by Professor Albert Legault

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NATO INTERVENTION IN KOSOVO: THE LEGAL CONTEXT*

The determining strategic event of the past year was undoubtedly the war in Kosovo. This unfortunately coincided with the 50th anniversary of NATO; the allied bombing of Serbia began on 24 March 1999, less than two weeks before the date of that anniversary, 4 April 1999. The war in Kosovo triggered an important legal debate, and it is still difficult to say whether it will be overturned or confirmed by practice. There is also the fact that NATO's new Strategic Concept remains largely an open question. It is thus instructive to examine, in turn, the legal aspects of these two debates.

THE LEGALITY OF UN INTERVENTION

In international law, matters are relatively clear. States shall not intervene in the internal affairs of a State or in matters that are essentially within the domestic jurisdiction of a State (Article 2 of the Charter of the United Nations). Nonetheless, there is an exception to this rule: the Security Council may intervene as it sees fit when it determines that there is a threat to international peace and security, which authorizes it to take enforcement action under Chapter VII of the Charter (Art. 2(7) of the UN Charter). That is plainly the provision that enabled the UN to intervene in Somalia and Haiti, but also in a number of other missions, when it believed that international peace and security were threatened.

In reality, the Security Council has taken an innovative approach in the last three years, citing three new norms of intervention: the right to intervene for humanitarian reasons; international criminal courts; and supervision of free elections or interventions designed to promote social, political and economic reconstruction within a country, a phenomenon best known as "consolidation of peace". Are these new norms now part of international law?

This is where a host of questions arise. Purists are extremely cautious in respect of this practice on the part of the UN, because it derives, in a way, from the legislative or quasi-legislative powers of the Security Council.[1] Even Canadians expressed certain reservations regarding this development in a report prepared on the role of the Security Council in the 1990s.

The Security Council must give serious thought to whether it should be solely a political body or should also be a legislative body. If its functions are to have a political dimension only, it would have to make only political decisions, in specific cases, and not take on a judicial role. If the Council does want to perform functions of a judicial nature, it must be more circumspect in doing so, and be sure that its actions are consistent with the princi-

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ples and precedents. To date, the Security Council has played a legislative role in an overtly political manner. It is very likely that the international community will not allow it to continue to do this indefinitely.[2]

In other words, by taking innovative approaches, the Security Council is in fact being faithful to the spirit of the Charter, but in so doing it is setting itself up as an executive oligarchy without first obtaining the consent of all members of the UN. In some circumstances, humanitarian law may be cited and characterized as customary law, but custom cannot prevail over the international law of treaties, instruments and conventions freely entered into by States.

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The debate inevitably shifts when it comes to Kosovo, and divides into two camps on the question of the role of a universal international organization, the UN, versus the role of a regional security organization.

In legal terms, NATO, as a regional arrangement (which it is in reality because of the terms of the Washington Treaty) or regional agency (which is what the OSCE is, since the 1993 framework agreement between that organization and the UN, but what NATO cannot claim to be), may intervene in respect of international peace and security, provided that the actions it undertakes are consistent with the Purposes and Principles of the UN (Article 52), but Article 53 is also extremely clear: "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council".

Most legal experts agree that under that provision, the air strikes against Serbia were illegal, because they were never authorized by the Security Council. Other, more libertarian experts cite humanitarian law or the law of "collective emergency" to justify NATO's action.[3] The UN Secretary-General, Kofi Annan, has himself acknowledged that the NATO action was legitimate, and has gone so far as to say that a new norm of intervention was now emerging — for cases involving the violent repression of minorities — that will and must take precedence over the other concerns of the law of States.[4] Thus any flagrant violation of humanitarian law, be it crimes against humanity, violations of human rights or the Geneva Conventions, or ethnic cleansing, may provide a legitimate basis for action on the part of the international community because all these issues have international consequences and go well beyond the sacrosanct principle of the domestic jurisdiction of States.[5] The real dilemma therefore lies in the fact that "while the Charter was ahead of its time in 1945, the reverse is true today", because the world has evolved to the point that it has entered a post-Westphalia era in which humanitarian law is just as compelling as the law of treaties freely entered into by States. There are thus some experts who believe that if the Security Council is incapable of acting, a new norm of intervention by a coalition of States would seem to be entirely justified where large-scale atrocities are being committed. [6]

