Bombing in the Name of Humanity: the RAF over Kosovo

1. Introduction

In addition to trying to develop the law of self-defence after 11 September 2001, the British government has also been at the forefront of attempting to develop a controversial justification for the use of force, namely humanitarian intervention. This is not limited to the Labour governments in power since 1997, but was unveiled by the Conservative administration as an argument for the intervention in northern Iraq in 1991 following the repression of the Kurds. The arguments though were brought to a head in the Spring of 1999 when, faced with the brutal repression of the ethnic Albanian population in the Serbian province of Kosovo, NATO planes bombed Serbian targets between 24 March 1999 and 10 June 1999. The debates in parliament were intense over the Kosovo intervention. The level of discussion over the international legal basis of the operation both within the House of Commons and the country was unprecedented. The greater reliance on seeking Parliamentary support could be due to the lack of a clear international legal basis for the British decision to contribute air power to the operation (even though it was a NATO operation), but could also be due to the proposed mode of protecting human rights—by bombing from a safe height.

2. A Controversial Doctrine

Uninvited military interventions to protect widespread violations of the right to life has a doubtful pedigree in international law even before 1945, mainly because the intervening state has more often than not abused the doctrine to remove problematic governments and to install friendly ones. With the advent of a firm rule prohibiting the use of force in the UN Charter of 1945, one that has attained the status of jus cogens, allowing of only two exceptions—self-defence and Security Council authorized military action—the doctrine seemed to have even less chance of establishing itself in the new international legal order.
This might seem harsh when mass killings often by agents of the state have not abated in the twentieth and twenty-first centuries. The atrocities in Rwanda, the Congo, and the Darfur region of Sudan all occurring around the millennium show that genocide and crimes against humanity are being committed with appalling regularity (particularly in Africa), and the international community has done little to prevent them. Although it is perfectly feasible that the Security Council could authorize a military intervention to prevent further loss of life, its track record is poor. It pulled out the UN peacekeepers in Rwanda in 1994 in the face of the genocide being committed there, and it bizarrely authorized France (a supporter of Hutu regimes in the past) to undertake a limited military intervention, which had no affect on the genocide of nearly a million Tutsis and moderate Hutus.¹ In the Democratic Republic of the Congo it is estimated that somewhere between two and four million people have lost their lives in conflicts that have raged in that country since the end of the 1990s, although a robust Security Council authorized peace operation now keeps an uneasy peace there.² In Darfur at least a quarter of a million civilians have been killed by government forces and the Janjaweed militia since 2003, though an African Union/UN peace operation with a mandate to protect civilians has finally been agreed to by the government of Sudan³—the very perpetrators of the crimes being committed against the people of Darfur.

In these horrific circumstances, one might legitimately ask how it could possibly be illegal for a state or group of states, acting without Security Council authority, to intervene to protect human life. This question becomes even more challenging to the orthodoxy when the violation of the right to life attains the level of crimes against humanity (acts of murder and extermination ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of attack’),⁴ or genocide (similar acts ‘committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group’),⁵ the prohibitions on both of which are recognized as jus cogens.

During the Cold War there was little evidence that states accepted the legality of humanitarian intervention within the post-1945 legal order.

Sadly, there have been several modern instances of a state killing or attempting to kill large numbers of particular groups within its own frontiers, actions which have on occasions led to military intervention. On other occasions, no state has been prepared to intervene militarily, even when it was clear that a large number of citizens were being massacred. In May 1967, Biafra declared its independence from Nigeria. In the ensuing civil war many thousands of the Ibo tribe, which inhabited Biafra, died, due in part to the brutality with which the insurrection

was put down—brutality directed at the whole of the Ibo tribe not just the combatants. However, whilst only five African states were prepared to recognize Biafra, none were prepared to intervene to protect the Ibos, preferring instead to leave attempts to solve the crisis to the Organisation of African Unity (the predecessor of the AU) which had a clear policy against secession.⁶

A leading Biafran women’s activist, Mrs Oyibo Adinamadu, travelled to London to lobby the Labour government for assistance for the Biafran cause. The government refused to meet her. Indeed, Britain was a key arms supplier to Nigeria enabling the government to suppress the rebellion. The reason for British inaction given by the Foreign Secretary, Michael Stewart, was that cutting all connections with the Nigerian government in protest at the suppression would encourage ‘in Africa the principle of tribal secession—with all the misery that could bring to Africa in the future’.⁷

In other instances of mass killings there have been military responses, but neither the intervening state, nor other states, have sought to justify the action solely as a humanitarian intervention, thus reflecting the fact that there is little opinio juris amongst states for such a right. The Pakistani army’s brutal repression of the rebellion in East Pakistan in 1971, which resulted in Indian military intervention and the eventual emergence of the independent state of Bangladesh, is cited as an instance of humanitarian intervention by supporters of the doctrine.⁸ However, India, in the Security Council chamber relied on the clear exception to the ban on force, namely self-defence in response to alleged Pakistani aggression.⁹ Although India had not been attacked, it is quite significant that it relied primarily on the recognized exception to article 2(4). However, there are also points at which India seemed to be referring to the more controversial right, most particularly Prime Minister Gandhi who spoke of ‘the annihilation of an entire people whose only crime was to vote for democracy’, though she also referred to Pakistan’s ‘unprovoked aggression’.¹⁰

In other instances of state practice, though the target state had clearly been guilty of horrendous atrocities against its own people, the state using force did not rely on the doctrine of humanitarian intervention. In Kampuchea (Cambodia), the Khmer Rouge took power in 1975 and under the direction of Pol Pot it embarked upon a policy which directly led to the death of three million people. In December 1978, Vietnam invaded Kampuchea, overthrew the Pol Pot regime

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⁹ SC 1606th mtg, 1971.
and established a Vietnamese-backed regime. On this occasion the intervening state sought to deny that it had ever intervened at all, claiming that the events in Kampuchea were purely internal.¹¹

Britain joined the majority of UN member states at the UN in calling for ‘the immediate withdrawal of all foreign forces from Kampuchea’. It also called upon states ‘to refrain from all acts or threats of aggression and all forms of interference in the internal affairs of States in South-East Asia’.¹² In the Security Council Sir Anthony Parsons, the British delegate, clearly portrayed Kampuchea as the victim in declaring that it was ‘a small member state which has been invaded by a powerful neighbour in violation of article 2(4) of the Charter. It is imperative for all of us to uphold the principle of the inadmissibility of the threat or use of force against the territorial integrity or political independence of any state; otherwise the aggressor will take comfort’.¹³ In the House of Commons, Sir Ian Gilmour, the Lord Privy Seal, put the government’s view: ‘I do not condone the Vietnamese invasion. The Vietnamese invaded not as liberators, but as occupiers, in flagrant violation of the Charter of the United Nations’.¹⁴

In the same period the Tanzanian army, accompanied by a number of Ugandan rebels, entered Uganda and eventually overthrew the brutal dictatorship of Idi Amin in April 1979. The Tanzanian government claimed that this was an act of self-defence following the Ugandan annexation of some disputed territory in October 1978. The Tanzanian response was clearly not a proportionate one and so cannot be justified as self-defence. The British view of the international legality of this and other earlier interventions can be found in a document produced in July 1984 by the Foreign Office.¹⁵

The two most discussed instances of alleged humanitarian intervention since 1945 are the Indian invasion of Bangladesh in 1971 and Tanzania’s humanitarian invasion of Uganda in 1979. But, although both did result in unquestionable benefits for, respectively, the peoples of East Bengal and Uganda, India and Tanzania were reluctant to use humanitarian aims to justify their invasion of a neighbour’s territory. Both preferred to quote the right to self-defence under Article 51. And in each case the self-interest of the invading state was clearly involved. In fact, the best that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.

Of course if the UN authorizes intervention for humanitarian purposes then the action has a clear legal basis—the authorization of the American-led UNITAF into Somalia in 1992 is a clear example.¹⁶ On other occasions, though there is a UN resolution condemning the repression there has been no clear authority.

¹² GA Res. 34/22, 14 Nov. 1979, adopted by 91 votes to 21 with 29 abstentions.
In these instances Britain has relied on a combination of the resolution and humanitarian necessity.

In April 1991 after Iraq’s defeat in Kuwait led to a failed attempt to oust Saddam’s regime, the Security Council adopted a resolution categorizing Iraq’s repression of the Kurds as an action which threatened international peace and security.¹⁷ The Resolution did not authorize military measures, but Western states at least appeared to think that the resolution justified them sending up to 20,000 troops to occupy a large part of northern Iraq to prevent further repression and to protect the distribution of humanitarian aid. Although unauthorized by the UN, the intervention in Northern Iraq, which was followed up by the imposition by the US, UK and France of no-fly zones over northern Iraq starting on 6 April 1991 (to protect the Kurds), and southern Iraq starting on 26 August 1992 (to protect the Shias), did not appear to be full-blown humanitarian intervention. It did not seek to overthrow the brutal regime of Saddam Hussein; indeed, it appeared to be an action somewhere between the well-accepted right of states to provide humanitarian aid and the generally unacceptable right of humanitarian intervention. Given that very few states objected to the operation, it may be that such a limited right might have been acceptable in the future.

