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Recommended Citation

Burton, Leslie A. (2001) "Kosovo: To Bomb or Not to Bomb? The Legality is the Question," Annual Survey of International & Comparative Law: Vol. 7: Iss. 1, Article 5.
Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol7/iss1/5

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KOSOVO:
TO BOMB OR NOT TO BOMB?
The legality is the question

Leslie A. Burton*

I. INTRODUCTION

In 1998 and 1999, Yugoslavia was engaged in an “ethnic cleansing,” involving the systematic murder of its ethnic minorities, especially within its state of Kosovo. Although the United Nations issued Resolutions condemning Yugoslavia’s actions, the U.N. stopped short of ordering any enforcement action.

The North Atlantic Treaty Organization (“NATO”) members agreed that action must be taken to stop the slaughter. After attempts to negotiate peace in the region proved unsuccessful, NATO determined that an aggressive response was the only alternative. On March 24, 1999, NATO-sponsored forces commenced bombing Kosovo. The bombing ended on June 10, 1999, having achieved its aim.

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2. See infra notes 13, 14, and 15.
3. Sharp, supra note 1, at 303.
4. Id.
The subject of this paper is whether NATO’s actions were legal under international law.

Some scholars have maintained that the bombing was illegal in the sense that its scope was too broad; e.g. that the types of weapons (such as cluster bombs) were too indiscriminate; or that the targets were illegal (some claim that the bombing targeted civilians and in some cases killed the very refugees whom NATO was seeking to protect). These arguments are beyond the scope of this paper, which will address only whether the decision to commence bombing was itself lawful under international law.

II. SOURCES OF AUTHORITY

Only two sources could have authorized NATO to use force against a sovereign nation. The first source would have been the United Nations Charter. The second source would have been customary international law. Each of these will be examined separately.

A. THE UNITED NATIONS CHARTER AS AUTHORITY FOR THE USE OF FORCE

The United Nations Charter specifically recognizes the existence of regional organizations, such as NATO, and allows regional organizations to deal with matters of international peace and security, so long as these activities are “consistent with the Purposes and Principles of the United Nations.”

In the NATO Treaty, the member countries agreed that NATO would not use force in “any manner inconsistent with the United Nations purposes.”

Several provisions of the United Nations Charter specifically authorize the use of force against a sovereign nation. The question then becomes whether NATO’s use of force was authorized by any of the provisions of the United Nations Charter.

8. U.N. CHARTER art. 52(1).
1. Security Council Can Approve Use of Armed Force to Maintain International Peace

The United Nations Security Council may approve the use of force under the provisions of articles 39 and 42 of the United Nations Charter. First, the Security Council must determine that a “breach of the peace or act of aggression” has occurred.\(^\text{10}\) If the Council makes that determination, then it may impose economic and other sanctions (such as severing diplomatic relations) which do not involve armed force.\(^\text{11}\) If the Council finds that these measures would be inadequate, it may authorize the use of armed force as is necessary to “maintain or restore international peace and security.”\(^\text{12}\)

The Security Council did determine, under article 39, that Yugoslavia was breaching the peace by its treatment of its ethnic minorities. In Security Council Resolution 1160, issued in March 1998, it called for a cessation of hostilities in the area and imposed an arms embargo.\(^\text{13}\) When Yugoslavia refused to obey the resolution, the Security Council in September 1998 issued Resolution 1199, which referred to an “impending humanitarian catastrophe” in Yugoslavia and called for a cease fire and a political dialog.\(^\text{14}\) Yugoslavia again failed to heed the resolutions. Yet another resolution, 1203, was passed in October 1998. This one endorsed a cease fire which had been negotiated (but proved to be short-lived) and condemned all acts of violence and terrorism.\(^\text{15}\)

None of the resolutions authorized even the lesser sanctions of article 41, let alone the use of force under article 42.\(^\text{16}\) In fact, such an authorization would have been impossible to obtain because it needed the votes of all five permanent members of the Security Council,\(^\text{17}\) but at least two of them (China and Russia) would not have consented.\(^\text{18}\)

