

Robert Jackson

Humanitarian War over Kosovo

Det juridiske begreb *Jus ad Bellum* (retfærdig krig) indeholder tre begrundelser for intervention: Hensynet til den internationale orden, statsligt samtykke eller humanitære grunde med sidstnævnte som den mest kontroversielle. Efter 1945 har det internationale samfund været fjendtligt indstillet overfor intervention – ikke-intervention er den fundamentale norm. Forløbet af konflikten mellem serbere og kosovo-albanere præsenteres, og konklusionen er, at det var en intern konflikt, som de selv havde skabt, som ikke truede den internationale orden. Afvigelsen fra normen om enighed blandt stormagterne var det fatale aspekt af NATOs humanitære krig.

The *Jus ad Bellum* of Intervention

Intervention in world politics „raises questions of the utmost moral complexity: adherents of every political belief will regard intervention as justified under certain circumstances“ (Wight, 1979: 191). That observation of Martin Wight is as applicable today as ever. Any scholar who seeks to shed light on post-cold war interventions will quickly come up against some of the most knotted moral questions of international relations. There is, however, a conception of intervention which can help us untie them: interference by a sovereign state, group of such states, or international organization, involving the threat or use of force or some other means of duress, in the domestic jurisdiction of an independent state against the will or wishes of its government (cf. Bull, 1984: 1; Vincent, 1974: 13). This conception of intervention should be the starting point in any endeavor to understand the theory and practice of intervention in world politics. That is the classical approach of the „English School“ that I shall be taking in this essay.

The existence of constitutionally independent countries (i.e., sovereign states in external relationships that can be characterized as an international

societas - an association or society of legal equals - sets the stage for the normative problem of intervention, including intervention on humanitarian grounds. The classical ethics of intervention are a negative ethics premised on a sovereign state's constitutional immunity and therefore its fundamental right of nonintervention. If priority is to be given to human rights in any particular case there must be compelling and indeed overwhelming reasons to interfere with the sovereign rights of states and their citizens. That is the burden of proof concerning humanitarian intervention at the present time, as discussed by Andrew Linklater (1990). The doctrine of humanitarian intervention is a positive ethics in which human rights displace state sovereignty as the primary normative consideration in deciding questions of intervention. If world politics operated with a doctrine of humanitarian intervention it would mean that states were no longer protected (normatively speaking) by their sovereignty and would not enjoy any preemptory right of nonintervention - apart from the limitations placed on that right by the UN charter. International society would be a *universitas* in that regard: i.e., it would be an interna-

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tional community governed by an overriding normative purpose, or end, to which the legal independence and equality of member states would be subjected.

Does experience since the end of the cold war offer any solid evidence for the claim that in certain circumstances humanitarian considerations come before sovereign rights in the justification of military intervention as suggested by Christopher Greenwood (1993: 40) and Adam Roberts (1993: 444)? Is there evidence of a normative sea change on this issue from a *societas* of sovereign states to a global *universitas* of some kind?

Nonintervention is the preemptive norm of a pluralistic international society. The current legal site of that norm is Article 2 of the UN charter the pertinent sections of which read as follows:

„All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. ... Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.“

Because sovereign states have a right to have their jurisdictions respected by all other states, and by international society, they also have a corresponding duty to respect that right unless there are valid reasons to make an exception to the rule. Nonintervention is the norm and acts of intervention are what must be justified. Intervention is therefore an exceptional international action, and normative reasons must weight heavily to warrant such an action.

The current justifications for overriding that norm can be boiled down to

three. First, international order: the intervention is taken for valid reasons of international peace and security or national security. Second, consent: the intervention is at the request of the legal government of the target state - perhaps to assist that government to counter a prior intervention or to defend itself against an armed rebellion. Third, humanitarianism: the intervention is to protect the population of the target state (or segments of it) from grave abuses at the hands of their own government or anti-government rebels or as a result of domestic anarchy. The first two justifications are, for all intents and purposes, universally accepted among statespeople; the third is controversial. The international case law of these and other justifications is unsettled (see Akehurst, 1987: 281-90; cf. Damrosch and Scheffer, 1991).

Conventional practice identifies chapter VII and article 51 as the only valid grounds for overriding article 2 of the UN charter. The Security Council is authorized to identify „any threat to the peace, breach of the peace or act of aggression“ (article 39) and, if such a threat is determined by the Council, „it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security“ (article 42) (Arend and Beck, 1993: 31-32). Article 51 reads as follows: „Nothing in the present Charter shall impair the inherent right of individual or collective self-defense.“ That is the only justification of military intervention that remains wholly in the hands of individual sovereign states. Since 1945, as one commentator puts it, „the state's right to use violence otherwise than in self-defense has been transferred to the security council of the

United Nations" (Calvocoressi, 1992: 2). These norms express the *jus ad bellum* of post-1945 international society as defined by the UN charter.

The justification that has come to the fore in the 20th century is that of consent. We should understand this norm in the historical context of the colonial era when many Asian and African countries were ruled by European governments without their consent. Consent is the preemptive norm par excellence of weak ex-colonial states. A solicited intervention, strictly speaking, is not an intervention at all because it is not an interference in state sovereignty. On the contrary, it is a response to a request by the government of a target state which logically cannot violate its own sovereignty. The norm of consent is a clear bow toward the sovereignty of that government. It is an act in defense of state sovereignty. But because external armed force is involved solicited intervention is conventionally understood as a form of intervention (cf. Wight, 1979: ch. 11; Akehurst, 1987).