However, there were mixed messages coming from the British government and its officials. The Foreign Secretary spoke on BBC radio in answer to questions about the legality of the military measures taken to protect vulnerable people inside Iraq, specifically the no-fly zone of August 1992. First he stated that ‘we operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided that we comply with international law’. In relying on general international law he did not claim an unfettered right of intervention to protect human rights but stated that ‘international law recognizes extreme humanitarian need’ when acting ‘in support of’ Resolution 688.¹⁸ Legal opinion from the Foreign Office though suggested that this was simply an application of the customary right of humanitarian intervention given that Resolution 688 did not mandate the actions taken.¹⁹

3. Kosovo—the Crystallization of a Customary Right?

There was undoubtedly a situation of extreme violence in Kosovo in 1998–9, symbolized by the brutal massacre of over forty ethnic Albanians by Serbian forces in the Kosovo village of Racak on 15 January 1999. Such killings took

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place within a vicious war between the Serbian forces and the Kosovo Liberation Army (KLA) in which civilians were targeted on both sides, though the Serbian attacks were more atrocious and may well have amounted to crimes against humanity (President Milosevic of Serbia was indicted for crimes against humanity in Kosovo by the ICTY, though he died in March 2006 before a conviction could be secured).

It is clear that the levels of violence and suppression in Kosovo in the thirteen-month period leading up to the NATO bombing constituted a threat to the peace. Indeed, the Security Council made that determination prior to the bombing.²⁰ There is little doubt that this determination potentially removed the restriction on UN intervention in the internal affairs of a state.²¹ UN sanctioned military intervention, though, normally requires the express authority of the Security Council. The issue is whether states can take ‘humanitarian’ military action ‘in support’ of resolutions which make determinations of a threat to the peace, breach of the peace or act of aggression, even though there is no express authorization to do so.

The interventions in northern Iraq in 1991 and Kosovo in 1999 appear to be context-breaking actions, aimed at creating a new right to take military action in support of Security Council resolutions. Did they succeed? Are the Iraq and Kosovo operations further lawful developments of the jus ad bellum or are they so inconsistent as to be incompatible with the UN Charter? Treaty regimes can be developed quite radically but there are limits to this development (this applies to the NATO treaty as well). Furthermore, for subsequent practice to modify a treaty it must be widely supported by the members. Is the fact that the then nineteen members of NATO supported the action in Kosovo sufficient by itself, not only to modify the NATO treaty (which in article 5 clearly establishes a defence pact) but also the requirements of the UN Charter? This section will consider whether the inability of the Security Council to authorize military action was a justification for NATO taking action. The lack of alternatives debated before the UN, apart from the stark choice between bombing or inaction, needs to be considered, as does the possibility of seeking a mandate from the General Assembly.

As with the other isolated instances in international practice, it is possible to look at the interventions in Northern Iraq and Kosovo and pick out from the morass of legal justifications certain statements by some states and, assuming acceptance by the international community, present this as evidence of opinio juris for a right of humanitarian intervention. However, as with earlier interventions, recent attempts to resurrect the doctrine have been combined with other justifications which attempt to base the actions on norms acceptable to the international community. In 1991 the UK, in justifying its part in the intervention

²¹ Art 2(7) of the UN Charter.
in Northern Iraq, at one point invoked the doctrine of humanitarian intervention, while at another it purported to place the action within the context of Resolution 688, thereby trying to give the action some sort of UN sanction, knowing that Security Council authorized operations are, alongside self-defence, the universally recognized exceptions to the ban on the use of force.

In 1999, the UK was seen, perhaps above all other NATO states, as the chief advocate of humanitarian intervention to justify the actions of the RAF, but it failed overall to invoke it in its pure form. When announcing the launch of NATO airstrikes to the House of Commons on 24 March, 1999, Deputy Prime Minister John Prescott stated that the action was supported by all nineteen members of NATO, and was ‘intended to support the political aims of the international community’ set out in Council Resolutions 1199 and 1203, both of which had been breached by the FRY. The action was further ‘justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe’. The danger in accepting this sort of layered argument as a justification for unilateral or multilateral humanitarian intervention is that it ignores the reasons why India in 1971 and the UK in 1991 and again in 1999 did not rely on the doctrine as sole justification. Instead, they tried to invoke recognized exceptions to article 2(4) despite knowing full well that the operations did not fit the requirements of the exceptions—there was no armed attack against India in 1971, and there was no express authority from the Security Council to use force against Iraq or Serbia.

Although the approach taken by the intervening states in Iraq and Kosovo weakens the doctrine of humanitarian intervention, at least in its pure form, probably beyond repair, it still leaves the question of whether military intervention taken in support of or in the spirit of Security Council resolutions is a new and accepted concept in international law. In the absence of a clear mandate from the Security Council, the intervening states have invoked the argument that they are acting on behalf of the ‘international community’. The Security Council resolutions represent the will of the international community and the states are enforcing that will. The ‘international community’ seems to be the concept underpinning the recent actions in Iraq in 1991 and Kosovo in 1999. The increased recognition of this notion, much derided in the past by powerful states, is necessitated when military intervention is taken to uphold fundamental norms of the international community prohibiting crimes against humanity which were being committed in northern Iraq and Kosovo.

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The British Foreign Secretary, Robin Cook, seemed to realize that it was pointless trying to find or imply authority from specific resolutions, and instead the argument had to be based on the will of the international community, when he was pushed before the Foreign Affairs Select Committee of the House of Commons in April 1999 to justify the apparent contravention of the prohibition on the use of force. He stated that ‘the legal basis for our action is that the international community [of] states do have the right to use force in the case of overwhelming humanitarian necessity’.²⁵

It is easy to invoke the ‘international community’ to legitimate a military intervention, but who or what is the ‘international community’? There are dangers of simply basing it on international laws—no matter how fundamental—are clear, for there is a huge leap from recognizing that there are laws prohibiting crimes against humanity, and imbuing states with the right unilaterally or in combination with their allies to enforce those norms. Such a system of law will rapidly descend into self-help, whereby the name of the ‘international community’ is simply invoked at the discretion of powerful states as a cloak for their military interventions and to further their hegemony. However, in the cases of Iraq in 1991 and Kosovo in 1999 some of the discretion was removed in that there were Security Council resolutions recognizing the gravity of the human rights abuses in those countries. Does this not give a certain objectivity lacking in the old doctrines based on self-help such as humanitarian intervention? Discretion, though, remains for this new form of intervention is only claimed as a legal right not a duty, though it is often cloaked in the rhetoric of moral obligations. Furthermore it is somewhat disingenuous to claim that the international community’s will is embodied in a Security Council resolution when that organ has the capacity to expressly authorize military action to enforce its will. The determination of a threat to the peace is not the same as a mandate to take military action to combat the threat. Again the argument fails to recognize the gap between statements of law and their enforcement.

In the case of Kosovo, the subsequent authorization by the Security Council of NATO-led KFOR to secure the post-conflict stage in Kosovo²⁶ cannot be seen as retrospective endorsement of the NATO bombings. First, Russia and China made this particularly clear when the mandating resolution for KFOR was adopted.²⁷ Second, the Security Council as a political organ concerned with the maintenance or restoration of peace and security will quite often have to ‘build upon facts or situations based on, or involving illegalities’.²⁸ This does not signify an acceptance of their legality, though it might undermine the legitimacy of an inconsistent Council. What it does mean is that NATO stepped outside the parameters of the UN Charter when it suited the organization, and then it

²⁵ Foreign Affairs Committee, Minutes of Evidence, 14 April 1999, para 152 (HC 188-ii).
²⁶ SC Res. 1244, 10 June 1999.
²⁷ SC 4011st mtg, 10 June 1999.
²⁸ B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1 at 11.
stepped back in again when it, or rather the G8, had produced a suitable formula for ending the bombing which satisfied Russia and was agreed to by Serbia.

Although binding chapter VII resolutions were breached by Serbia this was not a sufficient justification for what Nico Krisch has labelled the ‘unilateral enforcement of the collective will’.²⁹ The lack of consensus in the Security Council that a simple chapter VII resolution condemning and demanding certain action can give rise to military action by willing states if the resolutions are ignored is telling. Indeed, all that will happen if Western states continue to utilize resolutions in this way, is that there will be no agreement on any type of chapter VII resolution in the future in case certain states take it upon themselves to undertake military action to enforce them.

