

**SPECIAL ISSUE ON HUMAN RIGHTS IN BOSNIA AND THE BALKANS**

*Secession, Law, and Rights: The Case of the Former Yugoslavia*  
Daniel Kofman

*The Bosnian Paradigm*  
Rusmir Mahmutcehajić

*The Quest for Tolerance in Sarajevo's Textbooks*  
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*Anticipating Consequences: What Bosnia Taught Us About Healing the Wounds of War*  
Judith Pinter

*A Symposium on Kosovo and Human Rights*  
Ramet, Gordy, Mertus, von Kohl, Gow, Williams, Scharf, Pavlaković, Papanikolatos, and Williams



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# HUMAN RIGHTS REVIEW

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gotiated away with the signing of the Charter. Thus, "rather than artificially limiting a state's right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force, including circumstances which exist outside the 'four corners' of the Charter."<sup>7</sup> Yet even a broad reading of self-defense is not very helpful with respect to Kosovo. The concept of self-defense applies only to states; it does not protect individuals against their own states.<sup>8</sup> The self-proclaimed Albanian Kosova has never been recognized as a state, and the NATO countries undertaking the intervention were never attacked or threatened with attack. Thus, the self-defense exception would require an extremely expansive interpretation to apply to Kosovo.

A second exception to the general ban on the use of force is Security Council enforcement actions under Chapter VII of the Charter. According to Article 24(1), the Security Council is authorized under Article 39 to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken...." It may then "decide what measures not involving the use of armed force are to be employed to give effect to such decision"<sup>9</sup> and, if these other measures have not been effective, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."<sup>10</sup> The UN Security Council issued three resolutions concerning the case of Kosovo (Resolutions 1160, 1199, 1203), which Serbia flagrantly disregarded. The Council found the existence of a threat to the peace and enjoined Serbia to take certain actions, such as the reduction of troops. But it would be a strain to contend that those resolutions authorized the use of force.

The third exception, found in Chapter VIII of the Charter, permits actions undertaken by "regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security."<sup>11</sup> Regional arrangements may undertake any action in this regard that is "consistent with the Purposes of the United Nations."<sup>12</sup> However, collective defense treaties, such as that of the North Atlantic Treaty Organization (NATO), do not provide an independent legal basis for the use of force; a legal basis for engaging in force must still be established from other sources of international law extrinsic to these treaties.<sup>13</sup> The Security Council still must give authorization for what would be considered "enforcement actions" under Chapter VII.<sup>14</sup> As the NATO intervention in Kosovo was never authorized by the Security Council, it does not fall within the Chapter VIII exception.

### Lawful Use of Force Implicitly Permitted Under the UN Charter

While it would be a stretch to argue that the express provisions of the UN Charter permitting force apply to Kosovo, at least four strong arguments can be made that the UN Charter implicitly permits or even mandates humanitarian intervention in the case of Kosovo.

### 1. Intervention as Not Violating Territorial Sovereignty

First, by its very terms the Charter does not prohibit all threats or uses of force; the kind of force it prohibits is inapplicable to the Kosovo scenario. Article 2(4) prohibits force against the "territorial integrity or political independence of any state." Under the traditional concept of sovereignty, "even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its 'invasion' of the sovereign's domain reserve."<sup>15</sup> This is to embrace a concept of sovereignty which renders modern developments in international law concerning the core purposes of the UN Charter superfluous. Humanitarian intervention comes in direct conflict with this conception of sovereignty and, thus, would constitute unlawful intervention.

The modern concept of sovereignty, however, refers not only to state borders, but to the ability of people within those borders to effect choices regarding how the state should be governed and by whom. Those who threaten that ability (be they internal or external in origin) violate the sovereignty of the people. When another state intervenes to protect human rights, it is not violating the principle of sovereignty, but liberating it.<sup>16</sup>

A related notion regards governments that commit violations of human rights as implicitly waiving any claims to the protections normally offered by sovereignty against intervention by others.<sup>17</sup> An essential condition of sovereignty is the maintenance of certain standards of administration on its territory, and forfeiture of that duty of maintenance opens the door for intervention. Humanitarian intervention in such a case "falls below the threshold set in Article 2(4) since the intervenors (if the intervention is truly humanitarian) do not seek to deprive the state of its territorial or political attributes but, rather, to enhance them."<sup>18</sup>

It is paradoxical that the Milošević government, which flagrantly disregarded the sovereignty of the internationally recognized states of Croatia and Bosnia-Herzegovina, is now claiming its sovereign rights. A regime built and sustained by intense human rights violations, such as the one led by Slobodan Milošević in Belgrade, is not entitled to make claims to "territorial integrity." The integrity of territorial boundaries have already been polluted as the regime has tried to gain and hold onto the territory only through the grossest human rights violations, including mass deportations and murders of civilians. Any state like Serbia "that is oppressive and violates the autonomy and integrity of its subjects forfeits its moral claim to full sovereignty."<sup>19</sup>

