

# Lessons of International Law from NATO's Armed Intervention Against the Federal Republic of Yugoslavia

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## The threat or use of force and the Charter of the United Nations

Under the UN Charter, the threat and use of force is prohibited by Article 2.4, which most writers consider a peremptory norm of international law. The use of force by individual states (acting alone or in a military alliance) is permitted only in self-defence under article 51 or against "enemy states", according to Articles 107 and 53 (the action may be taken by individual states or by a regional organisation). The practice shows that states are lawfully permitted to resort to force, if they are authorised by the UN Security Council (SC), acting under Chapter VII, that is, if the SC determines that there is a threat to peace or a breach of peace or that an act of aggression have taken place. This point is no longer object of controversy, even though writers are questioning whether this permissive rule is the consequence of a custom within the Charter or can simply be derived from Article 48, which states that actions required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all UN members "or by some of them".<sup>1</sup>

Regional organisations or regional arrangements, also, are allowed to take enforcement measures. However, according to Article 53, they cannot act independently of the Security Council. Either they are delegated by it or they need a proper authorisation.

<sup>1</sup> See generally J. A. Frowein, "Legal Consequences for International Law Enforcement in Case of Security Council Inaction" in J. Delbrück (ed.) *The Future of International Law Enforcement. New Scenarios - New Law?* (Berlin: Duncker & Humblot, 1993) p. 111-24.

Given the constraints of the UN Charter, states have tried to enlarge the instances of lawful recourse to force in many ways. For instance, they have advocated a restrictive interpretation of the scope of Article 2.4, asserting that intervention in foreign territory is permitted when it is not aimed at the conquest of territory or the overthrow of a foreign government and is thus not contrary to territorial integrity or political independence. The exception of self-defence is also subject to a broad interpretation, advocating the legality of a pre-emptive right of self-defence (for instance before an armed attack takes place). The United States has long held the view that regional organisations can adopt enforcement measures without having to be authorised by the Security Council. On the other hand, some of the African and Asian states and the (then) Communist countries advocated the theory of wars of national liberation declaring that armed intervention in favour of a people fighting for its self-determination was permissible.

Is the use of force against the Former Republic of Yugoslavia (FRY) by NATO to be considered a further step towards extending the exception to the use of force prohibited by the UN Charter?

#### Western governments' legal justification of the air campaign against FRY

NATO states gave two justifications for the recourse to armed force. On the one hand, the use of force was presented as having taken place within the framework of Security Council resolutions. On the other, NATO states referred to the theory of humanitarian intervention, or more precisely, it was claimed that armed intervention was needed "to prevent further humanitarian catastrophe".

These two justifications require separate analysis. As for the former, it is interesting to note that United Nations practice now tends to accept that civil war and humanitarian emergency can constitute a threat to peace, as set down in Art. 39 of the Charter. In the absence of troops available to the SC, which would allow it to undertake armed action directly, the practice has evolved so that the SC authorises the states, individually or associated, or regional organisations or arrangements to use armed force. But such operations take place under the supervision of the SC, to which the states are obliged to report. As for regional organisations, Art. 53 of the Charter (reiterated in UN General Assembly Resolution 49/57- 1994), states quite clearly that coercive actions cannot be undertaken by regional organisations or arrangements without being delegated or authorised by the Security Council. Naturally, the member states of a regional organisation can react in self-defence if another member state is being attacked without waiting for SC authorisation.

Not having obtained explicit SC authorisation, the NATO member States participating in the raids stated that the armed intervention took place within the framework of the resolutions adopted by the SC on Kosovo. Both Resolution 1199 (1998) and Resolution 1203 (1998) define the situation in Kosovo as "a threat to peace". But neither authorise the use of force. The warning contained in Resolution 1199, which states that the SC, in case of breach by the Serbs, would "

consider further action and additional measures to maintain or restore peace and stability in the region”, can evidently not be considered an authorisation. In diplomatic language, in fact, “to consider” is a rather weak expression and not an equivalent of “to take measures”. Furthermore, the adoption of “further measures” would have been among the competences of the SC and not of the individual states; thus they would not have been authorised to use force even if the resolution had used more incisive language, like that contained in Resolution 687 (1991) on Iraq, which reserves the right “to take further steps”. Moreover, some states during the meeting of the SC to discuss the Russian proposal to halt the bombings expressly acknowledged that there was no authorising resolution. For example, on 26 March 1999, the Slovene delegate, while justifying the recourse to armed force, stated that he would have preferred a SC authorisation, even though it was impossible under the circumstances at that time.<sup>2</sup>