The collective security system has been stretched and pulled by the practice of mainly Western states and as a result is quite generous to them, but they still need to seek and gain a Security Council mandate. The desire of Western states to base their military actions on Security Council resolutions is significant though, for it seems to undermine the argument that the NATO bombardment of the FRY and the intervention in northern Iraq are strong evidence of a re-emergence of a unilateral right to humanitarian intervention.³⁰ After examining the claims of NATO states both before international and national fora and in pleadings before the International Court in May 1999,³¹ Krisch concludes that despite the odd (and inconsistent) statements by the US and the UK which seemed to favour unilateral humanitarian intervention, both those states and the remainder of NATO members tried to justify their action on the basis of the collective authority of the UN rather than on the right of humanitarian intervention. ‘Thus, a purely unilateral humanitarian intervention seems even more difficult after the case of Kosovo than before’.³² It seems that by trying to force the military actions under the UN umbrella, NATO states have probably done more damage to the already precarious doctrine of humanitarian intervention, as well as breaching, and therefore undermining, the constitutional parameters of the UN collective security system they helped to create. ‘The failure of the Security Council to condemn the NATO action when member states rejected a Russian draft on 26 March 1999 by twelve votes to three,³³ cannot be seen as an authorization of the bombing, nor an endorsement of it, since a major concern for many states voting against the

³¹ See Case Concerning Legality of the Use of Force (Yugoslavia v United Kingdom) Request [by the FRY] for Provisional Measures, 1999 ICJ Rep. 826. The Court refused to grant the request, although it did express its concern both at the loss of life in Kosovo, and ‘with the use of force in Yugoslavia’ which ‘under the present circumstances raises very serious issues of international law’ (paras 15–16).
³³ UN Doc. S/1999/328.
resolution was its lack of balance in that it failed also to condemn the brutality of the repressive measures taken by the FRY.³⁴ Above all, lack of condemnation by the Security Council cannot be seen as an authorization to use force.

It must not be forgotten that in the case of Kosovo there was an authorization from an international organization, NATO. Do nineteen democracies acting in concert represent the international community? Can such an organization be in breach of international law? The fact that NATO is composed of democracies does not by itself suggest that it is the fulcrum of the international community, although there has been a significant trend in the international community towards democratic government. In fact in taking decisions to go to war, whether under international authority or not, many of the constitutional checks and balances present in liberal democracies for most forms of governmental decision-making in NATO states, are not applicable. This is certainly the case in the UK where the power to take such decisions rests within the executive. The only real democratic control on such military actions is public opinion, and the exercise of democratic accountability at the next election. In essence then, NATO has no greater claim to represent the international community than would any other organization of a similar size.

The legality and legitimacy of NATO action is also undermined when a consideration of its own Treaty is undertaken. Although it has claimed the right to take ‘non Article 5’ operations,³⁵ in other words not only military action in self-defence, these cannot simply be those determined by NATO alone. NATO can only operate within the framework of international law, in particular the UN Charter which has supremacy over any other international treaty when there are conflicting obligations.³⁶ Although NATO members, by consensus, can re-interpret their own treaty to allow them to take non-defensive military operations, they cannot somehow contract out of the UN system,³⁷ to set themselves up, in effect, as a competitor to the UN. It was thus incorrect for the US under Secretary of State, Strobe Talbott, to state that ‘we must be careful not to subordinate NATO to any other international body’,³⁸ for the whole international security system is based on a hierarchy with the UN at the apex.

The House of Commons Defence Select Committee was similarly in error in March 1999 when it announced that ‘insistence on a UN Security Council mandate for such… operations would be unnecessary as well as covertly giving Russia a veto over Alliance action. All 19 Allies act in accordance with the principles of international law and we are secure in our assertion that the necessity of unanimous agreement for any action will ensure its legality’.³⁹ To allow smaller

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³⁶ Art 103 of the UN Charter. ³⁷ In particular arts 42 and 53 of the UN Charter.
³⁸ Cited in Simma, ‘NATO, the UN’ at 15.
groups of states forming alliances or organizations the right of ‘self-authorization’
to take enforcement action would be to let the genie out of the lamp,\(^{40}\) and would
lead to competing claims to intervention.

It is worth noting that the US and UK assert the primacy of the UN Charter
over other conflicting treaty regimes when it suits. The essence of the two states’
arguments in the Lockerbie cases in the 1990s was that the obligations imposed
on Libya by the Security Council prevailed by virtue of the UN Charter over
Libya’s rights and duties contained in the 1971 Montreal Convention for the
Suppression of Unlawful Acts against the Safety of Civil Aviation.\(^{41}\) It is incons-
istent for these two states to argue the supremacy of the UN Charter in the case
of Libya, and yet dismiss it in the case of the NATO intervention in Kosovo.

It is because the UN represents the vast majority of the world’s states that it
has the only legitimate claim to be acting on behalf of the international com-

unity. Indeed, given its broad membership and broad purposes, practically it is
the only organization that can claim to be the international community. When
states set it up in 1945 it was imbued with exceptional powers that no state or
other organization could possess, unless they received authority from the UN. It
was because the UN represented ‘the vast majority of the Members of the inter-
national community’ at the time\(^{42}\) and now more so that it has the powers of
the international community. Within the UN, it is the General Assembly that is
reflective of the political will of the organization. ‘The special value of the General
Assembly is its universality, its capacity to be a forum in which the voice of every
member state can be heard’.\(^{43}\)

Certainly after the bombing campaign was over and KFOR was established
under Security Council authority, NATO members seemed to recognize, if not
the illegality of their bombing campaign, certainly the dangerous precedent that
it set. Kosovo seemed re-packaged as a unique situation forced upon NATO by
exceptional conditions that somehow set it apart from later catastrophes that year
in East Timor and Chechnya. In the general debate of the General Assembly
in October 1999, the representative of Belgium, for instance, hoped that resort-
ing to force without the approval of the Security Council would not constitute
a precedent, while expressing concern about a return to the law of the jungle.\(^{44}\)
Germany stated that state sovereignty would remain the guiding principle in
international relations.\(^ {45}\) President Bill Clinton portrayed the Kosovo situation
not as a triumph for NATO but somehow as a triumph for the United Nations.\(^ {46}\)

\(^{40}\) Simma, ‘NATO, the UN’, 20.
\(^{41}\) Cases Concerning Questions of Interpretation and Application of the Montreal Convention
Arising From the Aerial Incident at Lockerbie (Libya v UK), (Libya v US) 1992 ICJ Rep. 3 and 114
(Provisional Measures Judgments); (1998) 37 ILM 587 (Preliminary Objections Judgments).
it would be prepared to develop a legal framework for enforcement actions ‘of the international community’ in the case of humanitarian emergencies in the future.⁴⁷ These statements show that, without prejudicing the positions of states on the legality of the operation, Kosovo was being labelled as an exceptional action without any legal precedence. Nevertheless, the Netherlands warned the Council that its repeated inaction would push the organization towards the margins as a custodian of the peace, and it called on the Assembly to demand that the veto power be exercised with maximum restraint.⁴⁸

4. The General Assembly: an Alternative Source of Authority?

The statement by the Dutch representative in the General Assembly debates in its 54th session in Autumn 1999 shows the dilemma that NATO states have over whether the Security Council has exclusive competence over military enforcement action, or whether the Assembly has a role. The Dutch suggested that the Assembly should act as a mechanism of accountability to ensure that the veto was not misused in similar situations in the future. They did not go so far as to say that the Assembly itself could, if the Security Council was deadlocked, authorize or recommend such action. However, there are strong arguments that the General Assembly has residual enforcement powers in exceptional cases, and indeed it should have been the fall-back forum for seeking authority to undertake the bombing of the FRY. The argument by NATO that it had no choice but to undertake the bombing without an authorization from an organ which truly represents the international community is thus revealed to be incorrect. Indeed, if any forum can legitimately claim to represent or indeed embody the international community, then it has to be the General Assembly of the UN. The General Assembly not only has subsidiary competence in the field of collective security, it has primary competence in issues of human rights.⁴⁹ Claims to intervene in Kosovo to protect human rights would thus have all the attributes necessary for the Assembly to grant authority, though only if it was convinced by a two-thirds majority of NATO’s case.⁵⁰

Debates over the competence of the General Assembly to recommend military measures to be taken when the Security Council has failed to exercise its primary responsibility for collective security, tend to be clouded by question marks

⁵⁰ Abstentions do not count as votes, so the required number of votes in favour of military action may not be as high as thought: see F.L. Kirgis, International Organizations in their Legal Setting (2nd edn, St Paul Minn.: West Publishing, 1993) 213.
over the legality of the Uniting for Peace Resolution adopted by the General
Assembly in 1950. The immediate reason for the adoption of the Resolution
was the return, in August 1950, of the Soviet Union to the Security Council,
leading to the discontinuation of the Council as the body dealing with Korea.
In fact the Assembly had adopted an ‘enforcement’ resolution on Korea after the
Soviets had returned to the Security Council but before the Uniting for Peace
Resolution was adopted.

However, the reasons for Uniting for Peace went beyond Korea, in that the
Western influenced majority in the General Assembly at the time was also of the
view that the frequent casting of the Soviet veto during the period 1946–50 was
an abuse of that right, and that the ideal of Great Power unity at San Francisco was
no longer attainable. The Western states wanted an alternative form of collective
security, based not on permanent member agreement in the Security Council,
but on the basis of the will of the majority in the Assembly. Such a concept of
collective security, whilst opening up the potential for economic and military
actions against transgressors, also had the potential, in theory, for allowing the
General Assembly to authorize military action against one of the permanent
members. A more likely scenario would be for the Assembly to authorize military
action that would affect the interests of a permanent member. It may be because
this system of collective security was potentially dangerous that the resolution
restricted the Assembly’s power to recommend military measures to the most
flagrant violations of international peace, namely breaches of the peace or acts of
aggression, and did not expressly permit the Assembly to take such measures as a
response to threats to the peace.