### 2. Intervention in Line with Principles and Purposes of UN

Second, the Charter advances central principles that could not be protected in Kosovo without intervention. It is the principles of the Charter to which

states should endeavor to conform, rather than just the letters of its provisions.<sup>20</sup> As Article 2(4) itself states, reading on into the second phrase, members of the United Nations are prohibited from acting "in any other manner inconsistent with the Purposes of the United Nations." Interventions consistent "with the Purposes of the United Nations" are permitted. Humanitarian intervention in the case of Kosovo furthers the core UN purpose of maintaining international peace and security.<sup>21</sup> Peace and security must mean more than the absence of an internationally recognized war; human rights violations short of all-out war also constitute major breaches of peace and security. In situations such as Kosovo, peace and security cannot be said to exist so long as the state is free to commit gross and systemic human rights abuses against its own people.

Other central purposes of the United Nations, as noted in Article 1 of the Charter, include developing "respect for the principle of equal rights and self-determination of peoples..."<sup>22</sup> and "encouraging respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religion..."<sup>23</sup> Where, as in Kosovo, a government flouts respect for the principles of equal rights and self-determination, and abuses the most basic human rights and fundamental freedoms of individuals, intervention may be the only way to reaffirm the central goals of the UN.

### 3. Intervention as Mandated Under Human Rights Provisions

A strong argument can be made that the UN Charter does not only permit intervention on humanitarian grounds, in cases like Kosovo, but actually requires it. Articles 55 and 56 of the UN Charter implore "all Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of...universal respect for, and observance of, human rights and fundamental freedoms for all..." As a first step, in 1948 the General Assembly approved the Universal Declaration of Human Rights, which declares that "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>24</sup> Since that date, the General Assembly and other regional and international bodies have adopted a host of human rights instruments. As Louis Sohn has explained, these instruments represent an authoritative interpretation of the UN Charter's human rights provisions.<sup>25</sup> The right to life, which is included in all main human rights instruments, includes the right to emergency assistance and to protection from gross and systemic human rights abuses.

As ideas of universal human rights have gained acceptance, the notion of state sovereignty has lost ground. The internationalization of human rights suggests that the treatment of citizens within a state is a subject of international concern, and to that extent no longer a matter of exclusive domestic

jurisdiction.<sup>26</sup> Egregious violations of human rights themselves pose a threat to international peace and security, thereby warranting intervention in serious cases. Where, as in Kosovo, a state is incapable of protecting human rights or is itself the perpetrator, the central purposes of the UN cannot be guaranteed without intervention.

### 4. Intervention as Stop-gap Measure

Another strong argument supporting NATO action in Kosovo rests on the UN's own failure to act. If the UN were functioning as intended, unilateral intervention would not be needed. Yet because the UN system is not functioning properly as a collective body addressing human rights and other security concerns, states retain the right to act unilaterally.<sup>27</sup> Institutions and mechanisms that would have warranted a state's relinquishment of its traditional rights were never established.<sup>28</sup> Article 43 of the Charter envisioned the creation of a system whereby states would make available to the Security Council, "on its call and in accordance with a special agreement or agreement, armed forces, assistance and facilities...necessary for the purpose of maintaining international peace and security."<sup>29</sup> These agreements were to be "negotiated as soon as possible by the Security Council."<sup>30</sup> However, to this date, no such agreements have been negotiated.

Article 106 of the Charter envisioned the creation of "transitional security arrangements" whereby signatories to the Charter could undertake joint action to maintain peace and security as stop-gap measures until the signing of Article 43 agreements. As Sean Murphy observes, "while such action was authorized only during a transition period to allow for the conclusion of Article 43 agreements, that transition period has not yet ended."<sup>31</sup> Accordingly, the intervention undertaken in cases such as Kosovo could be viewed as legitimate "Article 106 collective actions," undertaken only out of necessity due to failures by the UN.

