

FOR: NORTH ATLANTIC TREATY ORGANISATION
Office of Information and Press

NATO-EAPC Research Fellowship

Between Peacekeeping and Peace Enforcement: Does the NATO Intervention in Kosovo Provide a New Formula of Peace Operation?

Final Report

June 2003

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Introduction

Operation Allied Force in Kosovo was widely discussed not only from a legal, but also from a political and a moral perspective. Not undermining moral or political considerations – which as will be described later, played a vital part in the discussion on NATO intervention – the focus of this report is put on the assessment of the legal dimension of the operation.

Thus, the purpose of this report is to provide a legal analysis of the Operation Allied Force by referring to both general and customary international law. With regard to the general international law, such documents as the UN Charter, Security Council resolutions, the General Assembly Uniting for Peace procedure and the North Atlantic Treaty will be examined. In reference to customary international law, theories and concepts on humanitarian intervention will be described.

Reference will be made to the existing reports on Kosovo, in particular to the International Independence Commission on Kosovo Report, the UK Foreign Affairs Select Committee Report, NATO Secretary General Report: Kosovo one year on and the so-called Dutch report.

Hence, instead of setting forth new theories, the spotlight will be put on documents, examining existing opinions and theories, and in specifically discussing the issue of legality of NATO operation on the basis of existing UN and NATO documents and reports on Kosovo.

This report consists of three main parts. As an initial step, the report provides a brief background to the Kosovo Crisis, focusing on the origins of the crisis, the failure of the diplomatic efforts and the reasons standing behind the operation, its aims, justification and motives. This part is concluded by giving a brief background to peace operations, including peacekeeping, peace enforcement and humanitarian intervention. As will be argued, Kosovo intervention can neither be regarded as peacekeeping nor as peace enforcement and may be roughly classified as a collective humanitarian intervention. However, it went far beyond traditional understanding of this term.

Then a legal analysis is provided, describing in detail the possible legal framework for humanitarian intervention. General international law, in particular the UN Charter framework, the Security Council resolutions on Kosovo and the Uniting for Peace procedure will be examined and finally the legality of the intervention under the Washington Treaty will be discussed. Then, the framework of customary international law and the changing nature of the concept of humanitarian intervention will be examined. The second part will also describe theories and concepts of humanitarian intervention, providing possible grounds for its justification under international law. The focus will be put mainly on the concept of overwhelming humanitarian necessity, but other possible justifications such as that based on the resolution 1244 (post-facto justification), the concept of Kosovo as a legal precedent, and the link theory will be examined. This part will be concluded by a discussion on the role of the international lawyer, arguing that the Kosovo crisis showed the fluidity of international law and opened grounds for various, often mutually-exclusive legal opinions.

The final part consists of two separate chapters. It starts from a conclusion that the Kosovo crisis goes beyond legal analysis, touching on moral and political considerations. As may be concluded, there is a major difference between the notion of legality on the one hand and legitimacy or rightfulness rooted in moral principles on the other. In the final chapter further perspectives of humanitarian intervention will be discussed, in particular with regard to changing the Charter framework and allowing for its more flexible interpretation.

The Kosovo crisis is a controversial issue and is subject to vigorous legal debate. It raises more questions than provides answers. However, the purpose of this report is neither to provide definitive answers to the relevant questions nor to solve the legal problems that are often insolvable. Instead, the focus is put on discussing the Kosovo crisis and possible legal solutions, in particular with regard to further perspectives of the new framework peace intervention on humanitarian grounds. As will be argued, Operation Allied Force provides a new formula of international intervention that calls for new legal solutions.

Background to the Kosovo Crisis and the Operation Allied Force

Origins of the Kosovo Crisis

The Origins of the Kosovo crisis can be traced back to medieval history and the time of the Ottoman Empire. Nevertheless, the purpose of this report is neither to examine the historical roots of the conflict nor to explore reasons for ethnic tensions between Serbians and Kosovars. Instead, a few important facts should be brought to attention so as to understand the reasons underlying Operation Allied Force.

It seems that the main reasons for the conflict lies in the nationalistic politics of Slobodan Milosevic, in particular when the revocation of Kosovo's autonomous status in 1989 was followed by a Belgrade policy aimed at changing the ethnic composition of Kosovo. Serbian brutal repressions led many Kosovar Albanians to believe that violence was the only solution in order to attract the attention of the international community¹. This caused a further escalation of conflict and a response from the Yugoslavian forces (police, army and para-military groups), which started ethnic cleansing throughout Kosovo. As a result it is estimated that in the summer of 1998 alone 1500 Kosovar Albanians were killed and about 300.000 had fled their homes to hide in mountains and forests. These events led to the adoption of Security Council resolution 1199 and also the threat of NATO air strikes in October to force Yugoslavian authorities to retreat from its actions².

This prompted an immediate response from the Kosovo Liberation Army. The emergence of an armed KLA and its attacks was used however by the authorities in Belgrade to justify more violence, directed not only against the

¹ See. further Independent International Commission on Kosovo Report,1

² Roberts, 112-113

KLA, but also against the civilian population³. In the circumstances of an escalation of the conflict and the danger to the stability of the region, the international community started to look for a diplomatic means to solve the conflict.

Diplomatic Efforts

In the 1990's some diplomatic initiatives were undertaken. However these did not bring any results and although the Kosovo problem was perhaps not entirely ignored by the international community, it was definitely overshadowed by other Yugoslavian conflicts, in particular by the situation in Bosnia and Herzegovina. As a result, the decision was made to exclude the Kosovo problem from the Dayton negotiations, which only led to an increase of repression on the part of the Yugoslavian authorities against Kosovo Albanians. A turning point came in 1998 when the Kosovo crisis, was brought to the international policy agenda. As a result, diplomatic efforts to solve the crisis throughout 1998 culminated in the Rambouillet agreement⁴. The Kosovar Albanians were offered considerable autonomy, but no independence. The Serbs were asked to concede autonomy, but not sovereignty, with Kosovo's ultimate status left open. Despite the efforts of the international community and the willingness of the Kosovar Albanians to sign the Rambouillet Accords, the Yugoslav delegation refused to sign it⁵. According to the Independent International Commission on Kosovo, the diplomatic efforts were impeded because of multiple and divergent agendas and mixed signals coming from the international community. Russia's contribution to the process also caused ambiguity. Although her particular relationship with the FRY enabled crucial diplomatic steps to take place, her rigid commitment to vetoing any enforcement action was the major factor forcing NATO into an action without the explicit Security Council mandate. Finally, as the Commission argued the minimal goals of the Kosovar Albanians and of Belgrade were

³ See NATO Secretary General Report: Kosovo One Year On, 6

⁴ See The Rambouillet Agreement- a Summary Annex 3 to the Independent Commission on Kosovo Report

⁵ NATO Secretary General Report: Kosovo One Year On, 9

irreconcilable⁶. In effect, all diplomatic efforts failed and NATO decided to launch air strikes in March 1999.