The Soviet Union objected strongly to the Resolution; in particular it argued
that it violated the Charter requirement that coercive power was granted solely
to the Security Council. In 1962, the International Court in the Expenses case
stated that ‘action’, which is the preserve of the Security Council, refers to
coercive action but it failed to state whether this excluded the Assembly from
recommending coercive measures. At some points the Court suggested that
‘action’ is restricted to mandatory, coercive action ‘ordered’ by the Security
Council. In other words the Assembly did not appear to be barred from
recommending enforcement action as part of its significant responsibility for
the maintenance of peace as recognized by the Court. Furthermore, despite
the wording of the Uniting for Peace Resolution, there appears to be no cogent
argument against allowing the Assembly to recommend military measures to
combat threats to the peace.

53 GA 301st plen. mtg, 1950.  54 Art 11(2) of the UN Charter.
56 S.D. Bailey and S. Daws, The Procedure of the UN Security Council (3rd edn, Oxford:
However, when looking at the issue from the perspective of the ban on the use of armed force, a rule of *jus cogens* from which no derogation is allowed, doubts may be cast on the legality of the Uniting for Peace Resolution and the power of the Assembly to recommend military measures. The exceptions to article 2(4) are explicitly stated in the UN Charter to include only action in self-defence under article 51 of the UN Charter and military action authorized by the Security Council under articles 42 or 53. To state that the General Assembly can authorize military action arguably creates a third exception, which would appear to be contrary to the *jus cogens* in article 2(4). However, the Security Council is authorizing military action on behalf of the UN and so the exceptions to the ban on force are those undertaken in legitimate self-defence and those authorized by the UN. The question of which organ within the UN authorizes them is an internal issue and does not affect the legitimacy of UN action *vis-à-vis* a transgressing state. The internal issue can be resolved in favour of both organs having the ability to authorize military action, given that the Assembly effectively has all those recommendatory powers possessed by the Council, albeit at a supplementary level of competence.

The Uniting for Peace Resolution, whereby the Assembly can be activated in the face of a deadlocked Security Council by a procedural vote in the Council that is not subject to the veto, has been used in the past to gain UN authority for innovative military actions. In the face of a military intervention by two permanent members in the Suez crisis of 1956 and, more relevantly, in the face of a threat to the peace in the Congo in 1960 which was in a state of collapse, the Security Council, unable to take substantive action itself due to the veto, transferred the matter to the Assembly. The Assembly duly became the organ of authority in the case of UNEF, a traditional peacekeeping force, and temporarily in the case of ONUC, which acted in a more muscular fashion. Although it may be argued that these two operations were more ‘peacekeeping’ than ‘enforcement’, and thus are not direct precedents for seeking an enforcement mandate for an intervention in Kosovo, the Congo operation came very close to enforcement. In addition, the General Assembly had, even before the adoption of the Uniting for Peace Resolution, become involved in the Korean enforcement operation. In fact the Assembly made a substantial contribution to UN action in Korea in 1950 by passing a resolution which allowed the UN force to continue its operations to establish ‘a unified, independent and democratic government of Korea’ after the Security Council had been deadlocked by the return of the Soviet representative. This resolution was seen as endorsing General MacArthur’s crossing of the 38th parallel and so can be classified as authorizing enforcement action. The British Foreign Secretary, Ernest Bevin, who was instrumental in the

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57 *Expenses* case, 168.
58 Arts 10 and 14 of the UN Charter.
60 But see *Expenses* case, 177.
61 GA Res. 376, 7 Oct. 1950.
It is somewhat ironic that a procedure advocated by Western states in 1950 was conveniently forgotten in the case of the Kosovo crisis in 1999. The cumbersome nature of convening an emergency special session of the Assembly is no real excuse given that NATO first threatened to use force without express authority in October 1998. The matter could have been put forward before the Assembly during its 53rd annual session. Indeed, the Assembly did consider the situation of human rights in Kosovo and adopted a resolution on 9 December 1999 that was very critical of the violations of human rights and international humanitarian law by the FRY, and was supportive of the demands made by the Security Council. Although adopted against a background of a reduction in the oppressive actions carried out by the FRY forces in Kosovo, this still represented an opportunity for NATO to seek authority for its airstrikes.

It may be argued that in the Kosovo crisis, as with Iraq in 1991, the Security Council was failing to take the necessary military action to combat breaches of Security Council resolutions, and in the face of situations that clearly constituted threats to the peace. In these circumstances it was breaching the trust put in it by member states when they established the United Nations. Assuming that the Security Council was being blocked by an illegitimate threat of the veto in a situation that clearly warranted Security Council authorized military action, it is still not legally permissible for states to take it upon themselves, whether in the forum of another organization or not, to enforce those resolutions. Such a contention presumes that states had these powers before they ‘collectivized’ them in the Security Council, which is very doubtful. It also ignores the fact that legally speaking they must be expressly returned or granted to them by the UN. Furthermore, when the UN Charter speaks of the Security Council having ‘primary responsibility’ to maintain or restore international peace and security, it is recognizing that the General Assembly, not states or organizations acting outside the UN, has significant secondary responsibility in the field of peace and security, which may be invoked when the Security Council is unable to act. Indeed, when combined with its undoubted competence in matters of human rights and its legitimate claim to represent the international community, the General Assembly was the natural alternative when the Security Council was deemed to have failed to take adequate action in the face of repression by the FRY. The need for the authority of the UN is made graphically clear by Jules Lobel and Michael Ratner who argue that ‘warfare is of limited utility as a means

63 GA Res. 53/164, 9 Dec. 1998. Adopted by 122-3-34. Russia voted against the resolution and China abstained. The Russian vote against was explained in the GA Third Committee debate on the draft on the basis that the resolution did not sufficiently respect the territorial integrity of the FRY: UN Press Release GA/SHC/3511, 18 Nov. 1998.
of solving complex, long-standing, underlying problems; that a world order that allows individual or coalitions of nations to deploy offensive military might for what they deem are worthy causes amounts to anarchy—these perils require that force be only used as a last resort as determined by a world body’.⁶⁴

Although Lobel and Ratner see the Security Council as that world body, it is argued above that the world body is the UN, which acts normally via the Security Council, but exceptionally via the General Assembly. If the Security Council were unable to act because of legitimate concerns that the situation does not require it to exercise its primary responsibility to authorize military action, then it would be unconstitutional for the Assembly to have exercised its competence. However, if there is a genuine threat the peace, breach of the peace or act of aggression so dangerous and overwhelming that it requires a military response then the Assembly is entitled, indeed obliged, to act. In the Kosovo crisis, the Security Council had determined there to be a threat to the peace, and there was strong evidence of massive repression and crimes against humanity. However, instead of pushing the matter before the Security Council to see if Russia or China would actually veto a resolution authorizing the bombing, it was simply assumed that it would be the case. This appears to be a correct assumption, although it may be because Russia in particular wanted to negotiate a less volatile and more humane military intervention than bombing. Furthermore, to have put a resolution before the Council and have it vetoed would then have freed NATO states to put forward a procedural resolution before the Council transferring the matter to the General Assembly, where a vote on the proposed NATO action should have been held. Assuming that such a request for authority would have won both a procedural vote in the Security Council and a substantive vote in the General Assembly, NATO then would have had a sound legal basis upon which to launch its air strikes.

Why NATO did not follow this course remains a matter of conjecture since, at least on the surface, it does not appear to have been on the agenda. Three reasons may have been pertinent. First of all a fear that the method of military action being put forward (bombing) would not be acceptable to two-thirds of the membership. Bombing in the name of humanity may be a cause for concern for the international community. The main reason why this was the only option on the table for NATO was ‘a desire, understandable in itself, to minimize NATO casualties’.⁶⁵ Secondly, securing UN authority would have created an expectation, though not a legal obligation, that NATO would launch military action thereby restricting NATO’s freedom of choice. Thirdly, a fear that the use of the General Assembly to sanction military action would set a dangerous precedent and could be used against NATO states in the future. This ignores the fact that


the precedents for securing Assembly authority are already there, they have simply been conveniently forgotten; it also ignores the fact that bombing without any UN authority is an even more dangerous precedent.

5. Regional Autonomy?

Despite the Assembly having supplementary powers, the UN system is still dominated by the Security Council, a body often criticized for the legitimacy of its decision-making processes.\(^6\) Can the authority of the UN be undermined by the undoubted selectivity and lack of representation in Security Council decision-making? Furthermore, does this signify that the failure to take military enforcement measures by the Council allows states or regional bodies to take action in its stead—as occurred in the case of NATO’s military enforcement action to bring an end to the repression in Kosovo in 1999? There seem to be some implications of this type of approach in the 1999 Security Protocol of ECOWAS,\(^67\) the 2000 Constituent Treaty of the AU,\(^68\) and the EU’s Security Strategy of 2003.\(^69\) Claims to take military action in these documents can be interpreted very widely indeed, and yet they are subject to much more muted criticism when compared to the US claims to use force in a wide range of situations in the National Security Strategy or Bush Doctrine of 2002. It seems that they have greater legitimacy because they were adopted by regional organizations representing the collective view of groups of states.

