

THE UNITED NATIONS CHARTER AND USE OF FORCE IN INTERNATIONAL LAW: AN INQUIRY INTO THE LEGALITY OF NATO'S INTERVENTION IN KOSOVO*

Abstract

In international law, prohibition on the use of force against the territorial integrity of another state is prohibited and the United Nations is restrained not to intervene in any matter considered to be within the domestic jurisdiction of a member state, except action taken within the collective enforcement measures under chapter VII of the Charter. Consequently, what underlies the humanitarian intervention debate is this perceived tension between the values of ensuring respect for fundamental human rights and the primacy of the norms of sovereignty, non-intervention, and self determination which are considered essential factors in the maintenance of peace and international security. These values are set out in the United Nations Charter as fundamental purposes of the United Nations. However, while there are mechanisms within the Charter for the protection and enforcement of peace and international security, there are no equivalent provisions or mechanisms in the Charter for the protection of human rights. There is no legislative prescription on how to deal with grave breaches of the Geneva Conventions particularly when there is inaction by the United Nations Security Council. It is for this reason that the paper which has adopted the doctrinal approach questions the legality of the NATO's intervention in Kosovo on grounds of protecting the ethnic Albanians from repression by the Serbian forces without the approval of the United Nations. The paper answered such questions whether there is an emerging norm of unilateral humanitarian intervention. It concluded that the Kosovo incident was a violation of international law and is just one isolated case that did not establish any state practice of unilateral intervention.

Keywords: Humanitarian intervention, NATO, International law, sovereignty, international humanitarian law

1. Introduction

Kosovo¹ before the eruption of the crisis was a semi-autonomous federation under the Federal Republic of Yugoslavia. Kosovo was part of the Ottoman Empire from the 15th to the early 20th century. According to recorded history, during the late 19th century, Kosovo became the centre of the Albanian National Awakening.² However, following their defeat in the Balkan Wars, the Ottomans ceded Kosovo to Serbia and Montenegro. Both countries joined Yugoslavia after World War I, and following a period of Yugoslav unitarianism in the Kingdom, the post-World War II Yugoslav constitution established the Autonomous Province of Kosovo and Metohija within the Yugoslav constituent republic of Serbia.³ Tensions between Kosovo's Albanian and Serb communities simmered through the 20th century and occasionally erupted into major violence, culminating in the Kosovo War of 1998 and 1999, which resulted in the withdrawal of the Yugoslav army and the establishment of the United Nations Interim Administration Mission in Kosovo. The crisis erupted in 1998 when the President of Yugoslavia revoked the autonomous status of Kosovo and sought to bring it under the direct control of Belgrade which is mainly ethnic Serbians. Kosovo is made up of predominantly ethnic Albanians. The people of Kosovo rejected the move and Yugoslavia sent in forces who are predominantly of Serbian origin to enforce civil obedience. The crisis caused serious humanitarian crisis with the Serbian forces accused of violating human rights of the people of Kosovo, genocide and other serious international crime. The European members of NATO and their US counterpart did not approach the United Nations Security Council for mandate to intervene in Kosovo, sensing that Russia and China would veto any such resolution. Consequently, on the 23rd of March 1999, NATO, without the approval of the Security Council began a three month long bombing campaign against the Federal Republic of Yugoslavia, allegedly to prevent the ethnic cleansing of Kosovar Albanians in the semi-autonomous region of Serbia by Slobodan Milosević's authoritarian regime. The Kosovo War was an armed conflict in Kosovo that started in late

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¹ .Kosovo officially the Republic of Kosovo is a partially recognized state and disputed territory in Southeastern Europe and has an area of 10,887 square. Available on <https://en.wikipedia.org/wiki/Kosovo>. Accessed on 5 October, 2019. Kosovo is landlocked in the center of the Balkans and bordered by the uncontested territory of Serbia to the north and east, North Macedonia to the southeast, Albania to the southwest and Montenegro to the west. It possesses varied and diverse landscapes for its size by climate along with geology and hydrology. Most of central Kosovo is dominated by the vast plains and fields of Metohija and Kosovo.

² .History of Kosovo: Available on <https://en.wikipedia.org/wiki/Kosovo>. Accessed 5 October, 2019

³ .Ibid

February 1998 and lasted until 11 June 1999. This precipitated a mass expulsion of Kosovar Albanians as the Yugoslav forces continued to fight during the aerial bombardment of Yugoslavia.⁴

On 17 February 2008, Kosovo unilaterally declared its independence from Serbia.⁵ It has since gained diplomatic recognition as a sovereign state by 100 United Nations member states. Serbia does not recognize Kosovo as a sovereign state, although with the Brussels Agreement⁶ of 2013, it has accepted its institutions. While Serbia recognizes administration of the territory by Kosovo's elected government, it continues to claim it as the Autonomous Province of Kosovo and Metohija. It is the legality of the NATO's intervention in 1999 to help the people of Kosovo to overcome the ethnic cleansing and genocide perpetrated by the Serbian forces that informed the choice of the topic. The paper shall now examine the international law stipulations on the use of force in international relations and to determine how close the Kosovo incident was close to legal validity.

