

Armed Humanitarian Intervention

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2003

Critical assessment of the claim that humanitarian intervention is a good reason to
override principles of classic international law

Introduction

The terrible facts surrounding the critical situation in Kosovo during 1998-1999 are well known and little disputed. The need for swift and decisive action to stop horrendous crimes against humanity, ethnic cleansing, massive displacement of peoples and worsening war crimes was widely recognised. NATO intervention by military force was widely welcomed, but at the same time it was harshly criticised as a blatant act of illegal aggression. To a great extent Kosovo and the current crisis in Iraq compels us to reconsider the troubled law of humanitarian intervention.¹ The arguments for and against the acceptance of a legal doctrine of humanitarian intervention are difficult as intervention challenges traditional State sovereignty principles upon which international stability is reliant. However, as an element of substantive human rights globalisation, modification to the law maybe necessary and justified as we enter the 21st century and an era of expanding peremptory norms, or *jus cogens*, and *erga omnes* state responsibility.

During the Kosovo crisis the NATO alliance justified their military action and intervention primarily on the grounds that it was necessary to halt and reverse the ongoing humanitarian disaster. President Clinton, repeatedly citing the atrocities committed by Yugoslav leader Milosevic's state apparatus, called the armed intervention a moral duty and declared NATO's air campaign "a just and necessary war."² These sentiments were repeated by British Prime Minister Blair who said that NATO "must be willing to

¹L. Henkin., *Kosovo and the law of "Humanitarian Intervention"*, 93 *The American Journal Of International Law*, 824 (1999).

²R. B. Bilder, *Kosovo and the "New interventionism": Promise or Hell?*, 9:1 *Journal Transnational Law & Policy* 153 Fall (1999).

right wrongs and prosecute just causes.”³ To a number of western human rights advocates, Kosovo was a noble crusade and the dawning of a new world order, at the same time a turning point in international law in which respect for human dignity triumphed over state sovereignty.⁴ Part of the justification for armed humanitarian intervention and the overriding of several principles of classic international law came from the failure of the United Nation Security Council⁵ to act promptly and decisively in Kosovo to protect human rights. The result being NATO, as an internationally recognised collective regional force, took justified, necessary and proportionate action, on the behalf of the international community to protect oppressed peoples, innocent bystanders and stop the perpetration of serious crimes against humanity.⁶ Let us not forget that the Kosovo humanitarian crisis was not the only time the United Nations⁷ failed to act decisively. The UN failed to take action to halt massive violations of human rights in Cambodia, Uganda, Sudan, Angola, Sierra Leone, Liberia, Tibet, East Timor and the Rwanda genocide where up to 800,000 people were slaughtered in eight weeks.⁸ During these crises the UN failed to take responsibility to ensure the

³*Id.* at 153.

⁴*Id.* at 153.

⁵Organ of the UN *Charter*, signed 26th June 1945 (entered into force 24th October 1945).
Hereafter, Charter.

⁶D. Bobrow, M. Boyer, *Maintaining System Stability*, 41 #6, *The Journal of conflict Resolution*, 727 Dec. (1997).

⁷*Hereafter* UN.

⁸Bilder, *supra* note 2, at 162. Comment; Bilder attributes the failure to the US. and NATO, however, it would be more appropriate to find the UN accountable for not enforcing and ensuring human rights protection according to the Charter. It could be suggested that the UN is complicate to genocide in Rwanda for failing to ensure protective measures and by the fact that UN staff pulled out of Rwanda one week after the genocide began. This raises serious questions about reviewing UN Security Council Permanent Members veto powers and if alternative measures can be implemented.

protection of innocent lives and stop massive human rights violations.

Because of these catastrophic failures it would only seem reasonable and natural for states with the will and capability to step in and fill the void left by omissions of the UN. Arguably, the UN has recognized its own limitations and permitted a wide interpretation of the *Charter* and Security Council Resolutions. Even if this argument is found to be baseless it is still the case that questions surrounding humanitarian intervention need to be addressed.

Claims of legal humanitarian intervention in Kosovo introduce the possibility of emerging customary international law that trumps the *Charter*. However, because of the difficulties in determining which serious crimes against humanity would justify intervention, and the degree of necessity and proportionality of intervention, it is important that progress in this area is cautious and balanced. If developments are impulsive and motivated solely for self-interest it could undermine future situations of genuine humanitarian catastrophes.⁹ Additionally, developments need to take into consideration elements of certainty and stability that international agreements offer. Within this discussion it should always be remembered there are different cultural and philosophical views on the interpretation of human rights and state sovereignty. Western philosophical views are dominant in international and human rights laws, however, considerations should be made for differing opinions when trying to reach a consensus amongst states.

⁹P. Rodman, *The Fallout from Kosovo*, Foreign Affairs, 47 July/August (1999).