Political Justification, Aims and Motives for Launching the Campaign and its Conduct

When it became clear that the Yugoslav government was embarked on a policy of mass forced expulsion of Kosovar Albanians, the North Atlantic Council decided to act and justified its decision on the following ground:

The unrestrained assault by Yugoslav military, police and paramilitary forces, under the direction of President Milosevic, on Kosovar civilians has created a massive humanitarian catastrophe, which also threatens to destabilise the surrounding region. Hundreds of thousands of people have been expelled ruthlessly from Kosovo by the FRY authorities. We condemn these appalling violations of human rights and the indiscriminate use of force by the Yugoslav government. These extreme and criminally irresponsible policies, which cannot be defended on any grounds, have made necessary and justify the military action by NATO.

NATO's military action against the FRY supports the political aims of the international community: a peaceful, multi-ethnic and democratic Kosovo in which all its people can live in security and enjoy universal human rights and freedoms on an equal basis.⁷

This argument raised by NATO was indeed shared by the Independent International Commission on Kosovo. The Commission although it undermined the legality of the intervention, because of the absence of approval from the United Nations Security Council, yet concluded that “the action was legitimate and justified because all diplomatic avenues had been exhausted and because intervention had the effect of liberating the majority population of Kosovo from a

⁶ Independent International Commission on Kosovo Report, 4

⁷ NATO Secretary General Report: Kosovo One Year On, 10-11

long period of oppression under Serbian rule and it stopped the systematic oppression of the Kosovar Albanians"⁸.

The North Atlantic Council described the operation objectives at the meeting on 12 April 1999. They demanded that Milosevic and his regime should:

1. ensure a verifiable stop to all military action and the immediate ending of violence and repression;
2. ensure the withdrawal from Kosovo of the military, police and paramilitary forces;
3. agree to the stationing in Kosovo of an international military presence;
4. agree to the unconditional and safe return of all refugees and displaced persons and unhindered access to them by humanitarian aid organisations;
5. provide credible assurance of his willingness to work on the basis of the Rambouillet Accords in the establishment of a political framework agreement for Kosovo in conformity with international law and the Charter of the United Nations.⁹

One may ask what the NATO motives were in launching the operation? The answer to this question has a rather speculative nature, however, Professor Adam Roberts has enumerated four possible reasons: "guilt over past inaction regarding Bosnia"¹⁰, the "concern over peace and security in the region", "reluctance to accept large numbers of refugees on a permanent basis", and "NATO's credibility"¹¹.

⁸ Independent International Commission on Kosovo Report, 4-5

⁹ NATO Secretary General Report: Kosovo One Year On, 11

¹⁰ At this point Professor Roberts is citing Lord Robertson (then Defence Secretary, George Robertson), said on 12 June 1998: "the world has learned its lessons from Bosnia. The international community now knows it must be united, firm and determined from the earliest possible moment in dealing with the Balkans.

¹¹ House of Commons Foreign Affairs Select Committee Report, para. 72

With regard to the conduct of the campaign the main aim of air campaign was to conduct strikes on tactical targets, such as artillery, field headquarters and other military targets while minimalising the risk of civilian casualties. The rightness of this strategy was confirmed by the Independent international Commission on Kosovo. Although the Commission pointed out certain mistakes and civilian casualties, overall it was

... impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of "military necessity" in the context¹².

NATO strategy of air strikes was also confirmed by the UK Foreign Affairs Committee. However, the operation was still criticised mainly by Professor Ian Brownie on the basis of its justification¹³. Moreover, the report pointed out that the international community made certain mistakes before the NATO campaign against Milosevic was launched. Nevertheless as we can read in the report "overall the Government was right to support the launching of air strikes on 24/25 March 1999"¹⁴. The Committee however pointed out that "many of NATO's political leaders were excessively optimistic about the prospect that Milosevic would back down either before a bombing campaign was launched or after a short campaign"¹⁵.

In the light of the documents mentioned above aims of NATO action were justified and right. Some criticism can be made about the air strikes, especially with regard to certain mistakes which caused civilian casualties. Nevertheless bearing in mind the large scale of the operation the civilian casualties were not exceedingly high.

¹² Independent International Commission on Kosovo Report, 183-184

¹³ House of Commons Foreign Affairs Select Committee Report, para. 76

¹⁴ House of Commons Foreign Affairs Select Committee Report, para. 123

¹⁵ House of Commons Foreign Affairs Select Committee Report para. 111

Another question of vital importance is that of how to classify operation Allied Force and of asking what type of operation took place in Kosovo. This is of particular importance since one should differentiate Operation Allied Force from further KFOR involvement in Kosovo, which may be regarded as peacekeeping. This requires us to look at the broader context of peace operations.

Defining Terms: Peacekeeping, Peace Enforcement, Humanitarian Intervention

Operation Allied Force can be regarded neither as peacekeeping nor as peace enforcement. The closest description would be to call the NATO operation humanitarian intervention. However, it goes beyond traditional understanding of the doctrine, as will be described later on¹⁶. Yet, in order to avoid misunderstandings, a clear distinction between three main types of peace operations should be drawn. This will require a brief description of different types of peace operations.

Peacekeeping

In light of the Boutros Ghali Agenda for Peace, peacekeeping can be regarded as “the deployment of the United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well”¹⁷. A broader approach is taken in the Brahimi Report where we can read that UN peacekeepers “must be able to carry out their mandate professionally and successfully and be capable of defending themselves, other mission components and the mission mandate, with robust rules of engagement, against those who renege on their commitments to a peace accord or otherwise seek to undermine it by

¹⁶ Special attention will be put on the concept of humanitarian intervention, see. Changing Nature of Humanitarian Intervention

¹⁷ An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, ch. 2

violence”¹⁸. An even wider definition is given by Trevor Findlay, to whom “peacekeeping” may be considered as a “deployment of the UN or other multilateral personnel in the field, as a tool of conflict prevention, management or resolution”¹⁹. In the light of these definitions although current KFOR activities include peacekeeping, Operation Allied Force, could not be regarded as peacekeeping, since it did not fulfil its conditions, especially since the UN Charter limits the use of force to self-defense.

Peace Enforcement

Unlike peacekeeping, peace enforcement missions require use of force. The UN Charter authorizes the Security Council to introduce measures that may be necessary to “maintain or restore international peace and security”²⁰ against those responsible for threats to peace, breaches of peace and acts of aggression. These measures may include not only economic sanctions but also military action against a country which violates the Charter. The distinguishing feature of peace enforcement, as opposed to peacekeeping, is that they do not require the consent of the lawbreaking parties of conflict. However, since the Operation Allied Force was a forceful military operation it does not fulfil the conditions for peace enforcement. In fact the best definition of it is that of humanitarian intervention, even though NATO operation goes far beyond the traditional understanding of this concept.

