

Kosovo: the implications for humanitarian intervention

by Richard Caplan

Do NATO's actions represent an advance or a setback for international order?

Asked, some 200 years after the event, to comment on the significance of the French Revolution, the Chinese Premier Zhou En-lai is reported to have replied, "It's too soon to tell". If it is still too early to assess the impact of the French Revolution, what can be said about the likely implications of NATO's war in Kosovo only a few months after the guns have fallen silent?

To many observers, NATO's war in Kosovo marks a dramatic shift in the contours of international relations that is likely to have far-reaching ramifications for years to come. States have long taken exception to the notion of humanitarian intervention because it threatens to undermine a bedrock principle of the international system: national sovereignty. Yet, in the case of Kosovo, the 19 states of the Atlantic Alliance chose to put aside their concerns for national sovereignty in favour of humanitarian

considerations.¹ They did so without the explicit authorisation of the UN Security Council - arguably the only legal basis for states to resort to force against other states apart from self-defence.

Do NATO's actions herald a sea change in state practice with respect to humanitarian intervention? Do they represent an advance or a setback for international order?

Historic trends

When viewed in the context of broader developments since the end of the Cold War, it becomes apparent that NATO's actions are part of a larger trend which has seen states give increased weight to human rights and humanitarian norms as matters of international concern. Starting with northern Iraq in 1991, when Britain, France and the US established a 'safe haven' to protect the

Kurdish population from violent attacks by Saddam Hussein, states have carried out humanitarian interventions in Bosnia, Somalia, Rwanda, Haiti and Albania. Many of these interventions were launched only after a crisis had assumed catastrophic proportions. States have thus come under pressure to take more effective measures in advance of humanitarian disasters.

It is not only by virtue of enforcement action that humanitarian norms have achieved increased prominence. The international community has also taken steps to give greater substance to humanitarian law. The establishment of two *ad hoc* war crimes tribunals (for Yugoslavia and Rwanda) and the initialling of a treaty in 1998 to set up a permanent international criminal court with jurisdiction over war crimes, genocide and crimes against humanity represent significant progress in this regard.

Alongside these developments NATO's actions in Kosovo begin to look less anomalous. A critical difference, however, between these events and NATO's war in

Kosovo, is that in every case but one they were UN-sanctioned initiatives while NATO's was not. (The one exception was northern Iraq, where the Security Council authorized a humanitarian relief operation but not the coercive measures taken by the Western allies in support of the operation.)²

Yet in Kosovo, NATO was not acting entirely independently of UN prescriptions. The Security Council had demanded, *inter alia*,



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that Belgrade cease all actions by its security forces affecting the civilian population of Kosovo, withdraw its units engaged in civilian repression from the province and enter into 'meaningful dialogue' with the Kosovan Albanians leading to a political settlement. (The Albanians, too, were subject to various demands.)³ The Security Council had warned repeatedly of an 'impending humanitarian catastrophe' if these and other demands were not met. It was in support of these objectives that NATO first issued and then acted on its threats to use force.

The failure of the Serbian authorities to comply with the UN's demands did not, however, provide sufficient legal justification for NATO's actions, notwithstanding the claims some states made to that effect. The resolutions contain references to 'further action' and 'additional measures' which the Security Council was only prepared to 'consider'. Yet it would be wrong to suggest that the member states of NATO side-stepped the UN wilfully. All of these states, though no doubt some more than others, would have preferred to see the Security Council manage the crisis - if the Security Council had been able to do so effectively. Indeed, they sought successfully to return the matter to the Security Council once Belgrade had agreed to NATO's demands. In the end the Atlantic Alliance acted without UN authorisation because it could not countenance the prospect that a Russian and Chinese veto of enforcement measures would allow Belgrade to proceed with its campaign of violence.

Bridging the gap

The problem here, as in other humanitarian crises, is one of the UN 'willing the end but not the means', as Adam Roberts has aptly put it.⁴ NATO can be said to have responded to a fundamental weakness in the global humanitarian order that entitles individuals to certain protections, by virtue of international covenants or binding UN resolutions, but does not offer effective mechanisms to ensure respect of them. NATO member states thus saw their actions possessing in legitimacy what they may have lacked in legality. This distinction was reflected in remarks by French President Jacques Chirac on the eve of NATO's threatened use of force in October 1998. France, he said, "considers that any military action must be requested and decided by the



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Soldiers patrol the village of Gornje Zakut, watched by returning Albanians

Security Council [but] the humanitarian situation constitutes a ground that can justify an exception to a rule, however strong and firm it is."⁵

It was, and remains, a risky proposition. In principle any state would have been in its right to come to the defence of Yugoslavia in what was construed by some, including Russia and China, to be an act of NATO aggression against a sovereign state. Naturally the political and military realities were such that counter-measures of this kind were highly unlikely. Indeed, when offered the opportunity to demand an immediate end to the air strikes, 12 out of 15 Security Council members voted against the Russian-sponsored resolution - an indication, arguably, of some recognition of the necessity of the NATO campaign.

