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Aaron Schwabach

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THE LEGALITY OF THE NATO BOMBING OPERATION IN THE FEDERAL REPUBLIC OF YUGOSLAVIA

Aaron Schwabach†

On March 24, 1999, North Atlantic Treaty Organization (NATO) forces began bombing targets in the former Yugoslavia in an effort to end Yugoslavia's war against its ethnic Albanian population.[1] American, British and French forces under NATO command began bombing Serbian targets throughout Yugoslavia.[2]

A great deal of attention has been focused on the military and humanitarian effectiveness of the bombing campaign. At the time of this writing, it is impossible to determine whether the NATO strikes will have the desired effect.[3] Regardless of the outcome, an international event of this magnitude, involving three of the five permanent members of the Security Council (France, The United Kingdom, and The United States), is bound to have an impact on international law.

The purpose of this article is to provide an overview of the NATO action in the context of international law relating to the

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† Associate Professor of Law and Director, Center for Global Legal Studies, Thomas Jefferson School of Law; J.D., Boalt Hall, 1989; e-mail aarons@tjsl.edu.

[1] *See The West Versus Serbia*, ECONOMIST, March 27, 1999, at 49. For purposes of convenience in this article, the term "Yugoslavia" is used to refer to the Federal Republic of Yugoslavia [hereinafter FRY]. The use of this name does not reflect any acknowledgement of the validity of the FRY's claim to be the successor state to the former Yugoslavia. *See, e.g.,* Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?,* 23 DENV. J. INT'L L. & POL'Y 1 (1994). Where it seems appropriate, the geographic components of the FRY are referred to as Montenegro, Serbia, Kosovo, and Vojvodina. The latter two are currently part of the republic of Serbia; whether Kosovo should be a part of Serbia is, of course, the central issue in the conflict.

[2] *See The West Versus Serbia, supra* note 1, at 49; *see also* Bruno Simma, *Kosovo: A Thin Red Line*, 10 EUROPEAN J. INT'L L. 6 (1999) (a history of the political and legal events leading up to the NATO bombings).

[3] This article was written in March 1999. Events since that time have shown that the NATO campaign did, for the most part, achieve its objectives.

use of force. To that end, this article will examine the legality of the bombings under current international law, as well as the effect that the action may have on the development of international law.

I. SOURCES OF INTERNATIONAL LAW

Some, at least, of the sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice:

> international conventions; . . . international custom, as evidence of a general practice accepted as law; . . . the general principles of law recognized by civilized nations; judicial decisions; and the teachings of the most highly qualified publicists of the various nations . . . .[4]

For the most part, the sources of law listed in the statute (other than international conventions) can be grouped together under the heading of "customary international law,"[5] although this is to some extent an oversimplification. General principles of law have traditionally been seen as a third category of public international law. However, they can also be seen as "supplemental rules" or as a "secondary source of law."[6] Judicial decisions and the teachings of the most qualified publicists are merely a "subsidiary means for the determination of rules of law."[7] In any event, judicial decisions and, to the extent that a state actually observes them, general principles of law *are* state practice, and thus form the basis for normative expectations.

Customary international law, in contrast to treaty law, is derived from the practice of states as international actors. Cus-

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[4] Statute of the International Court of Justice, June 26, 1945, 59 Stat.1055, art 38(1). The Statute is silent as to which nations are to be considered "civilized."

[5] On the different approaches to the sources of customary international law, *see* W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984); *see also* Andrew W. Willard, *Incidents: An Essay in Method*, 10 YALE J. INT'L L. 21 (1984); W. Michael Reisman, *International Incidents: The Law that Counts in World Politics*, 10 YALE J. INT'L L. 1 (1988); Bowett, *International Incidents: New Genre or New Delusion*, 12 YALE J. INT'L L. 386 (1987); W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L. J. 133 (1987).

[6] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) cmt. l and reporter's note 7 (1987).

[7] Statute of the International Court of Justice, *supra* note 4.

tomary international law is perhaps best described as a set of normative expectations developed through observation of the actions of states.

