

Phaedon J. Kozyris

Delayed Learning from Kosovo: Any Chance for Common Understandings of Facts and Law?

The Kosovo conflict has raised some extremely important questions relating to the use of force for humanitarian intervention: when is it justified, who decides and under what procedures, what kinds of action and of what dimension come within its legitimate purview, and how does it end. In this context, the incidental aspects of how wars are conducted cannot be avoided. The fact that military operations now have ceased in Yugoslavia does not render these questions moot not only because we must assess blame or bestow praise for what happened there but also because we desperately need some guidance for the future.

As the curtain for the political future of Kosovo now rises, a second set of crucial questions must be addressed, relating to the structure of government and of the state in multi-ethnic nations, with emphasis on the rights and obligations of minorities which constitute local majorities in part of the territory of a nation, including issues such as autonomy, wars of national liberation and the right of secession.

While the related scholarly literature is extensive, I will limit myself to dealing with these questions in a simpler and more direct essay-type way. I will focus on those fundamental propositions on means and ends where there is a consensus (I will preface them with “it is agreed”) or where there should be deemed to exist some consensus (I will preface them with “it should be agreed”) or where some meritorious approaches have surfaced (I will preface them with “it has been suggested”).

I. The Use of Force for Humanitarian Intervention - Promises and Problems: Where Are We?

It is agreed that the preservation of peace, and the related respect for national sovereignty, is the central pillar of the international legal order.

To make sure that the non-defensive use of force against another state, where there is a threat to peace, is consistent with international law, the United Nations' Charter provides that such use requires the approval of the Security Council and it is agreed that this is the only generally accepted method. Such approval has not been obtained for the NATO bombing of Yugoslavia. The three related Security Council Resolutions of 1998 (1160, 1199 and 1203) express concern and even see a threat to the peace in the Kosovo conflict but do not authorize the use of force by anyone.

It has been suggested that, while there are good reasons behind the UN structure, with the General Assembly of all the member nations endowed with limited authority and with most of the crucial decisions entrusted to the Security Council, in some situations of extraordinary importance, where the great-power veto has paralyzed the process, there must be other paths to action. It is agreed, however, that such instances should be rare and exceptional, lest they destroy the system, and should be accompanied by the appropriate safeguards. One such procedure, still controversial, is the so-called "Uniting for Peace Resolution", where the great-power veto can be overcome by an overwhelming consensus in the General Assembly. In any event, no such Resolution was adopted for Kosovo.

It has been also suggested that, given the increasing recognition of the importance of human rights for everyone, another exception should be recognized for humanitarian intervention but only under very specific and controlled conditions since it would involve both a violation of the territorial sovereignty and an interference in the internal affairs of a state. The need for caution here is obvious since the pretense of protecting human rights can provide an easy cover for all sorts of power politics and even imperialist objectives, being perverted to strike at antagonists and seriously undermining international peace and security.

While there is not much international precedent for such a humanitarian intervention *de lege lata*, some publicists, most notably Judge A. Cassese in his "Comment: *Ex inuria ius oritur*" (*Jurist*) and elsewhere (*Le Monde*), have proposed a list of key conditions that must be met before such an intervention may be considered not legal but at least arguably legitimate. Let us review the four Cassese conditions and see whether they had been satisfied before NATO decided to intervene and whether

NATO complied with them during the armed intervention.

Let us begin with the first and key procedural condition to a legitimate intervention: (a) it must be only by a "group" (not just one or a few) of states, and only with the support or non-opposition of a majority of the UN members, at a time when the UN Security Council cannot take action because of the veto. NATO probably qualifies as such a group and the Security Council remained blocked. The international approval is questionable, however, since no procedures were utilized, e.g. a General Assembly Resolution, to verify such a consensus. But, for the sake of the argument, let us assume that there has been a "tacit" approval of some kind for the Kosovo intervention.

The other three conditions relate to substance and they require in sequence (b) gross and egregious breaches of human rights involving a loss of life of hundreds or thousands of innocent people and amounting to crimes against humanity (c) exhaustion of all peaceful avenues for obtaining redress without avail and (d) limiting the use of armed force only to what is commensurate and proportionate to stopping the atrocities.