The third justification for intervention - humanitarian - is controversial because it does not require consent by the target state and it seems to go beyond UN charter rules regarding international peace and security and legitimate self-defense. The charter proclaims human rights as a goal of the UN but it does not include human rights as a specific ground for international intervention in state sovereignty. Humanitarian intervention thus seems to repudiate the foundational norm of state sovereignty. It is very controversial among non-democratic and authoritarian governments who as the most likely targets of humanitarian intervention are jealous about their sovereignty and normally

claim the absolute priority of the right of consent. Some legal scholars deny that there is any such justification in international law.

An important caveat about these justifications deserves emphasis: none of them is without problems in its practical application to particular cases. All of them are ambiguous to some degree. That is so even for consent which arguably is the least equivocal of the three. For example, if consent is to be valid in law it must emanate from the legal government of a sovereign state and be freely given. The basic normative concern is to ensure that an invitation is not spurious - which is a question of fact and judgment in any particular case. Similar questions also arise in connection with self-defense (is there a *bona fide* threat to the state involved?) and in connection with humanitarian justifications (is the human suffering of sufficient magnitude to warrant a violation of state sovereignty?). Like most questions of international ethics, intervention is a question of judgment. But that should not deter us from studying it since it surely also is one of the most important normative questions of contemporary international relations.

To sum up thus far. Since the adoption of the UN charter in 1945 and even more so since the termination of colonialism, which notionally can be said to have occurred in 1960, international society has been not only cool but hostile to the practice of intervention. This negative posture is nowhere better captured than by the UN General Assembly's 1970 „Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,“ which asserts that „the practice of any form of intervention ... violates the spirit

and letter of the Charter" (Akehurst, 1984: 108). That is the restrictive doctrine of intervention which is undoubtedly subscribed to by a large majority of states at the present time.

NATO's Coercive Humanitarianism

A humanitarian crisis in Kosovo that had long been anticipated by many Balkan political observers accelerated in 1998 and exploded in March 1999 when NATO attacked Yugoslavia with air power. *Operation Allied Force* was a milestone: the first time in NATO's 50 year history that it had gone to war, and primarily for a humanitarian cause rather than a defensive or security reason. NATO's intervention began several months earlier at a peace conference at Rambouillet, outside Paris, where it dictated terms affecting Yugoslavia's sovereignty which the government in Belgrade was obliged to accept, or suffer the military consequences.

International intervention in Bosnia had the consent of the newly independent Bosnian government whose sovereignty was challenged by armed Serb and Croat secessionists. But international intervention in Kosovo was denied consent by the sovereign government of Yugoslavia which was similarly challenged by armed Albanian secessionists. NATO's eventual intervention in Bosnia, after several years of irresolution, was to enforce an international agreement between the belligerent parties designed to preserve the Bosnian state, and protect human rights. NATO's intervention in Kosovo was to save the Kosovo Albanians, at the risk of partitioning the Yugoslav state. The Kosovo intervention trespassed on basic norms of the UN charter and took place

without a mandate from the UN Security Council. The primary justification for NATO's intervention - in the crisp language of the British foreign office - was „overwhelming humanitarian necessity“ (quoted in Roberts, 1999: 106). NATO is described as having had a „sense of shame“ stemming from their four years of anxiety, indecisiveness and inaction in Bosnia (Roberts, 1999: 104). NATO states were concerned about the organization's credibility. Moreover, NATO's intervention in Kosovo was targeted against the government: the United States, Britain and some other NATO countries clearly wanted to get rid of the government of Slobodan Milošević (Roberts, 1999: 116).¹ They explicitly said they were not attacking the Serbian people.

Kosovo had long been part of the Ottoman empire when it was conquered by Serbia in 1912. That right of conquest was confirmed by the League of Nations at the end of the first world war by the inclusion of Kosovo in the new state of Yugoslavia. Kosovo was never a self-governing republic within the Yugoslav Federation - unlike Slovenia, Croatia, Macedonia and Bosnia. Instead, it remained part of the Serbian republic. Kosovo acquired a measure of self-administration within Serbia under the 1974 Yugoslav Federal Constitution which defined it as „a composite part of the Socialist Republic of Serbia.“ Kosovo's limited political jurisdiction within Serbia was taken away by President Milošević in 1989 and direct rule from Belgrade was imposed. Kosovo was recognized as an integral part of the Federal Republic of Yugoslavia - i.e., Serbia - by the European Union after the former and larger Yugoslavia fell apart in 1991-92. The 1995

Dayton accords upheld the sovereignty and territorial integrity not only of Croatia and Bosnia but also that of Serbia.

The province became a cockpit of Albanian secessionism, government repression, and increasing civil war in the late 1990s - accompanied by a growing exodus of ethnic Albanian refugees from Kosovo. In 1998 the Kosovo Liberation Army (KLA) mounted an offensive against the Yugoslav army and police. It was met with a military response and reprisals against Kosovo Albanians suspected of supporting the KLA. Serbian paramilitaries got involved to defend Serb villages from the KLA, and to terrorize Kosovo Albanian villagers. Fearing that the civil war might spread into neighboring states and that the refugee crisis might develop into a major humanitarian disaster, the UN Security Council and NATO became involved. During the course of the conflict thousands of Kosovo Albanians were killed or maimed by Yugoslav regular or paramilitary forces. Villages were destroyed. Serb villagers, although fewer, suffered the same fate at the hands of the KLA. At the height of the crisis perhaps as many as 1.5 million Kosovo Albanians fled into the mountains or sought exile in neighboring countries.