Humanitarian Intervention

Humanitarian intervention takes place when there is a “threat to international peace and security”; in particular when there is a risk of conflict spreading to other states or an exodus of refugees that threatens political and economic stability in the region²¹. In the case of humanitarian intervention, however, one

¹⁸ Panel on United Nations Peace Operations Summary of Recommendations, para. . 3

¹⁹ Findlay, 12

²⁰ UN Charter, art. 42

²¹ Durch, 5

may point to two consequences. On the one hand intervention violates sovereignty, but on the other it may be considered as an effort to protect the state's sovereignty, namely its populace from the effects of civil war or a renegade government²². While peacekeeping is directed towards maintaining peace, peace enforcement tries to enforce it, the purpose of humanitarian intervention is to relieve the suffering resulting from a situation of conflict or anarchy. Therefore, these peace operations should be examined separately, and although humanitarian intervention may be regarded as a precursor of peacekeeping it can not be regarded as a part of the process.

* * *

The Kosovo case shows the evolution of the traditional concept of humanitarian intervention, in particular in finding its new legal framework. While we should be cautious not to misuse terms described above, we should understand that it is not always possible to draw a clear line between those terms. Moreover, humanitarian intervention is a dynamic and changing concept as was indeed reflected in the Brahimi Report. Therefore the term humanitarian intervention, as used in this report, goes beyond the strictly and narrowly defined traditional understanding of this phrase.

²² Durch, 5

Legal Analysis

Introduction

The principal question raised by international law is whether the NATO Operational Allied Force is legal under international law. It is important not to confuse the principle of legality with the principle of justice, or any justification on political or moral grounds. This is not by any means to undermine the role of moral or political considerations. Indeed, one should not assess the NATO operation on purely legal grounds. However, at this stage of the analysis, for the sake of logical legal argument other moral or political arguments should be set aside and one should look at the legality of the operation under general and customary international law.

General International law

In order to answer the question whether the Operation Allied Force was legal, one should carefully examine the UN Charter and the North Atlantic Treaty. In particular one should answer the following questions: Was NATO intervention justified under the UN Charter and under the Security Council resolutions? Could the Uniting for Peace Procedure be used in case of the Council unwillingness to take further steps? What were the legal bases for the Operation under the Washington Treaty? Thus, in order to examine legality of the operation under general international law one should primarily focus on the Charter framework.

UN Charter Framework

One of the major purposes of the United Nations is “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts

of aggression or other breaches of peace...”²³ Thus, the UN organs hold the responsibility for maintaining and protecting peace. Use of force, as a rule, is prohibited under article 2(4) of the UN Charter. According to the article “all member states shall refrain in their international relations from the threat or use of force against a territorial integrity or political independence of any state...”²⁴ It should be pointed out that Article 2(4) is a *jus cogens* norm, which means that can not be subject to change by a general international law by any decisions or obligations pertaining to it, or any bilateral or multilateral treaty.

This prohibition is yet not absolute and the Charter provides exceptions, which include the right to self defence²⁵, and the use of force authorization by the Security Council by member states or regional organisations²⁶.

The first exception is granted under article 51 which provides for the “inherent right of individual or collective self defence”. Nevertheless, this requires an armed attack to have occurred against a member of the United Nations and only after “...the Security Council has taken measures necessary to maintain international peace and security”²⁷. Hence, even ethnic cleansing of Kosovars, conducted by the Yugoslavian army and police does not constitute justification to use the right of self-defence under article 51 of the Charter because it was directed against its own citizens.

Article 42 of the Charter provides the second exception: when the measures not involving the use of force²⁸ “would be inadequate or have proven to be inadequate the Security Council can take measures involving the use of force authorizing members states to take such measures.

However, even if Operation Allied Force would have received prior authorization from the Security Council, article 42 would not have applied since the

²³ Art. 1 of the UN Charter

²⁴ Art. 2 (4) of the UN Charter

²⁵ Art. 51 of the UN Charter

²⁶ Art. 42 and 53 of the UN Charter

²⁷ Art. 51 of the UN Charter

intervention was carried out by an international organisation NATO and not by independent states. Instead, article 53 could possibly be applied.

Indeed, article 53 provides the last exception to the prohibition of the use of force and provides that the Security Council shall utilize regional arrangements or agencies for enforcement action under its authority²⁹. However, the Charter emphasises that no enforcement action shall be taken without the authorization of the Security Council³⁰. This article yet requires further attention. This is what may be called the “decentralized option” (being an alternative to the enforcement action of article 42) and includes two phases. The normative phase consists in the Security Council recommending or authorising resort to military force by the regional organization. The second phase requires the decision of the regional organization offering or accepting its military involvement in the management of the crisis³¹. The vital question, however, concerns the conditions under which a regional organization can carry enforcement actions pursuant to Article 53(1) of the Charter and what degree of control the Security Council ought to exercise over the operations. Nevertheless, there is no agreement on this issue: positions range from strict control³², which implies that the Council envisages the start-up, supervision and termination of enforcement action³³, to a mere authorization, which according to some authors may be even implicit or expressed ex-post facto.³⁴

Indeed, with regard to the last case, according to Professor Louis Henkin, it can be even argued, that Resolution 1244 is an ex-post post facto authorization for the NATO action and that the Security Council in approving the Kosovo

²⁸ Art. 41 of The UN Charter

²⁹ This article has become a subject of certain misinterpretations, especially during the Cold War when the Security Council regularly found itself in a state of paralysis- See Simma, 3

³⁰ Art 53 of the UN Charter

³¹ Gazzini, 410-411

³² Gioia 151 at 194 and Villain 157 at 444, Referred in Gazzini, 411

³³ Sarooshi D., The United Nations and the development of Collective Security Reference (1999) 250, referred in Gazzini, 411

³⁴ Walter, 129 at 179; Simma, 120 at 4, referred in Gazini, 411

settlement, effectively ratified the NATO action and gave it the Council's support³⁵.

Under the UN Charter "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 shall be taken... to restore international peace and security"³⁶.

Indeed, during the Kosovo crisis the Council issued a number of resolutions which determined the existence of conflict and the threat to the peace. These resolutions, however, require careful consideration.

Security Council Resolutions on Kosovo

The first of the resolutions: 1160 called for political solution of the conflict and dialogue between the conflicting parties and imposes arms embargo vis-a-vis both parties to the conflict. The Resolution emphasized that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures³⁷.

In resolution 1199 the Security Council condemned acts of violence, and the breaking of the arms embargo and expressed concern at the reports of continuing violations of the prohibitions imposed by the resolution 1160, and at increasing violations of human rights and of international humanitarian law. It emphasized the need to ensure that the rights of all inhabitants of Kosovo were respected. The UN Council demanded cessation of hostilities, a ceasefire and improvement of humanitarian situation. Moreover, it called parties to enter into "meaningful dialogue without preconditions and with international involvement"³⁸. In addition it demanded that Yugoslavia implement a series of "concrete measures towards achieving a political solution to the situation in

³⁵ Henkin, 826

³⁶ Art. 39 of the UN Charter

³⁷ UNSC Res 1160 of 31 March 1998

³⁸ UNSC Res 1199 of 23 September 1998

Kosovo". The Council called upon Member States to provide "adequate resources for humanitarian assistance in the region." Finally, the Council decided that if the recommended in resolutions 1160 and 1199 measures were not be taken it would "consider further action and additional measures to maintain or restore peace and stability in the region"³⁹.