II. INTERNATIONAL CONVENTIONS: THE UNITED NATIONS CHARTER AND THE NORTH ATLANTIC TREATY ORGANIZATION

All of the NATO member states are also members of the United Nations (U.N.). As members of the U.N., these five states are required to abide by the provisions set forth in the Charter of United Nations (U.N. Charter). The U.N. Charter permits states to use armed force against other states only in two situations: when required or permitted by a resolution of the Security Council,[8] or when the state is acting in self-defense.[9]

Article 2(4) of the U.N. Charter provides that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[10]

The NATO bombing is a "use of force against the territorial integrity" of Yugoslavia, if not against its "political independence," and therefore a violation of the U.N. Charter.

Pursuant to Chapter Seven of the U.N. Charter, the Security Council is given the authority to act in order to preserve peace and safety of the international community. The Security Council, although it has repeatedly addressed the Kosovo issue, did not specifically authorize the use of force against Yugoslavia. The United States and NATO have maintained that the resolution is implicitly authorized by Security Council resolutions 1160,[11] 1199,[12] and 1203,[13] and that only the certainty of a

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[8] U.N. CHARTER art. 2, para 4.

[9] *See id.* at art. 51.

[10] *See id.* at art. 2, para 4.

[11] S.C. Res. 1160, U.N. Scor, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998).

[12] S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

[13] S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

Russian and/or Chinese veto stood in the way of a Security Council resolution explicitly authorizing action against Yugoslavia. Security Council Resolution 1199, in particular, determined that the situation in Kosovo is "a threat to peace and security in the region."[14] Prior to the bombings, NATO Secretary-General Solana referred to and repeated this phrase in a statement concluding "that the Allies believe that in . . . respect to the present crisis in Kosovo as described in U.N. Security Council Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."[15] Despite the assertions of the NATO members, however, the likelihood of a veto of any explicit authorization by not one but two of the permanent members makes it clear that NATO's action is not authorized by the Security Council.[16] The Security Council was never intended to decide matters upon a "one country, one vote" principle, and the veto power given to the five permanent members exists for good reason.

In order for NATO's action to be legal, it must either be self-defense under Article 51 of the U.N. Charter or be permitted by some rule of customary international law not in conflict with the NATO states' obligations under Article 2(4).

A. *NATO's actions as self-defense under the U.N. Charter*

Article 51 of the U.N. Charter provides in part that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain inter-national peace and security.[17]

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[14] S.C. Res. 1199, *supra* note 12, at 2.

[15] *See* Simma, *supra* note 2, at 6 (quoting a letter dated October 9, 1998 from Secretary-General Solana to the North Atlantic Council).

[16] Secretary-General Kofi-Annan, less than two months before the beginning of the NATO bombings, met with the North Atlantic Council concerning the Kosovo situation. When asked about the permissibility of a NATO action against Yugoslavia, he replied "normally a U.N. Security Council Resolution is required." Simma, *supra* note 2, at 3. On the same day, NATO Secretary-General Solana stated that Kofi-Annan's visit indicated "that the United Nations shares our determination and objectives." *Id.*

[17] U.N. CHARTER art. 51.

Self-defense, therefore, may be either individual or collective. There is considerable disagreement as to where the limits of "collective self-defense" lie, and also as to whether self-defense may be anticipatory rather than merely reactive.

The International Court of Justice has stated that the mere fact that a country is a threatening presence is insufficient to trigger the Article 51 right of collective self-defense.[18] A customary international law right of anticipatory self-defense has existed at least since the *Caroline* case, decided in 1842.[19] The Caroline test requires that anticipatory self-defense be proportional, and that the need be "necessary, instant, overwhelming, and admitting of no other alternative with no moment for deliberation."[20]

There is considerable disagreement as to whether a right of anticipatory self-defense exists in light of the U.N. Charter. Those who see the existence of such a right disagree on whether the *Caroline* formulation is applicable in an era of modern weaponry. At the beginning of the U.N. era, the *Caroline* formula was applied in essentially unchanged form: "Preventative action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation."[21] NATO's action may be proportional to the magnitude of the threat posed by Yugoslavia, and the need may also be, in decreasing order of likelihood, necessary, overwhelming, and instant. However, there were probably other alternatives open to NATO, and there have certainly been enough moments for deliberation: NATO contemplated some form of action against Yugoslavia over the Kosovo question for months before acting.