2. The UN Charter and NATO Treaty on Use of Force

The UN Charter is legally binding on all United Nations member states, including all members of NATO, because they have each signed it. The Charter⁷ prohibits the use of force by UN member states to resolve disputes, but with two specific exceptions to this general prohibition namely, the first exception set forth in Chapter VII⁸ which mandates the UN Security Council to authorize the use of force in order to fulfill its responsibility to maintain international peace and security.⁹ In particular, The Charter¹⁰ provides that should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. Article 51 contains the second specific exception to the prohibition on the use of force--the right to self-defence. In particular, it provides that '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'.¹¹

NATO did not have the backing of the United Nations Security Council to use force in Yugoslavia. Further, NATO did not claim that an armed attack has occurred against another member state of NATO because that is the only reason under which NATO can intervene in another member state. The NATO Treaty in article 5 which is the key section of the treaty has a commitment clause which commits each member state to consider an armed attack against one member state, in Europe or North America, to be an armed attack against them all. There was no such attack against any member state of NATO in 1999. Most importantly, Yugoslavia was at the time of the incident a member of NATO. The principal legal issue remains, however, since NATO as such is not a member state of the UN,

⁴The Legitimacy of NATO's bombing in Kosovo in 1999: Available on https://en.wikipedia.org/wiki/Legitimacy_of_the_NATO_bombing_of_Yugoslavia. Accessed on 5 October, 2019

⁵2008 Kosovo Declaration of Independence. Available on https://en.wikipedia.org/wiki/2008_Kosovo_declaration_of_independence. Accessed 5 October, 2019. The 2008 Kosovo declaration of independence was adopted on 17 February 2008 by the Assembly of Kosovo. In a meeting attended by 109 of the total 120 members, the assembly unanimously declared Kosovo to be independent from Serbia, while all 11 representatives of the Serb minority boycotted the proceedings.

⁶. The Brussels Agreement: formally the First Agreement of Principles Governing the Normalization of Relations, was made between the governments of Serbia and Kosovo on the normalization of their relations. It was negotiated and concluded, although not signed by either party, in Brussels under the auspices of the European Union. The negotiations were led by Serbian Prime Minister Ivo Dačić and Kosovo Prime Minister Hashim Thaçi, and mediated by EU High Representative Catherine Ashton. The agreement was concluded on 19 April 2013. The government of Serbia does not recognize Kosovo as a sovereign state and by Resolution 1244 Kosovo is part of Serbia, but government of Serbia has begun to normalize relations with the government of Kosovo in accordance with the Brussels Agreement. Available on [https://en.wikipedia.org/wiki/Brussels_Agreement_\(2013\)](https://en.wikipedia.org/wiki/Brussels_Agreement_(2013)). Accessed 6 October, 2019.

⁷Article 2(4) UN Charter

⁸ Particularly articles 39, 40, 41, 42, 43, 51 & 53 of the UN Charter

⁹Article 24 imposes the duty of maintaining international peace and security on the UN Security Council and that in doing so, it is acting on behalf of the member states.

¹⁰ See the provisions of Article 42 of the Charter

¹¹ See Article 51 UN Charter

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whether the member states of NATO, the United States and the European powers that sent armed forces to attack as part of the NATO bombing campaign, violated the UN Charter by attacking a fellow UN member state in the absence of UN Security Council authorization, and in the absence of an attack or a threat of imminent attack on them.¹²

It is important to note that under the UN Charter, the United Nations considers NATO to be a 'regional arrangement',¹³ which allows it to deal with matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. However, the UN policy on military intervention by regional arrangements is clearly stated under the UN Charter to be one of prescription from the Council to the regional arrangement and no other way. The Charter was very specific on how best the UN can utilize regional arrangement for the maintenance of international peace and security. The Charter provides that:

The Security Council can, where appropriate, 'utilize such regional arrangements or agencies for enforcement action under its authority. However, no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