General principles on the use of force and non-intervention

The state obligation not to use unlawful force in the settlement of disputes can be said to be one of the most fundamental rules of international law.¹⁰ Even though this principle has the status of a *jus cogen*, the actual use of force remains one of the most contentious areas of international law.¹¹ While the vast majority of states agree that, *prima facie*, the use of force is impermissible, there is considerable disagreement over the precise definition of force and the circumstances in which it may lawfully be used.¹²

In the same way, non-intervention principles are a dominant norm of international law designed to protect political independence, territorial integrity and help to reduce the probability of conflicts.¹³ As a rule the principles are firmly and formally embedded in normative conventions governing international relations.¹⁴

Prior to the 1945 *Charter* of the United Nations, the question of a state's right to resort to the use of force and intervention within the territory of another state without the state's consent was judged in terms of the criteria for the just war. A just war being, when it is used as a defense or for the purpose of righting a great wrong. However, it

¹⁰T. Hillier, *Principles of Public International law* 245 (2nd ed. Cavendish Publishing Ltd. London 1999).

¹¹*Id.* at 245.

¹²*Id.* at 245.

¹³M. W. Doyle, *Ways of War and Peace* 389 (London, W.W. Norton & Co. 1997).

¹⁴R. Little, *Political Theory, International Relations, and the Ethics of Intervention* 13 (J. Forbes, & M. Koffman, eds., London, Saint Martins Press, 1993).

was expected that a state should first try to find a peaceful dispute resolution and only if these attempts failed could it resort to an armed conflict. A further consideration was given to whether the resulting conflict might produce more harm than good. With the growth of positivism international law increasingly abandoned efforts to judge right from wrong and in effect accepted the use of force as a legitimate instrument of state policy. This had the additional effect of international law focusing on the actual conduct of hostilities and the increased development of humanitarian laws.

Twentieth century changes in the attitude of international law towards the use of force began with the advent of the League of Nations in 1920. Not only was a 'cooling off' period of three months prior to resorting to war required, but also a duty to try and reach a peaceful settlement during was established.¹⁵ The next substantial developments came through the 1928 Treaty Providing for the Renunciation of Wars as an Instrument of National Policy.¹⁶ Article 1 of the treaty provides that the 63 signatory States renounce war as an instrument of national policy and are committed to the peaceful settlement of disputes. However, fundamental legal disputes still existed concerning the understandings of actions without an official declaration of war, the threat of war without actual hostilities and whether war was permitted in self-defence.¹⁷ It was also generally accepted that international law prohibited intervention by any state within the territory of another without state's consent. This included the prohibition of unilateral intervention in

¹⁵See League of Nations Article 12.

¹⁶Hillier, *supra* note 4, at 246.

¹⁷*Id.* at 246.

internal wars and even for agreed urgent humanitarian purposes.¹⁸ The *Charter* reaffirmed these prohibitions as part of a general prohibition on the use of force.

¹⁸Henkin, *supra* note 1, at 824.

The *Charter* was set up in an attempt to correct these legal inadequacies and establish international stability, acceptable common standards and enforceable mechanisms for individual justice.¹⁹ The purposes and principles of the *Charter* are based on state reciprocity and the mutual respect of member states to cooperate according to the *Charter's* spirit and intent. Additionally, to be effective the Security Council, as the primary body responsible for the maintenance of international peace and security, must have its authority recognized by all signatory members.²⁰ Article 1 of the *Charter* emphasizes that it is the purpose of the UN to 'maintain peace and security.' It is recognised that this may involve collective measures to prevent and remove threats to the peace, the suppression of acts of aggression or other breaches of the peace, and the settlement of international disputes by peaceful means. Article 2(3) requires member states to settle disputes by peaceful means in order that international peace security and justice are not endangered. Article 2(4) prohibits the use, or threat, of force in international relations.

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, or in any manner inconsistent with the purposes of the United Nations.

From Article 2(4) it is noted that the main concern is the prohibited use of force and not the outlawing of war. This presupposes that war and humanitarian laws, governing the rules of armed conflicts, are necessary and inevitable for the time being. Therefore, as

¹⁹P. Fifoot, *To Loose the Bands of Wickedness*, 135-136 (Brassey's, UK, 1992).

²⁰See *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 54th Sess., Supp. No.1, at para.66 & 69, U.N. Doc A/54/1 (1999).

long as the possibility of war exists it is better to keep them within narrow well-defined parameters, in effect minimizing the damage to individuals and maintain the stability of the international community. Even though the *Charter* has been successful in clarifying certain legal issues surrounding the use of force and self-defence to bring greater international stability, it has not been completely successful at addressing all situations where massive human rights violations occur. Part of the failure to implement the *Charter* and its enforcement mechanisms can be attributed to the politicising of the UN.

The political process that works within the organization, in particular the Security Council and its Permanent members can and does restrict its capabilities. If the Security Council is unable to act in times of catastrophic human rights abuses then there must be some alternative mechanism to protect affected individuals. This moral argument will be discussed in detail later. However, there is also a legal justification that can be extrapolated from the *Charter* and customary international law.

Self-Defence and the use of Force

Prima facie, the use of force is lawfully justified in a number of situations. The three categories where force may be considered are retorsion, reprisals and self-defence. It is under the heading of self-defence that concepts of justification for humanitarian intervention generally arise.