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[18] *See generally* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). This view has been heavily criticized by commentators, especially in the United States. *See, e.g.,* Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua,* 81 AM. J. INT'L L. 206 (1987).

[19] *See* R.Y. Jennings, *The Caroline and McLeod Cases,* 32 AM. J. INT'L L. 82, 89 (1938). On the right of anticipatory self-defense, *see generally* George K. Walker, *Anticipatory Collective Self-Defense: What the Treaties Have Said,* 31 CORNELL INT'L L.J. 321 (1998) (concluding that the inherent right to anticipatory collective self-defense still exists).

[20] *Id.*

[21] International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 205 (1947).

Article 51 uses language ("Nothing in the present Charter shall impair . . .") arguably acknowledging the prior existence of a customary law right to self-defense, and indicating an intent that the right be retained by the member states. The reference to "armed attack" may have been intended to limit that right in some way, as the International Court of Justice indicated in the Nicaragua case,[22] or it may simply have been an inexact rendering of the French text, which refers simply to *l'agresion.*

Yugoslavia is a threatening presence in the Balkans. Since it came into existence in 1991, Yugoslavia has already taken direct and/or indirect military action against Croatia, Bosnia, and (briefly) Slovenia. Yugoslavia's war with Croatia and support for the Serbian side in the Bosnian civil war were aimed at expanding the borders of Serb-held and Serb-populated territory; thus, all states bordering or including some piece of Serb-populated territory must feel a certain amount of apprehension. The same holds true for states possessing territory to which Serbia has some historical claim, as it does to Kosovo.

None of the NATO members have been attacked by Yugoslavia. Physically, none of the NATO members borders Kosovo, and only one borders Yugoslavia: Hungary shares a border with Vojvodina. The involvement of other states, if it is legal at all, is legal as an exercise of collective, not individual, self-defense. This is clearest in the case of the United States and Canada, which are beyond the reach of any effective threat by Yugoslavia.

Yugoslavia has warned all of the states with which it shares borders not to participate "directly or indirectly" in any NATO actions.[23] Hungary, as a NATO member, is already participating at least indirectly. Macedonia, where 12,000 NATO troops are based,[24] is probably participating directly, and definitely participating indirectly.

The problem with using Yugoslavia's threats as a justification for the exercise of the Article 51 right of self-defense, how-

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[22] *See* Nicar. v. U.S., *supra* note 18.

[23] *See The West Versus Serbia, supra* note 1, at 49.

[24] *See id.* The name "Macedonia" in this article is also used for convenience, and does not imply any opinion on the controversy over the use of that name. *See, e.g.*, Igor Janev, Note, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 93 AM. J. INT'L L. 155 (1999).

ever, is that the warnings were given *after* the first NATO attacks. That threats were given at all, though, is further proof that Yugoslavia, as long as it continues its drive to expand its "ethnically pure" Serbian territory, is a constant threat to its borders.

If a collective right of anticipatory self-defense does exist, the NATO action would appear to be justified.[25] Yugoslavia's actions in Kosovo, coupled with its recent history of aggression across its borders, renders the likelihood of an armed attack on a neighboring country fairly high. Although most of those countries are not NATO members, NATO has assured Albania, Bulgaria, Macedonia, Romania, and Slovenia that it would view a Yugoslav attack on them "very gravely."[26] A formal treaty is not necessary to establish the existence of collective self-defense; informal arrangements of this nature are probably sufficient.[27]

The Kosovo Liberation Army has been, in part, armed by elements of the Albanian armed forces.[28] There is substantial sympathy in Albania for the Kosovars, and at least 65,000 Kosovar refugees have entered Albania since March 25, 1999.[29] The likelihood that the current conflict will lead to war between Yugoslavia and Albania is high. Other bordering countries are threatened as well. Macedonia, for instance, with an Albanian minority estimated at between twenty-three (23%) and thirty-five (35%) of its population (not counting Kosovar refugees), faces the possibility of internal civil strife.[30] More immediately, Macedonia may come under direct attack because NATO troops are stationed there.[31]

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[25] This is so despite the delay in NATO's action, which provided it with *Caroline's* "moment for deliberation." The one alternative that is always available is inaction; NATO, after months of deliberation, may have decided that its only alternatives were to bomb Yugoslavia or to do nothing.