\(^{10}\) U.N. CHARTER art. 39.
\(^{11}\) Id. at art. 41.
\(^{12}\) Id. at art. 42.
\(^{16}\) Grant, supra note 5, at 19.
\(^{17}\) U.N. Charter, art. 27(3), requires that non-procedural matters be passed only with the concurrence of all five permanent members of the Security Council. These members are: China, France, Russia, the United Kingdom, and the United States. U.N. CHARTER art. 23.
\(^{18}\) In fact, China, Russia, and India were the only members of the Security Council to vote to condemn the bombings.Aaron Schwabach, The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia, 11 PACE INT’L L.R. 405, 416 (1999), citing Law and Right, When They Don’t Fit Together, THE ECONOMIST, April 3, 1999, at 19-20.
The United States, through Secretary of State Madeleine Albright, took the position that the Security Council, by issuing these Resolutions, had authorized the use of armed force in Kosovo. This contention is without merit. Nothing in the Charter makes an article 39 resolution into a self-executing article 42 resolution. States cannot infer that they have Security Council approval to use armed force to enforce all Security Council resolutions. Further, after the bombing had commenced, Secretary-General Annan reprimanded NATO, stating that it should not have acted without Security Council authorization, offering further proof that there was no Security Council approval. No authority exists for the U.S. position, which was roundly dismissed by international law scholars.

Finally, regional organizations do not have any greater right to use force than the United Nations does. Under article 53, regional organizations cannot use force without the approval of the Security Council. NATO did not have Security Council approval and its use of force was not authorized under these provisions.

2. The U.N. Charter Authorizes Individual, Collective, and Anticipatory Self-Defense

Even without Security Council approval, however, it seems that regional organizations may legitimately use force in self-defense under article 51.

Article 51 of the United Nations Charter allows nations to use armed force for self-defense, or defense of others, when attacked. That article states that "nothing in the ... Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations ..." Article 5 of the NATO Treaty similarly allows NATO to use force in self defense against an "armed attack." If Yugoslavia had attacked another nation, these articles would have authorized the victimized nation and its allies to respond with armed force.

19. Sharp, supra note 1, at 318-19; Grant, supra note 5, at 19.
22. Grant, supra note 5, at 19.
23. U.N. CHARTER art. 53.
The problem with using these articles as justification for the NATO bombing is that Yugoslavia made no attack against a member of the United Nations, or indeed even against any other nation. Yugoslavia's actions were entirely within its own borders, against its own citizens. As horrendous as Yugoslavia's acts against its own citizens were, they were not grounds for an armed response under any provisions of the United Nations Charter. To the contrary, article 2(7) of the Charter provides that "Nothing . . . in the present Charter shall authorize the United Nations to intervene in matters which essentially are within the domestic jurisdiction of any state. . . ."26

Yugoslavia's argument, therefore, is that no other nation may act, especially with force, when Yugoslavia applies its own domestic policies to its own peoples. This argument is well-grounded in the language of the Charter.

The opposing argument asserts that Yugoslavia is a "threatening presence" in the area, and that this threat gives rise to a claim of collective self-defense.27 Under this position, Yugoslavia's actions threaten other nations, not only because refugees from Yugoslavia pour into neighboring nations to escape the massacres in Yugoslavia, but also because the strong anti-minority sentiment in Yugoslavia may have dangerous effects on those minorities who live in neighboring nations.28 Further, Yugoslavia's prior actions, such as its attack against Croatia and Slovenia and its support for the Serbians in the Bosnian civil war, were aimed at expanding its borders over neighboring states with Serbian populations.29 Thus states bordering Yugoslavia had reason to see Yugoslavia as a threatening presence in the area.30

The NATO members, however, were not among the nations arguably threatened. None of them bordered Kosovo, and only one member (Hungary) bordered Yugoslavia.31

Further, the existence of a "threatening presence" does not justify the use of force under the plain language of Article 51. Force may be used only in response to an "armed attack."

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27. Schwabach, supra note 18, at 409.
28. Id. at 409, 411.
29. Id. at 409.
30. Id.
31. Schwabach, supra note 18, at 409.
But some commentators have argued that self-defense includes "anticipatory collective self-defense." In other words, a group of nations should not have to sit back and wait until an attack on one of them actually occurs if an attack is imminent.

Commentators advocating an anticipatory collective self-defense argument have used a six-prong test to determine whether self-defense is justified. The prongs are: (1) the use of force is proportional, (2) the use of force is necessary, (3) the threat is instant, (4) the threat is overwhelming, (5) there is no peaceful alternative, and (6) there is no time for deliberation. 32

This test fails here. Let us assume arguendo that the first four prongs were met: the use of force was proportional to the perceived risk, the use of force was necessary to prevent serious harm, the threat was immediate and ongoing. But the last two elements were not satisfied. First, other alternatives existed to bombing Kosovo, such as economic sanctions or the sending of peace-keeping forces. Further, NATO contemplated taking action for months before deciding to bomb, 33 thus giving the lie to the argument that no time for deliberation existed. Thus, the NATO bombing was not justified by a theory of "anticipatory self-defense," at least under the United Nations Charter.