The use of force is permitted under Security Council authority for the prevention and removal of threats to peace, the suppression of acts of aggression and to resolve by peaceful means any international disputes that might lead to a breach of peace.²¹

Although Article 2(4) prohibits the use of force it must be read in light of Article 51 which states:

Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

It is important to know what are the inherent rights, applicable for individual and collective self-defence. Additionally, what Security Council measures are necessary for the maintenance of peace? In situations where the Security Council doesn't act swiftly or is bogged down with international politics, is there then a justification for self-defence measures to be taken to protect the rights and freedoms of unprotected individuals? At the same time can states who fall outside of the traditionally recognized categories take self-defence measures? These are some of the difficult questions that the international community need to decide when considering the justification for humanitarian intervention.

It is possible to see two approaches to the use of force and the scope of self-defence. A permissive flexible customary law view and a restrictive *Charter* view. However, even within the restrictive view there is the possibility to argue for the legal justification of the

²¹ M. O'Connell, *The UN, NATO, and International Law After Kosovo* 22 Human Rights Quarterly 59 (1999).

use of force in specific instances of humanitarian intervention.

It can be recognized that the customary right of self-defence is not a narrow exception to the general ban on the use of force so long as there is some element of defence of the state. The classic customary law definition of self-defence, found in the *Caroline* case (1841)²², permits the use of force with flexibility in a variety of situations. The main consideration being in response to an attack, however, an attack does not itself have to involve measures of armed forces. Economic and propaganda aggression qualify, all that is required is that there is an overwhelming necessity for forceful action. It is increasingly suggested that 'necessity' could include the *erga omnes* state duty to defend the violation of *jus cogens* crimes. Importantly, customary self-defence may go beyond the right guaranteed by the *Charter* and for this reason it is important to determine whether customary self-defence has survived the *Charter*.²³ For example, in the 1983 US. invasion of Grenada, the 1986 US. bombing of Libya and the 1981 Israeli destruction of the Iraqi nuclear reactor at Osarik, the customary right of self-defence has been used as a justification for resorting to force. The flexibility of permissive customary law allows state discretion to decide when self-defence actions can be justifiably taken. However, this is in contrast to the restrictive approach to the use of force within Articles 2(4) and 51 of the *Charter*.

Based upon customary international law a flexible approach can be argued, where

²²Caroline Case (1841) British and Foreign Papers 1137-8, 30 British and Foreign State Papers 195-6.

²³Hillier, *supra* note 4 , at 249.

action is judged according to necessity and proportionality. The *Nicaragua case*²⁴ confirms the customary law prohibition on the use of force and that the justified, necessary and proportionate use of force is permitted only if an armed attack has occurred. Additionally, states are permitted to assist in collective self-defence action providing the victim state has specifically requested them to assist. Even though the *Nicaragua case* refers to the necessity of an armed attack, if conditions for self-defence are read in a wider regional scope, as was the case in the Tanzanian invasion of Uganda, the Vietnamese invasion of Cambodia and the Indian invasion of West Pakistan, then justification can exist. During the Grenada invasion crisis, the OECS acted without Security Council authorisation claiming collective self-defence in the face of external aggression. The General Assembly condemned the action as unlawful, however the US. vetoed a Council Resolution finding the intervention a violation of international law.

To further understand the issue of individual and regional self-defence, consider the Preamble of the *Charter*.

*...to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institutions of methods,
that armed force shall not be used, save in the common interest,...*

The *common interest* element can be determined by the numerous UN treaty documents which address the fundamental protection of individual human rights. Ultimately, these documents address *inherent individual dignity* as the fundamental

²⁴Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.) (Merits), 1986 I.C.J. Reports 14 (June 27).

common interest element.²⁵ Maintaining peace and security in the region and the common interest element could therefore justify regional self-defense action even when it does not comply with the restrictive *Charter* view.

It is argued that Article 51 was never intended to be a conclusive statement of the right to self-defence.²⁶ The *travaux preparatoires* of the San Francisco Conference suggest that Article 51 was included in order to clarify the relationship of regional organisations to the Security Council, rather than define self-defence. Therefore, regional security forces may take proportionate action without Security Council authority where it is deemed necessary. It is also argued that the customary rights are specifically retained by the use of the word '*inherent*', meaning 'pre-existing in customary international law'. The restrictive *Charter* based view suggests that self-defence use of force can only be carried out providing strict criteria are satisfied, at the same time the Security Council must be immediately informed and permitted to interject at any time it sees fit. As is stated under Article 51, states have the right to individual and, or, collective self-defence. If there has been no request from a state, collective security self-defence action is permitted under Security Council authority, in accordance with Article 39 determination.

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or an act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with arts 41 and 42 to maintain or restore international peace

²⁵Universal Declaration of Human Rights, G.A. res. 217 A (III), UN. Doc. A/810 at 71 (1948), *Per* Preamble.

²⁶Hillier, *supra* note 4, at 250.

and security.