[26] *The West Versus Serbia, supra* note 1, at 49.

[27] *See* Walker, *supra* note 19, at 375 (noting that Kosovo, the "country" most affected by Yugoslavia's actions, is not in a position to request assistance from NATO or the United Nations, because it is not a state).

[28] *See How It All Started: No Place for Them Both,* ECONOMIST, April 3, 1999, at 20-21.

[29] *See A Week is a Long Time in a War*, ECONOMIST, April 3, 1999, at 17-18.

[30] *See The Macedonian Exit Route*, ECONOMIST, April 3, 1999, at 18.

[31] This latter possibility involves an element of bootstrapping.

If a right of anticipatory collective self-defense exists, NATO is properly exercising that right in Kosovo, unless the NATO operation violates some other provision of international law. The Security Council has taken no action to end the NATO campaign.[32] A question that will need to be addressed, however, is whether NATO's actions violate its own constitutive document, the North Atlantic Treaty of 1949.[33]

B. *The North Atlantic Treaty*

Article I of the North Atlantic Treaty imposes two obligations upon NATO that may have been violated by the bombing of Yugoslavia. The first obligation requires that:

> [t]he Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . .[34]

The members of NATO have, individually and collectively, made many attempts to settle disputes with Yugoslavia through peaceful means. On the other hand, bombing another country is inherently dangerous to international peace and security, even when the purpose of the bombing is to preserve peace, security, and justice.

The second requirement pursuant to Article 1 is that the NATO parties undertake to "refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[35] Note that the language here is somewhat different. In the first part of Article 1, the parties undertake to settle disputes as set forth in the U.N. Charter. In the second part, however, the parties promise not to use force in a manner inconsistent with the *purposes* of the U.N., rather than promising not to use force in a manner inconsistent with the U.N. Charter.

The purposes of the U.N., as set forth in the Preamble of the U.N. Charter and Article I, include "[re-affirming] faith in fundamental human rights, in the dignity and worth of the

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[32] *See Law and Right: When They Don't Fit Together*, ECONOMIST, April 3, 1999, at 19-20.

[33] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[34] *Id.* at art. 1.

[35] *Id.*

human person. . ."[36] as well as "[promoting] social progress and better standards of life in larger freedom,"[37] "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,"[38] and "achiev[ing] international co-operation in solving international problems of [a]. . . humanitarian character."[39] The ostensible reason for the bombings is to protect the rights of the Kosovars. To the extent that NATO has accurately stated its reasons, the NATO action is consistent with this second part of the North Atlantic Treaty.

Article 5 of the North Atlantic Treaty creates a right to collective self-defense.[40] The English text of the treaty uses the same "armed attack" language as Article 51 of the U.N. Charter,[41] possibly indicating an intent by the NATO members to abandon the right to anticipatory collective self-defense. Article 7 leaves the "primary responsibility . . . for the maintenance of international peace and security"[42] in the hands of the Security Council. Article 7 also includes a provision that the treaty "does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of Parties which are members of the United Nations. . . ."[43] This may prevent a reading of Article 5 as intending to adopt a limitation, if any, on the right of anticipatory collective self-defense. On the other hand, this may be legalistic hairsplitting.

III. CUSTOMARY INTERNATIONAL LAW

At least two questions of customary international law arise from the NATO action. The first is whether, regardless of the existence of a right of anticipatory collective self-defense under Article 51 in 1945, there now exists a custom of exercising anticipatory collective self-defense under Article 51. The second is whether, regardless of the limitations on the use of force con-

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[36] U.N. CHARTER pmbl.

[37] *Id.*

[38] *Id.* at art. 1, para 2. The "maintain international peace and security" provision in art. 1, para 1 is problematic. *See id.* at art. 1, para 1.

[39] *Id.* art. 1, para 3.

[40] *See* North Atlantic Treaty, *supra* note 33, at art. 5.

[41] *See id.*; *see also* U.N. CHARTER art. 51.

[42] North Atlantic Treaty, *supra* note 33, at art. 7.

[43] *Id.*

tained in the U.N. Charter, a custom of armed intervention to prevent genocide exists or is coming into existence.