That being said, the legal debate has not yet been resolved, because any interpretation based on the right to intervene in the name of humanitarian law is improper in two respects. First, it amounts to stripping the veto of the major powers of any substance, or nullifying the veto [7]; second, it creates an intolerable precedent, in that it means that a group or coalition of States may now, with no formal authorization from the Security Council, act as it pleases, citing the precedent of Kosovo.

Prof. Delbrueck summarizes the position taken by a number of legal experts on this point: while NATO's action is "objectively illegal, there are nonetheless certain bases for that action that are not legal, but justified". The true crescendo in this debate was reached with the publication of Bruno Simma's article on the legal aspects of the NATO intervention. One of his conclusions is worth quoting in full:

> Hence, we would be well-advised to adhere to the view emphasized and affirmed so strongly in the German debate, and regard the Kosovo crisis as a singular case in which NATO decided to act without Security Council authorization out of overwhelming humanitarian necessity, but from which no general conclusion ought to be drawn. What is involved here is not legalistic hair-splitting versus the pursuit of humanitarian imperatives. Rather, the decisive point is that we should not change the rules simply to follow our humanitarian impulses; we should not set new standards only to do the right

thing in a singular case. The legal issues presented by the Kosovo crisis are particularly impressive proof that hard cases make bad law.[8]

The legal debate is therefore not over. While NATO's action was illegal under the principles of international law, the question remains of whether the concept of "humanitarian emergency" marks a turning point in the evolution of international humanitarian law. As history and events to come in Kosovo unfold, they will undoubtedly one day provide the answer to the question of whether the world has entered a new era in international relations — a "post-Westphalia plus" era — or not.

NATO'S NEW STRATEGIC CONCEPT

The fundamental changes caused by the end of the Cold War terminated the Soviet threat, thus reducing the relative importance of Article 5 of the North Atlantic Treaty for the Alliance's collective defence. What now threatens the states is no longer Russia, which has been transformed more or less inevitably into a partner, or interstate conflicts, but rather ethnic and intra-state issues, problems relating to control of the proliferation of weapons of mass destruction and peripheral conflicts such as that involving Iraq. Most of the threats to strategic stability are thus outside the NATO area. At the same time, the United States no longer wants to assume sole responsibility for defending the so-called free world and would like to confer new missions on NATO and give its Allies a heightened role in the sharing of these duties.

Talks on the Alliance's new Strategic Concept, which began at the London Summit in 1990, went through various stages between 1991 (definition of the Concept) and Madrid 1997 (review of the Concept). NATO completed this review of its strategy in time for the Alliance's 50th anniversary in April 1999.[9] In the initial stages of its review the Alliance concluded that its security risks were "complex" and came from "numerous directions", but added in the same breath that "maintaining the strategic balance in Europe" was the Alliance's primary task.[10] In the meantime, NATO set new missions for itself. In Oslo, in 1992, it agreed to support case-by-case peacekeeping activities under the aegis of the Conference on Security and Cooperation in Europe (CSCE), which became the OSCE (Organization) in 1994, and in December of that year, in response to the growing crisis in the former Yugoslavia, it offered to undertake missions for the UN, subject of course to Security Council authorization.