During 1998 the Security Council passed several resolutions on the Kosovo conflict acting under chapter VII of the UN charter. Yugoslavia was called upon to „achieve a political solution to the issue of Kosovo through dialogue“; it also called upon Kosovo Albanian leaders „to condemn all terrorist action“ and to pursue their political goals by peaceful means. Both parties were urged to enter into „meaningful dialogue“ and „without preconditions.“ The

settlement was to be based on the fundamental principle of territorial integrity of Yugoslavia and on the humanitarian standards of the OSCE and was to include a substantial „degree of autonomy and self-administration“ for Kosovo. Resolution 1160 registered support for OSCE attempts to arrange a peaceful settlement of the conflict, but also imposed a comprehensive arms embargo on Yugoslavia. Resolution 1199 expressed concern about „the flow of refugees“ into neighboring countries and called upon the Yugoslav authorities and the Kosovo Albanian leaders „to improve the humanitarian situation and to avert the impending humanitarian catastrophe.“ It reiterated the requirement for a negotiated resolution of the conflict. More emphatically, it demanded that the Yugoslav authorities refrain from using their security forces for civilian repression in Kosovo. It firmly declared that the Kosovo Albanian leadership condemn all terrorist action. It called upon the Yugoslav government to facilitate the safe return of refugees. Resolution 1203 demanded that the government of Yugoslavia „comply fully and swiftly“ with the above Security Council resolutions.

These UN demands upon the government of Yugoslavia and the Kosovo Albanian leadership were not met with a positive response. Instead, the political situation in Kosovo deteriorated throughout 1998 and into 1999. In October 1998 an agreement was reached between NATO and Yugoslavia which committed the latter to curb its use of military and police force in Kosovo and to end repression of the Albanian population. The commitment was not honored by President Milošević. Nor did the KLA restrict its use of violence.

The civil war continued unabated. By early 1999 there was a massive forced expulsion and flight of Kosovo Albanians into neighboring Albania, Macedonia and Montenegro (a separately governed part of Yugoslavia).

NATO's member states became deeply concerned about the deteriorating humanitarian situation in Kosovo. In January the Yugoslav government and the Kosovo Albanian leadership were issued with a „summons“ by NATO to attend the Rambouillet peace conference which involved Russia as well as the leading NATO powers. In February a basis for a settlement of the conflict was laid down at Rambouillet which contained the following terms. First, that Kosovo should enjoy „substantial autonomy“ without violating the „national sovereignty and territorial integrity“ of Yugoslavia. Second, it should be based on democratic institutions and should insure the protection of human rights and the rights of national minorities (i.e., Serbs) in Kosovo. Third, all Yugoslav armed forces were required to withdraw from Kosovo. Fourth, security was to be guaranteed by 30,000 international troops, including a core component of NATO forces, deployed on the ground in Kosovo. Lastly, an international conference was to be convened three years after the agreement went into effect to determine a basis for a final settlement of the conflict which would reflect „the will of the people“ of Kosovo (not Yugoslavia). If the parties failed to reach agreement on these terms NATO declared itself „ready to take whatever measures are necessary“ to secure „compliance with the demands of the international community and the achievement of a political settlement“ (*NATO Press Release,*

January 30, 1999). That clearly was an ultimatum.

The Rambouillet dictate was accepted by the Kosovo Albanian leaders most of whom were seeking political independence. However, President Milošević refused to comply arguing that it infringed Yugoslavia's sovereignty by demanding that Yugoslav forces vacate Kosovo and be replaced by an international force run by NATO. The Yugoslav government also pointed out that the requirement that the final settlement should reflect the will of the Kosovo people was not only in conflict with the rival principle of territorial integrity of Yugoslavia but it also seemed to pre-judge the political resolution of the dispute in favor of Kosovo independence. Richard Holbrooke, the American diplomat who brokered the Dayton agreement, made a final attempt to arrange a diplomatic settlement but he failed to move Milošević from his position.

NATO made good on their threat by launching an air war against Yugoslavia on March 24, 1999. The NATO political and military leadership believed that by „degrading“ Yugoslavia's armed forces and infrastructure President Milošević would be obliged to accept NATO's terms. They clearly expected the Yugoslav dictator to capitulate quickly in the face of NATO bombing. That proved to be unrealistically optimistic. President Milošević kept waiting for NATO to fall apart politically. But that did not happen either. He only came to terms in early June after weeks of increasingly heavier air bombardment that eventually involved over 900 warplanes, over 14,000 strike missions, and resulted, according to NATO's estimates, in the death of 5000 Yugoslav combatants and 1200 civilians. It also

reportedly caused „enormous damage“ to the roads, bridges and industry of Yugoslavia (S. Myers quoted in Roberts, 1999: 119). The EU estimated the cost for reconstructing Kosovo at between \$2 billion and \$3.5 billion.