A. *Customary use of anticipatory collective self-defense*

In a comparison of instances of the use of force by states and regional security organizations claiming Article 51 justification, one author has assembled information[44] that, interestingly enough, indicates that almost all of the actions taken by individual states or temporary or informal groupings of states[45] have been met with a strong negative international reaction. These reactions have included condemnation by the General Assembly, attempted condemnation (vetoed by the offending member) by the Security Council, formal complaints by the Secretary-General and adverse determinations by the International Court of Justice.[46]

In contrast to actions by states, most actions by regional security organizations[47] have been met with, at worst, mild disapproval, and more often than not with approval. In most instances, the U.N. took no action.[48] "Peacekeeping actions" by regional security organizations, of course, do not require Security Council approval,[49] so long as the organizations advise the Security Council of their actions.[50] "Enforcement actions," on the other hand, do require approval.[51] Not surprisingly, it is

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[44] *See* Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391 (1993).

[45] Some of these groupings were nominally security organizations, such as the Warsaw Pact or the Organization of Eastern Caribbean States, but were effectively dominated by a single powerful state with Security Council veto power (The Soviet Union and the United States, respectively).

[46] *See* Meyer, *supra* note 44, at 401-402.

[47] Meyer included NATO in her list of regional security organizations, despite prior assertions by NATO members that NATO is merely a collective self-defense organization. *See id.* at 423-424. In a post-Cold War Europe, this seems quite reasonable. *But see* Simma, *supra* note 2, at 4 (stating that "NATO is not a regional organization in the sense of Chapter VIII of the U.N. Charter").

[48] *See* Meyer, *supra* note 44, at 415-416 (noting nine actions by the Organization of American States); *see also id.* at 418-419 (noting six actions by the Organization for African Unity); *id.* at 422 (noting five actions by the League of Arab Nations).

[49] *See* U.N. CHARTER art. 52.

[50] *See id.* at art. 54.

[51] *See id.* at art. 53, para 1.

often very difficult to distinguish a peacekeeping action from an enforcement action.

It appears, therefore, that there is an existing or emerging normative expectation that permits anticipatory collective self-defense actions by regional security or self-defense organizations where the organization is not entirely dominated by a single member. NATO is such an organization and includes a number of powerful states, three of which are permanent members of the Security Council. The NATO action against Yugoslavia is thus a valid exercise of the right of anticipatory collective self-defense as it has been developed via state practice since 1945.

B. *Armed intervention to prevent genocide*

Although the NATO action may be legal as an exercise of anticipatory collective self-defense, this is not the main justification that has been advanced. The credibility of the NATO action with the public, especially across the Atlantic in the United States, rests more on its humanitarian motive.[52] Not every genocide that occurs will threaten the interests of a powerful nation or regional security organization; there seems to be a growing sentiment, nonetheless, that a right of intervention to prevent genocide should exist. Many feel that armed intervention to protect people from genocide at the hands of their own government is not only morally justified but morally necessary. Some are even willing to argue that customary international law has already given rise to a normative expectation legitimizing actions of this nature.[53]

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[52] The German government, for example, while recognizing the questionable legality of NATO's actions, considered the situation in Kosovo "a state of humanitarian necessity leaving no choice of other means." Simma, *supra* note 2, at 6.

[53] *See, e.g., Law and Right: When They Don't Fit Together*, ECONOMIST, April 3, 1999. *See also* FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); MICHAEL O'HANLON, SAVING LIVES WITH FORCE: MILITARY CRITERIA FOR HUMANITARIAN INTERVENTION (1997); THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION (Stanley Hoffman ed. 1996); SEAN D. MURPHY, HUMANITARIAN INTERVENTION (1996); ROBERT L. PHILLIPS & DUANE L. CADY, HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM (1996); Oliver Ramsbotham & Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict (1996); Military Intervention: From Gunboat Diplomacy to Humanitarian Intervention (1995); Francis Mading Deng, *State Collapse: The Humanitarian Challenge to the United Nations, in* COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 207 (I. William Zartman ed. 1995).

The U.N. Charter was adopted in the aftermath of World War II. Some of the worst atrocities of that war were committed by the Axis governments, particularly the German government, against its own people. The U.N. Charter, however, contains no provision allowing the use of force to prevent such atrocities. In fact, Article 2(7) provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ."[54] This provision, however, also includes the qualification that "this principle shall not prejudice the application of enforcement measures under Chapter VII.