There was no UN approval for the intervention in Kosovo by NATO. NATO did not even apply for the approval let alone that it was refused. NATO had justified the actions in Kosovo under Article 4 of its charter¹⁴, which allows member states of NATO to consult together whenever political independence or security of any of the parties is threatened. Because the NATO actions in Kosovo were taken after consultation with all members, were approved by a NATO vote, and were undertaken by several NATO members, NATO contends that its actions were in accordance with its charter. Article 4, however, is silent as to the use of force and does not discuss under what circumstances force may be authorized.¹⁵ NATO's Treaty calls on NATO members to respond in mutual defense when any NATO member is attacked.¹⁵ It is unclear whether under the NATO Treaty force may be used in the absence of such an attack. Article 5 has been interpreted as restricting NATO's use of force to situations where a NATO member has been attacked. It is submitted therefore, that NATO's actions were in violation of NATO Treaty and the UN Charter. The UN Charter forbids member state from entering into treaty which conflicts with her obligation under the Charter.¹⁶ Its submitted that the purpose of article 5 is to require all NATO members to respond when any NATO member is attacked, not to invade a member state that has not invited NATO and who is not under any foreign attack. It is on this ground that the NATO action was a violation of NATO Treaty, and most importantly a violation of the UN Charter.

3. Humanitarian Intervention Practice by the United Nations

Forcible intervention in another state is prohibited in international law under Article 2(4) of the United Nations Charter which states that: '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 other manner inconsistent with the Purposes of the United Nations'. This general prohibition on the use of force has been confirmed by the International Court of Justice in the Corfu Channel Case and the Case Concerning Military and Paramilitary Activities In and Against Nicaragua¹⁷ and is considered to be a rule of *jus cogens*, that is, a peremptory norm of international law from which no subject of international law may derogate.¹⁸ The two main exceptions to this general prohibition are: the right of a state to use force in self-defence or collective self-defence under Article 51 of the Charter, and the right of the Security Council under Article 42 to authorize the use of force 'to maintain or restore international peace and security.'

¹²Thomas, George (1999-05-15). 'NATO and International Law' OnLine Opinion. Available on https://en.wikipedia.org/wiki/Legitimacy_of_the_NATO_bombing_of_Yugoslavia. Accessed on 5 October, 2019

¹³ Article 52 Un Charter

¹⁴ See Article 4 of NATO Treaty

¹⁵ Article 5 thereof

¹⁶ Article 103 UN Charter

¹⁷ See *Corfu Channel* ((U.K. v. Alb.), International Court of Justice 19 49, (I.C.J.) 4

And *Military and Paramilitary Activities(Nic. v. U.S.)*, International Court of Justice, (Nic. v. U.S.), 1986 (I.C.J.) 14

¹⁸ O`Connell, *International Law*: (2nd edn, Vol.11, 1970).

In legal terms, ‘international peace and security’ has traditionally been narrowly defined as the maintenance of interstate order. However, in recent years, the practice of the Security Council can be seen to have modified this concept to include grave humanitarian crises and it is generally recognized that the Security Council now has an exclusive right to authorize the use of force for the purpose of preventing or stopping widespread deprivations of internationally recognized human rights. Whether or not there is an obligation on the part of the Security Council to take such action is another question. The United Nations Charter¹⁹ prohibits the UN from intervening ‘in the domestic jurisdiction of any state.’ Nevertheless, since the end of the Cold War²⁰ the Security Council has availed itself of a right of humanitarian intervention by adopting a series of resolutions²¹ which have progressively expanded the definition of threat to international peace and security under Article 39 of the Charter to allow for Security Council-mandated military intervention to respond to grave humanitarian crises, even where such crises have been purely domestic in nature.²² It has been submitted that even where these internal conflicts have had international repercussions, the Security Council has not always made reference to these repercussions in defining a threat to international peace and security.²³ This is because the Security Council is hampered by a lack of political will among its members. The issue of political will was tragically evident in the crisis in Rwanda. An independent investigation of the genocide in Rwanda commissioned by the Organization of African Unity in its report condemned the Security Council and its members for having the opportunity to prevent the genocide but failing to do so and, among other things, pointed to the role of the United States in blocking the deployment of a more effective intervention force during the genocide. As a result, effective and consistent humanitarian intervention is made unlikely by the geopolitical realities of relations between the Permanent Five members of the Security Council, leading to the use of the veto and inconsistent action in the face of humanitarian crises. Such difficulties were revealed, for example, when Russia launched its attack on Chechnya²⁴ to crush the rebellion (killing and displacing thousands of Chechen civilians in the process) and the Security Council took no action.²⁵ Further, as the ethnic conflict in Kosovo intensified in 1998 and early 1999, it became clear that, while the Security Council had classified the situation as a ‘threat to peace and security in the region’, but it could not do more than that because Russia and China would exercise their power of veto on any resolution to authorize the use of force in Kosovo.²⁶

4. Unilateral or Unauthorized Humanitarian Intervention

Military action taken with the authorization of the Security Council by a state or group of states against another state to prevent gross and widespread violations of fundamental rights is referred to as collective intervention.²⁷ Unilateral intervention involving the threat or use of force refers to military action taken by a state without the authorization of the Security Council. The term unilateral intervention can also refer to unauthorized military intervention by more than one state and. NATO’s intervention therefore was a unilateral humanitarian intervention. There are conditions for the conduct of legitimate humanitarian intervention by state or group of states. The UN Security Council must approve the intervention. Without such approval, it becomes unlawful. Once such approval has been obtained a regional organization or a group of states could then legitimately intervene. While there may be valid argument for

¹⁹ Article 2(7)

²⁰ *Op.cit*

²¹ See for example Resolution 1973 authorizing the use of force to protect the civilian population in eastern Libyan city of Benghazi against the forces of Col Ghaddafi in 2011.

