality, and the third approach is a *de lege ferenda* justification.

It is in the interest of NATO, and of the international community as such, that the illegality view will not prevail. In whatever way the NATO action may be explained, as deviating from the law, as conforming to the law, or as progressively developing the law, the international community has so far not received a clear answer. By producing such an answer NATO and its member states could influence the legal situation. This group of states has already contributed with some concrete state practice, but it remains to articulate the principle behind it. "Quiet diplomacy" is an unfortunate method in this case, since it risks giving the impression that NATO itself perceives its actions as illegal, and–although it successfully fought a "war of values"–is not prepared to fight the intellectual battle for a more human rights focused international order that harbors the concept of humanitarian intervention.

An Emerging International Norm

Most international lawyers would agree that the current law of the UN Charter does not accommodate the bombing of the former Yugoslavia, since the action was neither based on a Security Council decision under Chapter VII of the UN Charter, nor pursued in collective self-defense under Article 51 of the Charter; the only two justifications for the use of force that are so far available under international law.

Nevertheless, most international lawyers would also agree that there is a trend in today's international community towards a better balance between the security of states, on the one hand, and the security of people, on the other (as the Carlsson-Ramphal Commission on Global Governance put it in its report *Our Global Neighbourhood* in 1995). Recent statements by UN Secretary-General Kofi Annan also support this view. Addressing the Commission on Human Rights in Geneva on 7 April –in the early days of NATO's bombing campaign–and by Milosovic's regime, he stated that "[e]merging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of sovereignty", and that the UN Charter should "never [be] the source of comfort or justification" for "those guilty of gross and shocking violations of human rights."

The issue of protection of human rights is steadily growing in importance. However, there is a need to concretize the meaning of that protection. The main security threats in today's world are not to be found in the relations between states, but concern threats from governments

towards their own citizens. International law is slowly adapting to these developments by establishing new global and regional structures for peacekeeping and peace-enforcement. The enunciation of new doctrines to use these new structures would be helpful in the progressive development of the law.

The Uniting for Peace Resolution

The veto power of the five permanent members of the Security Council (the P5) has been questioned in its present form. During the Korean War (1950-53) the then Western majority of the United Nations did not accept that the Security Council–through the veto–could block itself out of action and influence when peace was threatened or broken. The so-called Uniting for Peace resolution (adopted by the UN General Assembly in November 1950) allowed a qualified majority of the Assembly to take over the responsibility for the maintenance of international peace and security, when the Security Council was unable or unwilling to shoulder that responsibility.

During the Kosovo crisis–when both Russia and China threatened to veto any enabling Council resolution–NATO could have appealed to the General Assembly in line with the Uniting for Peace precedent and asked the Assembly for approval of its armed action. Since the Kosovo debate did not generate any North-South division (a Russian anti-NATO proposal was rejected in the Security Council on 26 March 1999 by, among others, Argentina, Bahrain, Brazil, Gabon, Gambia, and Malaysia), a qualified majority supporting and legitimizing the NATO intervention might well have been possible.

Law is often referred to as "a process," and international law (in the terminology of Myres McDougal) as "a world social process," encompassing concrete state practice, other governmental positions, group expectations and value demands from different participants in the world community, including IGOs (Inter-Governmental Organization) and NGOs. The outcome of this process is influenced by the authority of the participants and the persuasive power of their arguments. During the forthcoming sessions of the UN General Assembly and other international fora, states will have an opportunity to accept or reject any legitimization or criticism of the Kosovo intervention. In the interest of the progressive development of international law, NATO and/or its member States should take part in this process by enunciating a doctrine of humanitarian intervention, rationalizing bona fide the past for the benefit of the future.

A Precedent for Collective Humanitarian Intervention

NATO officials may so far have been reluctant to look upon NATO as a regional organization under Chapter VIII of the UN Charter, out of concern that such a categorization would imply an additional burden of obligations in the UN context. This concern is unfounded. Chapter VIII codifies the legitimacy and usefulness of regional security organizations and arrangements, but imposes no obligations other than those that already lie upon states under inter alia Chapter VII of the UN Charter. NATO, as an organization for collective self-defense, should accept itself as a regional security organization in the collective security sense of Chapter VIII. That chapter could be used as a platform to define its Kosovo action as a case of humanitarian intervention. In this way, though not authorized by the Security Council as required by Article 53 of Chapter VIII, the Kosovo action could be described as a precedent for collective (not unilateral) humanitarian intervention conducted by a regional organization after a process of collective decision-making. This precedent could also be characterized as one of non-passivity in humanitarian crises–a reflection of the need for international law to be related to international morality. A population in immediate danger of genocide should not be left alone to face its fate.