In a press communiqué dated 24 March, the UN Secretary General, while in no way criticising the behaviour of NATO countries, stated that the SC had the primary responsibility for maintaining peace and international security and that therefore the Council “should be involved in any decision to resort to the use of force”.<sup>3</sup> He went on to say that “. . . there are times when the use of force may be legitimate in the pursuit of peace”, but he also reiterated the need for an ad hoc resolution from the Council. It may be concluded that the resolutions mentioned above were the premise for authorisation of the use of force, but that the authorising act needed to actually resort to force never materialised.

As for justifying the intervention with humanitarian motivations, almost all states made some kind of mention of this in their policy stances, but a statement by the United Kingdom during the above mentioned debate in the SC is exemplary: “in the current circumstances, military intervention was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe”.<sup>4</sup> That justification was later reiterated by the Belgian agent in his plaidoirie before the International Court of Justice (from which, as will be seen, the FRY had requested provisional measures) – one of the few occasions on which a Western state entered into the merit of the operation without being required to do so. He stated: “Donc ce [the intervention against the FRY] n’est pas une intervention dirigée contre l’intégrité territoriale, l’indépendance pour l’ex-République de Yougoslavie, c’est une intervention pour sauver une population en péril, en détresse profonde. C’est la raison pour laquelle le Royaume de Belgique estime que c’est une intervention humanitaire armée qui est compatible avec l’article 2, paragraphe 4 de la Charte qui ne vise que les interventions dirigées contre l’intégrité territoriale et l’indépendance politique de l’État en cause”.<sup>5</sup>

2 Security Council, 3989th Meeting, 26 March 1999.

3 Press release SG/SM/6938, 24 March 1999.

4 Security Council, 3989th Meeting, 26 March 1999.

5 Cour internationale de Justice CR 99/15 (10 mai 1999), (<http://www.icj-cij.org/cijwww/cdoc...r/cyallcybe ccr9915 19990510.html>, p. 10).

## An implicit authorisation by the Security Council?

The foregoing suggests that the air raids should have been authorised by the SC; can it therefore be assumed that they received an “implicit” authorisation? In evaluating the October crisis and the act order by which NATO was ready to use force against FRY, Simma excludes this hypothesis.<sup>6</sup> He recognises that Resolution 1203 (1998) was adopted with a “remarkable degree of satisfaction”, even though agreement on the OSCE monitoring mission and the NATO overflights was reached under the threat of NATO air raids. Yet Simma points out that Russia was always opposed to the inclusion in Resolutions 1160 and 1199 of any reference to the use of force – a reference which nevertheless slipped into Resolution 1203, which Russia, in fact, abstained from voting. Motivating its abstention as well, China stated that the resolution still contained some mention of the use of force, even though the elements that authorised its use or threat of its use had been eliminated on China’s request. The United States underlined that the threat of force was the essential factor in concluding the agreement on OSCE monitoring and NATO verification and that the NATO allies, unanimous about the use of force, “had made it clear that they had the authority, the will, and the means to resolve the issue”.<sup>7</sup> The debate in the Security Council offers no elements in favour or against the thesis of an implicit authorisation; it does, however, reflect the openly contrasting positions of its permanent members.

Immediately after the beginning of the air raids, the Russian Federation presented a proposal to the SC in which it demanded “an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations”. The draft resolution (presented also on behalf of Belarus and India) was voted down (3 in favour, 12 against), so that the permanent Western SC members did not have to resort to the veto.<sup>8</sup> Can the rejection of the Russian proposal be considered an implicit authorisation of the use of force?