Could it not also be argued that either the European Council of twenty-seven countries or the NATO Council of twenty-six states acting by consensus is more representative than the UN Security Council of fifteen? In answer it must be pointed out that the European Council represents European states


\(^67\) See arts 3(a), 22(c) and 25(c). Art 22(c) provides for ‘humanitarian intervention in support of humanitarian disaster’.

\(^68\) Art 4(h) provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. However, it is worth noting that in the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, there are provisions that show greater deference to the UN Charter rules. Art 17(1) provides that ‘in the fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate closely with the United Nations Security Council, which has primary responsibility for the maintenance of international peace and security’. Art 17(2) further states that ‘where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union’s activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security’.

\(^69\) 12 Dec. 2003. At 7 the Strategy states that ‘we should be ready to act before a crisis occurs’, tackling such threats not ‘by purely military means’.
only, while the Security Council, for all its defects, represents the international community.⁷⁰ At the UN’s founding constitutional moment in 1945, it was the international community as a whole creating something unique, that only the international community (all states acting together in another constitutional moment) could subsequently take away. The founders also established fundamental universal rules such as the non-use of force, which can only remain valid if they are ultimately regulated by universal organizations. This signifies that only the UN can authorize any derogation from the prohibition of the use of force beyond a state’s inherent right of individual or collective self-defence. Regional self-authorization would be subject to too much abuse. Indeed, the likelihood of competing regional police forces would be great. Consequently, instead of having universal rules governing the use of force, there would emerge potentially conflicting regional rules.

Nevertheless, the universal organization is in need of significant improvement. The problem of legitimacy in the Security Council signifies the need for either a more representative and accountable Council exercising its primary responsibility for peace and security in a proactive consistent manner, or a re-invigoration of the subsidiary powers of the General Assembly. However, weaknesses in the universal organization do not signify that regional organizations can step in to fill the gaps, at least in matters of military enforcement. The international community created a universal organization to police universal rules, something not possessed by individual states, or even non-universal organizations. Only the international community as a whole could take this away. Until that happens, we are stuck with the Security Council, currently with its in-built selectivity, and a very limited Assembly with subsidiary powers to recommend enforcement measures that can be exercised in exceptional circumstances.

But if the UN High Level Panel’s recommendations of late 2004 are adopted there should emerge a more representative, more accountable, Security Council concerned with upholding fundamental rules of international law. The most significant of the Panel’s recommendations would remove some of the most delegitimizing selectivity by endorsing:

the emerging norm that there is a collective, international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁷¹

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⁷⁰ Art 24(1) of the UN Charter.

⁷¹ From Report of the High-level Panel on Threats, Challenges and Change (UN, 2004), ‘A More Secure World: Our Shared Responsibility’, recommendation 55, see also 56, 73–81. See further the Report of the Secretary General, ‘In Larger Freedom: Towards Security, Development and Human Rights for All’ (UN, 2005), para 125 of which states: ‘As to genocide, ethnic cleansing and other such crimes against humanity, are they also not threats to international peace and security, against which humanity should be able to look to the Security Council for protection?’ See also para 126.
Unfortunately, the inability of the Security Council to deal with the crimes against humanity being committed in the Darfur region of Sudan\(^72\) from 2003 onwards is evidence of the continued failure of the Council to take action in all cases of serious violations of international law. The smokescreen sent up by its reference of the matter to the International Criminal Court in March 2005,\(^73\) and the inadequacy of the AU force and its replacement AU/UN force, should not distract from the fact that the Council has failed to prevent the crimes against humanity being committed. An investigation ordered by the UN’s Human Rights Council in 2007 strongly argued that the responsibility to protect was applicable.\(^74\)

The version of the responsibility to protect adopted by world leaders at the UN’s World Summit in September 2005 shows, by its wording, that selectivity and discretion will still be preserved for the Security Council even in cases of gross human rights violations. Member states declared ‘we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.\(^75\) Thus by locking up the rules on the use of force on the matter of enforcing fundamental rules of international law in the Security Council, the drafters created an inherently selective and weak system. To unlock those rules in favour of regional organizations, however, may prove to be more disastrous. The better course is for a reformed and legitimate Council to emerge out of the current pressure for change,\(^76\) while rediscovering the Assembly’s subsidiary competence.

### 6. Britain and the Bombing Campaign

As early as March 1998 Prime Minister Tony Blair gave warning of future British involvement in Kosovo when telling the House that the Foreign Secretary was being dispatched to speak to President Milosevic:

That shows again the importance of the role that Britain can play, not merely in Bosnia but in the whole region in stabilising it, bringing peace and attempting to prevent conflict growing. I have no doubt that if there is a substantial conflict [in Kosovo] it will have an impact on us and on the whole of Europe as well as on that part of the world.\(^77\)

\(^72\) That this level of abuse has occurred is determined by a commission set up by the Council itself. See report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur (UN Doc. S/2005/60).

\(^73\) SC Res. 1593, 31 March 2005.


\(^75\) GA Res. 60/1, 24 Oct. 2005.


\(^77\) *Hansard* HC vol 307, col 1055, 4 March 1998.
The Foreign Secretary, Robin Cook, reported to the House on his mission to Belgrade which was undertaken against the background of Serbian security operations around Dreniza where fifty-one people were killed. ‘It is simply not credible that all those killed were terrorists’, given that less than half the corpses were men of military age—most were women and children.

I made it clear that I [visited Belgrade] not just on behalf of Britain, but as the presidency of the European Union. I regret to tell the House that President Milosevic sought to present the events in Kosovo as a legitimate police response to terrorism. Britain’s record against terrorism is firm and resolute. We strongly condemn the use of violence for political objectives, including the terrorism of the self-styled Kosovo Liberation Army. Terrorism, however, cannot be used as a pretext for the indiscriminate use of force against a civilian population.

The Foreign Secretary then outlined the approach of the six-nation Contact Group (UK, US, Russia, France, Germany and Italy), which was based primarily on sanctions, monitoring and accountability to the ICTY for war crimes. Use of military force, though raised in the ensuing discussion in the House was not at this stage an option,78 a position that seemed to be supported by Ministerial answers to the Foreign Affairs Committee in March 1998.79 The possibility of NATO involvement soon started to enter into House of Commons’ debates though as the situation quickly worsened.80

The incremental involvement of NATO in Kosovo, first through threats of force and then on 23 March 1999 by the use of force, meant that there was a significant opportunity for parliamentary involvement, though there was no full debate and vote before the bombing campaign began. On 13 October 1998 the NATO Council authorized activation orders for airstrikes aimed at coercing the regime in Belgrade to withdraw forces from Kosovo, and to comply with Security Council Resolution 1199. In the House of Commons the Foreign Secretary, Robin Cook, made a statement regarding this on 19 October, declaring that the commitment of President Milosevic to withdraw would not have been secured ‘if the diplomatic efforts backed by the contact group had not also been backed by the credible threat of military action by NATO’.81 There was very little debate in the House, with the opposition expressing reserved support for the government’s policy.

Interestingly, the government first spelled out its legal justifications for its threats of force on 16 November 1998 in the House of Lords. The government Minister, Baroness Symons, stated although there was ‘no general doctrine of humanitarian necessity in international law’ there were cases where limited uses of force were justifiable ‘in support of purposes laid down by the Security

78 Hansard HC vol 308, cols 317–8, 10 March 1998.
79 Foreign Affairs Committee, Minutes of Evidence, 19 March 1998 (Lloyd) (HC 649-i).
80 Hansard HC vol 311, cols 460–1, 20 April 1998 (Menzies-Campbell, Cook).
Council but without the Council’s express authorisation when that was the only means to avert an overwhelming humanitarian catastrophe.\(^{82}\) The Foreign and Commonwealth Office reinforced this argument in its statement on the legal authority of proposed military action given in evidence before the Foreign Affairs Select Committee on 26 January 1999 namely that ‘there may also be cases of overwhelming humanitarian necessity where, in the light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe’.\(^{83}\)

With parliamentary support for the threat of force seemingly there, in many ways it was easier to carry that support forward for the use of force, particularly after the House’s attention was drawn to the killings at Racak and Rugovo in January 1999, both in violation of the ceasefire agreement brokered by US envoy Richard Holbrooke in October 1998.\(^{84}\) On 24 February 1999, the Foreign Secretary reported on the parlous state of the negotiations conducted at Rambouillet in France, which gave both sides until 15 March to conclude an agreement. In so doing he stated that the NATO threat of force remained in place and that use of force would become a reality if there were major violations of the cease-fire by Belgrade, and ‘to secure compliance from Belgrade’ in the negotiations.\(^{85}\) There were limited criticisms in the lower house directed at the lack of Security Council authorization, and the government’s overriding desire to maintain the credibility of NATO. The effectiveness of the proposed use of force—bombing—was also called into question.\(^{86}\)