It is agreed that, before the intervention, a certain number of civilians and military personnel had lost their lives in Kosovo and many people were dislocated. As reflected in the UN Security Council Resolutions, the "fighting in Kosovo" was worsening, "threatening peace in the region" and grave concern was expressed especially about "the use of excessive and indiscriminate force by" the Serbs, leading in particular to the "displacement" of large numbers of persons "from their homes". Such language is helpful but not sufficient to explain both what was happening and, more important from the perspective of devising an appropriate and effective solution, why was it happening.

The explanation suggested by the NATO powers, and repeated in the western press, was simple, indeed simplistic, and has the direct quality of a snapshot detached from any historical perspective: a paranoid, Hitler-like, brutal, rampaging dictator (Milosevic) not only was oppressing his own people but was bent on exterminating the poor innocent Albanian Kosovars in pursuit of a virulent strain of Serbian nationalism. Get rid of Milosevic and all will be well. With all due respect, this picture not only lacks depth but constitutes a gross caricature of reality.

Let us start with some flashbacks to history and focus on fundamentals. Yes, of course, there is such a thing as Serbian nationalism and,

yes, it has been acting up recently. But there are also other Balkan nationalisms: Albanian, Croat, Bosnian, Slovenian etc. equally active and strong. Unfortunately, these nationalisms, egged-on by certain western powers and against the will of the Serbs, have led to the calamitous dismemberment of Yugoslavia and opened the Pandora's box of who gets what. The logic of creating a bunch of small, weak, airtight countries in the Balkans at a time when Europe is uniting and the frontiers are coming down escapes me and I wonder whether some of the conspiracy theories about who is to gain from all this have any merit. In any event, in the scramble for territory, and the civil wars, that ensued within certain geographical areas, have the Serbs perhaps been the bad guys or at least worse guys than the others, have they grabbed the lion's share? Hardly so. While at the beginning the Serbs tried to take advantage of their influence over the federal army, they eventually yielded on most fronts. There were some casualties on all sides but soon Croatia, Slovenia and the Former Yugoslav Republic of Macedonia became independent countries within the territories that they claimed without adequate protection for the Serb minority and Montenegro was given substantial self-determination. Lest we forget, hundreds and hundreds of thousands of Serb refugees were forcibly expelled from these territories, especially Croatia, and had to resettle within Serbia. There were many fewer refugees in the other direction. However, how about Bosnia-Herzegovina? Well, an objective history of that conflict among Serbs, Croats and Muslims waits to be written (and the testimony of such key witnesses as Lt. General S. Nambiar, ret., who was Commander of the UN Forces in Yugoslavia 1992-1993, see his letter dated April 9, 1999, available on the Internet, should be considered) and what is particularly needed is a credible account of the casualties of each side. We do know, however, that the Serbs ended up in Dayton with a raw deal in terms of population-territory and unity of their territory. In addition, it is clear that almost no Serbs were allowed to return to their homes in the territory of the others there and that the Serb share in the posts in the central government is minuscule and blatantly violates the Dayton plan.

Now we find ourselves in Kosovo, a hallowed ground for the Serbs who fought for it for many centuries and where recently the Albanian-origin, Muslim population had become an overwhelming majority. The loyalty of such majority to Yugoslavia has been subject to doubt. Lest

we forget, that region was under the administration of Albania during World War II and the Serbs suffered in the hands of the Axis powers. During the Tito years, the lid had been kept on. But as Yugoslavia started breaking up, and even before, an independence movement was gaining the upper hand among the Albanians at Kosovo and the local administration, which had substantial authority, started putting the pressure on the Serbs to leave. Isolated violent acts against the Serbs go as far back as the late 1980's. To counteract these developments, Yugoslavia revoked the autonomy of Kosovo in 1989. In other words, such revocation did not come out of the blue and it was not just an arbitrary act.