Despite some political obstacles in getting the resolution passed, in resolution 1203 the Security Council condemned acts of violence and terrorism, and expressed concern at the reports of continuing violations of the prohibitions imposed by resolution 1160. Hence, it demanded that Yugoslavian authorities and Kosovo Albanians comply fully with resolutions 1160 and 1199. Moreover, it demanded immediate action from the Yugoslavian authorities and that the Kosovo Albanian leadership "cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe". Thus, it affirmed that the situation in Kosovo constituted a threat to international peace and security⁴⁰. However, at the same time it reaffirmed that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council".⁴¹

The Security Council rejected (by 12 votes to 3) a draft resolution proposed by Russia on 26 March 1999 which would have condemned NATO military action. The rejection of a proposition that military action should be condemned could be interpreted as approval of that action. This argument was shared also by some experts: Professor Henkin pointed out that the proponents of intervention could argue that indeed NATO action had the support of the Security Council, since twelve of its members voted to reject the Russian proposal of the resolution⁴².

The Security Council resolution 1244 authorized the international security presence in Kosovo to exercise "all necessary means" to fulfill its

³⁹ UNSC Res 1199 of 23 September 1998

⁴⁰ Compare to Art. 39 of the UN Charter

⁴¹ UNSC Res. 1203 of 24 October 1998

⁴² Henkin, 826

responsibilities⁴³. As can be argued this resolution constituted a *post-facto* approval of the military action. Professor Henkin argued that Resolution 1244 “effectively ratified by an affirmative vote of the Council what earlier might have constituted unilateral; action questionable as a matter of law”⁴⁴.

In order to judge whether the NATO operation was legal and justified these resolutions should be carefully examined. As Professor Chinkin concluded:

*Arguments for the legality of NATO's actions in the FRY are strengthened by taking all these actions together: the Security Council recognised the situation in Kosovo as warranting Chapter VII action; it imposed such measures as it could get agreement on; prior to the bombing it affirmed the on-going actions of various European organisations, the EU, the OSCE and NATO, that did not involve the use of force; when it could take no stronger measures itself it did not condemn the regional agency that did so act; and subsequent to the action it endorsed the political agreement.*⁴⁵

NATO did not referred to the Council for further authorization to use force when it became clear that Russians for political reasons would veto any Security Council resolution containing an authorization to use force against Yugoslavia. However, this decision was criticized by many legal scholars, including Professor Bruno Simma, who argued that resolution 1199 was not sufficient in itself to provide legal basis for the threat or use of armed force against Yugoslavia. As he pointed out “the Security Council was in no position to take the logical further step of following up Resolution 1199”⁴⁶. Nevertheless, he admitted that NATO members “gave organization the go-ahead for military action if Yugoslavia did not comply with the Security Council resolutions”⁴⁷. The principal basis for such an action was a concept of humanitarian intervention,

⁴³ UNSC Res. 1244 of 10 June 1999

⁴⁴ Henkin, 827

⁴⁵ House of Commons Foreign Affairs Select Committee Report, para. 127

⁴⁶ Simma, 7

⁴⁷ Simma, 7

which according to Professor Simma should be linked as closely as possible to the UN Charter in order to further gain legitimacy⁴⁸.

A different view on the need for further Security Council resolutions was presented by Professor Louis Henkin⁴⁹. Although himself an opponent of any unilateral action without prior UN Security Council authorization, he admitted that NATO advocates can rightly argue that its action was not unilateral, but collective, pursuant to a decision of three of the five Security Council permanent members. Thus NATO did not pursue narrow parochial interests; it pursued recognized and clearly compelling humanitarian purposes. As he concluded, it may be argued that NATO intervention was a “collective humanitarian intervention in the common interest carrying out the responsibility of the world community to address threats to international peace and security”⁵⁰.

The question yet arises whether the Council has exclusive competence over authorizing the use of force or whether also the General Assembly has a role to play.

Uniting for Peace Procedure and the Role of the General Assembly

According to the UN Charter the Council is not the only UN organ responsible for collective security; such responsibility is also shared by the General Assembly⁵¹. As the Dutch Report on Kosovo⁵² pointed out, the Assembly acts as a mechanism of accountability to ensure that the veto was not misused. The

⁴⁸ Simma, 7. Professor Simma refers also to the letter from NATO Secretary General Solana, which addresses the permanent representatives to the North Atlantic Council, dated 9 October 1998- See Simma, 7

⁴⁹ Professor Henkin, however, points out that in his view unilateral intervention by a state or group of states is unlawful unless authorized by the Security Council - see Henkin, 836.

⁵⁰ Henkin, 826

⁵¹ Art 11 of the UN Charter

⁵² The term Dutch report will be used to describe the joined report prepared for a request of The Dutch Foreign Minister by the Dutch Advisory Committee on the issues of Public International Law (CAVV) and the Advisory Council on International Relations (AIV).

Dutch report did not go as far as to suggest that the General Assembly itself could, if the Security Council was deadlocked, authorize or recommend an enforcement action. Nevertheless there are strong arguments to support a view that the General Assembly has residual enforcement powers in exceptional cases, and thus should have been a forum for seeking authority to undertake the bombing of the FRY⁵³. Indeed, such a precedent occurred in 1950 when the Assembly, in response to the Soviet Union boycotting the Security Council at that time and in the prospect of continuous paralysis of the Security Council, adopted the so-called Uniting for Peace Resolution⁵⁴. A similar procedure was used again in 1956 during the Suez Crisis⁵⁵.

The resolution foresees recommendations for collective measures, including the use of armed force when necessary, if the Security Council fails to exercise its primary responsibility for maintenance of international peace and security. In the case of Kosovo the General Assembly did not use the Uniting for Peace mechanism, which was regretted by Professor Nigel White. As he pointed out, even though the UN normally acts via the Security Council, in exceptional cases it can act via the General Assembly⁵⁶. As he argued:

If the Security Council were unable to act because of legitimate concern that the situation does not require it to exercise its primary responsibility to authorize military action, then it would be unconstitutional for the Assembly to have exercised its competence. However, if there is a genuine threat to peace, breach of peace or act of aggression so dangerous and overwhelming that it requires military response then the Assembly is entitled, indeed obliged, to act⁵⁷.

Nevertheless, the question why this procedure was not used to justify the NATO operation can be raised. A possible reason for not using the Uniting for Peace procedure was explained by Professor Scheurer, who argued that it was not a

⁵³ White, 38

⁵⁴ See UNGA Resolution 377 (V)

⁵⁵ See UNGA Resolution, 997

⁵⁶ A similar argument was raised by the Foreign Affairs Committee- see para. 128

⁵⁷ White, 42

realistic basis upon which the Assembly could act, especially since the Security Council passed resolution 1203 reaffirming that “under the Charter of the United Nations, primary responsibility for the maintenance of international peace and stability is conferred on the Security Council”.