Some humanitarian interventions have been met with widespread (although not universal) approval, such as Tanzania's ouster of Idi Amin or the U.S./British maintenance of no-fly zones to protect Kurds in northern Iraq.[55] Other interventions have been less well received. When Vietnam's invasion of Cambodia toppled one of the most brutal governments in recent history, Vietnam was widely condemned as an aggressor rather than commended for ending the Khmer Rouge's reign of terror.[56]

At present the view that humanitarian intervention is permissible is a minority one.[57] Widespread acceptance of the NATO action, however, especially given its scope and the involvement of three permanent members of the Security Council, could indicate the emergence of a normative expectation that

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[54] U.N. CHARTER art. 2, para 7.

[55] The first of these, of course, was probably justified as an act of self-defense. The second, although not specifically authorized by the Security Council, was arguably a part of the Security Counsel-authorized war to end the Iraqi occupation of Kuwait. *See generally* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime,* 93 AM. J. INT'L L. 124 (1999) (noting that although not explicitly authorized by the security council, many U.N. members acquiesced in the effort to provide safe havens for Kurdish refugees).

[56] The Vietnamese invasion of Cambodia could perhaps also have been justified as self-defense, especially in light of the treatment of the Vietnamese in Cambodia by the Khmer Rouge.

[57] *See generally* W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law,* 10 YALE J. INT'L L. 279 (1985) (noting that humanitarian intervention is one of nine categories in which use of force is accepted); Louis Henkin, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: LAW AND THE USE OF FORCE 37 (Council on Foreign Relations 1989) (arguing for the general principle that right to limited intervention is acceptable but that it should not be extended to topple governments or occupy territory).

intervention to prevent genocide or forced expulsion of a population does not violate international law. As one commentator wrote:

> This war has marked out with awkward clarity the irresistible tension between two distinct forms of international law. The first, and most familiar, of these is that of the United Nations Charter designed to preserve the territorial integrity of sovereign states. The second, born at Nuremberg and developed subsequently in international conventions against genocide and torture, holds that there are some crimes that transcend the inviolability of nation states.[58]

The Security Council itself, in Resolution 1199, referred to "the impending humanitarian catastrophe" in Kosovo, and "emphasiz[ed] the need to prevent this from happening."[59] The Security Council has not condemned the NATO bombings, despite the efforts of some members to do so: on March 26, 1999, three of the fifteen Security Council members voted to condemn the NATO bombings.[60] On the other hand, the three countries seeking to condemn - China, India, and Russia - are three of the world's four most populous countries, containing nearly half of the world's people; two are permanent members of the Security Council. If their condemnation remains consistent, it would be unlikely that a normative expectation permitting armed humanitarian intervention would be formed.

IV. CONCLUSION

At present, NATO's actions violate international law unless NATO has a right to anticipatory collective self-defense under Article 51 of the U.N. Charter, and unless that right was properly exercised. Because there appears to be a practice on the part of the U.N. member states of tolerating such actions when undertaken by regional security organizations, it does appear that NATO has a right of anticipatory collective self-defense. It

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[58] Philip Stephens, *Fighting a Just War*, FINANCIAL TIMES, April 16, 1999, at 12.

[59] S.C. Res. 1199, *supra* note 12, at 2.

[60] *See Law and Right*, *supra* note 32, at 19-20 (Regardless of the legality of the bombing campaign itself, certain actions during the campaign may have been illegal. The bombing of the Chinese consulate, while accidental, was an illegal infringement on China's sovereignty, entitling China to some form of remedy.).

also seems that Yugoslavia's actions in Kosovo pose a genuine threat to the stability of the region.

It does not appear that there is currently a customary international law norm permitting the use of force by states to prevent other states from killing or expelling their own populations.[61] The practice of states in response to this incident (the NATO action) may bring about a change in customary international law, however: a high degree of approval, or even tolerance, for NATO's action on the part of other states might indicate the emergence of such a norm.

[61] Information on Yugoslavia's action before the International Court of Justice against the various NATO member states may be viewed at the International Court of Justice website (visited Oct. 21, 1999) <http://www.icj-cij.org>.