Since the Security Council did not stop the air raids and rejected the Russian proposal to do so, the hypothesis that the use of force was implicitly authorised is plausible. Naturally, such an authorisation would be a posteriori. Among other things, Resolutions 1199 and 1203 laid the groundwork for recourse to the use of force, having characterised the situation in Kosovo as a threat to peace.

One could, however, object that the thesis of implicit authorisation clashes with the explicit opposition of two members of the Security Council (China and the Russian Federation).

6 B. Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, vol. 10, no. 1, 1999, pp. 10-11; for more information on the October crisis, see J. Gow, “Kosovo after the Holbrooke-Milosevic Agreement. What Now?”, *The International Spectator*, vol. XXXIII, no. 4, 1998.

7 Security Council, 3937th Meeting, 24 October 1998, Press Release SC/6588, p. 12 (Russia), p. 13 (China), p. 13 (United States).

8 Security Council, 3989th Meeting, 26 March 1999, SC/6659.

Concretely, the thesis of implicit authorisation seems to be a bit of sophism. In fact, though explicit authorisation was not given, since China and/or Russia would have vetoed it, it is unreasonable to say that failure to pass a prohibitive deliberation is equivalent to an authorisation, on the principle that that which is not expressly prohibited is allowed. An authorisation must have an incontrovertible basis, in that it has to remove the prohibition of the use of force established by the UN Charter. Furthermore, none of the states in favour of the use of force which voted against the Russian proposal to stop the bombing ever referred to the thesis of implicit authorisation.

### The role of the International Court of Justice

On 29 April 1999, the FRY instituted proceedings against NATO countries before the ICJ for violation of international law and requested provisional measures asking NATO countries to stop the bombing immediately. The major problem before the Court was its competence to adjudicate the case, since the Court jurisdiction is not obligatory and presupposes the consent of the parties. In its order, delivered on 2 June 1999, the ICJ, having found that it lacked *prima facie* jurisdiction, did not assess the merit of the case and did not issue any provisional measure. However it made a few considerations on the merit of the affair which are relevant. The Court declared itself “deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo ... and with the continuing loss of life and human suffering in all parts of Yugoslavia”. It added that it was “profoundly concerned with the use of force in Yugoslavia” and said that “... all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law”. In stating that it was “deeply concerned” not only with the Kosovo tragedy, but also with the use of force in Yugoslavia, the Court took an equidistant position with respect to the two belligerents. It further stressed that “under present circumstances such use raises very serious issues of international law”.<sup>9</sup>

### An overview of opinions on the legality of the air campaign

Even though the air campaign against the FRY is a recent event, authors have already taken position on the legality of NATO countries’ action.

A few authors affirm that the NATO action was in conformity with international law. Among them, one has to cite Christopher Greenwood, Marc Weller, Adam Roberts and, to some extent, Catherine Guicherd.<sup>10</sup> These authors mostly invoke the

9 ICJ, 2 June 1999, Case Concerning Legality of Use of Force (Yugoslavia v. Belgium), Request for the Indication of Provisional Measures, Order, paras 16-19.

10 See “The Law and the War. Gowned Warriors”, *The Economist*, 15 May 1999, p. 17-8, in which Greenwood’s views are reported. For more details on Greenwood’s ideas on humanitarian intervention, see “Is there a right of humanitarian intervention?”, *The World Today*, vol. 49, no. 2, 1999, pp. 34-40. See also M. Weller, “Justification and Limits of Operations without a Mandate”, paper presented at the seminar on The Legitimacy of Crisis Response Military Operations, WEU Institute for Security

doctrine of humanitarian intervention.