Professor White, on the other hand, argued that there may be at least three reasons why NATO did not seriously considered putting the procedure on its agenda. First of all, a fear that bombing as a method of military action would not be acceptable to two-thirds of the membership. Second, securing UN authority would have created an expectation, though not a legal obligation, that NATO would launch a military action, thereby restricting NATO’s freedom of choice. Finally, a fear that the use of the General Assembly to sanction military action would set up a dangerous precedent and as a consequence could be used against NATO in the future⁵⁸.

In order to examine the legality of the Operation Allied Force one should not only consider the UN Charter, but also look into the Washington Treaty. Thus, the question occurs, what were the legal bases for intervention under the Washington Treaty?

Legality of the Intervention under the North Atlantic Treaty

According to the Treaty in case if an armed attack occurs each of the members

in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force...”

Nevertheless, since article 5 provides the use of force only in individual and collective self-defence, it does not apply to the Operation Allied Force and indeed for obvious reasons NATO was reluctant to claim that the operation was conducted under the framework of the article 5. Instead, as many argued the

⁵⁸ White, 43

recent expansion of NATO activities may be based on a dynamic interpretation of the Washington Treaty, in particular with regard to the Article 4, which states that “the parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened”⁵⁹. An important reference to the article 4, was made by the US Deputy Secretary of State Strobe Talbot during the NATO fiftieth anniversary celebration in Washington, when he argued that “We must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. But, the Alliance must reserve the right and the freedom to act when its members, but consensus, deem it necessary”⁶⁰.

Strobe Talbot’s interpretation of article 4, although it may have a very important consequence for the development of the doctrine of humanitarian intervention, however raises a problem of conformity with the UN Charter principles. This according to Ronald Scott Mangum, could lead NATO to enforce its goals by force and return to power politics⁶¹.

* * *

Having examined the debate on the legality of the NATO intervention under the Charter framework, the Security Council resolutions, the Uniting for Peace procedure and finally the Washington Treaty, one may point out the complexity and often ambiguity of its justification. Even though the Charter framework raises ambiguity, customary international law, together with emerging doctrines regarding humanitarian intervention, raises even more ambiguity and often mutually-exclusive interpretations, which will be shown in the next parts of this report.

⁵⁹ See Gazzini, 413

⁶⁰ Strobe Talbot speech cited in Mangum, 48

⁶¹ Mangum, 48

Customary International Law

In order to examine whether NATO operation was legal, one should carefully consider not only general international law, but also customary international law. In particular such questions should be posed: What is the role of customary international law in the development of the doctrine of humanitarian intervention and were the conditions for the existence of customary law (state practice and *opinio juris*) fulfilled? Furthermore, what theories provide justification for the operation under customary international law? The first step should be however to examine the components of customary international law.

Components of Customary International Law

Customary international law is a primary source of international law together with treaties⁶². It is composed of two elements: state practice and *opinio juris*, in other words a conviction that certain behaviour is required by a general legal norm. According to Professor Antonio Cassese, *opinio juris* is sufficient in the case of conviction that a state acts out of political, economical and moral authority⁶³. Only if the two elements exist (state practice and *opinio juris*) can a law be regarded as customary and thus is binding for the international community.

Although the UN Charter clearly delegates authority to the UN organs, in particular to the Security Council, many scholars argue that NATO intervention in Kosovo can be regarded as an initial step towards development of a customary international law allowing the right of humanitarian intervention, even without permission from the Security Council.

⁶² Sources of international law are enumerated in the article 38 of the Statute of the International Court of Justice which is an annex to the UN Charter.

⁶³ Hilpold, 461 See further Cassese, A follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*.

The idea behind this right is to protect individuals from continued violation of human rights. Proponents of such a right often refer to the doctrine of humanitarian intervention, arguing for the existence of a universal and widely recognised *opinio juris* on the legality of humanitarian intervention. This concept was already described while defining the differences between peace operations. However, in order to understand the impact of customary international law on the development of humanitarian intervention, this doctrine should be explained in detail.

Changing Nature of Humanitarian Intervention

As Professor Frederic Harhoff pointed out the definition of humanitarian intervention is always a matter of logical coherence and appropriate contextual determination. Humanitarian intervention as understood in public international law consists of armed force applied by one or more states into the territory of the conflict State for a particular humanitarian purpose. However there are certain pre-conditions attached to the concept. Firstly, there must be massive or large scale violations of international humanitarian standards committed against civilians. Secondly, it becomes an option only when the international community has run short of legal, diplomatic or political means to bring these violations to an end. Finally, the intervening state should neither be acting in self-defence, nor should the conflict state invite in the intervening state. Otherwise it would be a case of 'self-defence' or 'armed assistance'⁶⁴.

According to Professor Scheurer humanitarian intervention occurs where "positive law is morally unsuitable to deal with a situation of extreme urgency and gravity where the observance of the procedures prescribed by law lead to evident injustice and humanitarian hardship"⁶⁵. As he pointed out humanitarian intervention can only be taken in order to stop the immediate atrocities, not to

⁶⁴ Harhoff, 71

⁶⁵ Schreuer, 153

punish or to impose a legal regime for the future. It must achieve a humanitarian goal and be proportionate, that is use the minimum force to help the victims⁶⁶.

Furthermore, the Independent International Commission on Kosovo argued that there are certain conditions which must be satisfied in order to conduct humanitarian intervention. These are “the suffering of civilians owing to severe patterns of human rights violations or the breakdown of government, the overriding commitment to the direct protection of the civilian population, and the calculation that the intervention has a reasonable chance of ending the humanitarian catastrophe”⁶⁷.

Proponents and opponents of humanitarian interventions have offered very different answers and legal reasons to this question. Professor Frederik Harhoff briefly describes these under the following three categories:

- 1) The affirmative positions, which assert that humanitarian interventions are legitimate, that is to say justified on moral grounds and lawful under international law. Thus, in the affirmative position Kosovo intervention had a sufficient legal basis.
- 2) The legalist position denies the lawfulness of resort to armed force beyond the accepted special cases – regardless of their purpose and hence rejects the idea of the legality of the Kosovo intervention.
- 3) Finally the reformist position which holds that international law is unable to provide any clear position on the legality of humanitarian intervention and thus such intervention may be considered lawful under certain conditions. It therefore attempts to identify these conditions and reform the law⁶⁸.

It seems, that the last position provides the most convincing arguments in relation to the complex issues of humanitarian intervention. Such intervention to

⁶⁶ Schreuer, 153

⁶⁷ Independent International Commission on Kosovo Report, 10. See also the report, 193-194

⁶⁸ Harhoff, 79

be lawful has to fulfil certain conditions which will be described while examining the further development of international law.

Moreover, a possible justification for the NATO intervention can be found not only on moral or political grounds, but also in reference to the different theories and concepts that enable further development of the doctrine of humanitarian intervention. One may disagree, with a certain justification, but has to admit that such theories have a large impact on the development of the doctrine.