Nor can NATO argue that its attack was justified as an enforcement technique, as opposed to an act of self-defense. A regional organization cannot use force as an enforcement technique unless it first obtains authorization from the Security Council. 34

The NATO bombing of Kosovo was not authorized under the specific provisions of the United Nations Charter. Therefore we must examine whether it can be justified under customary international law.

B. CUSTOMARY INTERNATIONAL LAW AS AUTHORITY FOR HUMANITARIAN INTERVENTION

The use of force may sometimes be authorized, under customary international law, to protect people from genocide and other human rights abuses. Such a power, however, must be carefully delineated and limited.

32. Id.
33. Id.
34. U.N. CHARTER art. 53(1).
1. The Use of Force to Prevent Genocide.

The U.N. Charter does not state that its provisions are the only possible authority for using force. In fact the U.N. Charter states that regional organizations may deal with "matters relating to the maintenance of [regional] international peace and security" so long as the organization's actions are "consistent with the Purposes and Principles of the United Nations." Thus, the use of force, although not authorized by a specific provision of the U.N. Charter, may be lawful if it is not inconsistent with United Nations purposes and is otherwise lawful—in other words, if it conforms to customary international law.

When a practice is generally accepted, it begins to form a part of customary international law. A custom has been developing in recent years whereby nations may use force to intervene to prevent human rights abuses and genocide within the boundaries of other separate sovereign nations. Thus, even though the use of force is not explicitly authorized by the U.N. Charter, it may be authorized by customary international law.

Using force to protect people from genocide suffered at the hands of their own government is not inconsistent with the U.N. Charter or the purposes of the United Nations. In fact, humanitarian intervention is consistent with the purposes and principles of the United Nations.

Many believe that the formation of the United Nations, on the heels of the Nazi atrocities of World War II, was the starting place for the modern position favoring humanitarian intervention.

This argument finds support in the very Preamble to the U.N. Charter, which states that one of the Charter's purposes is to "reaffirm faith in fundamental human rights . . .":

Article I(3) goes on to emphasize that the Charter seeks to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all . . . ."
Article 55 states that

the United Nations shall promote: ... universal respect for, and observance of, human rights and fundamental freedoms for all ... 41

Article 56 requires that

[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. 42

These provisions indicate that humanitarian purposes are one of the primary goals of the Charter. Because humanitarian concerns are at the very heart of the Charter, the Charter provides a basis for humanitarian intervention.

Scholar Jordan Paust argued that the intervention in Kosovo promoted the purposes of the United Nations.43 He stated that the intervention served the general purposes of the United Nations listed in Article 1 of the Charter which include the preservation of peace, security, self-determination of peoples, and respect for and observance of human rights.44

He added that the action was legal under Articles 55 and 56 because all member states are required to take joint and separate action for the universal respect for and observance of human rights... [including to] prevent and punish... [genocide].45

Further support for humanitarian intervention is found in the Genocide Convention of 1948,46 the Universal Declaration of Human Rights of 1948,47 and the Geneva Conventions of 194948.

41. Id. at art. 55.
42. Id. at art. 56.
43. Geissler, supra note 6, at 342.
44. Geissler, supra note 6, at 342, citing Jordan J. Paust, NATO's Use of Force in Yugoslavia, 33 UNITED NATIONS LAW REPORTS 114, 114 (John Carey ed., May 1, 1999).
45. Id at 342, citing Paust, supra note 44, at 115.
The Genocide Convention in particular calls upon the United Nations to take such action as appropriate for “the prevention and suppression of acts of genocide.” Acts of genocide include killing, or inflicting serious harm, on members of an ethnic group with an intent to destroy that group. The crime of genocide transcends the inviolability of states, and using force to prevent it is legal. The crime of genocide was occurring in Kosovo. Because NATO intervened to prevent it, NATO’s action was legal.

The Universal Declaration of Human Rights condemns the unlawful taking of life, and the Geneva Conventions prohibits the murder of civilians. These agreements encourage signatories to take action when a state violates the agreements’ provisions. Yugoslavia was unlawfully taking lives and killing civilians. Therefore, NATO’s intervention was legal.

Additionally, there are several precedents for modern, post-Charter humanitarian intervention. In the 1970’s, India intervened in Bangladesh to prevent appalling atrocities. Tanzania intervened in Uganda in 1979 to end the barbaric rule of Idi Amin. In 1990, several west African countries intervened in Liberia to stop mass killings, and again in Sierra Leone in 1998. In 1991 the Allies intervened in Iraq to protect the...
Kurds. Although none of these actions were officially approved by the Security Council, the actions received widespread acceptance. The interventions in Uganda and Iraq, particularly, were widely accepted and approved.

