NATO Intervention on Trial: The Legal Case That Was Never Made

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The United States and its NATO allies have defended the air strikes against Yugoslavia on moral grounds (to stop atrocities) and security grounds (to prevent the conflict from spilling over to neighboring European countries), but curiously they have never articulated a legal justification for the intervention. The nearest the NATO countries have come to articulating a legal rationale has been to cite various resolutions of the Security Council, in which the Council has determined that the actions of Yugoslavia in Kosovo constitute a threat to peace and security in the region and, pursuant to Chapter VII of the UN Charter, demanded a halt to such actions. Notably, however, these resolutions do not employ the talismanic phrase, "States may take all necessary means..." which would constitute an express Security Council authorization of the use of force.

The failure of the NATO countries to articulate a legal basis for their humanitarian intervention in Kosovo is puzzling in that there are in fact several compelling legal arguments that could be made to justify the Kosovo intervention. The reason for this silence may be that each possible legal underpinning carries with it the specter of a practical consequence that the NATO countries traditionally hope to avoid. Unfortunately the policy of silence is a blunt and weak tool for navigating these concerns and, in the long term, frequently exacerbates the concerns and validates the objections to the legitimate use of force for humanitarian intervention.

The policy of avoiding the articulation of a legal rationale for NATO's humanitarian intervention in Kosovo reached its peak on May 11, 1999, when the International Court of Justice heard oral arguments in a case brought by the Federal Republic of Yugoslavia against the United States and nine other NATO countries.[1] Representing Yugoslavia, the British international law expert Ian Brownlie argued that 1) the NATO intervention was an unlawful use of force because it violated Article 2(4) of the UN Charter, which provided that each state is entitled to territorial integrity and political independence, 2) the

members of NATO breached the 1949 Geneva Conventions by targeting civilians and using depleted uranium weapons, and 3) the attack against the FRY constituted a form of genocide in violation of the Genocide Convention. The United States and its NATO allies declined to rebuff these arguments. Rather, they challenged the Court's jurisdiction on technical grounds.

While the technical arguments were successful for some of the plaintiffs, what the NATO member states failed to grasp was that Yugoslavia was using the norm and institutions of justice to seek a victory not primarily in the courtroom in The Hague, but in the court of public opinion. By making his case before the World Court (and the world media), Yugoslav President Slobodan Milošević took another step in his quest to level the moral playing field between Yugoslavia and NATO—and to employ the principle of moral equivalence which served him well in the Bosnian conflict. Coming amidst reports that NATO bombs had gone astray or were misdirected—destroying hospitals, civilian convoys, and even the Chinese Embassy in Belgrade—the case before the World Court further eroded public support for the NATO policy of continuing air strikes and decreased the general support for the potential deployment of a NATO ground force.

The NATO countries may have successfully blunted Milošević's strategy if they had outlined the legal case for the airstrikes early in the campaign, or at least during the preliminary stages of the case. The NATO countries could have, for example, argued that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide obliges those countries which have ratified it, including the NATO countries, to "undertake to prevent and to punish" genocide.[2] Moreover, it could reasonably be argued that the duty to cooperate in the prevention of genocide has attained the level of a preemptory norm of international law (*jus cogens*).[3] Such norms supersede other treaty rights and obligations. Further, the NATO countries could have successfully argued that as a party to the Genocide Convention, the Federal Republic of Yugoslavia has by implication waived its right to invoke territorial integrity to shield it from international action to halt genocide.

This argument would have been particularly compelling had the International Criminal Tribunal for the Former Yugoslavia issued an indictment for Milošević charging him with genocide. Yet, given the Western governments' internal debate as to whether an indictment of Milošević would frustrate the possibility of attaining a negotiated peace settlement, and their consequent delay in providing the necessary information to the Tribunal to support an indictment, it was not until May 24 that the Tribunal issued its indictment.[4] Importantly, the Tribunal failed to indict Milošević on charges of genocide, instead limiting the charges to war crimes and crimes against humanity.

Had the NATO countries sought to avail themselves of the opportunity to justify their humanitarian intervention, they could have asserted that inter-

vention designed to prevent grave human rights abuses is not prohibited by Article 2(4) of the UN Charter. As that Article is designed to prohibit the use of force aimed against the territorial integrity or political independence of a state (unless such force is authorized by the Security Council or is taken in self-defense), the NATO countries could have successfully argued that, since they explicitly rejected claims of independence for Kosovo and publicly reaffirmed the territorial integrity and political independence of Yugoslavia, the purpose of the air strikes could not be construed to either impair territorial integrity or to challenge political independence.[5]

NATO's reluctance to rely on this legal rationale reflects fears that the precedent would encourage other countries to intervene in less altruistic circumstances. It was for this reason that the Western countries condemned the Indian invasion of Bangladesh in 1971 and the Tanzanian invasion of Uganda in 1979.[6] While these invasions put an end to mass slaughters, in each case the self-interest of the invading state was clearly involved.[7] NATO apparently feared that it might be perceived as building on this precedent, as its strategy at times appeared calculated more to punish and declaw the Milošević regime for its past atrocities than to halt the human rights abuses being committed. Yet fears of abusive invocation of the doctrine of humanitarian intervention must be balanced against the compelling need for a contemporary and realistic interpretation of Article 2(4) in light of the re-emergence of Security Council paralysis in the face of mass atrocities. With NATO's movement toward the introduction of ground troops and increasing attacks directed at those military units responsible for the continued atrocities in Kosovo, NATO cleared the presumption of political self-interest which tainted the Indian and Tanzanian actions.