Possible Justification for NATO Operation in Kosovo

Even though not all of the presented concepts provide a sufficient explanation and justification for the NATO actions, one should not underestimate their role in developing the concepts and principles of humanitarian intervention. What is more, even if some seem to be too controversial at this stage, they may be perfectly justified in the near future. Thus, the development of humanitarian intervention is a dynamic process. The great role in this process is played by certain theories, a few of which will be described below. In particular, detailed attention should be given to the concept of overwhelming humanitarian necessity, which was used by NATO and the UK government and indeed had played a key role in explaining and justifying Operation Allied Force.

Overwhelming Humanitarian Necessity

This concept was developed by the British Government and rightly described in the UK Foreign Affairs Committee report on Kosovo, which emphasised that:

To justify its action the British Government relied not just upon a defence of humanitarian intervention, but a defence of humanitarian intervention in support of the Security Council, if not specifically endorsed by the Council. The Government's position on the legality of Operation Allied Force was in this way clearly set out by the then Defence Secretary on 25 March 1999. He told the House that the Government was "in no doubt that NATO is acting within international law" and that "the use of force...can be justified as an exceptional

*measure in support of purposes laid down by the UN Secretary, but without the Council's express authorisation, where that is the only means to avert an immediate and overwhelming humanitarian catastrophe.*⁶⁹

The British Government stance was upheld by the Foreign Affairs Committee which in the report concluded that “faced with the threat of veto in the Security Council by Russia and China, the NATO allies did all that they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible”.⁷⁰

The danger of overwhelming humanitarian catastrophe was raised by the North Atlantic Council as a sufficient justification for its action, since the FRY had failed to comply with numerous demands from the Security Council under Chapter VII of the Charter. Thus, the NATO intervention to a very large extent relied on the concept of overwhelming humanitarian necessity.

The North Atlantic Council took the following factors into consideration:

- the Yugoslav government's non-compliance with earlier UN Security Council resolutions,
- the warnings from the UN Secretary General about the dangers of a humanitarian disaster in Kosovo,
- the risk of such a catastrophe in the light of Yugoslavia's failure to seek a peaceful resolution of the crisis,
- the unlikelihood that a further UN Security Council resolution would be passed in the near future,
- and the threat to peace and security in the region⁷¹.

⁶⁹ House of Commons Foreign Affairs Select Committee Report, para. 134

⁷⁰ House of Commons Foreign Affairs Select Committee Report para.134

⁷¹ NATO Secretary General Report: Kosovo One Year On, 24

The North Atlantic Council, at this point, agreed that a sufficient legal basis existed for the Alliance to threaten and, if necessary, use force against Yugoslavia.

However, such an idea based on the “state of necessity” was criticized in the Dutch report, which argued that this ground can not be invoked to justify violations of peremptory norms of international law, such as a ban on the use of force⁷². Hence, the Dutch report, unlike the UK one, rejects the legality of the operation under the doctrine of overwhelming humanitarian necessity.

Another doctrine often used as a possible explanation for the NATO operation lies in the so-called *post-facto* justification on the basis of Security Council Resolution 1244.

Post-facto Justification

According to Professor Louis Henkin, a possible justification for the Operation Allied Force lies in resolution 1244 and it can be argued that the resolution “approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council’s support”⁷³. Thus, the resolution can be treated as a quasi-ratification of the NATO intervention.

Henkin’s argument was shared by the Independent International Commission on Kosovo, which argued that the concept of *post-facto* justification finds a sufficient basis in the Security Council willingness (in resolution 1244) to accept the central role of NATO in restoring normality to Kosovo. The Council recognized that NATO was to act on the basis of its negotiating position at Rambouillet and elsewhere, including the imposition of an UNMIK⁷⁴ regime that amounted to de facto independence for the province⁷⁵. This doctrine may be also supported by the idea of treating Kosovo as a legal precedent.

⁷² Dutch report, cited in Dekker, 119

⁷³ Henkin, 826

⁷⁴ United Nations Mission in Kosovo

⁷⁵ Independent International Commission on Kosovo Report, 172-173

Kosovo as a Legal Precedent

Another possible justification for the Operation Allied Force lies in the idea of treating Kosovo as a legal precedent, justified by implicit authorization stemming from the Security Council resolutions. However, the Independent Commission expressed its doubts about this concept, since it could become an undesirable precedent, being “likely to encourage an even greater reliance on the veto by those Permanent Members who fear expansive subsequent interpretations”. As a result, states could become concerned that their concurring vote on a preliminary resolution on a threat to peace might later be relied upon by some states to justify use of force and what they would regard as unwarranted intrusions on sovereign rights. As the Commission concluded “any move toward an implicit authorization for force tends to undermine ‘the bright red line’ that the Charter has attempted to draw around permissible force, although this dilution... may already be occurring in practice”⁷⁶.

The Commission argument was also shared by NATO, which for similar reasons was reluctant to justify its intervention on the basis of precedent, afraid of political risk and undesirable political consequences for future actions.

A different justification but one which had a limited impact on justifying the Kosovo operation, is often referred to as the link theory which stems from customary international law.

The Link Theory

One of the possible justifications for humanitarian intervention in Kosovo can be found in the so-called link theory described in the Dutch report as “a failure of the system of collective security enshrined in the UN Charter revives a presumed rule of customary international law from the period before UN was established concerning the legality of humanitarian intervention”⁷⁷. The Dutch

⁷⁶ Independent International Commission on Kosovo Report, 173

⁷⁷ Dutch report, cited in Dekker, 118

report however rejected the presumption of the existence of an old rule of customary law recognising a right of humanitarian intervention, as a difficult to prove⁷⁸. Indeed, NATO although admitting the failure of the collective security system, was reluctant to justify its intervention on the basis of the link theory, since it had a tenuous basis in international law.

Even though the possible justification for the NATO intervention may be a subject of legal disputes, the most convincing argument for the operation can be found in the theory of overwhelming humanitarian necessity and in the theory of ex-post facto justification.

* * *

It is remarkable that many lawyers criticising the concept of humanitarian intervention or even going further by arguing that it does not find any legal justification, confirm that the Kosovo intervention was justified. As Professor Hilpold describes this phenomenon, it signals new trend and a new approach in international law, and can be seen as “evidence of a new self-perception by the international lawyers who – in part – attribute to themselves a more prominent role in the shaping of the substance of this branch of law compared to the past⁷⁹”. Kosovo gives international lawyers a sense of relevance and of being close to the heart and gland and important issues⁸⁰. Indeed, this phenomenon requires closer attention.

The Role of the International Lawyer

International law, unlike other branches of law, raises the question of fundamental underlying presuppositions and opens up the possibility for

⁷⁸ Dutch report, cited in Dekker, 118

⁷⁹ Hilpold, 442

⁸⁰ Charlesworth, 381

different legal theories and various, often mutually exclusive interpretations. The debate over the legality of the NATO operation in Kosovo only confirms this phenomenon and shows the great fluidity of international law on humanitarian intervention. There is an increasing tendency among international lawyers to go beyond traditional legal positivism and admit that there are special cases that require the lawyer to look beyond the "black and white" letter of law. Some international lawyers even reject the core distinction between legality and illegality, instead focusing on the notion of legitimacy. In summary, there are certain 'hard cases' which create different views among international lawyers and the Kosovo case can serve as the best example.