²² Guicherd, Catherine, ‘International Law and the War in Kosovo’, (*Survival Series Article*) 41(2), 1999) 19-34.

²³ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, Submitted to the Minister of Foreign Affairs, Denmark, December 7 1999, (called the “Danish Institute Report”). p.7 on [www.diiis.dk>media>import>extra](http://www.diiis.dk/media/import/extra). Accessed on 16 November 2015.

²⁴ A country is a sovereign being independent of other nations. Chechnya is not categorized as a sovereign country but as part of the federal region, a subject of Russia. As a Russian Federation, Chechnya is governed by the rules and regulations of Russia. Chechnya is in the North Caucasus.

²⁵ International Response to Russian Second War in Checheyn in 1999. Russia incurred much international criticism for its conduct during the Second Chechen War, which started in 1999. The governments of the United States and other countries condemned deaths and expulsions among civilians. The United Nations Commission on Human Rights (UNHCR) passed two resolutions in 2000 and 2001 condemning human rights violations in Chechnya and requiring Russia to set up an independent national commission of inquiry to investigate the matter. However, a third resolution on these lines failed in 2004. Available on https://en.wikipedia.org/wiki/International_response_to_the_Second_Chechen_War. Accessed on 5 October, 2019

²⁶ Simma Bruno, *Ibid.*, P.7

²⁷ See article 51 of the Charter

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an intervention authorized by the Security Council, it is suggested that where unauthorized intervention is concerned there is no legal basis for doing so. Broadly speaking there are two schools of thought on the legality of unilateral or unauthorized humanitarian intervention.²⁸ Those who argue in favour of the right of unilateral humanitarian intervention maintain that the evolution of international human rights law and the Charter have had a revolutionary effect on the international legal system. That it is the individual, and not the state, that lies at the centre of international law because States receive their legitimacy from the will of the people. Hence, sovereignty is not an inherent right of states but, rather, derives from individual rights.²⁹ Thus, when sovereignty comes into conflict with human rights, the latter must prevail. Fernando Tesón a leading proponent of the legal right to unilateral humanitarian intervention argues that:

The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations.³⁰

However, on the other hand, those who argue against the right of unilateral humanitarian intervention do so from a positivist perspective. That based on the provisions of the UN Charter and particularly article 2(4), it was meant to be a watertight prohibition against the use of force³¹ and any customary right of unilateral intervention which may have existed was extinguished by the United Nations Charter. However, although each state has the right to take action to ensure respect for fundamental rights, this does not entail a right to use force without Security Council authorization for such a purpose. Although the purposes of the Charter are to maintain international peace and security, to develop friendly relations among nations based on respect for equal rights and self-determination, and to promote and encourage respect for human rights, it was thus submitted that 'any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor.'³² Thus while respect for human rights is considered important to a just international legal order, it is argued that neither the Charter, current state practice, nor scholarly opinion conclusively supports the view that there is a right of unilateral, unauthorized intervention to stop or prevent widespread deprivations of internationally recognized human rights.³³

5. Acts of Grave Breaches

Not all violations of the Geneva Conventions are treated equally. For the purpose of humanitarian intervention, it is the most serious crimes of international criminal law termed 'grave breaches,' that can be subject of any intervention in order to stop. The Geneva Conventions provide a legal definition of what amount to grave breaches.³⁴ Grave breaches are defined in the four Geneva Conventions. In summary, it provides that grave breaches shall involve any of the following acts, if committed against persons or property protected by the Convention namely: willful killing, torture or inhuman treatment including biological experiments, willfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³⁵ For the purpose of any humanitarian intervention, it is only a series of events or a developing situation of a certain threshold that amounts to grave breaches according to the Geneva Conventions that could the need to resort to use force to prevent or stop same by either the Security Council or by a group of states with the authorization of the Security Council. Thus, in his 1999 report to the Security Council on the

²⁸ Penelope C. Simons, 'Humanitarian Intervention: A Review of Literature', *The Ploughshares Monitor* December (2000) Volume 21 Issue 4