The majority, however, qualify the intervention as contrary to international law. The positions of this group of scholars vary. The most extreme opinions label the intervention as an act of aggression. Here one may cite Antonio Remiro Brotons<sup>11</sup> and, obviously, all the FRY scholars.<sup>12</sup> Others, for instance Bruno Simma, also consider the NATO action a violation of the UN Charter, but feel that the action was understandable because of Serbia's violation of human rights. It must not constitute a precedent, however, and the international community should restore the authority of the United Nations and of international law.<sup>13</sup> On the other hand, there are those who share the opinion that the NATO action was contrary to the Charter from a technical point of view, but consider NATO bombing a precedent on which to build a new international law.<sup>14</sup>

### Security Council Resolution 1244 (1999)

On 10 June 1999, the Security Council passed Resolution 1244 authorising "Member States and relevant international organisations to establish the international security presence in Kosovo ...". Thus the resolution, adopted under Chapter VII, sanctioned the NATO presence in a territory still formerly belonging to the FRY, after NATO countries had conducted an intensive air campaign to compel Serbia to accept its conditions of peace. In effect, this resolution is a sort of peace treaty and follows the pattern of modern practice which has seen a decline in peace treaties negotiated by belligerent parties.

Resolution 1244 was adopted with the abstention of China, which unsuccessfully tried to insert a number of amendments and delayed its approval. During the debate in the Security Council, China, whose embassy in Belgrade had been hit by mistake, complained that the resolution did not contain any mention "of the disaster caused by NATO bombing". Moreover, according to the Chinese representative, the resolution "failed to impose necessary restrictions on invoking Chapter VII of the United Nations Charter". Apart from harsh accusations by Cuba, few other states expressed their criticism of the NATO action. Brazil, Costa Rica and Mexico – which nevertheless voted for – belong to that category. Countries such

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Studies, Paris, 28-29 June 1999; A. Roberts, "Willing the End but not the Means", *The World Today*, vol. 55, no. 5, 1999, p. 8-12; and C. Guicherd, "International Law and the War in Kosovo", *Survival*, vol. 41, no. 2, 1999, p. 19-33.

11 A. Remiro Brotons, "De la asistencia a la agresión humanitaria? OTAN versus Consejo de Seguridad", *Política Exterior*, vol. XIII, no. 69, 1999, pp. 17-21.

12 See, for instance, the "Appeal for Peace" of professors and assistants of the Faculty of Law, Nis: <http://www.prafak.ni.ac.yu/appeal-old.html>. See also the appeal by the following law professors: Ljubivoje Acimovic, Vojin Dimitrijevic, Dejan Jansa, Konstantin Obradovic, Obrad Rasic, Milan Djahovic: <http://jurist.law.pitt.edu/moremail.htm>

13 Simma, "NATO, the UN and the Use of Force", p. 20.

14 A. Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of International Law*, vol. 10, no. 1, 1999, p. 23-30; M. J. Glennon, "The New Interventionism", *Foreign Affairs*, May/June 1999, p. 2-7.

as Gambia, part of a group usually critical of Western positions, stated that “the international community could no longer afford the luxury of being a helpless spectator, while the policy of ethnic cleansing continued”. The Gambian representative only added that “it was regrettable that force had to be used to arrive at the current situation”.<sup>15</sup> The stance of Gambia is representative of the mood of many Third World countries linked by Muslim solidarity. It is worth noting that while the previous resolution, that is Resolution 1239 (1999) on humanitarian relief assistance to Kosovo, was adopted with Chinese and Russian abstentions, only China abstained from voting Resolution 1244.

Is Resolution 1244 a post facto authorisation of the use of force? At this point, reference can be made to the “amnesty argument” employed to justify the Tanzanian invasion of Uganda in 1979. That intervention was successful in overthrowing a government responsible for gross violations of human rights and the international community condoned an act which was a technical violation of the UN Charter. In the present case, the “amnesty argument” is even more appropriate, since it had the formal blessing of the Security Council while the Uganda case was not even discussed in the Security Council.

### The doctrine of humanitarian intervention

Until a few years ago, the doctrine of humanitarian intervention was repudiated by the majority of scholars. Has this doctrine gained any currency through the NATO intervention against the FRY?

Unlike intervention for protecting nationals abroad, the legality of which is grounded in a body of respectable practice, the doctrine of humanitarian intervention cannot invoke any consistent practice of states to demonstrate its conformity with international law. In order to prove its legality, humanitarian intervention (that is, intervention for saving people of the territorial state from inhuman and cruel treatment) is often confused with intervention for rescuing nationals abroad (that is, entry into foreign territory to save the citizens of the intervening state); but the two concepts must be kept separate. The former usually involves a prolonged presence in foreign territory and a change in the government where the intervention takes place; the latter requires a limited presence abroad, that is, the time strictly necessary to evacuate foreigners.