Security Council authority permits the use of force under a Chapter VII Resolution, or, the regional use of force per Chapter VIII Resolution. Under Chapter VIII Resolutions, per Article 53, the Security Council is permitted to utilize and authorize regional arrangements for the enforceable settlement of disputes.²⁷ In practice most Chapter VIII permissions come from Chapter VII authority, therefore, not deviating from the universal vision of the UN being the primary authority because the limited authority given to regional forces it is still ultimately under Security Council control. Although most regional organisations have agreed to this arrangement it did not stop the OAS from organising a collective self-defence 'quarantine' force during the Cuban Missile Crisis. The US. realized the Soviet Union, as a Permanent member of the Security Council, would veto any use of force.²⁸ Therefore, based on regional self-defence action the US. argued that the Security Council's silence in the face of the OAS-authorized quarantine was in effect consent to their action under Chapter VIII.²⁹

²⁷O'Connell, *supra* note 21, at 57.

²⁸Under Article 27(3) of the *Charter*, a Security Council resolution to authorize intervention was subject to veto by any permanent member.

²⁹L. C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. Int'l L. 515, 522 (1963).

In determining what type of behaviour falls within Article 39 the 1974 General Assembly Resolution on the Definition of Aggression, Article 3, sets out the main acts which will qualify as acts of aggression necessary for legal self-defence action. The Article 3 list is not intended to be exhaustive, but, it does focus on threats of armed aggression. It could be argued that given the growing rise in global human rights accountability for universally recognised *jus cogen* crimes and *erga omnes* obligations of States, threats to and breaches of the peace encompasses more than the use or threat of armed force. If there are threats of genocide, mass torture and displacement of peoples these situations could fall under 'threats to and breaches of the peace', therefore giving justifiable self-defence action.

The Council's non-transparent political decision-making process, their wide contextual interpretation of the Charter and application of Chapter VII Resolutions suggests there is opportunity for the development of a humanitarian intervention doctrine under collective self-defense or as emerging customary international law. In 1991-1992, the Security Council authorized military intervention for humanitarian purposes in Iraq and Somalia. In principle, the Security Council did not justify intervention as humanitarian. The theory supporting these actions was that some internal conflicts, when accompanied by *jus cogen* crimes, even if unrelated to conflicts, may threaten international peace and security. Therefore, they were within the jurisdiction and were the responsibility of the Security Council under Chapter VI and VII.³⁰

³⁰Henkin, *supra* note 1, at 825.

The 1990 Security Council Resolution 678 (Chapter VII) authorised a coalition of States to liberate Kuwait from Iraqi aggression by “all necessary means.”³¹ Due to political and administrative difficulties the Security Council did not specify which provision of Chapter VII was to be used. They didn’t specify as to Article 42 authority for forces under UN command, or, Article 43, authorizing an agreement of coalition forces under US command. The Security Council in its avoidance of citing which specific Article was to be used demonstrates the innovative approach the UN takes in peace and security. Post Gulf War, the Security Council has used the same formulation of calling on States to use all necessary means in authorising operations not involving collective self-defence or Article 43 agreements.³² With international approval the Security Council has extended Chapter VII authorization to include peacekeeping operations and the authorization of regional organisations e.g. US. Peacekeeping forces in Somalia. The Security Council’s newfound flexibility encouraged NATO to evolve and take a more active role in regional peacekeeping. However, authority for action, or at least a genuine attempt. should be made. Arguably, these lawful modifications on the *Charter* through general practice and a sense of legal duty indicate the development of customary law.³³

The realisation that the Security Council is sometimes unable to act due to political interests is troublesome. Especially when the situation is an emergency, time is of the essence and crimes against humanity are being committed.

³¹O’Connell, *supra* note 21, at 69.

³²O’Connell, *supra* note 21, at 68.

³³Vienna Convention on the Law of Treaties, 1996, force 1980, art 21, 22, 31.

Within the confines of the *Charter* it seems that no general right of humanitarian intervention exists. In the intervention cases previously cited, humanitarian intervention may have been a factor but self-defence was claimed as the justification. Kosovo is one of the first international incidents where humanitarian intervention is cited as the justification for armed intervention. Part of the legal justification was based on Security Council Resolutions 1160 and 1199 that stated, “affirming that the deterioration of the situation in Kosovo...it constitutes a threat to peace and security in the region.” However, the Resolution did not authorise force by all necessary means. NATO, as a consensual regional force (ACTORD), considered it did not need specific Security Council authorization as it could be derived from Resolutions 1160 and 1199³⁴ and besides during the Cuban Missile Crisis the US. had to some extent justified collective self-defence. Both NATO and US officials repeated that the whole point of action was to support Resolution 1199 and NATO would act according to the principles of the Charter.³⁵ After failing to reach a final peaceful settlement through the “Rambouillet Accords”, NATO began a bombing campaign over Yugoslavia. US officials and NATO Alliance members justified their actions through, the humanitarian catastrophe...the acute threat to the security of neighbouring States... the serious violation of international humanitarian law and human rights..., and, the Council resolutions.³⁶ This catalogue of reasons considers ‘all the circumstances’ when none

³⁴The UK. Thought that authorization by the Security Council was not necessary. The US. Considered that the Council had provided the necessary authorization by implication, in the earlier resolutions on Kosovo, Resolutions 1160 (March 31st, 1998), 1199 (September 23rd, 1998), and 1203 (October 24th 1998).

³⁵O’Connell, *supra* note 21, at 78.