In the guerrilla movement for independence that started spreading in the early 1990's, there were many sneak attacks against the Serb police and other forces, as well as abductions and executions of Albanians who were thought to be collaborating with the Serbs. In addition, many Albanians were forcefully conscripted by the UCK and the inhabitants of many villages were relocated to areas controlled by the UCK. On the political front, the independence movement set up its own rebellious government. In this environment, a few things became rather obvious. To combat this secessionist and growing guerrilla movement, the Serbs took hard countermeasures both on the administrative and military fronts. While atrocities were committed on both sides, the Serb reprisals against villages from where the guerrillas came and which were harbouring them were quite hard and produced civilian casualties in the hundreds in recent times. In addition, there were some forced evacuations.

Did these actions by the Serbs rise to the level of "gross and egregious breaches of human rights ... amounting to crimes against humanity"? Well, had they been unprovoked and unexplained, standing alone, they might have been. But there were intended to combat a secessionist movement accompanied by a spreading guerrilla insurrection. To what extent does this purpose and context excuse military-type operations which produce "collateral damage" to civilians? By the way, to play games with emotions and call this type of operation "ethnic cleansing" not only overstates but it misleads in this case. At least until the end of 1998, there is no indication that the Serbs wanted to get rid of or oppress Albanians or Muslims as such who were peaceful and loyal to

Yugoslavia. Their aim was to maintain peace and the territorial integrity of Yugoslavia. Without the related threats, it is very doubtful that the local autonomy would have been tinkered with. Incidentally, to be blunt about it, the Americans are the last ones who might self-righteously and sanctimoniously condemn these kinds of anti-guerrilla operations. The Vietcong guerrillas, and with them the Vietnamese villagers, were dealt much harder blows in the lunar landscapes created by the immensely superior American firepower, delivered with much less discrimination mostly from afar or from high-up. We do not forget the villages that were destroyed to be saved; and let us not talk about forced relocations. I also personally remember quite well what happened to the Greek countryside during the civil war while fighting the guerrillas under American guidance and leadership. In other words, human rights suffer on all sides in the environment of guerrilla movements and wars of national liberation and we need some standards of “armed combat” to reduce their side-effects, especially to discourage “terrorist” acts which both create civilian casualties and provoke countermeasures damaging human rights. To sum up, until the bombing started, the Serb atrocities were increasing as the tempo of the guerrilla movement picked up speed. Whether there were so excessive as to meet the requirement of “gross and egregious crimes against humanity” is quite debatable, but let us concede, for the sake of the argument, that some such crimes had indeed been committed. How about the other two conditions?

How about the exhaustion of all peaceful avenues for obtaining redress? Let us agree here that in late 1998, a reasonable structure was set up, with the cooperation of the Serbs, through the Kosovo Verification Mission, under OSCE auspices, to monitor the human rights situation on the ground in Kosovo. Many observers were stationed in Kosovo, although perhaps not as many as were needed, and remained there for a number of months. But then they were withdrawn as the bombing started. Why did this operation fail? The West blames the non-cooperation of the Serbs while the Serbs allege that the Mission developed an anti-Serb stance, acted arrogantly, and facilitated the guerrilla operations. Probably there is some truth to both claims. In the meantime, the Rambouillet process started. Again, this was a reasonable step, bringing together the warring factions of Kosovo to a conference under Western sponsorship to seek ways to settle the conflict. The key

question then becomes: why did this conference fail? Well, there is much food for the historians there, but let us say that it must be agreed that the entire blame, or most of it, should be placed on the shoulders of the West. Remember that the Serb side first signed the text prepared by the Contact Group? That the Serbs stayed there while the UCK was rejecting it? And that the Serbs were eventually presented, in the form of an ultimatum, with a proposition that no state could accept: we bomb you unless you agree to allow both (a) the NATO forces to be stationed in Kosovo to go anywhere in Yugoslavia that they considered necessary and (b) the Kosovars to decide on independence in three years (for an insightful analysis of this aspect, see H. Kissinger, *New World Disorder*, Newsweek, May 31, 1999, at pp. 26-27). All this while the guerrilla movement was gaining strength and the Serb forces were to be substantially reduced! Can anyone blame Milosevic with a straight face for the Rambouillet debacle? Incidentally, it is difficult to understand why the West proved so intransigent and insulting. Perhaps the Serbophobia that has been cultivated over the 1990s; perhaps the naked arrogance of power; perhaps a political decision to support all the way the Albanian element in the Balkans, rather than to seek an accommodation between the combatants and press for a give-and-take on both sides; perhaps all of the above. Our inquiry could stop here since one of the essential preconditions for NATO's humanitarian intervention, the exhaustion by the side using force of all peaceful avenues of redress, was found lacking. But did NATO at least satisfy the last condition, did it use its force exclusively for the limited purpose of stopping the atrocities in a proportionate and commensurate way?