The general terms of the peace were based on principles agreed by members of the G-7 leading industrial nations plus Russia. The agreement was confirmed and sanctioned by UN Security Council resolution 1244 (1999) which was passed by a vote of 14 to 0, with 1 abstention (China). The terms were substantially the same as those of Rambouillet which the Yugoslav government had previously rejected: an immediate end of violence and repression in Kosovo, verified withdrawal of all Serb military forces from Kosovo, deployment in Kosovo of an international security presence under the authority of chapter VII of the UN charter, safe and free (i.e., uncoerced) return of all refugees and displaced persons, establishment of an interim UN civil administration that would lead to a form of Kosovo provincial government within a federal Yugoslavia, and demilitarization of the KLA. Resolution 1244 authorized deployment into Kosovo of a heavily armed international security force (KFOR) of some 50,000 troops who were allowed to defend themselves and to use „all the necessary means“ - i.e., including military force - to carry out their responsibilities. NATO was the main component and a NATO general was in command. Russia provided a troop contingent and it was expected that their military relationship to NATO would be based on a cooperative model similar to the one used in Bosnia. The UN Security Council also „demanded full cooperation by all

concerned, including the international security presence, with the International Criminal Tribunal for the Former Yugoslavia.“ Finally, it reaffirmed „commitment of all member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act.“

The NATO powers clearly saw these terms as a vindication of their intervention by guaranteeing the safe return of the refugees and restoring Kosovo autonomy within Yugoslavia. The Yugoslav government and the Russians saw them in a rather different light: as confirming the sovereignty and territorial integrity of Yugoslavia and the superior and supervisory role of the UN.

Justifying NATO's Attack on Yugoslavia

The unleashing of armed force is the most perilous international activity that states or alliances or international society as a whole can engage in. It obviously is dangerous: there is always a very real possibility that it can make things worse or escalate out of control. It is highly provocative and thus calls for justifications of a fundamental kind. That was manifestly the case with NATO's bombing of Yugoslavia (*BBC News Online Network*, 27 March, 1999).

The leaders of NATO took great pains to justify their bombing campaign. President Clinton declared: „We are upholding our values, protecting our interests, and advancing the cause of peace.“ He also said the Kosovo crisis was a „genocide in the heart of Europe“ that was „testing our humanity.“ People are being „slaughtered at NATO's doorstep“; we are „preventing

another holocaust." He remarked that „in Bosnia we failed to act in time, we left it too late" and that mistake was not going to be repeated in Kosovo: there are „great dangers of not acting now"; „inaction invites brutality" but „firmness saves lives." Finally, he said „we need a Europe that shares our values": the United States was defending „a peaceful, united, democratic Europe." The implication is clear: dictatorships and abusive governments had no place in Europe and were to be stamped out. Europe was defined as a region of democracies which respected human rights.

Other Western leaders echoed and amplified President Clinton's comments (*BBC News Online Network*, 27 March 1999). NATO Secretary-general Javier Solana said „NATO is not waging war against the Yugoslav people" but against the brutal regime of President Milošević. The Yugoslav government was portrayed as an outlaw regime, but the Yugoslav people were seen as tools and victims of Milošević. The German Chancellor Gerhard Schröder declared the air strikes were „not aimed at the Serbian people" and the NATO allies „will do all they can to avoid loss of civilian lives." The German foreign minister Joschka Fischer said „This is about preventing a human catastrophe." French President Jacques Chirac claimed the air attacks were launched to defend „peace on our soil, peace in Europe." British Prime Minister Tony Blair asserted „Barbarity cannot be allowed to defeat justice." The NATO action was necessary „to curb Milošević's ability to wage war on an innocent population." The British defense secretary said „the international community is not prepared to stand idly by and witness

a human crime perpetrated by Milošević." Robin Cook, the British Foreign Secretary, noted that

„we have tried repeatedly - right up to the last minute - to find a way to halt the repression of Kosovo Albanians through negotiation. ... We were left with no other way of preventing the present humanitarian crisis from becoming a catastrophe, than by taking military action to limit the capacity of Milošević's army to repress the Kosovo Albanians."

Japanese Foreign Minister Masahiko Komura was careful to point out that „Japan understands NATO's use of force as measures that had to be taken to prevent humanitarian catastrophe." The humanitarian tenor of most of these remarks is clear.

That was not so with the condemnations of the action not only by Yugoslavia but also by Russia and China whose opposition indicated the Security Council was deeply divided on the issue of Kosovo. That was a worrying departure from earlier post-cold war interventions in Iraq, Somalia and Bosnia all of which rested on great power unity at the most crucial moments. The Yugoslav government repeatedly condemned NATO for committing an act of aggression against its sovereign territory and the Yugoslav people. It was NATO and not Yugoslavia that was violating the most fundamental norms of international society. Russian President Boris Yeltsin expressed the same concerns: „Russia is deeply upset by NATO's military action against sovereign Yugoslavia, which is nothing less than open aggression." Russia's UN ambassador said it was a „dangerous precedent" for NATO to assume the role of a „world gendarme" and to disre-

spect the basic norms of the UN Charter. Russia's Ambassador to London pointed out „that breaking international law leads to catastrophes. ... Nothing in the UN charter or the North Atlantic treaty can justify taking military action against the sovereign state of Yugoslavia.“ He said that NATO attacks were a dangerous precedent because they were „a signal to the nationalistic elements all around Europe that they can have their way and destroy the existing state.“ Chinese President Jiang Zemin called „for an immediate halt to the air strikes and a return to the search for a political solution to the Kosovo problem through peace negotiations.“ The Chinese criticisms became more pointed and severe after NATO bombed their embassy in Belgrade by mistake. The tenor of most of these remarks are clearly concerned with traditional international law and the most fundamental values of the UN Charter: national sovereignty, territorial integrity, and international peace and security.