³⁶O’Connell, *supra* note 21, at 80-81.

was sufficient on its own to justify intervention.³⁷ In response to these justifications UN officials did not condemn NATO's use of force, saying only "normally a UN Security Council Resolution is required."³⁸

One result of NATO's action is that the principles governing regional forces are no longer neatly defined. Of the various opinions, some claim humanitarian intervention is just a narrow exception to the principles available to regional security coalitions, others argue the principles have not changed and NATO violated international law.³⁹

Whatever view ultimately finds the most overwhelming support, NATO's failure to obtain Security Council authorization has been heavily criticised by some governments as a "threat to international peace" and a "flagrant violation of the UN *Charter*."⁴⁰

Currently there is mixed opinion if intervention principles have, will or should change.

Moral justifications for humanitarian intervention

Does a principle of non-intervention really exist?

³⁷Similar to the US approach and the justification of invading Panama.

³⁸O'Connell, *supra* note 21, at 80.

³⁹The Russian Federation, supported by China, proposed a resolution in the Security Council to declare the NATO action unlawful and to direct that it be terminated. See *Security Council Rejects Demands for Cessation of Use of Force against Federal Republic of Yugoslavia*, UN Press Release SC/6659 (March 26th 1999) <<http://www.un.org/News.Press/docs/1999/19990326.sc6659.html>>.

⁴⁰Bilder, *supra* note 2, at 158.

Humanitarian intervention theories and practice are a more recent emergence within liberal democratic States. Liberal theorists propose non-intervention principles emerged as a practice among the monarchical sovereigns of Europe and were later adopted by liberal democratic governments as crucial for a stable democratic society.⁴¹

On the whole, the emergence and consolidation of modern liberal democracies has been inextricably intertwined with the development of the nation-state and is socially imbedded in that structural context.⁴² Although different liberal principles have never been formally justified in a single treaty, according to one set of philosophical precepts, they have been successfully recognised in the Charter. Through the Charter it is envisioned that an alliance of liberal democracies, subject to international law, will provide the exact point of equilibrium for world order. Compliance will hopefully be achieved by the operation of subtle decentralized systematic systems.⁴³ At the same time an alliance of States should be strong enough to include several liberal democracies at various stages of development with differing emphasize on individual rights.

The important value in the principles, is the protection of human rights within a society that hold common values that are free from outside interference. For these values to be realized they have to be worked out through the majoritarian democratic process nationally and internationally.⁴⁴ However, this view of non-intervention is paradoxical as

⁴¹Doyle, *supra* note 13, at 395.

⁴²*Id.* at 395.

⁴³F. Teson, *A Philosophy of International Law* 19 (Westview Press, Oxford, 1998).

⁴⁴*Id.* at 44. *Per*; Walzer's sophisticated defense of State sovereignty following J. S. Mill's claims of State autonomy.

it is often the dysfunction of the democratic political process within the State that violates human rights instead of protecting them. One only has to consider the growing number of cases before the European Court on Human Rights to recognise how a relatively mature democratic alliance struggles to come to terms with human rights guarantees. This makes it even more necessary for the alliance to be committed to universally accepted norms too which States can be held accountable. As these norms become entrenched within the alliance and obligations become defined, with substantive enforcement mechanisms, then it would seem natural for higher standards of individual human rights protections to be introduced and guaranteed.

The Liberal principle of non-intervention has played a central role in the development of international order, but the desirability of this order has recently come under serious challenge. A world of independent sovereign States is no longer unquestioningly considered as the most desirable mode of global organisation for the long-term future of individual justice. Contemporary Liberal theories can be applied to a global community view of international relations, especially with the introduction of the *Charter*, The Universal Declaration of Human Rights, ICCPR, ICESCR and other internationally recognised regional human rights agreements. Not only are States reliant upon each other for peace and security in a political sphere, but, the emergence of world economic markets, international movement of technology and information, and, overall 'global village' concepts, suggest that the protection of fundamental human rights is no longer

based on nationalism but internationalisation.⁴⁵

Considering the basic Liberal left cosmopolitan⁴⁶ political view it is possible to argue that necessary and proportionate humanitarian intervention is morally and legally justified.⁴⁷

⁴⁵P. G. Cerny, *Globalization and the Erosion of Democracy* 36. #1 European Journal of Political Research 1 (1999).

⁴⁶Doyle, *supra* note 13, at 389.

⁴⁷Rodman, *supra* note 9, at 45-46.

This position holds certain human rights are an overriding priority and should not be restrained by nationalism or eroded by globalism. The view defines primary human rights necessary to protect, as subsistence and security rights, including freedom from genocide, assault, torture and other serious crimes against humanity. Not only do these exist as *jus cogens*, but, an *erga omnes* duty exists to protect others rights, therefore, they are rights held by humanity and claimable by all against all human beings.⁴⁸ Secretary of State Madeline Albright argued this point as a justification for armed intervention in Kosovo. She stated:

*In today's world of deadly and mobile dangers, gross violations of human rights are everyone's business. As for the use of force, Kosovo tells us what we should have already known. Yes, in confronting evil and otherwise protecting our interests, force is sometimes required.*⁴⁹

One problem with this statement that draws into question any justification, is the “*our interests*” element as it is open to wide interpretations. However, as previously stated, intervention is best justified if it is within an alliance, in effect reducing the possible corruption of the interest element.