Of course, killing every Serb would have surely stopped the atrocities; but that would not have been proportionate and commensurate. At the other end, catching only those who committed specific atrocities would have been virtually impossible in the circumstances. Thus, an intermediate standard was needed. Did NATO propose and respect such a standard? The NATO threat, which has been carried out, was rather straightforward: we hold your entire nation hostage and we will gradually totally destroy you and drive you back to the stone-age: first the military and related installations, then the communications, then the transportation infrastructure, then the economy. Unless you give us "victory", the non-negotiable surrender of Yugoslavia to the five conditions of

NATO. This hardly qualifies as a “proportionate” response. Was it at least an appropriate response, in terms both of effectiveness and of the penalty that it imposed on those possibly responsible for the atrocities? Cornering an opponent is not normally a wise method for getting what you want. Forcing the Serbs to defend their sovereignty and pride not only strengthened the Milosevic regime but inflamed the conflict and led to an aggravated confrontation between Serbs and Albanians. In addition, the NATO scorched-earth bombardment of Kosovo greatly contributed to the tragedy of the inhabitants of Kosovo and to the exodus of the refugees. So much for effectiveness.

Turning now to the punishment of the culprits, I would beg the reader’s indulgence in allowing me to express a very grave concern about the nature of modern war as exemplified in Kosovo. The apocalyptic destruction of Yugoslavia by NATO has been visited in *terrorem* upon all the people through the enthusiastic use of the lethal armory of the most powerful military machine in the world, delivered from afar or high-up at no human cost to the triggermen and causing so much “collateral damage”. The issue is not only whether this use was “excessive” compared to the violations before the bombardments, the answer to which is rather obvious, and not even only whether human rights’ violations are allowed to balance out prior human rights’ violations. We are faced here with a serious problem which transcends the particular conflict. Playing at war against a weak, prostrate opponent from a position of safety is not only morally cowardly but also obscene and dangerous when it takes the form of a childish computer game as if the victims were just blimps on a screen or fish in a virtual-reality barrel. Such obscenity in Yugoslavia was compounded by the levity and wisecracks of the public relations spokesman (the indescribable Mr. Shea) and by the macho-crowing of the generals (the “scholarly” Mr. Clark), as if there were ever any doubt whether NATO, with so much overwhelming power at its disposal, could win, as if the question were not how and for what should NATO win. The exponential development of destructive military technology, nuclear and other, possessed by certain powers which have their own perceptions and agenda for the world, continues to pose a major threat not only to human rights but also to the humans themselves around the world. Those who possess these means are under a heavy responsibility to make sure that they are not abused. It stands to reason

that it must become the highest priority of international law to control and check this monster. A clearer definition of key terms such as “terrorism” and “genocide” to include certain of these destructive practices is urgently needed. The element of “intention” should be deemed to exist wherever the nature of the act gives predictable notice of its likely effects. In a piece published in the Chicago Tribune (May 28, 1999), Mr. Walter Rockler, one of the Nuremberg prosecutors, correctly assessed the enormous responsibility of the USA for piling up of its military hardware on the people of Yugoslavia, including Kosovo.

The conclusion is inescapable that the NATO bombardment of Yugoslavia not only is inconsistent with the basic principles of international law protecting the peace and safeguarding the territorial integrity and internal autonomy of states but also fails to satisfy the proposed conditions for a new law of humanitarian intervention, especially the requirements of first exhausting all peaceful means and of not resorting to excessive force. It must also be agreed that the NATO intervention is suspect for its selectivity. Yes, it is agreed that one need not intervene everywhere in order to claim credibility for his humanitarianism, the choice is not between helping all beggars to help one. However, the fact that the NATO powers, and especially the USA, not only show indifference to many violations of human rights and “ethnic cleansing” in our region (e.g. Kurds, Cyprus) but consider the victims “terrorists” and hobnob with the leaders, often no less dictatorial than Milosevic, who commit them, justifies a raised eyebrow about the genuineness of the intervention in Yugoslavia.