Perhaps the most penetrating critique of NATO was that of former Russian Prime Minister Victor Chernomyrdin. He became involved as one of three principal envoys who were charged with attempting to broker an agreement between NATO and Yugoslavia and he participated in the final settlement of the conflict. But in a major newspaper essay while the bombing was still taking place he complained that NATO's aim was to secure „Milošević's capitulation“ and „the establishment of a *de facto* NATO protectorate over Kosovo.“ He said

„these NATO goals run counter to Russia's stance, which calls for the introduction of United Nations forces into Kosovo with Yugoslavia's sovereignty and ter-

ritorial integrity intact. The new NATO strategy, the first practical instance of which we are witnessing in Yugoslavia, has led to a serious deterioration in Russian-US contacts ... because a sovereign country is being bombed ... This approach clashes with international law, the Helsinki agreements and the world order that took shape after world war II.“

He ended his remarks by warning that NATO was „headed for a Pyrrhic victory, whether the conflict ends with the Serbs capitulating or in an invasion of Yugoslavia“ (*International Herald Tribune*, 28 May, 1999).

The Russians and the Chinese were concerned that NATO was setting a precedent of intervention that would make states with national minorities vulnerable to secession movements. Yugoslavia was fighting a civil war against an armed insurgency. But NATO's action was increasing the likelihood that Kosovo would be carved out of Yugoslavia thereby setting a terrible precedent of sanctioning ethnic secessionism in multi-ethnic states - which was a standing danger to the states system that should be obvious to anyone familiar with international history since the end of the first world war. Russia saw NATO's action as a threat to its own domestic stability. Foreign Minister Ivanov said NATO's attempt to „tear Kosovo out of Yugoslavia“ jeopardized Russia's relations with its own Islamic minorities in the Caucasus region and elsewhere. China was also vulnerable to secessionism in Taiwan and Tibet. That anti-secessionist view is undoubtedly very widely held among UN member states many of which have at least potential minority problems.

Critics of NATO's intervention, including among them former leading

Western statesmen, invoked the closely connected language of prudence and international order. Henry Kissinger echoed the remarks of Victor Chernomyrdin by pointing out to the readership of a popular American weekly newsmagazine that NATO's intervention was gambling with international order by provoking „an outraged sense of humiliation“ among Russians that „threatened to blight US-Russian relations for years to come“ (Kissinger, 1999). It was also damaging American-Chinese relations. Dennis Healey, a former British Defense Secretary, expressed the same concern: „We risk our relations with Russia and China and this could produce consequences for the whole of the world far worse than what is happening in Kosovo.“ The implications of these remarks are clear. Russia and China are of much greater importance to NATO and the West than the domestic politics of a small Balkan state. Dividing the great powers, or even risking that division, is always the most dangerous policy. The veto is a „reserve power“ of the permanent members of the Security Council which rests on the principle of prudence and exists exclusively to preserve international order (Schwarzenberger and Brown, 1976: 230). There is a basic ethic of responsibility not to split the great powers into antagonistic camps if it can be avoided. Even actions that risk dividing them require compelling justification.

Some of these critics also said it was a terrible mistake to launch military action without first securing a mandate from the Security Council. To bypass the Council in order to avoid a veto would be to trample upon the constitution of international society at its most important point. The great power veto is a legal

recognition that armed intervention by international society must rest on a great power consensus. Otherwise it undermines international order and could prove to be dangerous. According to this way of thinking, diplomacy is always preferable to force if there is a choice of means and methods. Former President Jimmy Carter criticized the Clinton government for committing a major blunder in its Kosovo policy which had led to a quagmire:

„Washington has become increasingly inclined to side-step the time-tested premises of negotiation, which in most cases prevent deterioration of a bad situation and at least offer the prospect of a bloodless solution ... the [NATO] decision to attack the entire nation has been counterproductive, and the destruction of civilian life has now become senseless and excessively brutal ... Washington has ... short-circuited the long-established principles of patient negotiation ... bypassing the Security Council. ... Even for the world's only superpower, the ends don't always justify the means.“ (CNN interview, 26 March, 1999).

Another concern of those who opposed the NATO intervention, or were skeptical about its wisdom and worried about its consequences, was the fear that it would result in the creation of a second NATO protectorate in the Balkans (CNN interview, 26 March, 1999). Kosovo would join Bosnia as two protected territories where final responsibility for security and probably also for local administration and policing, physical reconstruction, and future state-building would ultimately rest with the USA and its major European allies. And since the Kosovo protectorate would have been imposed by NATO's military power it would be difficult to distinguish from

colonial protectorates of an earlier era installed by gun-boat diplomacy. Was NATO's military actions in the Balkans signaling a return to an era when Western values were imposed on obstinate governments by force?