On 23 March 1999 with the Belgrade talks brokered by US envoy, Richard Holbrooke, failing, Prime Minister Tony Blair announced that ‘Britain stands ready with its NATO allies to take military action’ with ‘a minimum objective to curb continued Serbian repression in Kosovo in order to avert a humanitarian disaster’. At this stage he received the ‘Opposition’s wholehearted support for the British forces who might have to take part in the NATO action’ from the Leader of the Opposition, William Hague. Both party leaders agreed that the cause of the problem was President Milosevic. The Prime Minister expressed his satisfaction at this support saying that ‘it is important that we in this House take a united view’. When pressed about the possibility of deploying ground forces, the Prime Minister expressed the ‘clear objective to curb Milosevic’s ability, through his military capability, to engage in . . . repression. That is our objective, and we shall carry on until it is fulfilled’.\(^{87}\) Criticism of the proposed bombing came from isolated members of the Conservative party, the left of the Labour

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\(^{82}\) Hansard HL vol 594, cols 139–40w, 16 Nov 1998. This was oft-repeated in the upper house for example vol 600, cols 436–7, 29 April 1999 (Symons).

\(^{83}\) Foreign Affairs Committee, Kosovo, Minutes of Evidence, 26 Jan. 1999, 1 (HC 188-i).

\(^{84}\) Hansard HC vol 323, col 565, 18 Jan. 1999 (Cook); vol 324, col 597, 1 Feb. 1999 (Cook).

\(^{85}\) Hansard HC vol 326, cols 409–12, 24 Feb. 1999 (Cook).

\(^{86}\) Ibid., cols 409–12 (Benn and Dayell).

\(^{87}\) Hansard HC vol 328, cols 161–6, 23 March 1999.
party, and the Scottish nationalists, and took different forms, principally that
the bombing would be a violation of Yugoslav sovereignty and a breach of inter-
national law, though others cast doubt on the likelihood of bombing being
successful by itself.\textsuperscript{88}

Tony Benn, MP for Chesterfield, questioned the legal basis of the proposed
military action, lacking as it did any express authority from the United Nations.
He also criticized the government for not allowing a proper debate in parliament:
‘to treat the House as though it were just an audience for “Newsnight” on so grave
a matter is simply below the standard that we are entitled to expect’. Tony Blair
responded by saying that his statement to the House ‘where I can be questioned,
not the least by my right hon. friend’ was hardly an interview on the television.
He also pointed out that the Serbs had violated two key resolutions of the Security
Council (1199 and 1203), which had demanded an end to the repression and a
withdrawal of Serbian forces. ‘The plain fact of the matter is that we have to act
now to avert the humanitarian disaster’, and so a full debate would come later.\textsuperscript{89}

The launch of airstrikes was announced to the House on 24 March 1999 by
the Deputy Prime Minister John Prescott. The lack of express UN authority
for the operation did not seem to present a problem for the bulk of the House.
As previously stated Prescott declared that the NATO action was supported by
all nineteen members of NATO and supported ‘the political aims of the inter-
national community’, set out in Council Resolutions 1199 and 1203, both of
which had been breached by Milosevic. The action was ‘justified as an exceptional
measure to prevent an overwhelming humanitarian catastrophe’. Furthermore
he warned the members of the Yugoslav army and other forces ‘who may be in
receipt of orders to repress the Albanians in Kosovo’ that individual responsibil-
ity will ensue if they breach international law, with possible prosecution by the
ICTY.\textsuperscript{90}

The statement shows the UK placing reliance for its own actions on a con-
troversial legal proposition permitting humanitarian intervention in support of
Security Council resolutions, while at the same time fully supporting the enforce-
ment of established norms of international humanitarian law against Serbian
forces. The presence of Security Council resolutions which clearly indicated that
the situation was a threat to the peace, and the consensus in NATO on the use
of force, were the two international institutional pillars on which the govern-
ment built this new form of intervention. This was sufficient to give the action
legitimacy. The opposition again gave its ‘full support’ to the action.\textsuperscript{91} Political
unity was shown by a visit to British forces involved in the Kosovo campaign
on 29 March 1999 by the Defence Secretary (George Robertson), the Shadow
Defence Secretary, and the Defence Spokesman for the Liberal Democrats.\textsuperscript{92}

\textsuperscript{88} Ibid., cols 167–9 (Tapsell, Benn, Salmond).
\textsuperscript{89} Ibid., cols 168–9.
\textsuperscript{90} Hansard HC vol 328, col 484, 24 March 1999.
\textsuperscript{91} Ibid., col 486 (Lilley).
\textsuperscript{92} Hansard HC vol 328, col 1204, 31 March 1999 (Robertson).
Individual members of the Commons criticized, *inter alia*: the lack of clear legal authority for the launch of the bombing raids, the lack of express approval by the House of Commons, the anger caused in Russia, the lack of action against the KLA, the counter-productive nature of bombing, and later the extent of the atrocities being committed in Kosovo. However, in general contributions of MPs took the form of statements supporting the action and the RAF pilots, although some were concerned about the lack of a long-term strategy. The overall view was expressed by Labour member, Bruce George, who asked ‘the doubters what consolation it would be to a Kosovan running away from being killed to be able to say that the British Government did not act, but were upholding a precise, legalistic definition of international law? We can be proud of what we are doing’. During the debate the Deputy Prime Minister rightly claimed that ‘there is solidarity for our purpose and unity in support of our service people’.

In the debate on the following day (25 March), the Foreign Secretary Robin Cook, when pressed again on the legality of the bombing stated more generally that ‘we are acting on the legal principle that the action is justified to halt a humanitarian catastrophe’. This led to a critical statement by the Shadow Foreign Secretary, Michael Howard, which while expressing support for the service people engaged in the action, pointed out that ‘one of the requirements of a just war is that the suffering that is an inevitable consequence of military action should be less than the suffering that the action prevents’. The remainder of the debate focused on the legal issue, and was characterized by lack of agreement as to whether the action was justified by Security Council resolutions or under a wider doctrine of humanitarian intervention, or a combination of both. The question of whether there was a duty to intervene was also raised, in which case it was argued there were numerous other just causes around the globe. The answer the government gave was that this was a humanitarian catastrophe in Europe, which affected British and NATO interests. There was insufficient dissent in the House to allow for a vote on the matter, despite Tony Benn pressing for one.

A second full debate following the commencement of the bombings was held on 19 April and although there was some discussion of holding a substantive vote on the issue, those in favour had insufficient support to force any kind

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93 *Hansard* HC vol 328, cols 487–92, 24 March 1999 (Benn, Hogg, Daylell, Galloway, Smyth); vol 328, col 574, 25 March 1999 (Clark).

94 *Hansard* HC vol 328, col 489, 24 March 1999 (George).

95 Ibid., col 493 (Prescott).

96 *Hansard* HC vol 328, col 541, 25 March 1999. See also statement by Defence Minister George Robertson (col 617). See further the statement by Robin Cook before the Foreign Affairs Select Committee, 14 April 1999, para 154 (HC 188-ii).


98 Ibid., col 619.
of vote.\textsuperscript{99} The foreign affairs spokesman for the Liberal Democrats, Menzies-Campbell, made a forceful statement in support of Tony Benn:

If we are to ask our young men, and increasingly our young women, to risk their lives in the furtherance of political objectives, surely they ought to know that they have the endorsement of the House of Commons.\ldots The right hon. Member of Chesterfield (Mr. Benn) has, of course, a long history of endeavouring to reform the prerogative power, and I have some sympathy with that point of view. It seems to me that, at a time when we are engaged in remarkable constitutional reforms in relation to Scotland and Wales, the adoption of the European convention on human rights into our domestic law\ldots there is time for a proper examination of that issue.\textsuperscript{100}

These initial debates reveal the importance of two factors for the government in taking its decision to bomb Serbia as part of a NATO operation. First that the action is taken, or is at least represented as being taken, on behalf of the ‘international community’. This concept has been much criticized in international legal and political theory relying as it does on a Grotian rationalist conception of the world.\textsuperscript{101} However, its revitalization by the British government was necessitated by its reliance on a form of humanitarian intervention, taken ‘in support of’ UN resolutions. The unanimity of NATO, shown at the organization’s 50th summit held in Washington in April 1999,\textsuperscript{102} was combined with the edicts of the Security Council, and later the G8,\textsuperscript{103} to give the action the necessary communitarian pedigree. Reliance is also placed on the fact that the Security Council did not condemn NATO’s bombing;\textsuperscript{104} indeed, it was argued that the vast majority of States on the Council (with the main exceptions of China and Russia) supported it.\textsuperscript{105} The lack of a clear legal basis in the NATO treaty does not appear to have been any cause for concern at the time, presumably on the grounds that if one state has the right of humanitarian intervention, then even more so will nineteen countries acting through a military alliance.