II. Humpty-Dumpty together again?

The Serb armed forces are out, the refugees return, the country is rebuilt, an international peace force maintains peace and essentially governs Kosovo, transformed now into a Natovo. Two questions would then raise their ugly head: (a) can the Serb minority and the Albanian majority live together there? (b) what political status is viable for Kosovo? My answer to the first question is a simple no, after what has happened, which suggests rather bluntly that Kosovo should be split into two parts, with the Serb portion including their hallowed grounds. Realistically, each part should join the state of its ethnicity, it makes no

sense to create two new minuscule states. There should be voluntary exchanges of populations, forgetting the bugaboo of “ethnic cleansing”. However, given the utopian climate generated in this dispute about human rights and minority rights and multiculturalism, we are probably condemned to at least an attempt to stick Kosovo together again, nominally within Yugoslavia. For that idea to have even a remote chance of succeeding in that environment, we should despair of giving enough power of majority governance to the Albanians while preserving all proper minority rights to the Serbs with the populations intermingled. Two cantons should be created in a quasi-federal union, necessitating again a voluntary exchange of populations, as proposed e.g. by professor T. Veremis in Greece. There are many models of such unions and we need to refine them on an ad hoc basis to take care of the particulars of each situation. Indeed, one such model has been needed for a long time in Cyprus. But this is a difficult and complex subject and has to wait for another day!

Postscript

The above text was first published in 1999 in the Academic Commentary Section of *Jurist: The Law Professors' Network*, an electronic site operated by the University of Pittsburgh and three other universities. Almost four years have passed but the points made in the text remain valid also today. Indeed, the NATO intervention has been followed by the massive expulsion-ethnic cleansing from Kosovo of most of the estimated 180,000 Serbs and 150,000 Gypsies and the formal invitation to them to return is not credible not only because of the currently prevailing circumstances but also because it appears rather clear that the NATO promises that the Province will remain as part of Serbia lack substance.

These developments further undercut the “humanitarian intervention” rationale of the invasion to protect civilians since in the end the result included another humanitarian catastrophe and the likely changing of borders. The whole operation appears more and more like a naked intervention in an ethnic civil war on the side of one of the parties. Thus, there is some logic to the reported Declaration of 132 Ministers of Foreign Affairs, within the Group of 77, on September 24,

2000 that this doctrine should not be used without UN Security Council authorization ([www.g77.org/Docs/Decl. 1999.html](http://www.g77.org/Docs/Decl.1999.html)).

Since, however, there is need for this doctrine of “humanitarian intervention” when the Security Council is deadlocked and atrocities approaching genocide are taking place, I will articulate hereafter a few thoughts on how we can try to save it from becoming merely a tool and a cover-up for games of power politics.

Remember the four conditions for legitimate humanitarian intervention as summarized by Judge Cassese: (a) action by a group of states supported (or not-opposed) by a majority of the UN members (b) gross and egregious breaches of human rights involving massive loss of civilian life amounting to crimes against humanity (c) exhaustion of all peaceful avenues of redress to no avail and (d) using only limited, commensurable and proportionate force. The International Commission for Intervention in State Sovereignty (ICISS), a respected group of experts, has prepared a report entitled “The Responsibility to Protect” which elaborates further but does not change these criteria.

In my judgement, these conditions are reasonable but what is missing is an impartial process for assuring that they are met. That there is some international consensus and a group of states are prepared to act (condition a) is not enough to generate a presumption in favour of the other three conditions. In particular, since the typical case involves an ethnic or a religious civil war, either internal or involving neighbours, the exhaustion of peaceful alternatives becomes imperative and the judgement that this has been done, as well as that massive atrocities are taking place or imminent, must be placed in respected and neutral hands, neutral not only in being unaffiliated to the combatants but also beyond great power influence as well as third-world anti-western rhetoric. This body should also have some role in defining and observing the implementation of the appropriate remedies.