The complexity of the case can be seen in the debate within the UK Foreign Affairs Committee, where legal authorities, ranged from Professor Ian Brownlie, the strongest critic of the legality of NATO action, to Professor Christopher Greenwood, the firmest supporter of its legality. Even the common agreement that the NATO operation did not comply with the UN Charter provisions led to entirely different conclusions on its legality⁸¹. Professor Lowe argued that "the analysis of the text of the UN Charter...yields no clear justification for the NATO action. On the contrary, it suggests that the action was unlawful." Professor Adam Roberts similarly argued that "in strict terms of black letter international law, "NATO's actions were not "demonstrably and beyond any reasonable doubt legal", but equally were not illegal. Professor Reisman argued that the NATO operation "did not accord with the design of the UN Charter."⁸²

One of the possible explanations for the phenomenon of this dramatic ranging of opinion is provided by Professor Ann Orford. As she suggested, lawyers while writing legal texts on the intervention in Kosovo, often operate at the ideological level. As a result, they often not only operate within the framework of rationality and facts, but also in the realm of identification, imagination,

⁸¹ House of Commons Foreign Affairs Select Committee Report, para. 126

⁸² House of Commons Foreign Affairs Select Committee Report, para. 126

subjectivity and emotion. In other words, they are biased on a personal and subjective level⁸³.

It may be even argued, that the tendency towards legal positivism is more prevalent among lawyers who come from the statutory law background, whilst those who come from the common law background are more prone to flexible interpretation of the UN Charter and often go beyond purely legal arguments. However, this explanation perhaps would simplify the problem.

This wide range of opinions has another explanation: those international lawyers, who do not stand on the ground of positivism, often take into account the context of international relations, political and moral considerations.

Indeed, the possible grounds and justification for NATO action lie not only in international law, but go beyond traditional legal positivism. They are often based on an assumption that moral arguments directed toward prevention of ethnic cleansing and genocide should justify NATO action, even without the Security Council authorization. These considerations will still require further examination.

⁸³ See Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*

Beyond Legal Analysis and Further Perspectives of Humanitarian Intervention

Beyond Legal Analysis

NATO Operation Allied Force can serve as a classic example of the impact of moral and political considerations on international law. It is not a coincidence that lawyers prefer to speak of the legitimacy of the Kosovo intervention instead of its legality. As John Sweeney put it “whether NATO action was lawful is a very different question from whether NATO action was right”⁸⁴. As Professor Chinkin stated “the actions have legitimacy, if not a strict legality under international law”⁸⁵.

Even those who argued that NATO intervention went beyond the Charter framework or even further, claimed that it was illegal, tended to justify the operation on moral grounds, pointing out the dilemma between morality and legality. This approach was reflected in the International Independent Commission on Kosovo report which concluded that the “NATO military operation was illegal, but legitimate”⁸⁶. This concept is however often criticised for its vagueness. Whilst legality can be determined under general and customary international law, legitimacy lacks clear standards. According to this view this can lead to confusion between law and morality⁸⁷.

Professor Louis Henkin, although admitting that unilateral intervention without the Security Council authorization is unlawful, posed an important question was it not “better to leave the law alone, while turning a blind eye (or a deaf ear) to violations that had a compelling moral justification”⁸⁸. Professor Christopher

⁸⁴ House of Commons Foreign Affairs Select Committee Report, para. 137

⁸⁵ House of Commons Foreign Affairs Select Committee Report, para. 137

⁸⁶ Independent International Commission on Kosovo Report 4

⁸⁷ See Rubin, 152 Alfred P. Rubin in his review article on the Independent International Commission on Kosovo blames the report for the inconsistency of its views with the actual structure of the international legal order and for confusing the notion of legality with legitimacy.

⁸⁸ Henkin, 826-827

Greenwood went even further, arguing that "an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last fifty years".⁸⁹ As the UK Foreign Affairs Committee report on Kosovo law emphasised: law can not undermine universal acknowledged principles of human rights, It thus concluded that "NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds".⁹⁰

As has been shown, the main problem of humanitarian intervention lies in the divergence of law and morality. On the one hand, we have the principle of state sovereignty in international law, on the other considerations of human rights which demand the right of intervention⁹¹.

Many international scholars see this situation as morally unsatisfactory and call for a new legal solution and further development of international law, which will make what is right and legitimate also legal, even if it does not have at present a clear legal endorsement. This argument often rests on the preference for human rights over state sovereignty⁹². Nevertheless, as even proponents of humanitarian intervention on moral grounds have indicated, a danger of this principle is its abusive interpretation for political reasons, especially by powerful states, thus undermining principles of international law. This requires strict and narrow criteria to be set for humanitarian intervention⁹³. Moral considerations should be borne in mind, but one must not confound a political or moral justification with the principle of legality under international law.

⁸⁹ House of Commons Foreign Affairs Select Committee Report, para. 129

⁹⁰ House of Commons Foreign Affairs Select Committee Report, para. 138

⁹¹ See further Guicherd, 20 see also Tomes, Operation Allied Force and the Legal Basis for Humanitarian Intervention

⁹² See further Krisch, 323-335.

⁹³ See Krisch, 327-329

The NATO operation in Kosovo, raises questions concerning further perspectives of this type of peace operation going beyond the traditional concept of humanitarian intervention and thus calling for new legal solutions.

Further Perspectives of Humanitarian Intervention

One of the solutions proposed by the Independent International Commission on Kosovo was to “close the gap between legality and legitimacy”. The best way to achieve this is to conceive of an emergent doctrine of humanitarian intervention that consists of a process of three phases:

- a recommended framework of principles useful in a setting where humanitarian intervention is proposed and where it occurs;
- the formal adoption of such a framework by the General Assembly in the form of a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by UNSC interpretations of the UN Charter that reconciles such practice with the balance between respect for sovereign rights, implementation of human rights, and prevention of humanitarian catastrophe;
- the amendment of the Charter to incorporate these changes in the role and responsibility of the United Nations and for other collective actors in international society to implement the Declaration on the Right and Responsibility of Humanitarian Intervention⁹⁴

Thus, the UN Charter could be adapted to this Declaration either by appropriate amendments or by a case-by-case approach in the UN Security Council⁹⁵.