According to the Kantian justification of international acts, as a theoretical basis for morality and legitimate intervention, certain universal human rights are primary.⁵⁰ By attaching a priority of values to humanitarian protection, intervention is morally and legally justified. As the liberal democratic alliance evolves and priority of rights expands

⁴⁸Doyle, *supra* note 13, at 398.

⁴⁹Madeleine K. Albright, *To Win The Peace...*, Wall Street Journal, June 14, 1999 at 20.

⁵⁰Teson, *supra* note 38, at 54-55.

so does a threefold international duty.

First, the State has an absolute duty exists to defend its own just institutions and in doing so to protect the interests of their citizens. The government of a just State has a duty to defend its just institutions because they are *just* institutions, not because they are *its* institutions.⁵¹ In other words, the rule of law and principles of individual autonomy are naturally just and this is what is worth defending.

Secondly, the respect of rights of all persons at home and abroad is not so absolute a duty, however, a duty does exist in certain circumstances to protect citizens of other States against serious crimes against humanity. This is tenet is supported by the understanding that all humans rights are universal and apply to all humans regardless of history, culture, or geographic circumstances. Therefore, every person has an equal claim to be treated with dignity and respect. Finally, the only way to secure global peace and a stable international community is to nurture an alliance of democracies in which these values are championed. The coexistence of democratic and nondemocratic regimes is the main cause of conflicts. A duty exists to promote and preserve the overall expansion of human rights and global democracy through a liberal alliance.⁵²

⁵¹Teson, *supra* note 38, at 55.

⁵²*Id.* at 55.

NATO's actions in Kosovo question classic international law principles of intervention, their future importance, how entrenched they are and how policy affects the democratic legislative process.⁵³ The overall discussions surrounding the legal theories of non-intervention and the moral justifications for humanitarian intervention are both confusing, complex and plagued by misconceptions.⁵⁴ Philosophical theories vary greatly and depending upon whoever needs to justify their actions can do so with some degree of success. This is particularly true if States have political and economic power to back their claims through creating their own spheres of influence, eg., the US invasion of Grenada and the former Soviet Union invasion of Afghanistan. However, interventions by India, Tanzania and Vietnam indicate, that this behaviour is not restricted to superpowers.

Given the relatively high number of interventions it is not surprising to find it argued, intervention is a 'built-in feature of our present international arrangements' or intervention is 'inherent in the nature of international society'.⁵⁵ It could be argued that intervention can be considered 'practically the same as that of international politics in general from the beginning of time to the present'.⁵⁶ This highlights the general acceptability of States to flex their political and military muscles and interfere in the internal apparatus of other States. Some analysts are inclined to term any foreign policy behaviour as intervention when a State tries to change the behaviour of another

⁵³O'Connell, *supra* note 21, at 47.

⁵⁴Little, *supra* note 14, at 15.

⁵⁵*Id.* at 15.

⁵⁶*Id.* at 15.

power.⁵⁷ Therefore, at its widest, intervention includes any foreign policy that effects another State. This suggests philosophical political theories on intervention are relative and even conventional principles of classic international law can be overridden with good reason.

Generally, the degree to which intervention occurs and possible claims of breaches depend upon the circumstances and how it effects the overall stability of the international community. In reality the complexity of cases, where morals, law and power conflict, tend to blur the philosophical distinctions and a combination of justifications for humanitarian intervention can be realised. Legal academics Lobel and Ratner state; “In the extreme cases of an on going genocide for which the Security Council will not give authorize force, perhaps the formal law ought to be violated...”⁵⁸ Subsequently, even in the face of international condemnation and possible sanctions it is better to satisfy moral obligations and protect humanitarian justice. These sentiments are repeated by Dworkin in his phrase, “rights...are trumps”, meaning that when people in other nations are subjected to intolerable atrocities, decent States cannot just “pass by” but are morally obliged to help.⁵⁹

⁵⁷*Id.* at 15.

⁵⁸O'Connell, *supra* note 21, at 73.

⁵⁹Bilder, *supra* note 2, at 159, See, R. Dworkin, *Taking Rights Seriously*, at xi (Gerald Duckworth & Co. Ltd. 1977) (“Individual rights are political trumps held by individuals.”).

In reality State intervention occurs to varying degrees all the time, it is only when the use of force is blatantly aggressive that States complain. Part of the reason for complaint could be that this threatens the international community as it is uncertain who is to be the moral judge for necessitous action? States with less economic and military power feel vulnerable and turn to the Charter for reassurance and protection. While superpower States rely upon the Charter for certainty and stability in international relations. Any excessive action tends to 'rock the boat' of international stability. The argument for strict Charter adherence to the use of force are strong even in light of 'moral necessity' for intervention. However, when the intervention is a collective action and the Charter's mechanisms have failed then intervention might be a legitimate exception to the prohibition of the use of force in Article 2(4) of the Charter.⁶⁰

Although the principle of non-intervention remains an important feature of modern international relations, NATO's intervention into Kosovo illustrates how it has come under a serious challenge.