²⁹ *Ibid*

³⁰ Fernando Tesón, 'Humanitarian Intervention: An Inquiry into Law and Morality', (1997) *Transnational Publishers, Dobbs Ferry*, p.173-174

³¹ >Simma Bruno, *Ibid*, p.2.3, see also Murphy, *Op. Cit.* p.71-75

³² A Cassese, 'Forcible Humanitarian Counter-Measures and Opinion Necessitatis' (1999) p. 24. Available on <http://ejil.org/pdfs/10/4/610.pdf>. Accessed on 5 October, 2019

³³ Murphy, *Ibid*. p. 356

³⁴ Elizabeth Orji, *Op. Cit.*, p.89

³⁵ See Articles 50 & 50 of the GC I & II, see also article 130 of GC III, article 147 GC IV

protection of civilians in armed conflict³⁶ stated that the Security Council, in deciding whether or not to intervene, should consider, among other things, be such: ‘The scale of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations must be high such that revolts the conscience of humanity’.

However, to justify military intervention for humanitarian purposes, one or more of the following acts must be prevalent namely either the government must be committing, supporting, or aiding and abetting widespread violations of internationally recognized human rights; or that there must have occurred a total breakdown of law and order resulting in such widespread deprivations of human rights or grave breaches which the government of the target state is incapable of preventing. It is however submitted that outside the provisions of grave breaches, using the definitions of genocide, crimes against humanity, and war crimes which are set out in the Statute of the International Criminal Court³⁷ as conditions that must exist to trigger a humanitarian intervention is also instructive. It is submitted that using these definitions would be useful since there is already international consensus on their meaning. However, because there may be gross violations of human rights which do not fall into these categories and thus reference to the major human rights treaties and Conventions may also be useful.

6. Intervention as the Last Resort

According to Falk³⁸, there is a legal obligation, a moral and political commitment on the part of the international community ‘to make recourse to war a *last resort*.’ Thus, before force is contemplated there must be a good faith pursuit of diplomacy by the states contemplating the intervention³⁹ and that there is a strong burden of persuasion associated with the rejection of the United Nations framework of legal restraint on the use of force.⁴⁰ Thus, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.⁴¹ It may also be necessary to consider whether certain non-military means, such as economic sanctions, are appropriate in the circumstances.⁴² It is after all these considerations and it is obvious that the only solution is a military intervention that recourse must be heard to the United Nations. This is because, as stated under the Charter, states are obliged under international law to resolve their disputes by peaceful means.⁴³ Article 37 of the Charter requires states, once they have exhausted the peaceful avenues to settle a dispute, to refer the dispute to the Security Council.

7. Kosovo and the Legality of NATO’s Intervention

The legitimacy under international law of the 1999 NATO bombing of the Federal Republic of Yugoslavia has been questioned by various parties. The debate dominated the last century. This is because the UN Charter is the foundational legal document of the United Nations and is a primary cornerstone of public international law. UN member states have legally bound themselves to uphold it. At the same time, all member states of the North Atlantic Treaty Organization (NATO) are also member states of the UN, and thus they must also comply with their obligations under the North Atlantic Treaty, the foundational document of NATO.⁴⁴ Supporters of the NATO bombing of Yugoslavia argued that the bombing brought to an end the ethnic cleansing of Kosovo’s Albanian population, and that it hastened (or caused) the downfall of Slobodan Milošević’s government, which they saw as having been responsible for the international isolation of Yugoslavia, war crimes, and human rights violations. Opponents of the bombing have argued that NATO targeted non-military buildings, resulting in civilian casualties. NATO in defence of her intervention described the conditions in Kosovo as posing a risk to regional stability. As such, NATO member states asserted they had a legitimate interest in developments in Kosovo, due to their impact on the stability of the whole region which, they claimed, is a legitimate concern of the Organization. This

³⁶ UN Secretary General Annual Report to the UNSC. Available on <https://www.un.org/securitycouncil/content/secretary-generals-reports-submitted-security-council-1999>. Accessed 5 October, 2019

³⁷ See article 6, 7 & 8 of the Rome Statute

³⁸ Richard Falk, Intervention And Resistance, Boston Review of Political & Literary Forum, (1999) p.855. Available on <https://bostonreview.net/archives/BR18.6/interresist.html>. Accessed 5 October, 2019.

³⁹ *Ibid*

⁴⁰ *Ibid*, p.856

⁴¹ Cassese, Op. Cit. p. 24

⁴² Murphy, Op. Cit, p.385

⁴³ Article 2(3) UN Charter

⁴⁴ The Legitimacy of NATO’s bombing in Kosovo in 1999: *Ibid*

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intervention was condemned as having no basis in public international law and that NATO's resort to moral ground to justify the intervention is flawed. It is for this reason that this papers seek to review the said intervention in 1999, and to inquire into the validity or legality of the intervention in international law.