According to the UN Charter, as indicated previously, the only valid grounds for the dictatorial use of armed force (*jus ad bellum*) are self-defense and military actions taken to maintain or restore international peace and security. Although the Security Council characterized the crisis in Kosovo as a threat to international peace and security, it did not authorize the use of force against Serbia prior to NATO's military action. NATO members of the Security Council did not try to obtain such a resolution because it would have been vetoed by China and Russia. Thus, NATO's bombing appeared to be in clear violation of the UN Charter. It also seemed to go directly against NATO's own pact, the 1949 North Atlantic Treaty, which was defensive in character and portrayed aggression as the supreme international crime. In strict legal terms, therefore, NATO's action in bombing Serbia seemed to be in violation of the UN charter and its own treaty. That provokes the questions: Did not NATO commit an act of aggression against the sovereign state of Yugoslavia?

NATO justified its military intervention in Yugoslavia by claiming, among other things, that it was permitted under international law. The repression of the civilian Albanian population by the Serb army and police forces in Kosovo was contrary to international humanitarian law; their ethnic cleansing could also be in violation of the UN Genocide Convention. The Milošević government defied several resolutions by the UN

Security Council taken under chapter VII provisions of international peace and security which all UN member states are duty bound to obey. Yugoslavia also failed to honor an October 1998 agreement with NATO to end its repressive use of armed force against Albanian civilians in Kosovo and to scale down Yugoslav forces in the province to a level consistent with civil policing activities. Quite clearly the Milošević regime was in breach of some of its international agreements and undertakings and was treating them with contempt. The American UN ambassador was undoubtedly justified in arguing that the Yugoslav government was a repeat international lawbreaker: they had violated „international humanitarian law,“ engaged in „unlawful repression of Kosovars,“ created „half a million refugees,“ put „pressure on neighboring countries,“ and broken their „international commitments.“ Moreover, a draft resolution placed before the Security Council on 26 March 1999 by the Russian Federation and supported by India and Belarus, which demanded an immediate halt to NATO's bombing and called for resumption of negotiations, was defeated by 12 votes to 3.

However, that was not the same as a positive UN Security Council resolution, under chapter VII of the Charter, authorizing the use of armed force against Yugoslavia. A positive resolution was not obtained. Without such a mandate it is impossible to avoid the conclusion that NATO's action in bombing Serbia was not in full conformity with established international law. Perhaps it would be more accurate to say it skirted the edge of international law without securing a full mandate. As one legal scholar put it, NATO's bombing

„flouts the traditional interpretation of the charter ... but it is compatible with the emerging international humanitarian law that recognizes the rights of individuals to be protected from genocidal practices, torture and other gross human rights abuses“ (Allan Gerson and T.G. Carpenter as quoted by *The New York Times*, 27 March, 1999).

Thus, although it can be argued that the intervention in Kosovo by NATO was justified on humanitarian grounds and also on grounds that the action was consistent with several prior UN Security Council resolutions, it is more difficult to argue that such legitimacy and legality is sufficient to override the fundamental nonintervention norm of international law without a clear and uncontested indication that the action was fully consistent with the *jus ad bellum* rules of the UN charter. Uncontestability would be indicated by a positive resolution of the Council that expressly authorized the action and escaped veto by any of the permanent members. That the NATO states later recognized and agreed to the principal that the Council should sanction the terms of the peace agreement with Yugoslavia was dictated by the Russians who were a crucial player in making any agreement with Milošević possible at all. NATO needed the Russians to broker an agreement with Yugoslavia if they were to escape the military logic of having to conquer the country in the event that Milošević refused to capitulate to their air power. Perhaps the Russians saw some urgency in the task of arranging a *modus vivendi* - not least for the sake of their own national economic interests. Important members of NATO, particularly Germany and France, also wanted the sanction of the

Security Council. The NATO states belatedly seemed to recognize the problems and dangers of dividing the great powers and they evidently wanted to repair the damage by getting Russia back on side even if it required, as in fact it did require, some compromise with the peace terms of the Yugoslav government. But they did not recognize that from the start. Or perhaps they recognized it but chose to ignore it. Either way their conduct raises serious concerns.

According to that way of thinking, while the Yugoslav government and President Milošević in particular were guilty of presiding over massive human rights violations against Kosovo Albanians, Yugoslavia was still a victim of unwarranted military action in violation of its national sovereignty and territorial integrity. That, it seems to me, is an inescapable conclusion if we accept that the traditional norms of international society, particularly the fundamental norm of nonintervention and related restrictions on the use of armed force, are still the basic references for making such judgments. Whether the *jus ad bellum* is being expanded to include humanitarian and other justifications is discussed in the final section.

Even if Yugoslavia had procedural international legality on their side, President Milošević could still be condemned for political recklessness and callousness of the worst kind. He gambled with the security and welfare the Serbian people knowing full well that he could not defend them in a military conflict with a far superior adversary whose air power could penetrate every corner of Yugoslavia virtually at will. The people and not merely the soldiers would undoubtedly suffer if it came to

an armed conflict with NATO. In other words Milošević disregarded his fundamental national responsibility. Instead, he played a game of brinkmanship with his own people's safety and welfare. He gambled that the alliance would lose its nerve in the face of the prospect of actually having to go to war if its coercive diplomacy failed. He lost the gamble. So in addition to inflicting terrible suffering on more than a million Kosovo civilians Milošević also brought down a calamity on the Serbian people.

Enlarging *Jus ad Bellum*?