In a speech in Bonn on February 4, U.S. Assistant Deputy Secretary of State, Mr. Strobe Talbott, went much further than what the Allied countries had hoped for. After emphasizing the incredible synergy between the various security institutions, in particular the UN and NATO, Mr. Talbott said it was very important "not to subordinate NATO to any other international body [meaning the UN] or compromise the integrity of its command structure". To his mind, NATO could of course "act in concert with other organizations, and with respect for their principles and purposes", but the Alliance must "reserve the right to act, when its members, by consensus, deem it necessary".[11]

It was precisely NATO's taking charge of the Kosovo problem that caused such a stir over the organization's intervention in South-Eastern Europe. In one of the first negotiated versions of the Strategic Concept presented in Washington, the framers felt that the furthest they could go would be to say that NATO should not act illegally. The final document on the Strategic Concept adopted in Washington in April 1999 is far from decisive in the matter.[12] Article 10 of that document describes NATO as "an Alliance of nations committed to the Washington Treaty and the United Nations Charter".[13] However, this merely recalls the various obligations subscribed to by the members of NATO, all of which are also members of the UN. This position is toned down somewhat in Article 15, which recalls that the UN Security Council "has the primary responsibility for the maintenance of international peace and security and, as such, plays a crucial role in contributing to security and stability in the Euro-Atlantic area". However, this is not a new provision, as it merely restates Article 24 of the UN Charter, in which members delegate to the Security Council "the primary responsibility for the maintenance of international peace and security" and notes that, as such, it "acts on their behalf".

The only concession made to the Allies in a way concerns the "out-of-area" because, in the field of "crisis management" and to enhance "the security and stability of the Euro-Atlantic area", which thus excludes the Near East, as the United States wished, the Alliance must:

> Stand ready, case-by-case and by consensus, in conformity with Article 7 of the Washington Treaty, to contribute to effective conflict prevention and to engage actively in crisis management, including crisis response operations.[14]

This text nevertheless has the merit of preserving the consensus necessary to any action by the Alliance. As for the out of Euro-Atlantic area, the Alliance reserves a right of "consultation" in accordance with the provisions of Article 4 of the Washington Treaty, and the Allies may "proceed with appropriate co-ordination of their efforts in fields of common concern".[15]

Furthermore, Article 31 of the document entitled "Conflict Prevention and Crisis Management" maintains

the confusion by stating, as provided for in the fundamental security tasks, that is to say Article 10 of the document cited above, that NATO will strive, "in cooperation with other organizations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, *consistent with international law* [emphasis added], including through the possibility of conducting non-Article 5 [of the Washington Treaty] crisis response operations". As may be seen, Washington appears to be making a concession by agreeing to act in accordance with international law, but this clarification is insufficient because it is merely a matter here of "seeking, in cooperation with other organizations", something that is neither restricting nor binding.

Here again, nothing is settled and the debate remains, to a large degree, open.

CONCLUSION

Can one thus rationally consider other types of humanitarian action outside of Europe? The example of East Timor is in this case revealing. There the UN made recourse to Chapter VII to re-establish minority rights that had been repressed by Indonesia, but, in contrast with the operation in Kosovo, this intervention was made with the full consent of Jakarta. Nonetheless, the long-term effects of this intervention are rooted in the Kosovo problem. Indeed, one might ask, are NATO and the UN from now on to be involved in a process of "majorization of minorities"[16], and if so, how far should this process be pushed? In other words, where should humanitarian neo-interventionism begin and where should it end? This evolving situation suggests that we are now at the intersection of two phenomena: how to assure human security in the context of "majorization of minorities"?

As to the Alliance's new strategic concept, the American view is clear: the Alliance must "reserve the right and freedom to act whenever its members agree by consensus that it is necessary". This position reflects the predominant place of the Americans within the Alliance, which other members will not challenge. But, must Canada participate in every peacekeeping operation that might occur inside Europe or even "out of area"? It is evident that Canada must act on a case-by-case basis, but even this implies that Canada must maintain a military capability that is at all times robust, trustworthy and well-adapted to this type of operations.

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NOTES

* Part of Professor Albert Legault's testimony to the Senate Standing Committee on Foreign Affairs, 26 October 1999.