More worrying, perhaps, is the precedent which NATO's actions have established. Will other states now feel freer to take enforcement measures in response to humanitarian crises when a UN consensus cannot be achieved? In some cases we might welcome such a development, as with Vietnam's intervention in Pol Pot's Cambodia and Tanzania's in Idi Amin's Uganda - two genocidal regimes whose elimination many applauded, however much states felt constrained to condemn the violations of national sovereignty which these interventions entailed. It is easy, however, to imagine other cases where the projection of mili-

tary force into another state will raise concerns, notwithstanding legitimate humanitarian grounds for such action. Even in the cases of Vietnam and Tanzania, the motivations for intervention were principally strategic: both states were responding to cross-border raids by their neighbours.

It is in part because motivations may be mixed and the intervening parties opportunistic - Hanoi went on to install a puppet regime in Phnom Penh - that states are hesitant to challenge the principle of non-intervention, as NATO's actions in Kosovo have done. Yet the alternative - unswerving adherence to the letter of the law - would arguably make the world safe for all manner of unconscionable acts carried out within a state's own borders, unless the Security Council were to determine that such acts posed a threat to international peace and security (the formal requirement for a UN-mandated enforcement action).

A way forward?

The conundrum is a very real one. It has only now become so pressing because the end of the Cold War has made it possible for states to undertake interventions which would hitherto have courted nuclear disaster and have thus been unthinkable.

Mindful of the challenge, the British government has been seeking to devise new

rules of the road. In a speech in Chicago in April 1999 Tony Blair declared "the principle of non-interference must be qualified in important respects". But the Prime Minister focused largely on the issues of when and whether to intervene, not how to do so. The options for change are numerous - from seeking greater cooperation among the permanent five (P-5) members of the Security Council to reforming the Security Council decision-making process to establishing a new legal basis for intervention. The attendant difficulties are also many.

Greater cooperation among the P-5 is already an option, albeit the least reliable one, as the diplomacy over Kosovo itself has shown. Chastened by NATO's recent actions, Russia and China may now seek to ensure that future Security Council resolutions preclude any possibility of intervention. Greater NATO accommodation of Russian security concerns, however, could help to establish a more cooperative relationship on the Security Council.

Reform of the Security Council decision-making process, through either the abolition or dilution of the veto, would be even harder to achieve and still might not guarantee results. Most states, while sensitive to the humanitarian imperative, are wary of facilitating interventions, especially when it is the former colonial powers that would probably be exercising the prerogative. Greater UN control over a military operation might mitigate their concerns but would rankle the US - a key player - unless perhaps a UN voluntary force can one day be established.⁶

An international or regional convention on intervention would be as difficult to achieve as fundamental UN reform. Indeed, the UN Charter would almost certainly need to be amended to accommodate such a treaty.⁷ There is also only limited scope for the emergence of regional customary law in this area. Although it is possible for customary rights to develop among a group of states, to be valid these rights would require the unanimous consent of all affected - including, in the case of Europe, that of Russia.

The obstacles to the formulation of new rules are therefore great. In the absence of a consensus for change, however, it is likely that some states will find it necessary to act outside the UN. Telling in this regard is the recommendation made by US Senator William Roth, president of the North Atlantic Assembly, NATO's parliamentary body, and adopted by the Assembly in November 1998: "NATO must preserve its freedom to act: the Allies must always seek to act in unison,

some states will find it necessary to act outside the UN

preferably with a mandate from the United Nations (UN) or the Organization for Security and Cooperation in Europe (OSCE), the framework for collective security in

Europe. Even though all NATO member states undoubtedly would prefer to act with such a mandate, they must not limit themselves to acting only when such a mandate can be agreed."⁸

Humanitarian intervention is likely to remain the exception rather than the rule. Yet as sovereignty comes increasingly to imply a government's responsibility towards its people and not just the scope for independent action, the pressures for states to intervene in response to urgent humanitarian catastrophes will also increase. If states find it necessary to act outside the framework of the UN Charter, the result may be to weaken one of the central pillars of international order. However, the failure to take effective action to ameliorate humanitarian catastrophes could have even graver consequences.

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1 For a view of NATO's other 'agendas' in Kosovo, see Richard Falk, 'Reflections on the war', *The Nation*, 28 June 1999, pp11-15.

2 UN Security Council Resolution 688 (5 April 1991).

3 The relevant UN Security Council resolutions are 1160 (31 March 1998), 1199 (23 September 1998) and 1230 (24 October 1998).

4 Adam Roberts, 'Willing the end but not the means', *The World Today*, May 1999, pp8-12.

5 Cited in Catherine Guicherd, 'International law and the war in Kosovo', *Survival*, Summer 1999, p28.

6 See Brian Urquhart, 'For a UN volunteer military force', *New York Review of Books*, 10 June 1993, pp3-4

7 Article 103 of the UN Charter reads: 'In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

8 'Summary recommendations', *NATO in the 21st century*, available at the Assembly's website: <http://www.naa.be>.

Humanitarian Evacuation Programme

Destination of Kosovan refugees airlifted from Macedonia

Germany	14,689
United States	9,198
Turkey	8,340
France	6,339
Norway	6,072
Italy	5,829
Canada	5,438
Austria	5,080
United Kingdom	4,346
Netherlands	4,060
Australia	3,969
Sweden	3,675
Denmark	2,823
Switzerland	1,687
Spain	1,426
Portugal	1,271
Belgium	1,223
Poland	1,049
Ireland	1,033
Finland	958
Czech Republic	824
Slovenia	745
Croatia	370
Israel	206
Malta	105
Luxembourg	101
Slovakia	90
Iceland	70
Romania	41
Total	91,057