The General Assembly Friendly Relations Declaration of 1970 reaffirmed "a duty to cooperate" as part of the Charter system. A modern interpretation of this principle should oblige States to do their utmost–not excluding armed action, as a last resort–to avert a humanitarian crisis. A duty to intervene (with armed force) in such crises–in devoir d'ingerence as French Foreign Minister Dumas argued in relation to the Iraqi Kurds in 1991–is hardly conceivable, but a "duty to act" even in situations when the Security Council is veto-blocked, should make itself felt in the international community. Thus, an option for regional organizations to intervene in humanitarian crises when the political will and military capacity are at hand, should be part of modern international law. The Uniting for Peace precedent should be used to take the matter to the General Assembly in order to mobilize UN approval outside the Security Council framework.

Setting Strict Conditions for Intervention

As a number of legal scholars have made clear (Reisman and McDougal in 1973, Lillich in 1993, Cassese in 1999), strict conditions for any forcible intervention in the absence of Security Council authorization need

to be set out as part of an emerging doctrine on humanitarian intervention. A list of requirements should include the following:

(1) it has to be a case of gross human rights violations amounting to crimes against humanity;
(2) all available peaceful settlement procedures have been exhausted;
(3) the Security Council must be unable or unwilling to stop the crimes against humanity;
(4) the government of the state where the atrocities take place must be unable or unwilling to rectify the situation;
(5) the decision to take military action can be made by a regional organization covered by Chapter VIII of the UN Charter, using the Uniting for Peace precedent to seek approval by the General Assembly as soon as possible; or the decision can be taken directly by the General Assembly with a two-thirds majority in accordance with the Uniting for Peace procedure;
(6) the use of force must be proportional to the humanitarian issue at hand and in accordance with international humanitarian law of armed conflict;
(7) the purpose of the humanitarian intervention must be strictly limited to the stopping of the atrocities and the building of a new order of security of people in the country in question.

The Next Step

There is a ground-swell of opinion in the international community in favor of intervention in cases of gross and systematic violations of human rights and fundamental freedoms. Such acts cannot go unchallenged fifty years after the adoption of the Universal Declaration of Human Rights and the Genocide Convention. All members of the international community have a responsibility to make human rights a living part of international law; and after Kosovo, those states that intervened by force to protect human rights in Kosovo have a special responsibility to link their action to the progressive development of international law. A step in this direction is already overdue. The formulation of a doctrine on humanitarian intervention, as the legal outcome of the Kosovo crisis, should now be in the offing. NATO countries should take the lead in this worthy endeavor by setting out the issues involved and bringing them to the appropriate international fora.

NOTES

1. Article 2(4) of the UN Charter states that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
2. The Commission on Global Governance was an independent group of 28 leaders set up in 1992 on the initiative of former West German Chancellor Willy Brandt, to recommend ways by which international security and governance could be improved. Brandt had invited the then Swedish Prime Minister, Ingvar Carlsson, and the Secretary-General of the Commonwealth, Shridath Ramphal of Guyana, to co-chair the commission. Although Carlsson wrote an article in *The International Herald Tribune* in 1995 with the title "The World Needs a Humanitarian Right to Intervene" (January 25), he heavily criticized the NATO action in 1999.
3. General Assembly Resolution 377 (V), 3 November 1950. The Resolution included the following: "If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or acts of aggression the use of armed force when necessary, to maintain or restore international peace and security."
4. According to Article 18(2) of the UN Charter, "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."
5. General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, in GA Resolution 2625 (XXV), included the provision that "States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all."
6. Michael Reisman & Myres McDougal, Humanitarian Intervention to protect the Ibos, in Richard B. Lillich (ed), *Humanitarian Intervention and the United Nations*, Charlottesville 1973; Richard Lillich, The Development of Criteria for Humanitarian Intervention, Wilton Park lecture, 1993; and most recently Antonio Cassese, *Ex iniuria ius oritur:* Are we Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, *European Journal of International Law* web site 1999 (http://www.ejil.org/journal/Vol10/No1/com.html).