NATO might also have argued that based on the facts pertaining to the dissolution of the former Yugoslavia and the failure of Serbia/Montenegro to be recognized as a state under international law, its actions did not contravene article 2(4). When Croatia, Slovenia, Bosnia, and Macedonia achieved their independence, the Security Council declared in Resolution 777 of 1992 that Serbia/Montenegro did not continue the international legal personality of the former Yugoslavia and thus was not entitled to continue the UN membership of the former Yugoslavia, a position that was confirmed by the General Assembly in Resolution 47/1.[8] Given Kosovo's claim for independence and Montenegro's indication that it might seek to secede as well, the legal process of dissolution may legitimately be considered to be continuing. Thus, an argument could be made that Serbia/Montenegro does not possess full rights of sovereignty and territorial integrity as protected by Article 2(4) of the UN Charter.

Notably, several of the NATO countries referenced S.C. Res. 777 and G.A. Res. 47/1 in their statements to the World Court, but they argued only that Serbia/Montenegro does not have a right to bring a case since it is not a party

to the UN Charter. The problem with taking the argument to the next level is that if Serbia/Montenegro were not deemed a sovereign state, it might argue that it could not be held responsible for failing to abide by the treaties of the former Yugoslavia, including the Geneva Conventions and the Genocide Convention. This concern should not be overstated, however, since non-state actors may still be held personally responsible for war crimes, crimes against humanity, and genocide under customary international law and principles of *jus cogens*.

A final argument which NATO could have made to justify its humanitarian intervention is that the people of Kosovo are entitled to self-determination and thus to exercise their right of collective self-defense. Even Ian Brownlie, the counsel for Yugoslavia, recognized that self-determination has become a peremptory norm of international law.[9] As the Kosovo Albanians represent a clearly defined group of people with a distinct identity who have been systematically denied fundamental human rights and the opportunity to engage in collective democratic self-governance, they are entitled to self-determination. In the very unique circumstances facing the people of Kosovo, the internationally recognized right of self-determination includes the right to resort to force (other than by terrorism) and to seek independence.[10]

The question is slightly more complicated when it relates to whether the right of self-determination includes the right to call upon other states to engage in collective self-defense against the aggression of a totalitarian regime. The International Court of Justice rejected the Reagan Administration's attempt to assert such a rationale for intervening in Nicaragua in 1985, stating "[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system."[11] But the situation in Kosovo is different in that NATO is not intervening to impose democratic government in Yugoslavia, but to protect the Kosovo Albanians from ethnic cleansing and genocide. Of course, making this argument would have required the United States to indicate its willingness to recognize Kosovo's independence—a step which may have complicated relations with certain European states unwilling to contemplate an independent Kosovo.

Given their potential downsides, NATO's reluctance to embrace one or more of these legal justifications is perhaps understandable, though misconceived. Although NATO successfully concluded its air campaign, the lack of an articulated legal stance weakened international and domestic support for the intervention, undermined the authority of the Security Council, and diminished international respect for the rule of law.

Notes

1. Case Concerning Legality of Use of Force (Yugoslavia v. United States). The transcript of the oral arguments are available at http://jurist.law.pitt.edu/Kosovo.htm.

2. Convention on the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277.
3. L. Oppenheim, *International Law*, 9th ed. (London and New York: Longmans, Green, 1992), 7-8. On the other hand, the rule against the use of force has also been recognized as "a conspicuous example of a rule of international law having the character of jus cogens." Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, 100 [para. 190].
4. *Milosevic and Others*, (IT-99-37) (May 24, 1999).
5. For the modern debate among scholars on the legality of unilateral humanitarian intervention under the UN Charter, see Ian Brownlie, "Humanitarian Intervention," in *Law and Civil War in the Modern World*, ed. John Moore (no publishing information provided, 1974), 218-10; Richard Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives," in *Law and Civil War in the Modern World* , ed. John Moore (no publishing information provided, 1975), 229, 247-248.
6. See Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (1984): 1620, 1628-1633.
7. Schachter, "The Right of States."
8. See Michael P. Scharf, "Musical Chairs: The Dissolution of States and Membership in the United Nations," *Cornell International Law Journal* 28 (1995): 29, 57.
9. Ian Brownlie, *Principles of Public International Law*, 4th ed. (New York: Oxford University Press, 1990), 513, 515.
10. Antonio Cassese, *Self Determination of Peoples* (no publishing information given, 1995), 151. The United States, for example, has taken the position that the resort to force, other than by terrorism, by liberation movements is not unlawful.
11. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986, I.C.J. 14, 133.