Although the government attempted to portray the action as having a cast-iron legal basis, the reality is that the bombings were a challenge to the orthodox view that the UN Charter does not allow for humanitarian intervention without

\textsuperscript{99} \textit{Hansard} HC vol 329, col 668, 19 April 1999.  
\textsuperscript{100} Ibid., col 590.  
\textsuperscript{102} \textit{Hansard} HC vol 330, col 21, 26 April 1999 (Blair).  
\textsuperscript{103} G8 support was relied on at a later stage, see \textit{Hansard} HC vol 331, col 885, 18 May 1999 (Cook). On 6 May 1999 the G8 laid down the general principles upon which a political solution to the Kosovo crisis would be based. This brought Russia on board but it did not persuade Russia (or China) that NATO’s bombings were lawful. See Security Council meeting at which resolution 1244 was adopted authorizing KFOR: SC 4011st mtg, 10 June 1999, 7 (Russia), 8–9 (China).  
\textsuperscript{104} See SC 6699th mtg, 26 March 1999 when a Russian draft resolution (UN Doc. S/1999/328) demanding a cessation of the use of force against the FRY was defeated, with only China, Russia and Namibia voting for it.  
\textsuperscript{105} \textit{Hansard} HC vol 328, col 615, 25 March 1999 (Robertson); vol 329, col 579, 19 April 1999 (Cook).
the express authority of the Security Council. A precedent for this new form of humanitarian intervention could have been drawn from the western intervention in northern Iraq in 1991, taken in support of, but not authorized by Security Council Resolution 688. This was indeed mentioned by the former Conservative Defence Minister, Tom King, during the Kosovo debates.\textsuperscript{106}

The second factor relied upon by the government was that the action, at least initially, had the apparent overwhelming support of the House of Commons, though this was not put to a vote, despite attempts by dissenters. There was a much greater effort on this occasion to inform the House and to ensure it was behind the action. There was dissent on the legal basis, and criticism of the strategy (increasingly in the latter case from the opposition),\textsuperscript{107} but the government managed to carry sufficient support in the House for the duration of the war. However, the unforeseen length of the bombing campaign did cause some problems for the government in maintaining this support. When parliamentary support began to falter, the government relied more heavily on claiming that public opinion was on its side,\textsuperscript{108} as well as support from the Kosovan Albanians themselves,\textsuperscript{109} whose suffering seemed to be exacerbated by the NATO action, although this alleged effect of the bombing was vehemently denied by the government.\textsuperscript{110} Thus although the UK’s contribution to the war was conducted and led by the executive, it was only able to maintain its grip on the action while it had a large measure of parliamentary support. The government’s claims as to the amount of degradation being caused to the Yugoslav army were clearly important in keeping the House on its side. For instance, the Defence Secretary made claims in the House on 22 May 1999 that twelve Yugoslav tanks were destroyed, and on 25 May a further five tanks were destroyed, as part of a ‘very effective air campaign’.\textsuperscript{111} During the air campaign the RAF flew 1,008 sorties, and delivered 1,618 strikes (overall NATO figures were 10,484 sorties and 38,004 strikes). The RAF sustained no losses.\textsuperscript{112} The evidence of the impact of NATO airstrikes on Serbian forces suggests that the government’s claims about the level of destruction were exaggerated, although they may have been honestly made.\textsuperscript{113} Nevertheless, the bombing campaign did persuade President Milosevic to withdraw his forces from Kosovo.

\textsuperscript{106} Hansard HC vol 328, col 553, 25 March 1999.
\textsuperscript{107} Hansard HC vol 329, cols 21–3, 13 April 1999 (Hague, Ashdown); vol 329, col 583, 19 April 1999 (Howard); vol 330, col 24, 26 April 1999 (Hague); vol 331, col 891, 18 May 1999 (Howard).
\textsuperscript{108} See Foreign Affairs Select Committee, 14 April 1999, para 158 (Cook) (HC188-ii). See also the Labour Chairman of the Commons Defence Select Committee, Bruce George in P. Wintour, ‘Onslaught on Belgrade May Avert Split’, The Observer, 4 April 1999, 20.
\textsuperscript{109} Hansard HC vol 328, col 1204, 31 March 1999 (Robertson).
\textsuperscript{110} Ibid., col 1212 (Robertson). See also the Foreign Secretary before the Foreign Affairs Select Committee, 14 April 1999, para 106 (HC188-ii).
\textsuperscript{111} Hansard HC vol 332, col 255, 26 May 1999 (Robertson).
\textsuperscript{113} S. Castle, ‘Doubts still linger over NATO’s war evidence’, The Independent, 17 Sept. 1999, 16.
7. Democratic Accountability

In terms of democratic accountability, the House of Commons certainly was not simply a rubber stamp for the executive’s actions over Kosovo. Indeed, it seemed to be informed in a way not seen before in times of war. It debated the issue regularly during the bombing and questioned the Prime Minister, Foreign Secretary and Defence Secretary fairly closely.¹¹⁴ Furthermore, the government was not only held accountable before the House, but also before the Foreign Affairs Select Committee of the House, which for example on 14 April 1999 questioned the Secretary of State for Foreign Affairs very closely on NATO errors, legality, lack of preparation for the influx of refugees, and the lack of preparation for a ground force which might be necessary if the bombing failed. On being questioned about the wisdom of stating that a ground force was not on the agenda, the Foreign Minister replied that he operated ‘in a democratic environment in an alliance with 19 democratic states’, which meant that no unilateral statement on the use of a ground force was possible,¹¹⁵ though it turns out that the British government was at the fore of secretly planning a ground campaign.¹¹⁶ The Chairman of the Select Committee claimed, with some justification, that the questioning of the Foreign Secretary had ‘been a most helpful exercise in democratic accountability at a critical time’.¹¹⁷ Nevertheless, despite the frequent public debates on the matter there is some truth in the criticism that parliament was being treated as some kind of ‘press conference’, in which MPs could ask questions but could not alter the course of the war, nor influence government strategy.¹¹⁸

The schisms that were beginning to open in parliament were closed when the Yugoslav authorities agreed to withdraw and accept NATO’s conditions early in June 1999 after eleven weeks of NATO bombing. The Prime Minister’s report to the House on these developments and the imminent embodiment of the peace plan in a Security Council resolution,¹¹⁹ including KFOR operating under chapter VII of the Charter, was welcomed by the opposition which supported the continued bombing until the verified withdrawal of Serb forces.¹²⁰ In a sense the debate then started over again, revolving around the role of British troops in KFOR. In essence the debates on the post-conflict stage initially took a similar course in the House, though the impression was that with Security Council approval given on this occasion, dissent was muted. The clear international legal basis of KFOR seemed to have reduced the critical attitude that the House

¹¹⁴ By 18 May 1999 there had been three full day debates on the NATO military action, and five statements to the House: Hansard HC vol 331, col 965, 18 May 1999 (Robertson).
¹¹⁵ Foreign Affairs Select Committee, 14 April 1999, para 146 (HC 188-ii).
¹¹⁷ Foreign Affairs Select Committee, 14 April 1999, para 168 (HC 188-ii).
¹¹⁸ Hansard HC vol 329, col 579, 19 April 1999 (Benn).
¹¹⁹ SC Res. 1244, 10 June 1999.
¹²⁰ Hansard HC vol 332, cols 464–6, 8 June 1999.
adopted towards the bombing by NATO. The initial debates seemed to be more as to the effects of the Resolution 1244, the logistics of the operation, the role of the Russian contingent, the disarming of the KLA, and the security of British military personnel, rather than the legitimacy of the operation.¹²¹ However, in the longer term, debate ensued in the lower house as to the ’precedential’ nature of the initial bombings of Kosovo.¹²²

Further detailed scrutiny of the UK’s role in the Kosovo crisis ensued before the House of Commons Select Committees on International Development, Defence and Foreign Affairs. Of particular interest to the current project are the reports of the latter two.¹²³ The Defence Committee’s report was largely on lessons learned from the conflict, though it did criticize the threat and then the use of force by NATO as being more about its credibility as an effective military organization than about military necessity, a criticism further compounded by the Alliance’s policy of bombing, the purpose of which was unclear in that it started as a means of preventing ethnic cleansing (for which the Committee thought it unsuitable) and then ended as a means of coercing Milosevic into compliance.¹²⁴

The Foreign Affairs Committee produced a very full report on 7 June 2000 after seeking evidence from a number of witnesses, including leading international lawyers. The report may be seen as a necessary democratic balance to the use of prerogative powers by the executive.¹²⁵ However, the longer-term impact of this report seems limited. It was even noticeable that coming over a year after the initiation of the bombing campaign, it did not catch the attention of the public, or more importantly the media, with only the isolated article realizing its significance.¹²⁶ As the report itself concluded as regards the problems facing the international community in dealing with the aftermath of the conflict: ‘[t]his is a formidable challenge which deserves the full support of the international community. We are concerned that the attention span of the international community is short’.¹²⁷ The same could be said of the vagaries of public concern, which was intensely focused on Kosovo in the lead up to and during the bombing campaign, but quickly moved on to other matters when Serbia withdrew its forces.