UN Secretary-General Kofi Annan supported intervention in principle, saying 'there are times when the use of force may be legitimate in the pursuit of peace', but was critical of unilateral action by NATO.⁴⁵ He argued 'under the UN Charter the Security Council has primary responsibility for maintaining international peace and security and this is explicitly acknowledged in the North Atlantic Treaty. Therefore, the Council should be involved in any decision to resort to the use of force.'⁴⁶ On the day the bombing started, Russia called for the UN Security Council to meet to consider 'an extremely dangerous situation caused by the unilateral military action of the North Atlantic Treaty Organization against the Federal Republic of Yugoslavia.'⁴⁷ However, a draft resolution, tabled jointly by Russia, Belarus and India, to demand 'an immediate cessation of the use of force against the Federal Republic of Yugoslavia' was defeated. Among the 15 UN Security Council nations, there were three votes in favour (Russia, China and Namibia) and twelve against, with no abstentions. Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia, and Slovenia, along with the US, Britain, France, Canada, and Netherlands voted against it.⁴⁸ The Security Council thus rejected a demand for the immediate cessation of the use of force against the Federal Republic of Yugoslavia and the urgent resumption of negotiations.

Acting on a draft resolution submitted by Belarus, Russian Federation and India, the Council failed to adopt a cease fire resolution and according to Article 27 (3) of the United Nations Charter, decisions of the Security Council should be made by an affirmative vote of nine members, including the concurring votes of the permanent members. Speaking before action on the text, the representative of the Russian Federation said that:

Attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against the text would place themselves in a situation of lawlessness. Indeed, the aggressive military action unleashed by the North Atlantic Treaty Organization against a sovereign State was a real threat to international peace and security, and grossly violated the key provisions of the United Nations Charter.⁴⁹

The United States representative, also speaking before the vote, said that:

The allegation contained in the draft resolution that NATO was acting in violation of the United Nations Charter had turned the truth on its head. The Charter did not sanction armed assaults on ethnic groups or imply that the world should turn a blind eye to a growing humanitarian disaster. By rejecting the resolution before it today, the Council would reaffirm the requirements it had put to the Government in Belgrade to cease their brutal attacks against the people of Kosovo and move towards peace.⁵⁰

Speaking after action on the text, the representative of the Federal Republic of Yugoslavia⁵¹ in rejecting the UN decision lamented that:

NATO had turned a sovereign and peaceful country and its proud people into 'a killing field and a testing ground' for its' most sophisticated weaponry, trampling upon international relations and defying the authority of the Security Council and its resolutions. My country had been given two alternatives: to give up part of its territory, or have it taken away by force which was the essence of the 'solution' offered at the 'negotiations' in France. By attacking Yugoslavia, NATO had not

⁴⁵*Annan, Kofi; with Nader Mousavizadeh (2012).Interventions. A Life in War and Peace Penguin Books. pp. 92*

⁴⁶ Kofi Annan, *Ibid*

⁴⁷UN Reject Cessation in Kosovo: Available on <https://www.un.org/press/en/1999/19990326.sc6659.html>. Accessed on 6 October, 2019.

⁴⁸See the UN press Release of SC/6659 of 26 March, 1999. Available on <https://www.un.org/press/en/1999/19990326.sc6659.html>.Accessed on 6 October, 2019.

⁴⁹UN Press Release, SC/6659, *Ibid*

⁵⁰Being part of the proceedings and argument before the floor of the Security Council on the 26 March, 1999 before the rejection of the motion seeking to halt the bombings in Yugoslavia.

⁵¹*Ibid*

solved the alleged humanitarian catastrophe, but had created one for all citizens of Yugoslavia and for peace and security in the region and beyond.

It should therefore be noted that the Russian position was the correct position in international law. The rejection of Russia's condemnation by the US and her allies amounted to political, but not legal, support of NATO's intervention. After the war ended with the *Kumanovo Treaty*⁵² and the bombing stopped, some argued that the creation UN Interim Administration Mission⁵³ in Kosovo, by Security Council Resolution 1244, constituted a legal ratification *post festum* after the event of the intervention. Aside from the above-discussed issue of the legal justifiability of launching the war, *jus ad bellum*, against Serbia, the NATO bombing campaign has been criticized for exceeding the limits of lawful wartime conduct, *jus in bello*, under international humanitarian law, such as the Geneva Conventions. There were several reports of bombing civilian targets and convoys by NATO. This paper adopts the positivist argument which rejects the right of unilateral or unauthorized humanitarian intervention. Thus, while there is an obligation on the part of states to ensure respect for fundamental human rights, there is no legal right to threaten to use or to use force to compel such compliance. Yet, while this paper maintains that the NATO intervention was formally 'illegal' because NATO did not obtain the required Security Council authorization before or after the campaign, it is also submitted that a purely legal analysis is inadequate to assess the legitimacy of the NATO intervention in view of the grave humanitarian crisis at that time in Kosovo. It is correct that normal textual readings are on their side, and that the Charter system cannot be legally bypassed in the manner attempted by NATO. Yet it is equally true that to regard textual barriers to humanitarian intervention as decisive in the face of genocidal behavior is politically and morally unacceptable, especially in view of the qualifications imposed on the unconditional claims of sovereignty by the expanded conception of international human rights. Falk rightly observed that:

Humanitarian interventions' involving the threat or use of armed force and undertaken without the mandate of the authorization of the Security Council will, as a matter of principle, remain in breach of international law. But such a general statement cannot be the last word. Rather, in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get 'as close to the law' as possible. Such analyses will influence not only the moral but also the legal judgment in such cases.⁵⁴

With respect to NATO's intervention in Kosovo, it is argued that at the time of the initiation of the bombing campaign, the Alliance made every effort to remain 'close to the law' by closely following and linking its efforts to the resolutions of the Security Council and by stating that the action taken was an urgent measure to prevent a larger humanitarian crisis.⁵⁵ However, international law requires that states settle their disputes by peaceful means and that recourse to the use of force be a last resort, once all avenues of peaceful resolution of a situation have been explored.⁵⁶ Except in circumstances of self-defence, the threat or use of force is the domain of the Security Council. According to Falk,⁵⁷ NATO did not pursue what he refers to as 'flexible diplomacy,' which according to him may have allowed the situation in Kosovo to be resolved without recourse to war.

It was alleged that NATO intervention violated several international humanitarian law restrictions. Under international humanitarian law, civilians and civilian objects shall not be directly targeted and all feasible precautions must be taken to prevent civilian deaths and incidental injuries caused to civilians or civilian objects are required to be proportionate to the purpose of the attack. Moreover, an attack is deemed indiscriminate which 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'⁵⁸ Thus, the

⁵²The Military Technical Agreement between the International Security Force and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia was an accord concluded on 9 June 1999 in Kumanovo, Macedonia. It concluded the Kosovo War. The full text can be found on the website of NATO. Available on https://en.wikipedia.org/wiki/Kumanovo_Agreement. Accessed on 5 October, 2019.

⁵³Created on the 10th June, 1999.

⁵⁴ See Falk, *Op. Cit.*, p.853

⁵⁵Simma Bruno, *Op. Cit.* p 4.

⁵⁶ Article 51, 52

⁵⁷ *Op. Cit.*, p855

⁵⁸ Article 51(5)(b) of AP I

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means of enforcement chosen must be effective to protect the vulnerable civilian population and must not endanger them or their way of life further. In the context of Kosovo, NATO's actions were subject to strong criticism in the face of several widely publicized bombings of non-military targets, such as urban telecommunications towers, major and minor bridges, heating plants, electric power stations, water supplies, and, mistakenly, civilian convoys. According to Reports published by Amnesty International⁵⁹ and Human Rights Watch,⁶⁰ which investigated these bombings, noted that some 400-600 civilians were killed during the campaign.

8. Is there an Emerging Norm of Humanitarian Intervention?

There is no international relations agreement as to whether there is a norm of humanitarian intervention resulting from Security Council practice, let alone a norm with respect to unauthorized humanitarian intervention has emerged. The concept of domestic jurisdiction has changed in substance, if not in law. The two dominant norms of world politics during the Cold War namely, that borders were sacrosanct and that secession was unthinkable no longer generate the almost universal enthusiasm and acceptance that they once did. The automatic and almost reverential respect for non intervention in the internal affairs of states has made way for a more subtle interpretation according to which, on occasion, the rights of individuals take precedence over the rights of repressive governments and the sovereign states they represent. There is a general consensus that for any humanitarian intervention to be a legitimate course of action, the interventions ought to be authorized and implemented collectively by the international community. The westphalian presumption against unilateral intervention ought to stand. According to Caplan,⁶¹ many states, particularly European, are 'rethinking historical prohibitions against humanitarian intervention in the wake of NATO's actions over Kosovo.' According to him, the 1991 unauthorized intervention in Iraq led by the United States and the United Kingdom, the ECOWAS intervention in Liberia, along with the NATO intervention in Kosovo:

Are part of a larger trend that has seen states give increased weight to human rights and humanitarian norms as matters of international concern to the extent that the Security Council may now choose to characterize these concerns as threats to international peace liable to enforcement measures under Chapter VII of the UN Charter. Indeed, in the space of less than five years from 1992, the Security Council authorized interventions of a humanitarian nature in Somalia, Bosnia, Rwanda, Haiti, and Albania. Since many of these interventions were launched only after a crisis had assumed catastrophic proportions and were therefore judged by critics to be 'too little, too late,' states have come under considerable pressure to take more effective measures in advance of humanitarian disasters – as NATO arguably did in the case of Kosovo.⁶²

Still the challenge remains no less urgent for states to find a way to reconcile effectiveness in defense of human rights and humanitarian law with legitimacy of process. In sum, the international relations literature reveals though

⁵⁹ . See amnesty International Report, 2000, Federal Republic of Yugoslavia. Published 1 June, 2000 and available on <https://www.refworld.org/docid/3ae6aa1118.html>. Accessed on 6 October, 2019. The report listed several instances of NATO bombing of civilian targets which is a violation of international law. For instance, the report noted that on 12 April a train carrying civilian passengers was twice hit by missiles launched by a NATO airplane during an attack on a railway bridge at Grdelica, reportedly killing at least 12 people. The incident called into question whether the pilot adhered to fundamental principles of humanitarian law which state that an attack should be cancelled or suspended if it becomes clear that the objective is not a military one or may cause disproportionate loss of civilian life. Again, on 23 April NATO bombed the Serbian state television building in Belgrade killing 15 people, all of them apparently civilians. NATO justified the attack in the context of its policy to "disrupt the national command network and to degrade the Federal Republic of Yugoslavia's propaganda apparatus". However, even if the station could have been considered a military target – which NATO failed to demonstrate – serious questions remained as to why precautions were not taken or warnings given to avoid killing civilians.

⁶⁰ . Human Rights Watch Report tagged: Civilian Deaths in the NATO Air Campaign in Kosovo published February, 2000. Available on <https://www.hrw.org/legacy/campaigns/kosovo98/reports.shtml>. Accessed on 6 October, 2019. The report was critical of NATO's action as a result of the civilian deaths arising from the air campaigns. Such deaths undermined the legitimacy of NATO's intervention.

⁶¹ Richard Caplan, 'Humanitarian Intervention, Which Way Forward' (2000) p. 25 Online publication and available on <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-7093.2000.tb00051.x>. Accessed on 6 October, 2019.

⁶² Richard Caplan, 'Humanitarian Intervention, Which Way Forward' (2000), *Ibid*, p. 25.

there has been normative movement on the issue of humanitarian intervention since the end of the Cold War, however, there remains a lack of consensus regarding the legitimacy of and appropriate circumstances under which both UN authorized and unauthorized humanitarian should be conducted.

9. Conclusion

However, there currently is no legal right or emergent right of states or regional organizations to forcefully intervene in another state for such a purpose without the authorization of the Security Council, although there may be a moral right to forcefully intervene in such circumstances, as NATO claimed to justify her intervention in Kosovo in 1999. The paper also discovered that the provisions of the NATO Treaty, particularly articles 4 and 5 which require the Union members to agree on any collective decision and to see an attack on a member state as attack on all of them cannot and did not provide a legal basis for the intervention. However, NATO could not justify her invasion of Yugoslavia, a member of the Union of NATO pursuant to its extant Treaty because Yugoslavia was never attacked by anyone. The paper however observed the normative incompatibility between the NATO Treaty and the United Nations Charter. Hence it cannot be concluded that there is an emergent norm supporting such action. While a strong argument can be made in favour of developing guidelines for both UN authorized and unauthorized humanitarian intervention, there is currently no consensus as to the content of such guidelines and there is likely to be resistance in the international community to developing and formalizing such criteria. It is significant, however, that the Security Council is yet to develop a criteria when contemplating enforcement action in situations of humanitarian crisis though the Security Council's Report in resolution 1265,⁶³ expressing, among other things a 'willingness to respond to situations of armed conflict where civilians are being targeted' and resolving to establish a mechanism to review the recommendations is a welcome development in this regard. It is for this reason that the paper submitted that the NATO intervention in Kosovo in 1999 without any legal framework either under the UN Charter or the NATO Treaty to which Yugoslavia belongs is a violations of international law. The justification of the intervention on grounds of humanitarian crisis has no legal foundation and is contrary to positive international law. Though there may be moral grounds for the intervention, the law however, does not operate on the basis of morality but by and within a set of agreed principles. That set of agreed principles is the UN Charter and the intervention was not conducted pursuant to same.

⁶³UN Resolution Report 1265, 1999 UN Doc. S/RES/1265 1999, September 17. Available on <https://en.m.wikipedia.org/wiki/United-Nations>. Accessed on 17 November 2018. The resolution was unanimously adopted on 17 September, 1999 and was the first resolution to address the topic of protection of civilian in armed conflict.