A review of the doctrine of humanitarian intervention and the practice of states until 1985 shows that a right of humanitarian intervention does not exist in customary international law:<sup>16</sup> the two constitutive elements of the international custom (*diuturnitas* and *opinio iuris*) are lacking. Even the most celebrated examples of humanitarian intervention, such as Indian intervention in Bangladesh (1971) or Vietnamese intervention in Cambodia (1978), were justified by the

15 Security Council Press Release SC/6686, 4011th Meeting (PM) 10 June 1999.

16 N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1985).

intervening state by invoking a classical motivation, namely self-defence. Western governments condemned the Vietnamese intervention. The United Kingdom stated that no country has the right to topple a foreign government, "however badly that government may have treated its people". In the words of the British government, "to hold to the contrary principle is to concede the right of a foreign government to intervene and overthrow the government of another country".<sup>17</sup> The leading authority to prove the unsoundness of a right of humanitarian intervention, is the ICJ which, in the Nicaragua case (1986), rejected the US argument that it intervened in Nicaragua to protect human rights. The Court said that "the use of force could not be the appropriate method to monitor or ensure such respect" (that is, respect of human rights).<sup>18</sup> The British government, also, in a memorandum by its Foreign Office delivered in 1986, argued very clearly against a right of humanitarian intervention.<sup>19</sup>

It must be admitted that state practice has evolved since then. The British government justified the intervention in Northern Iraq, in 1991, which could not be founded on Security Council Resolution 688 (1991), with the doctrine of humanitarian intervention. It said that it intervened in Northern Iraq ". . . in exercise of the customary international principle of humanitarian intervention".<sup>20</sup> One author also cites the ECOWACS intervention in Liberia.<sup>21</sup> However, the Liberian case is a doubtful example of genuine humanitarian intervention without the consent of the territorial sovereign, since ECOWACS entered the territory with the consent of all factions and the intervention was afterwards endorsed by the Security Council. Therefore one can conclude that, British statements apart, the first respectful piece of practice supporting the doctrine of humanitarian intervention is represented by the NATO air campaign against the FRY. However, the intervention met with the protest of important states and it is difficult to say, therefore, that there is a consistent practice and an *opinio iuris* – the elements of an international custom. The time factor (that is, *diuturnitas*) is also lacking. Thus an international custom authorising humanitarian intervention by individual states (individually or jointly) does not exist; moreover, it is early to say that a new norm of customary international law is emerging.

That said, one has to admit that Security Council practice shows that humanitarian emergency is now considered "a threat to peace" under Article 39 of the UN Charter. Once the Security Council has determined that there is a threat to peace, it can authorise states to enter foreign territory for an action aimed at the restoration of peace and stability. In this connection, the Security Council resolutions on

17 Ronzitti, *Rescuing Nationals Abroad*, p. 100.

18 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 134, par. 268.

19 See *British Year Book of International Law*, vol. 57, 1986, p. 614.

20 See *British Year Book of International Law*, vol. 63, 1992, p. 827.

21 See Greenwood, "Is there a right of humanitarian intervention?", p. 36-7.



Somalia, former Yugoslavia, Rwanda and Haiti can be quoted.<sup>22</sup>

### The quest for a new legitimacy

Writing on the intervention in Kosovo, Adam Roberts said that “the fundamental question is not the legality, but rather the wisdom, of particular uses of force”.<sup>23</sup> This view needs to be corrected. Abiding by international law is a necessary element of democracy. A military action should not only be “wise” and opportune or feasible, but also in conformity with international law. An illegal action (or an action of dubious legality) generates divisions between allies and may eventually not be endorsed by parliaments, with grave consequences for the cohesion of the warring coalition. Unless we want to go back to the pre-Charter times and give States the right to vindicate contemporary *erga omnes* obligations through the use of force, the United Nations system should be upheld. On the other hand, one cannot give the five permanent members of the Security Council the power to authorise an armed intervention and to judge its legality. This would mean becoming hostage to their veto power.