Does experience since the end of the cold war offer any solid evidence for the claim that in certain circumstances humanitarian considerations preempt sovereign rights in the justification of military intervention? During most of the 20th century the grounds of legitimate and lawful intervention in sovereign states by armed force, *jus ad bellum*, were curtailed by international society. The right of conquest was abolished. Unequal treaties and capitulations were relegated to the scrap heap of Western imperial history. Colonialism was outlawed. Protectorates and trusteeships became things of the past. All of that restriction reflected the classical liberal doctrine of international *societas*: namely that states which mind their own business have a right to be left alone: *laissez-faire*.

But in light of NATO's bombing of Yugoslavia, it might be argued that the normative grounds for armed international intervention are becoming less restrictive once again. Is there an emerging doctrine of justified armed intervention in world politics that moves beyond the prudential and procedural

ethics of the 1945 UN settlement? (Roberts, 1999).² Is there a return to an era of geographical morality in which certain civilizations, such as Europe, define their own preemptive international norms, such as democracy, for the employment of armed force in their region? (Huntington, 1996: ch. 12). Are legitimate spheres of influence creeping back into world politics? Are internationally mandated protectorates coming back into vogue? If so, should we welcome such a change or worry about it?

Pluralist ethics were clearly evident in the case of Kosovo: the NATO intervention disclosed many statist and prudential concerns. President Clinton, Prime Minister Blair and other NATO leaders expressed their fear that a massive exodus of Kosovo refugees might upset the social and political stability of neighboring countries which, in turn, could destabilize the entire Balkan region. On the other side, concern was expressed about the dangers of dividing the great powers. Critics of NATO said it was a terrible mistake to launch military action without first securing a mandate from the Security Council.

Pluralist norms were also strongly indicated by the unwillingness of intervening powers to take risks with the lives of their soldiers. Indeed, their interventionist policy was virtually dictated by the mandate that casualties to their own troops must be minimal or possibly must not be tolerated at all. That surprisingly restrictive norm of *jus in bello* was evident in the coalition war against Iraq as well as the interventions in Somalia and Bosnia. In Kosovo the safety of NATO's troops dictated an air campaign to compel the Yugoslav government to come to terms. The exclusive use of air power led to the morally

questionable decision to deliberately put civilians on the ground at risk to reduce the risk to pilots in the air. As it turned out, civilians were in far greater danger than the air-crews who carried out the bombing from high altitude (approx. 5,000 meters) which sacrificed precision for air-crew safety. No NATO fliers were killed but an estimated 1200 civilians died as a result of collateral damage or mistaken targeting. That suggests the practical inadequacy of humanitarian justifications for military interventions that cannot also be justified by conventional norms of national security and international order. Countries that champion humanitarian values, such as the United States, are unwilling to risk the lives of their soldiers to defend human rights. That is hardly a solid military basis for a practical policy of humanitarian intervention.

This is not to imply that humanitarianism and human rights were empty rhetoric or hollow values. They were significant normative considerations for the principal players involved. But it would be a mistake to conclude from the Kosovo experience that solidarism is preempting pluralism in international ethics. Instead, it indicates that humanitarianism can be pursued within the pluralist framework of international society, but only up to a point - which is defined by the national interests or concerns of the states involved. That evidently is the only operational context within which human rights can be defended by American and probably also Western armed forces.

The Kosovo conflict was also portrayed by Western leaders as a conflict between democracy and dictatorship. In a BBC television interview NATO Secretary General Javier Solana pointedly

said that „dictators have no place in the Europe of the 21st Century.“ As indicated, President Clinton called for a Europe that shared America's values and he justified NATO's bombing of Yugoslavia as being „for the sake of our values.“ The United States was defending „a peaceful, united, democratic Europe.“ French President Jacques Chirac claimed the air attacks were launched to defend „peace on our soil, peace in Europe.“ The implication is clear: dictatorships and abusive governments had no place in Europe and were to be stamped out. The leading states of Western Europe were defining the terms of legitimacy and legality of states everywhere in Europe - up to but not including the border countries of Russia. Territory anywhere in this Europe was characterized as the common property of all Europeans and not the exclusive property of particular European states. All of that is suggestive of a geographical sphere of influence where Western norms and values shall prevail.

In condemning the „barbaric“ domestic policies of Milošević and attempting to impose „civilized“ policies by force the NATO states invoked a standard of conduct that also brings to mind the old European „standard of civilization“ (Gong, 1984). In attacking the sovereign state of Yugoslavia NATO repudiated the traditional Westphalian doctrine of *cujus regio, ejus religio* and instead adopted a secular version of the older interventionist doctrine of *respublica Christiana*. Historically Europe and later the West operated with their own „standard of civilization“ originally defined by the Christian religion and later by secular Western values. The NATO attack on Yugoslavia was justified by the norms of democracy, human rights,

rule of law, etc. which are set out in NATO's post-cold war doctrines of regional security. The terms of Yugoslavia's capitulation resulted in Kosovo taking a place alongside Bosnia as two protected territories in the Balkans where final responsibility for domestic security, local administration, physical reconstruction, and future state-building rested with the United Nations and various Western or Western-dominated international organizations, including NATO, the EU, and the OSCE. And since the Kosovo protectorate was imposed by military power it had some parallels with European protectorates and trusteeships of an earlier era (Wight, 1952: 7-11).