Human rights and State sovereignty

Fernando Teson identifies a 'congenital tension' between the concern for human rights and the idea of State sovereignty.⁶¹ He argues that these two major pillars of international law generate a tension for the normative dimensions of international relations, because, if intervention is prescribed to promote human rights, then the door

⁶⁰Bilder, *supra* note 2. 161.

is open to 'unpredictable and serious undermining of world order'. If, as in Kosovo, regional intervention is accepted to curb human rights violations, then the principle of non-intervention necessitates a 'morally intolerable position' and it becomes impossible to stop serious crimes against humanity. To deal with this dilemma, Teson argues that reformulating our conception of international law is necessary.⁶² At the heart of this argument and the priority of rights, is the determination that only individuals have rights. Considering sovereignty and the right of non-intervention of the State is not a naturally inherent right, the legitimacy of the State can only be justified if it promotes and protects the rights of its citizens. If the State fails to do this, as by Milosevic's treatment of the Kosovan people, it loses its legitimacy and the protection afforded by the principle of non-intervention. Under these circumstances' NATO was entitled to intervene to rectify the ongoing violations of human rights. The balance of rights and the growing priority given to humanitarian intervention, recognises an increasingly permissive attitude for the duty to intervene. The traditional justifications underpinning the principles of non-intervention are of less concern as the legitimacy and sovereignty of States is ultimately derived from the rights of individuals.

⁶¹*Id.* at 56.

⁶²Little, *supra* note 14, at 25.

However, problems arise as to defining and determining a priority of individuals rights. In Kosovo this was not a difficult dilemma as the seriousness of the crimes committed are defined by treaties and customary law. Slater and Nardin argue it is possible that intervention may be moral, on occasions, and yet remain illegal because the 'requirements of effective law and sound morals are not the same'.⁶³ According to the cosmopolitan view for the NATO alliance to be morally justified any humanitarian armed intervention must satisfy four basic conditions under necessity and proportionality.

First, less drastic remedies must already have been tried and failed. This can best be achieved through political negotiations and sincere efforts over an acceptable period. Arguably this condition was met by the Rambouillet Accords negotiations.

Second, it must appear likely that the intervention will end the abuse of rights. Given the rapid escalation of events in Kosovo and the heightened international awareness some immediate action was obviously needed to be taken. However, we are still unsure as to the long term results gained and real threat of human rights abuses being committed against the Serbian community in Kosovo. Additionally, there is always the danger of provocation through biased misinformation and the manipulation of events.

Third, the costs of the intervention must be proportional to the scale of the rights violations. This condition can also be judged according to humanitarian law criteria. If the intervening State, or alliance, violates humanitarian laws through its intervention then it could call into question proportionality of the actions.

⁶³*Id.* at 26.

Finally, the disruptive effects of the intervention on international stability must be minimal.

The Security Council has had a difficult time to determine on long term stability issues especially when action involves superpowers or Permanent members of the Council. Due to residual Cold War political divisions between the super powers there still exists a limited consensus within the Permanent Members of the Security Council.⁶⁴ In Kosovo, NATO forces realized this potential problem and rather than allow possible destabilisation of Europe they acted, as a unified democratic alliance. However, any dismantling or weakening of State sovereignty and the balance of power must be progressed keeping in mind global stability. Just because there is the belief in a greater justice for the greater good it might not be prudent to act in all circumstances. Wisdom is required to balance politics and justice at all times.

War and Peace

⁶⁴Clarke, W., Herbst, J., 'Somalia and the Future of Humanitarian Intervention', 1996, *Foreign Affairs*, Vol. 75 No. 2. p. 81.

On the whole liberal democratic states show a tendency to maintain peace among themselves, while non-liberal states are generally prone to war.⁶⁵ It is through war, including civil wars, that the most serious human rights violations occur. The decline of interstate war and armed intervention, in the core, is often accounted for by reference to the existence of a 'zone of peace' between liberal democratic states.⁶⁶ Locating democracy and armed intervention in processes of globalization draws attention to the dynamic nature of the relations between them. However, these dynamics are obscured by assumptions of embedded Statism and realistic self-centred isolationism. The role of armed intervention in globalization promotes a rethinking of the basic unit of analysis in this debate for humanitarian justification. Democracy and intervention (armed or otherwise) are not the same thing in all times and places, nor do they have fixed relations to other social institutions and processes. Concepts of democracy and aims of war are extensive⁶⁷ and have changed overtime.⁶⁸ These developments, through the merging of industry, technology and bureaucracy, have contributed to the centrality of ideology and nationalism in 20th century politics and have shaped the ability of States to justify the use of force and forms of intervention engagement. Changes in the meaning and nature of war have contributed directly to the militarization of society and large-scale modern conventional intervention is at the centre of necessity to allied warfare. It entails a meshing of the military and independent consensus of allies, as demonstrated

⁶⁵Teson, *supra* note 38, at 11.

⁶⁶Doyle, *supra* note 13, at 404.