1. According to Frederic L. Kirgis, "they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time". See Frederic L. Kirgis, Jr., "The United Nations at Fifty: The Security Council's First Fifty Years", *The American Journal of International Law*, Vol. 89, July 1995, p. 520 (506-539).
2. See David M. Malone and John G. Cockell, "The Security Council in the 1990's: Lessons and Priorities", Ottawa, DFAIT, November 1996, p. 15.
3. For humanitarian laws see Jordan J. Paust, "NATO's Use of Force in Yugoslavia" in *United Nations Law Reports*, Vol. 33, No. 9, 1 May 1999 at http://www.UNLawReports.com; for the concept of humanitarian emergency, see Jost Delbrück, Harvard Law School Panel Discussion in *"United Nations Law Reports"* at the same site and the same number.
4. See *SG/SM/6949-HR/CN/898*: "Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty."
5. See Paul Conlon, "This Dilemma is No Accident", *United Nations Law Reports*, Vol. 33, No. 9,1 May 1999 at http://UNLawReports.com. The declaration of NATO General Secretary authorizing strikes is significant in this context. Mentioning prior resolutions 1160 (31 March 1998) and 1199 (23 September 1998) of the Security Council, Mr. Javier Solana declared: "I conclude that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force." This declaration is very carefully worded and made conditional on three specifications: "particular circumstances" relating to "the present crisis in Kosovo" and to "Resolution 1199". These specifications take into consideration the German position which does not want to see Kosovo as a precedent that would be used in the future.
6. See Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", in *European Journal of International Law*, at http://www.ejil.org/journal/Vol10/No1/abl.html.
7. See Editorial Comment of United Nations Reports, Vol. 33, No. 9, 1 May 1999.
8. See Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", paper presented at two round tables organized by the United Nations Association of the United States, Washington, 11 and 12 March 1999; available at http://www.unaus.org under Jeffrey Laurenti:The Policy Options. For a permissive and contrary interpretation, see Ivo H. Daalder, "NATO, the UN and the Use of Force", at the same site. The argumentation is evidently more political than legal, but it deserves to be quoted because it is based on the concept of constructive ambiguity: "The Kosovo model of constructive ambiguity goes a long way toward filling the gap between requiring an express UN mandate on the one hand and NATO's self-mandating on the other. This approach recognizes that the authority to act in difficult cases may not be viewed in precisely the same way by every NATO member state, some of which may embrace a right of humanitarian intervention in response to gross violations of human rights or genocide, while others may require at least some relevant Security Council resolution short of express authorization (e.g., a finding that the conflict in question threatens international peace and security). Constructive ambiguity can thus allow agreed action to occur at a time when legal norms regarding the use of force in situations other than self-defense are still evolving."
9. The Final Luxemburg Declaration of May 1998 announced that "an activity report [...] foreseeing the adoption of this actualized Concept" will appear in December 1998, giving enough time for allies to consider it by April 1999.
10. The 1991 Strategic Concept also mentions "insuring a stable security environment in Europe".
11. Bruno Simma, *op. cit.*
12. "The Alliance Strategic Concept" approved by Heads of State and Government at the North Atlantic Council in Washington on 23 and 24 April 1999. Press Release NAC-S(99) 65, 24 April 1999.
13. The Washington Declaration, signed by Heads of State and Goverment and published 23 April 1999, used the same terminology since Article 4 states that: "We reaffirm our commitment, formulated in the North Atlantic Treaty, to the goals and principles of the UN Charter..." See Press Release NAC-S(99) 63, 24 April 1999.
14. Strategic Concept of the Alliance, *op. cit.* Article 10. This article is reproduced verbatim in the Washington Summit Declaration of 24 April 1999 as Article 6. See Press Release NAC-S(99) 64, 24 April 1999.
15. *ibid.*
16. Probably in contrast to a century of "minorization of minorities" as existed inside the borders of the USSR and whose most perverse consequences are now felt in the Caucasus region.