Was NATO's military actions in the Balkans signaling a bold move into a new millennium? Or was it indicating an unwitting and unrecognized return to an earlier era when Western values were imposed on obstinate governments and populations by armed force? Are we progressing into a world made safe for human beings and democracy? Or are we witnessing a retrogression to an era of geographical morality in which certain regions of the world determine their own preemptive international norms for the employment of armed force in their region? Do regional states, in this case the NATO states, have a right to use armed force unilaterally within their region without the authorization of the UN Security Council? Does NATO now have the role of a regional police force that serves summons to non-NATO European states that defy the regional norms of democracy and human rights - even if they have not clearly violated the UN charter? Does NATO have a free lancing right to impose their values in Europe

by military means when diplomatic means prove unsuccessful?

Some Conclusions from Kosovo

The debate between pluralists and solidarists on the fundamental moral question of humanitarian intervention is not a debate between those who are concerned about human rights and those who are indifferent or callous about human suffering. Every decent person has these concerns. It is not even a debate about how to best go about preventing human suffering. That is an important question. But it is of secondary importance. It is a debate about the basic values of international society. Issues of justifiable armed intervention and justifiable warfare are being raised that are at the very foundations of international society. The states who are in a position to pursue and preserve international justice have a responsibility to do that whenever and wherever possible. But they have a fundamental responsibility not to sacrifice or even jeopardize other fundamental values in the attempt. International order and stability, international peace and security, are such values. In my view, the stability of international society, especially the unity of the great powers, is more important, indeed far more important, than minority rights and humanitarian protections in Yugoslavia or another country - if we have to choose between those two sets of values.

It is not only that peace and security are values that are important in themselves: which is obvious. It is also that humanitarian values are never under greater threat than when states get involved in wars and international peace and security are placed in jeopardy.

War is the biggest threat to human rights. War between the great powers is the biggest humanitarian threat of all. Nothing else comes close. The facts and reasons are incisively stated in the following comment by Adam Roberts (1999: 114):

„All major cases of genocide and ethnic cleansing in the 20th century have occurred during or immediately after major wars: the chaos and hatred unleashed in war, and the secrecy that wartime conditions engender, can provide the necessary conditions for such mass cruelty.“

That is the larger humanitarian value at stake. Responsible leaders of major powers whose compassion inclines them to consider using armed force in the defense of humanity should never lose sight of that larger moral consideration.

But that issue seems to be lost on at least some of the NATO politicians who came to power in Western countries during the 1990s: the „yuppie“ generation of American and European leaders born after the end of the second world war. What seems to be absent from their political minds is a heightened awareness of the extreme dangers of war. If that is so, it is surely surprising because such insight can easily be derived even from a casual acquaintance with the violent history of much of the 20th century. Have the leading NATO statespeople of our time forgotten a fundamental lesson of international relations that their immediate predecessors always had at the front of their minds?

That is not to forget even for one moment that Kosovo was a humanitarian disaster for the people of Kosovo and of Yugoslavia more generally. But it was a disaster of their own making.

It was their domestic crisis. President Milošević played political roulette by arbitrarily taking away Kosovo's rights of local autonomy within the state of Yugoslavia. The majority population of Yugoslavia, the Serbs, supported him, probably overwhelmingly. In that regard, the Serbian leader could be accused of acting as a democratic politician rather than a responsible statesman. Kosovo Albanian militants, later known as the Kosovo Liberation Army (KLA), threw their own political caution to the wind by engaging in armed rebellion against the Yugoslav state with the aim of carving Kosovo out of Yugoslavia. In doing that they split with the peaceful party of Kosovo Albanians who sought a rapprochement with Belgrade that would restore their constitutional rights. But many Kosovo Albanians supported the secessionist KLA. The Kosovo disaster was thus created by President Milošević with the popular support of the Serbs; it was enlarged by certain Kosovar Albanian warlords who enjoyed substantial popular support from among the Kosovo Albanian people.

The Kosovo disaster was a tragedy for everybody, Serbs and Albanians alike, who were caught in it and victimized by it. That it was a humanitarian disaster there can be no doubt - although of far lower magnitude than originally estimated by NATO.³ But the claim that it was an international crisis that required military intervention was unfounded. It did not present a serious threat to international peace and security either in the Balkans or beyond. It became a major international crisis only when NATO decided to intervene on its own initiative and without a full international mandate. NATO got invol-

ved for humanitarian reasons that no civilized person could question. But the leading NATO powers, and in particular the United States, could be criticized for losing sight of the bigger picture. There is some basis for believing that by intervening NATO may have made the humanitarian disaster worse rather than better. What it made definitely better were the secessionist prospects of the Kosovo Albanians.

Notes

1. Roberts has noted that this intention is in conflict with an underlying principle of the laws of war, namely „that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy“ (Roberts, 1999: 116).
2. „... crimes against humanity, violations of the 1948 Genocide convention, and violations of the 1949 Geneva Conventions may all constitute grounds for intervention. ... In this perspective, it cannot be right to tolerate acts which violate widely supported legal norms just because the Charter does not explicitly provide for military action in such circumstances, or because a veto on the Security Council makes UN-authorized action impossible“ (Roberts, 1999: 106-107).
3. NATO originally estimated 100,000 civilian killings but six months after the conflict UN investigators reported finding approximately 2000 victims and expected the number to increase to 10,000 (*The Globe and Mail*, 11 November, 1999).

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