Perhaps it is too ambitious, but deserves attention in view of the stakes involved, to propose the creation of a permanent body of respected experts, selected by international-consensus procedures in the context of no pending disputes, endowed with long-time tenure much like a court, and with adequate staff and finances, who will be entrusted with the review of conditions (b) to (d). Indeed, they may even play a role in providing a forum for the discussion and implementation of

peaceful settlements alternatives.

To add teeth to this structure, perhaps the positive recommendation of this body by majority vote should be required before a particular humanitarian intervention take place without Security Council approval. A lesser variation would be to amend the UN Charter to make a so-approved intervention veto-proof at the Security Council. A serious objection to this proposal would relate to the possible inordinate delay that it might entail. However, this could be reduced if the body had no more than e.g. five members and it was functioning in an investigatory, not adversary, court-like, time-consuming mode. It should also not be forgotten that many disputes that lead to serious human rights violations are festering for a long time and quite visible, if not predictable, and the proposed body could collect and compile data and information in ample time.

Since humanitarian intervention often involves the use of military force special importance should be attached to insisting that it both complies with the Additional Protocol I of 1977 to the Geneva Conventions as concerns "collateral damage" and is "proportionate" and "appropriate" to the violation. Furthermore, it should be clear that sites such as the civilian authorities and their buildings, as well as the economic infrastructure, are not military targets even though, of course, the "contribute" to the war effort much as the very existence of the population does.

It would appropriate to end this paper with reference to a major danger, much greater than that posed by marauders such as Gengis Hun, that confronts mankind today which extends not only to humanitarian intervention but to all uses of military force. This danger is posed by the unlimited use of modern murderous weapons that cause horrendous damage to life, limb and property in circumstances of total war against the population and the resources of the "enemy". What makes these weapons extra dangerous is that they can be fired from a distance by persons who work in a play-like environment and have no immediate sense of what they are causing. We must be frank and admit that the main culprits here are the western powers and especially the United States of America.

In the late 19th and early 20th centuries, courageous efforts had been made in the international arena to humanize the conduct of war, with

emphasis on protecting civilians and on outlawing the use of certain weapons. Fascist Italy in Africa and later, to a greater scale, Nazi Germany with the bombing of London violated this spirit. However, by far the most brutal actions, clearly beyond any military necessity other than to terrorize the civilians and destroy their resources in order to force a surrender, were committed by the United States and England against the German cities and by the United States against the Japanese cities. Similar practices occurred later in Vietnam and in Kosovo and are now in evidence in Iraq in circumstances which are particularly reprehensible because the purported enemy is no real match for the attackers.

Barbarous total war, disguised as “collateral damage”, represents an atavistic return to the killing fields. Mankind, including in particular the people in the nations that have such weapons, should recognize it as enemy number one and must make serious efforts to stop it. They should take into consideration that it is difficult to mobilize the world community against “terrorist acts” by isolated groups that cause limited damage when the major powers are engaged in terrorist wars approaching a holocaust. Barbarous methods of using force are particularly inappropriate in the context of “humanitarian intervention”.

Some Recent Bibliography in Greece on the Law of Humanitarian Intervention in Kosovo:

1. R. Lavallo, “Legal Aspects of the Kosovo Crisis and its Outcome: An Overview”, *RHDI* 53 (2000) 501.
2. C. Antonopoulos, “The NATO Military Action Against the Federal Republic of Yugoslavia (Kosovo) and the International Law on the Use of Force”, *RHDI* 52 (1999) 411.
3. M. Telalian, “International Law Developments on the Use of Force: The Principle of Non-Intervention in Kosovo”, *HR* 15 (2002) 789 (in Greek).
4. An entire issue of the law review *To Syntagma* (The Constitution) was devoted to the topic, with articles by L. Divani, M. Telalian, F. Pazartzis, A. Skordas, A. Bredimas, A. Giokaris and L. Sicilianos, *To Syntagma* 27 (2001) 693 (in Greek).