Interestingly, the Foreign Affairs Committee report contradicts some of the positions taken by the government during the bombings, positions that had the support of parliament at the time. The report ranged from the period before

¹²² See for example Hansard HC vol 340, col 372, 22 Nov. 1999 (Maples).
the conflict to the post-conflict situation and contained many critical findings.
Concentrating here on its review of the legality of *Operation Allied Force*, the Committee noted that while the government was confidently asserting the certainty of the international legal basis, the Committee’s view was that the operation was contrary to the UN Charter having received no UN authorization, neither from the Security Council nor had any recommendation been sought from the Assembly. Furthermore, it concluded that ‘at the very least, the doctrine of humanitarian intervention has a tenuous basis in current customary international law, and that this renders NATO action legally questionable’. This serious criticism was balanced by the finding that in the face of the threat of Russian and Chinese vetoes ‘the NATO allies did all that they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible’. However, given the other statements made in the Committee’s report it is clear that NATO did not go far enough in this regard, reflected in the conclusion that ‘NATO’s military action, if of dubious legality in the current state of international law was justified on moral grounds’. The Committee thus advocated that the UK argue for and support new principles to be adopted by the UN governing humanitarian intervention.¹²⁸

The Committee’s report was clearly very different from the position adopted and supported by the vast majority of MP’s during Operation Allied Force, bearing in mind that Select Committees are drawn from the membership of the House of Commons. The absence of strict party political control over the Select Committee may have a great deal to do with this divergence in opinion. While welcoming a more critical appraisal of the government’s actions, it seems to be a weakness in the UK’s system of accountability that this critique comes too late to affect the military operation in question, though its affects may be felt in the future. The government simply responded by reasserting its confidence in the legality of its actions.¹²⁹ By the time the Foreign Affairs Select Committee adopted its report in June 2000, the UK had already committed troops to combat threats to the peace in East Timor and Sierra Leone, leaving the report consigned to history.

In addition to questioning the government’s failure to put its case before the UN General Assembly, the Foreign Affairs Committee was also critical of the lack of democratic decision-making before parliament, where although there were plenty of discussions on Kosovo, there was no clear vote in favour of the action. The Foreign Affairs Select Committee report of 2000 did not purport to recommend a change in the prerogative powers of the executive to deploy troops. It did recommend however that the government ‘should take a substantive motion in the House of Commons at the earliest opportunity after the commitment of troops to armed conflict allowing the House to express its view, and allowing Members

¹²⁸ Ibid., paras 124–44.
¹²⁹ (1975–2001) UKMIL Part Sixteen.IV. item 80. See also item 83 (statement by Robin Cook, Foreign Secretary on 7 June 2000). See also his response to the Fourth Report (Cm 4825, Aug. 2000).
to table amendments’. The requirement that the government should win the vote over contrary proposals in the lower house would give ‘extra democratic legitimacy to military action’.¹³⁰ The report thus recognizes the need for proper parliamentary approval of such action, even if it had received authority from an international organization. In the case of Kosovo, where there is no clear authority, and the legal basis is arguable, there is an even greater need to have this clear expression of support. Such a requirement may also encourage a more critical attitude by parliament towards the government’s actions, rather than the supine attitude present in most debates on military deployment. The report fell short though of requiring that positive parliamentary approval be given prior to the government’s decision to deploy. It did, however, start a reform debate in parliament, which will be reviewed in chapter eleven.

8. Conclusion: the Future of Humanitarian Intervention

Despite the uncertain opinio juris in favour of a doctrine of humanitarian intervention in the build-up to and during the Kosovo crisis, the British government alone seemed to persist in its view that such intervention was justified in certain circumstances. Indeed, to its credit it tried to convince others of the merits of its approach. In 1999, after the Kosovo bombings and the withdrawal of Serb forces, the UK submitted to the UN Secretary General a ‘framework to guide intervention by the international community’. In a speech to the American Bar Association on 19 July 2000, the Foreign Secretary Robin Cook outlined six of the principles upon which intervention should be based. First, intervention should be reduced by more effective conflict prevention; second, armed force should only be used as a last resort; third, ‘the immediate responsibility for halting violence rests with the state in which it occurs’; fourth:

When faced with an overwhelming humanitarian catastrophe, which a government has shown it is unwilling or unable to prevent or is actively promoting, the international community should intervene. Intervention in internal affairs is a sensitive issue. So there must be convincing evidence of extreme humanitarian distress on a large scale, requiring urgent relief. It must be objectively clear that there is no practicable alternative to the use of force to save lives.

Fifth, ‘any use of force should be proportionate to achieving the humanitarian purpose and carried out in accordance with international law’; and sixth, ‘any use of force should be collective’. The latter signifies that the authority of the Security Council should be secured ‘whenever possible’, but if not then action by regional bodies such as NATO was sufficiently collective.¹³¹

¹³⁰ Foreign Affairs Select Committee Fourth Report, 7 June 2000, paras 165–6 (HC 28-I).
¹³¹ (1975–2001) UKMIL Part Sixteen.IV. item 82 (see also item 90).
The movement away from there being a right to intervene towards the argument that there is a responsibility or a duty to protect vulnerable populations has become part of the UN debate. However, the World Summit outcome document of 2005 was based on there being a responsibility to protect based firmly on the Security Council, not on other organizations. Herein is the key difference between the British approach and the consensus in the UN as a whole. The reality though is that humanitarian action is discretionary, whether under Security Council authority or under another collective guise. This is shown by the answer given by Robin Cook’s successor (Jack Straw) on 25 June 2002 in response to a question about the parlous state of the citizens of Zimbabwe under the brutal regime of Robert Mugabe:

If only it were possible simply by wishing for an international coalition to end the damage Mugabe is doing, it would be done. If it were possible to do ‘what happened in Kosovo’... it would be done. However, it is irresponsible to cite that example as a criticism of the Government and the international community and neither to rule it out nor rule it in. Everyone knows that the suggestion that we embark on a bombing campaign, as we had to do in Kosovo for 78 days, comes from fantasy land, and it would be deceiving the people of Zimbabwe to pretend otherwise.¹³²

Furthermore, the government’s claim that it has gained support for its doctrine,¹³³ is contradicted by Foreign Office statements that there has been a lack of support for the UK’s guidelines, illustrative of the ‘reluctance on the part of much of the international community to accept change in the abstract’.¹³⁴

Nevertheless, the government has expressed support, at least in abstract, for the emerging doctrine of the ‘responsibility to protect’ (known as R2P). For example in 2005, in the House of Lords the government was asked whether it was committed to the emerging R2P norm. In response the minister stated that it welcomed the recommendations of the UN’s High Level Panel of 2004 which were similar to the government’s proposals of 1999.¹³⁵ Whether this created any sort of legally binding commitment to intervene on the part of the British government was made clear by a minister’s statement before the House of Commons in 2007 that responsibility to protect remains a ‘political commitment rather than a legal obligation, but it is in the UK’s interests to make sure that this commitment holds’.¹³⁶

The very idea, consistently advocated by the British government as part of its support for humanitarian intervention/R2P, namely that humanitarian intervention should be limited to protecting the endangered civilians, is also

¹³³ See for example Han\(\text{sard}\) HC vol 419. cols 1234–6, 26 March 2004.
¹³⁴ Foreign Affairs Committee Seventh Report, Foreign Policy Aspects of the War Against Terrorism, 5 July 2004 (HC 441-ii).
¹³⁵ Han\(\text{sard}\) HL vol 670, col 56w, 7 March 2005.
¹³⁶ Han\(\text{sard}\) HC vol 461, col 254w, 4 June 2007 (McCartney).
undermined by the fact that NATO’s intervention in Kosovo produced a chain of events that resulted in Kosovo’s controversial declaration of independence from Serbia on 17 February 2008 thereby changing the very nature and make-up of the country being intervened in, and also leading to calls for independence for other putative micro-states, including the breakaway regions in Georgia. Security Council Resolution 1244 adopted in 1999 after the withdrawal of Serb forces, clearly reaffirmed the ‘commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’, as well as calling for ‘substantial autonomy and meaningful self-administration for Kosovo’.¹³⁷ The Resolution authorized an international civil presence (UNMIK) to promote the ‘establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo’.¹³⁷ It seems impossible to read this resolution as allowing for a unilateral declaration of independence by Kosovo as a form of ‘settlement’, in the absence of any enabiling Security Council resolution, which was not forthcoming.

For the Foreign Secretary, David Miliband, in explaining the UK’s recognition of the new state of Kosovo, to argue that Resolution 1244 does not preclude independence,¹³⁸ would seem to be another example of the British government reading a UN resolution in the face of its clear meaning—a technique that had already been used unconvincingly in the arguments put forward to justify the invasion of Iraq in 2003. Despite the huge controversy that this provoked, it seems the British government cannot resist the temptation to place reliance on unsupported interpretations, and furthermore to display immense hubris in claiming their correctness.

¹³⁷ SC Res. 1244, 10 June 1999.