Protecting human rights also was cited as part of the justification for the United States’ sending troops to the Dominican Republic in 1961, and again to Grenada in 1984. In the latter two instances, no allegations of genocide were made. Rather, the circumstances were anarchy, riots, and political upheaval. Arguable these situations are additional grounds for humanitarian intervention, but are beyond the scope of this paper.

The humanitarian interventions in Bangladesh, Uganda, Sierra Leone, Liberia, and Iraq support the argument that using force to protect people from killings and other human rights abuses has become customary international law.

The idea of humanitarian intervention is not new. The first reference to humanitarian intervention was in 1579, and by the end of the nineteenth century most scholars believed that humanitarian intervention was legal.

In more modern times, however, the right of humanitarian intervention has been the subject of conflicting views. In fact, between 1900 and World War II, scholars assumed that the rights of sovereign nations to do whatever they wanted to their own citizens within their own borders was paramount. Execution and torture within a state were significant only

59. Id.; Schwabach, supra note 18, at 416. Although the action to protect the Kurds was not specifically authorized by the Security Council, some argue that it was approved as a part of the war authorized by the Security Council to end the Iraqi occupation of Kuwait. See Jules Lobel & Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires, and the Iraqi Inspection Regime, 93 AM. J. INT’L L. 124, 124-125 (1999). However, the war had officially ended before the Allies acted to protect the Kurds. In any event, many U.N. members acquiesced in the effort to provide safe havens for the Kurds. Schwabach, supra note 18, at 416 n.55.

60. Sharp, supra note 1, at 315 n.152 and accompanying text; Schwabach, supra note 18, at 416.


63. Geissler, supra note 6, at 333, citing BROWNLE, supra note 36, at 338.

64. Sharp, supra note 1, at 315, citing NATIONAL SECURITY LAW 674-75 (John Norton Moore et al., eds., 1990).
if they were imposed upon a foreign national.\(^\text{65}\) Otherwise, a state's internal acts could not be addressed by international law.\(^\text{66}\)

But this rule has been changing.\(^\text{67}\) After World War II, both in the United Nations Charter and in subsequent conventions, nations agreed in binding treaties not to torture or kill their citizens.\(^\text{68}\) These promises, coupled with contemporary state practice, have combined to create a customary international law permitting the use of armed force to prevent genocide and other human rights abuses which violate international law.\(^\text{69}\)

Opponents of humanitarian intervention argue the traditional view, that the sovereignty of nations is paramount, superseding any human rights concerns.\(^\text{70}\) To support the continuing validity of this view, they point to articles 2(4) and 2(7) of the Charter.

Article 2(4) provides that

All members shall refrain in their international relations form the threat of use of force against the territorial integrity . . . of any state, or in any other manner inconsistent with the purposes of the United Nations.\(^\text{71}\)

Article 2(7), as discussed in section II.A.2, supra, states that the U.N. may not intervene in the domestic jurisdiction of any state.

Relying on these provisions to oppose humanitarian intervention is misplaced. Humanitarian intervention does not violate article 2(4) because humanitarian actions are not directed at the territorial integrity or political independence of governments.\(^\text{72}\) Humanitarian intervention is not directed at changing territorial boundaries or the government of the

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65. Sharp, supra note 1, at 315-316 n.156 and accompanying text, citing NATIONAL SECURITY LAW, supra note 64, at 674-75.
66. Grant, supra note 5, at 45.
67. Id.
68. Sharp, supra note 1, at 315, citing NATIONAL SECURITY LAW, supra note 64, at 674-75.
69. Sharp, supra note 1, at 315; Geissler, supra note 6, at 344.
70. Geissler, supra note 6, at 335. Among the scholars opposing any right of humanitarian intervention is Ian Brownlie, who states that it is illegal and finds no consensus in the documents of the United Nations or the drafts of the International Law Commission. Id. Brownlie further states that any right of human intervention which existed pre-Charter would not have survived the prohibitions of the Charter. Sharp, supra note 1, at 315, citing BROWNLIE, supra note 36, at 342.
71. U.N. CHARTER art. 2(4).
72. Geissler, supra note 6, at 327.
target country. The use of force in Kosovo, for example, was not intended to topple the government. Instead, the purpose of humanitarian intervention is to protect people from human rights abuses.