### Limiting Principles

For all of the above reasons, the decision to intervene in Kosovo can be firmly grounded in international law. However, this is not the end of our inquiry. For humanitarian intervention to be perceived as legitimate, there must be further limiting principles that are applied to such acts in order to ensure that misapplication or exploitation does not occur. The following proposed limitations are firmly supported by international law.<sup>32</sup>

A case for humanitarian intervention can be made when the human rights abuses are extreme and verifiable, "shock[ing] the conscience."<sup>33</sup> Specific circumstances warranting intervention might include "natural and human-made disasters, genocide, other large-scale human rights atrocities, and internal aggression placing large numbers of people in life-threatening danger."<sup>34</sup> Inter-

vention should only be carried out by individual states or collective alliances if, as in the case of Kosovo, international organizations have failed to address the human rights abuses.<sup>35</sup> The intervening states should not have interests in the affairs of the target state beyond the human rights concerns. While the motives of states are likely to be mixed, at the very least the motives for intervention would need to be overridingly humanitarian, rather than focusing upon self-interest.<sup>36</sup> The case for intervention is strong when the following criteria are met: the abuses threaten widespread loss of human life; intervention would likely divert a disaster; the ongoing nature of the problem threatens the peace and security of the region; and there has been a good faith attempt to use diplomatic and peaceful means of settlement.<sup>37</sup> All of these factors were present with respect to Kosovo.

The only question that remains is whether the means and method of intervention were appropriate. Limitations supported by international law include: the use of minimum force necessary to prevent the atrocities; withdrawal as soon as the threat has ended; and a determination that greater damage would be done to the target society if no action were taken.<sup>38</sup> The intervening state should not maintain a presence in the target state longer than is necessary to fulfill the humanitarian goal. The intervening state should also ensure that it limits its attention to the human rights abuses and does not attempt to intervene in every aspect of the political and economic system of the target state that it does not like.<sup>39</sup>

The means and methods of intervention are further restricted by the laws of war.<sup>40</sup> Specifically, the Geneva Convention of 1949 further prohibits "indiscriminate attacks," defined as attacks where the damage to civilian objects would be "excessive in relation to the concrete and direct military advantage anticipated."<sup>41</sup> Two main principles of the law of war that must be observed are necessity and proportionality.<sup>42</sup> The concept of proportionality requires an ends-oriented determination: "The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."<sup>43</sup>

A question arises as to whether NATO complied with these principles throughout its bombing campaign. Particularly troubling is the criteria of proportionality. This required NATO to undertake action designed to elicit some permissible objective. To the extent that the bombing campaign was viewed as necessary for ending human rights abuses and returning deported civilians, the action was within the scope of international law. Unavoidable and unplanned damage to civilian targets incurred while attacking legitimate military targets were within the law. Yet the action became questionable when it became apparent that the bombing was not effectively advancing military objectives and the impact of the bombing was felt mainly by Serb civilians. When it became clear that the military means chosen were poorly related to the desired ends, the means should have been changed—that is, either ground troops

should have been introduced along with the bombing or the bombing should have been halted and other means employed.

Thus, while the decision of NATO to intervene in Kosovo was legal, and the means and methods of the intervention were initially permissible, the NATO campaign may have become illegal over time. It is ironic that after participating in flagrant violations of humanitarian law in Croatia, Bosnia, and Kosovo, Serbs now claim to have been the victims. In order to preserve the legitimacy of international law, any arguments of illegality in the use of force must be thoroughly investigated.

### Conclusion

A close reading of the United Nations Charter supports humanitarian intervention in Kosovo. While the explicit Charter provisions permitting force do not appear to be applicable, the Charter implicitly permitted and even mandated the action. The strongest justifications for humanitarian intervention in Kosovo are linked to affirmative human rights concerns, subject to substantive and procedural limitations. While the intervention in Kosovo was fully legal at the outset, any claims that the bombing campaign violated the laws of war should be investigated. Meaningful humanitarian intervention does not threaten world order. Rather, it vindicates the fundamental principles for which the United Nations was created.

### Notes

1. The author acknowledges the tremendous assistance of Katherine Guernsey and Barbara Wilson in the preparation of this article.
2. See, e.g., Mertus and Mihelic, *Open Wounds: Human Rights Abuses in Kosovo* (Helsinki Watch, 1994).
3. See Thomas Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990). See also Jose Alvarez, "The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations by Thomas M. Franck," *Journal of International Law and Politics* 24 (1991): 199.
4. Franck, *The Power of Legitimacy*, 50-66.
5. Domingo E. Acevedo, "Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force," paper presented at the American Society of International Law Proceedings, April 12, 1984, in Robin A. Cooper, "The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?," *American Society of International Law Proceedings* 78 (1984): 68, 73.
6. For a more restrictive view of self-defense ruling out anticipatory self-defense, see Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge, UK: Grotius Publications, 1997). See also Antonio Cassese, *International Law in a Divided World* (Oxford: no pub. given, 1986), 230 *et seq.*
7. This view is stated in the U.S. Army's *Operational Law Handbook* 4-3 (2000).
8. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (no publisher information provided, 1996), 139.
9. UN Charter, Article 41.
10. UN Charter, Article 42.