The international community has enlarged the scope of Article 39 of the UN Charter, giving the Security Council the power to qualify, as a threat to peace, a humanitarian emergency. However, Articles 2.4 and 51 of the Charter, which prohibit the use of force and authorise it only in self-defence, still remain unchanged.

The Amsterdam Treaty of the member states of the European Union reiterates the option that the EU, acting through the WEU, may resort to military action for the so-called Petersberg missions. NATO’s new strategic concept argues for non-Article 5 crisis-response operations, the legitimacy of which cannot be grounded on self-defence, like Article 5 operations. Although the Alliance’s strategic concept recalls Article 7 of the NATO Treaty, thereby recognising the primacy of the UN Security Council, and confirms the Alliance’s faith in international law, it is clear that these kinds of action are dependent on a new source of legitimacy.

Proposals such as the reform of the United Nations Charter are clearly impracticable and should be left aside. The same is true, *mutatis mutandis*, as far as the emergence of a new norm of international law legitimising humanitarian intervention is concerned. As shown in the previous paragraph, the practice of states is far from meaningful. All that can be said is that entering foreign territory for genuinely humanitarian reasons does not amount to an act of aggression, particularly when the Security Council has previously qualified the situation as a threat to peace. Also the idea of having an implicit authorisation by the Security Council, in the sense that it determines that an Article 39 situation is in existence, with states afterwards left free to intervene without a formal authorisation, should be dismissed.

It is better to explore the potential role of the regional organisations under

22 See Resolutions 794 (1992) on Somalia; 816 and 824 (1993) on Bosnia-Herzegovina; 929 (1994) on Rwanda and 940 (1994) on Haiti.

23 Roberts, “Willing the End but not the Means”, p. 12.

Chapter VIII. Given the end of the honeymoon between the permanent members of the Security Council, it is in the interest of the West to strengthen regionalism within the United Nations. Europe cannot permit genocide, ethnic cleansing and gross violations of human rights to take place inside its borders. According to Article 53 regional organisations or regional arrangements may carry out coercive actions under the authority of the Security Council. In one case, regional organisations act under direction of the Security Council and are used by it for its own purposes. In the other case, Article 53 allows regional organisations to take enforcement measures, provided they are properly authorised by the Security Council. This means that regional organisations do not act as an agency of the Security Council, but are permitted to resort to forceful action for pursuing their own goals, which should be in keeping with those established by the Charter.

As seen, the UN General Assembly has restated the principles set out by Article 53 and the Secretary General, paying lip service to Chapter VIII, has affirmed that armed intervention should require Security Council involvement. But should SC authorisation be given on a case-by-case basis or is it possible to envisage a general authorisation? Article 53 does not state that the Council should authorise regional organisations to resort to force on a case-by-case basis; the Council might thus give a general authorisation and adopt a resolution setting out the conditions and limits within which a regional organisation or a regional arrangement may take action. The regional body should act under the scrutiny of the Security Council, which could always decide to stop a regional action, since it has the ultimate responsibility for maintaining international peace and security. But this means that the five permanent members could exercise a negative veto power – the regional action receives a general authorisation/it can be stopped by a UN resolution/which can be blocked by a permanent member. On the contrary, the current situation can be described as a situation of positive veto power, since the authorisation to take action can be blocked by a permanent member.

In Europe, the OSCE, EU, WEU and NATO qualify as regional organisations or arrangements. However, the OSCE, which is the only pan-European organisation, is not eligible to carry out coercive armed actions, since enforcement measures are ruled out by its constitutive instruments. A second drawback is that OSCE decisions are taken by consensus and the work of its permanent bodies could easily be paralysed. The EU could be used to implement Petersberg missions through personnel seconded by its members or through the WEU. From a political point of view, the EU seems the most attractive organisation; however its military capability is still in fieri. NATO remains the only organisation in Europe “with teeth”, that is, endowed with a real military capability. And it is no longer a moot point whether it is only a military alliance or a regional organisation as a number of UN resolutions have, since the experience in the former Yugoslavia, referred to NATO as a regional organisation.