Additionally, humanitarian interventions do not violate article 2(7). As human rights have gained acceptance, the notion of state sovereignty has lost ground. Human rights issues are no longer considered purely domestic issues. Genocide is no longer considered a local matter, but a breach of the international peace.

A minority of international scholars argue that humanitarian intervention is not legal. In addition to relying on the United Nations Charter provisions discussed above, they point to the opposition of China, India, and Russia to the NATO bombings. They argue that the "wide acceptance" necessary for a practice to become customary international law cannot occur when three of the world's four most populous counties reject the practice.

However, all nineteen member countries of NATO supported the bombing, and many other nations supported it as well. When China, India, and Russia introduced a resolution to condemn NATO, the other twelve members voted it down. This indicates the implicit acceptance of the great majority of Security Council members that the NATO bombing was lawful.

Enforcement actions in the United Nations historically have been hindered by the permanent member veto power. The perpetual disagreements of these members should not prevent an emerging norm from being considered as customary international law. In fact, the better argument is that widespread acceptance of the NATO action indicates acceptance of the use of force in humanitarian interventions, especially

73. Id. at 337.
74. Id.
76. Id.
77. Geissler, supra note 6, at 327, 337.
78. Schwabach, supra note 18, at 417.
79. Geissler, supra note 6, at 338.
80. Sharp, supra note 1, at 321-22.
81. Id. at 322.
82. Mertus, supra note 75, at 1777.
83. The NATO action was specifically approved by nineteen NATO members, all of which were also members of the United Nations. In addition, several other nations voiced their approval of the NATO action. Geissler, supra note 36, at 338.
considering that three permanent members of the Security Council (the U.S., France, and the U.K.) were NATO members which voted in favor of the bombing.

Using force to prevent genocide and other human rights abuses, therefore, is not only consistent with the purposes of the United Nations, it is increasingly accepted under customary international law. Under this view, the bombing of Kosovo was legal.

2. Limitations on Humanitarian Intervention

There are some risks in allowing humanitarian intervention. Only a few powerful states are in a position to use their economic and military power on behalf of human rights. Thus, the doctrine could be perverted or manipulated for the gain of the powerful nation. During the cold war period, for example, some states misused the doctrine as a pretext for occupying other states.

An international consensus should be established as to humanitarian interventions. This could be accomplished by United Nations resolutions or through Conventions. This consensus could clarify the standards required for humanitarian intervention.

Some of the criteria could include:

(1) That the threat of immediate genocide or extreme human rights abuses exists.

(2) That peaceful diplomatic efforts have failed or are unlikely to be effective.

(3) That the intervening states have little or no interest in the affairs of the target state beyond the human rights concerns. (This would assure that the motives of the intervening state be overriding humanitarian, rather than self-interested.)

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84. Sharp, supra note 1, at 325.
85. Mertus, supra note 75, at 1778.
86. Id.; Geissler, supra note 6, at 333.
87. Mertus, supra note 75, at 1778.
88. Geissler, supra note 6, at 345.
89. Id.
90. Mertus, supra note 75, at 1779-80.
(4) That the use of force is necessary, and the force used will be appropriate and will end when the goal has been accomplished.

These criteria would assure that humanitarian interventions are just that, and not power grabs which would violate articles 2(4) and 2(7) of the Charter.

Some commentators have suggested that humanitarian intervention occur only when it is requested by the target state.91 This suggestion is wholly impractical. First, a government which is violating the rights of its citizens is unlikely to request humanitarian assistance to protect its citizens from itself. Second, such an act would not be humanitarian intervention, but humanitarian assistance, an entirely different matter.92 Perhaps the criteria should be, instead, that the victims would welcome the intervention.93

If criteria such as these were established, states would have a standard by which to judge whether they should use force, and the international community would readily know whether the states who were “intervening” were conforming to international law.

III. CONCLUSION

International law scholar and professor Julie Mertus has pointed out that “[m]eaningful humanitarian intervention does not threaten the world order. Rather, it vindicates the very principles on which the United Nations was founded.”94

As an exercise of humanitarian intervention, NATO’s decision to bomb Kosovo was justified, moral, and most of all, legal under customary international law.95 In the future, the United Nations should consider establishing specific criteria for such interventions, to prevent potential abuses.

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91. Geissler, supra note 6, at 333.
92. Mertus, supra note 75, at 1779-80.
93. Id. at 1779.
94. Mertus, supra note 75, at 1787.
95. The bombing itself may have gone beyond the bounds of what was justified in terms of who was targeted and what types of bombs were used; these details are not within the scope of this paper.