⁶⁷C. Greenwood, *The Concept of War in modern International Law* 36 International and Comparative Law Quarterly 297 (1987).

⁶⁸Doyle, *supra* note 13, at 406.

by NATO member States. The totalization of war and globalization of Liberal democracy has broad implications, not only for the justification of intention but also for social institutions and the practice of democracy.⁶⁹

Usually, the balance within the 'just war' theories⁷⁰, or, human intervention, depends upon numerous considerations including, international stability, proportionality and necessity costs, self-interests and seriousness of human rights violations.

Democracy and Intervention in an Imperial Order

The view of global interventionism has been applied by liberal democratic States to justify armed intervention and is a primary justification for humanitarian intervention in Kosovo.

Humanitarian intervention is justified as one way to extend or defend liberal spaces, within the 'democratic liberal heartland', therefore, intervention usually takes the form of policy.

⁶⁹Doyle, *supra* note 13, at 408.

⁷⁰Teson, *supra* note 38, at 59.

NATO, in Kosovo, contributed to the liberal democracy project of internationalization of a civic culture. This assumes that humanitarian intervention is not only a force for peace, but, a way to extend liberal democracy and civic culture. Additionally, it should be realised that the doctrine of 'double effect'⁷¹ maybe one of many factors used to balance the necessity and proportionality costs of intervention, but, it does not disvalidate the legitimacy of NATO taking direct action against Yugoslavia. Liberal internationalization means, States that fail to protect humanitarian rights, do not have the right to be free from intervention. Considering the 'spirit and intent' of numerous human right treaties it suggests States have a duty and moral obligation to protect and intervene when necessary, to provide subsistence rights to all human beings. The moral justification for intervention effects Liberal and non-Liberal democratic States alike. Several non-Liberal democratic States that function, with varying degrees of harmony, within the international community are not considered outside the law of nations and are still bound by elementary principles. In human rights abuses it is up to legitimate States to act as representatives, on the behalf of abused citizens, to defend their rights. In extreme circumstances of serious violations of acceptable moral norms, armed intervention, maybe justifiably used if necessary to uphold international law and preserve individual justice, peace, and security. The current trend of a duty to intervene, promote global awareness and responsibility, through economic, environmental and technological assistance, is supported by the UN and numerous NGO's. Assistance may include intervention that could effect self-interests of the

⁷¹*Id.* at 60.

State(s).

Problems arise when considering the globalization of Liberal democracies. Despite the apparent development and spread of Liberal democratic States during the 20th century, the possibilities for genuine democratic governance are seeing an overall decline.⁷²

The globalization of government structures and systems increasingly take oligarchic forms where hegemonic neoliberal norms of economic freedom and personal autonomy are delegitimizing both democratic governance and the credibility of those who try to make democracy work.⁷³ If intervention is not morally justifiable or a democratic alliance is not united, claims of liberal democratic imperialism can be levelled against the intervening State(s). Those opposed to NATO's interventionist actions in Kosovo, claim they are illegal, demonstrate an ultra-imperialist military economic order and the sovereign territorial state of Yugoslavia is being dictatorially absorbed into the globalization alliance of democratic States.⁷⁴

Therefore, to counter balance these possible abusive self-interest elements, consideration for humanitarian intervention should be case specific according to individual circumstances.

Conclusion

⁷²Cerny, *supra* note 40, at 1.

⁷³*Id.* at 2.

⁷⁴Doyle, *supra* note 13, at 420.

The breakdown of the Security Council to act efficiently and swiftly to prevent serious crimes against humanity was in large part a justification for NATO to act through a sense of moral duty, without direct Security Council authority.⁷⁵ Ideally, authority for collective humanitarian intervention should come from the Security Council acting decisively free from political influence for the sake of inherent individual dignity and international stability. Because the UN failed to establish fully functioning enforcement mechanisms, the responsibility has often fallen on regional organisations. Although, NATO's actions of 'humanitarian intervention of necessity' might be viewed as falling outside the strict bounds international legal criteria, it is within the spirit and intent of the *Charter* and international law. This is especially true if the *Charter* is regarded as 'living instrument' that is relevant to the needs of evolving concepts of individual justice as the protection of individual rights is taking a predominant role in international law.

A world of independent sovereign States is no longer unquestioningly regarded as the most desirable mode of organisation for the long term future of the human race.

However, any transition, from Statism to Internationalization, needs to be within the overall framework of international stability balancing State rights and individual rights.

The balance should be governed by enforceable cooperative humanitarian agreements.

The recent events in Kosovo illustrate the need for clarification, modification or reaffirmation of existing international law governing intervention and substantial steps

⁷⁵O'Connell, *supra* note 21, at 57.

should be taken to resolve this confusion as to the legality of humanitarian intervention. Through NATO's actions in Kosovo a message has been sent to the UN and the international community that progress is urgently needed to prevent future humanitarian disasters. The crucial point should be the protection of individual rights and collective stability. The recent situation in Kosovo points to a weakness in the UN in how to balance these often competing demands

However, one should not rush to dismantle existing mechanisms no matter how flawed. Progress on humanitarian intervention doctrines should be within the existing framework, and mechanisms in place should be utilized not penalized.