According to the report, the proposed framework should include three threshold principles, which must be satisfied in any legitimate claim to humanitarian intervention. First of all there must be severe violations of international human rights or humanitarian law on a sustained basis, and great suffering of a civilian society and risk due to the "failure" of their state, which entails the breakdown of

⁹⁴ Independent International Commission on Kosovo Report, 187

governance at the level of the territorial sovereign state. Second, the overriding aim of the intervention involving the threat and the use of force must be the direct protection of the victimized population. Finally, the method of intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible, and must specifically take measures to protect all civilians, to avoid collateral damage to civilian society, and to preclude any secondary punitive or retaliatory action against the target government.⁹⁶

Furthermore, the Commission described eight contextual principles used to assess the degree of legitimacy possessed by the actual use of force.⁹⁷

These include the following:

1. There must be a serious attempt to find a peaceful solution to the conflict.
2. Recourse to the UN Security Council or the lack thereof, is not conclusive. This is the case if approaching the Council fails because of the exercise of a veto by one or more permanent members; or if the failure to have recourse to the UN Security Council is due to the reasonable anticipation of such a veto, where subsequent further appeal to the General Assembly is not practical.
3. Before military action is taken, lesser measures of mediating and coercive action, including sanctions, embargoes and non-violent methods of peace observation, must have been attempted without success.
4. Recourse to the threat or use of force should not be unilateral, but should enjoy some established collective support that is expressed both by a multilateral process of authorization and the participation of countries in the undertaking;

⁹⁵ Independent International Commission on Kosovo Report, 10

⁹⁶ Independent International Commission on Kosovo Report, 293

⁹⁷ Independent International Commission on Kosovo Report, 10

5. There should not be any formal act of censure or condemnation of the intervention by a principle organ of the United Nations, especially by the International Court of Justice or the UN Security Council.
6. There must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations.
7. Territorial or economic goals are illegitimate to justifications for intervention, and there should be a credible willingness on the part of intervening states to withdraw military forces and to end economic coercive measures at the earliest point in time consistent with the humanitarian objectives.
8. After the use of armed force has achieved its objectives, there should be energetic implementation of the humanitarian mission by a sufficient commitment of resources to sustain the population in the target society and to ensure speedy and humane reconstruction of that society⁹⁸

According to the Commission these principles are designed to prevent a doctrine of intervention from becoming a license for the unprincipled exercise of great power politics⁹⁹.

Going in the same direction, but by looking from a slightly different perspective is the idea presented in the UK Foreign Affairs Committee report by Professor Lowe, which sets out “his” principles for humanitarian intervention. This requires “prior determination by the Security Council of a grave crisis, treating international peace and security”.¹⁰⁰ Professor Lowe, however, argued that it is even more important to develop international law so that actions such as in Kosovo would in future be legally acceptable. This could be done in a treaty which would set out the conditions under which humanitarian intervention should be permissible. Although, as he pointed out consensus on a treaty text

⁹⁸ Independent International Commission on Kosovo Report, 293-294

⁹⁹ Independent International Commission on Kosovo Report, 294

¹⁰⁰ House of Commons Foreign Affairs Select Committee Report, para. 140

could be problematic; nevertheless the parameters for action set by NATO should become the basis of new customary law principles¹⁰¹.

The Dutch report offers a different solution. It suggests increasing the number of membership of the Security Council and limiting the right of veto. According to the report, this could enhance the legitimacy of the Council, but its impact on effectiveness remains uncertain. The alternative option discussed in the report is the creation of a separate legal basis for humanitarian intervention. According to the Dutch report it is “extremely desirable that, as part of the doctrine of state responsibility, efforts be made to further develop a justification ground for humanitarian intervention without a Security Council mandate”¹⁰².

This is possible since the international duty to protect and promote fundamental rights “has...developed into a universally valid obligation that is incumbent upon all the states in the international community, both individually and collectively”¹⁰³.

A proposal which goes much further was offered by the Independent International Commission on Kosovo, which suggested strengthening of the level of human rights protection contained in the UN Charter. Thus, ideally the Charter should be amended to enhance the role of human rights in their own right within the system for collective security. This is urgently needed since human rights protection has been of secondary importance to the Security Council within the existing charter’s framework. Such amendment would

*...put pressure on and make it possible for the UNSC to invoke violations of human rights and humanitarian law directly as a reason for taking a variety of types of measures. The Council would consequently no longer have to stretch reality to invoke the notion of "threat to the peace" in every case, and would also have greater difficulty standing by and doing nothing*¹⁰⁴.

¹⁰¹ House of Commons Foreign Affairs Select Committee Report, para. 139

¹⁰² Independent International Commission on Kosovo Report, cited in Dekker 121

¹⁰³ Dutch report, cited in Dekker 121

¹⁰⁴ Independent International Commission on Kosovo Report, 195-196

The Commission goes even further suggesting particular changes to a number of articles in the Charter making reference to human rights¹⁰⁵.

The proposals of changing the framework of the UN Charter, as well as of introducing certain principles governing humanitarian intervention require careful consideration before being implemented. As the practice of the last years shown, there are a number of political and organisational problems in implementing such changes. Indeed, the proposals discussed in the three cited reports are still waiting for their implementation.

¹⁰⁵ See the details of particular amendments-Independent International Commission on Kosovo Report, 196-198

Conclusions

The legality of Kosovo intervention still is a controversial issue and the majority of lawyers agree that the operation was not legal under the UN Charter framework. Nevertheless, the same lawyers often justify the action on political and moral grounds. As Professor Bruno Simma argued, the lessons which may be drawn from the Kosovo crisis include the phenomena of “hard cases in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law”¹⁰⁶.

The fact that a respected authority in international law, admits that in certain instances it is accepted to act outside the law, should force us to think whether indeed existing law reflects the need to protect human rights in the case of humanitarian catastrophe. This can lead us to the conclusion that the emerging doctrine of humanitarian intervention which can be justified on moral or political grounds should be turn into a legal doctrine of humanitarian intervention. This requires either changing the UN Charter framework or allowing for its more flexible interpretation. One should however not be naive enough to believe that this will be a rapid process. It seems yet that the Kosovo intervention can be treated as a significant precedent that will have a vital impact on the gradual process of creating a legal doctrine of humanitarian intervention.

Nonetheless, opponents of the Kosovo intervention can argue that such a precedents of states or international organisations acting outside the UN system can lead to the erosion of international law or its abusive re-interpretation. Thus, in order to avoid this, the conditions for humanitarian intervention need to be clarified and this is indeed the strong argument for changing the UN Charter framework and developing clear-cut principles governing humanitarian intervention and instances in which the use of force will be allowed. Hence, establishing a solid legal basis for the doctrine of humanitarian intervention would create a system in which human rights will be better protected.

¹⁰⁶ Simma, 22

The opponents of the doctrine may rightly argue that it is highly politicised and selectively implemented. Nevertheless, they should answer the question: is it better to intervene in the case of overwhelming humanitarian necessity only when political circumstances allow one to do so, or should one as a matter of principle turn a blind eye on human rights violations? Moreover, the question can be raised: what would have happened if the NATO did not intervene in Kosovo?

As a conclusion to this report we may cite Professor Adam Roberts comment on the operation Allied Force: "NATO was not the ideal instrument; it was simply the only one that was there"¹⁰⁷.

¹⁰⁷ House of Commons Foreign Affairs Select Committee Report, para. 135

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