NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 45
Issue 1 *VOLUME 45, NUMBER 1-2, 2000-2001*

Article 12

January 2000

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I am very pleased to be part of this celebration of Dean Harry Wellington's extraordinary contributions to both legal scholarship and to the well-being of two major law schools. My topic isn't directly related to the substantive fields that have benefited from Harry Wellington's contributions, but it is related to his formative influence on me, when he was my first-term, small group professor at Yale for constitutional law. As I recall it, Dean Wellington decided to teach Constitutional Law because he started thinking about what eventually became his book on interpreting the Constitution. What was particularly striking and memorable about that class for me was his willingness to invite us into his classroom as his partners—admittedly very green ones. It was a model that I tried to follow while I was General Counsel for the Department of Defense, as we encountered one impossible issue after another, often arising in contexts where there were no authoritative sources to consider or much less be bound by. We may not have lived up entirely to Dean Wellington's collaborative, but rigorously honest and probing approach—but we tried.

One of the issues* we struggled with was the use of force by the North Atlantic Treaty Organization (NATO), first in Bosnia, and then in Kosovo. It is quite possible that the actions taken by the NATO alliance there signaled a fundamental change in both the post World War II ("WWII") international security paradigm and in the use of force in our post-cold war environment. In order to address the legal significance of these events, I would like to set the stage for our discussion.

Since the end of WWII, the legal justification for the use of force to ensure international peace and security has typically started with the United Nations Charter. Under that Charter, member nations have committed to 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

* I would like particularly to acknowledge CAPT Harvey Dalton, USN (Ret.), Associate Counsel, Office of the Department of Defense General Counsel, for all of his assistance and advice on these issues.

the United Nations.[1] Member nations have conferred on the UN Security Council the primary responsibility for the maintenance of international peace and security, and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf.[2] The members also have agreed to accept and carry out the decisions of the Security Council in accordance with the UN Charter.[3] The Security Council is the sole entity which is authorized to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and may make recommendations or decide what measures shall be taken to maintain or restore international peace and security.[4] The measures that the Security Council is allowed to take may involve provisional measures,[5] measures not involving the use of force,[6] and measures involving the use of force, utilizing forces made available to the Security Council by the member nations.[7]

It is also important to note that Article 51 of the UN Charter articulates the inherent right of all states to individual or collective self-defense.[8] Moreover, Article 52 of the Charter expressly recognizes the legitimacy of regional arrangements or agencies for dealing with the maintenance of international peace and security as appropriate for regional action, if they are consistent with the purposes and principles of the United Nations.[9] On the other hand, the Charter provides that, *except for measures taken in collective self-defense*, no enforcement action may be taken by regional arrangements or agencies without the authorization of the Security Council.

This has been the international security structure for the post WWII era, and it has worked fairly well, even in the face of the cold war rivalry between the NATO allies and the Warsaw Pact nations. Except for the instance of the Korean conflict, the Security Council has been the arbiter of international peace and security; and the nations of the world have frequently turned to the Security Council to resolve threats to international peace and security, as well as to settle disputes which threaten the peace.

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1. U.N. CHARTER art. 2, para. 4.
2. U.N. CHARTER art. 24.
3. U.N. CHARTER art. 25.
4. U.N. CHARTER art. 39.
5. U.N. CHARTER art. 40.
6. U.N. CHARTER art. 41.
7. U.N. CHARTER art. 42.
8. U.N. CHARTER art. 51.
9. U.N. CHARTER art. 52.

Acting under Chapter VII of the Charter, the Security Council has authorized the use of force on several occasions in the recent past. Operation Desert Storm was launched pursuant to UN Security Council Resolution 678,[10] which authorized those members cooperating with the Government of Kuwait to use "all necessary means" to uphold and implement UNSC Resolution 660 (which had condemned the Iraqi invasion of Kuwait and demanded the immediate withdrawal of Iraqi forces)[11] and all subsequent resolutions. Similarly, UN Security Council Resolution 940 authorized the establishment of a multilateral force and the use of "all necessary means" to facilitate the departure from Haiti of the military leadership and the prompt return of the legitimately elected Government of Haiti.[12]

There have been instances, however, when regional organizations have acted on their own authority to respond to threats to international peace and security without action by the Security Council. For example, in the 1962 Cuban missile crisis, the Organization of American States acted to impose a quarantine on shipment of missiles to Cuba, and authorized the use of force to prevent those shipments from reaching their destination. The organization's action was immediately reported to the Security Council, but no UNSC resolution authorizing the action was forthcoming.

Similarly, the use of force in Grenada in 1983 was partially based on a request from the Organization of Eastern Caribbean States, a regional security organization composed of Antigua, Montserrat, Saint Lucia, Saint Vincent and the Grenadines, Grenada, Dominica, and St. Kitts/Nevis, which in turn was based on an appeal from the Governor General of Grenada, Sir Paul Scoon. These states unanimously determined that the conditions on Grenada were a threat to the entire region that required immediate and forceful action, and requested that the United States, Jamaica and Barbados assist in restoring international peace and security in the region. Thus, there have been two instances where action involving the use of force by a regional security organization has been taken without reference to or authorization from the UN Security Council.

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10. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 27, U.N. Doc. S/RES/678 (1990).

11. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg. at 19, U.N. Doc. S/RES/660 (1990).

12. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994).

An interesting aspect of both of these actions is that use of force was authorized and initiated in the absence of an armed attack against the territorial integrity or political independence of any state. Article 51 of the UN Charter provides that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[13]

There are a number of eminent legal scholars who maintain that the right of self-defense arises only in the face of an armed attack (and some who maintain that an armed attack across borders is required), and that the use of force in self-defense absent the existence of an armed attack is not legally sustainable. However, if one examines state practice under Article 51 and the law of self-defense, he or she will quickly appreciate that the presence of an armed attack is not a prerequisite for the use of force in self-defense. Note that Article 51 provides that "[n]othing in [this] Charter . . . . impair[s] the inherent right of individual or collective self-defense . . . ."[14] This is explicit recognition that the right of self-defense is not derived from the Charter itself. Article 51 recognizes that the right of self-defense exists independently of the Charter; in fact it exists as a principle of customary international law established by the practice of nations for centuries. And, in fact, the earliest articulation of the principle of self-defense grew out of an instance involving the use of force where there had been no armed attack against sovereign territory.

During an insurrection in Canada in 1837, Canadian insurgents found refuge, recruits, and other private support from the United States, particularly along the border. In late December 1837, about a thousand armed insurgents were encamped on Navy Island on the Canadian side of the Niagara River. There was another camp at Black Rock, on the American side. The *Caroline* was a small steamer used by the men on Black Rock and Navy Island to travel between the camps and other locations.

On the night of December 29, 1837, U.S. citizens were aboard the vessel in the port of Schlosser, New York when it was boarded at midnight by between seventy and eighty armed men, under the command of a British officer. They attacked the people on board, set the steamer on fire, cut her loose, and set her adrift over Niagara Falls.

13. U.N. CHARTER art. 51.
14. *Id.*

This generated an outcry in the United States, and led to an exchange of correspondence between Secretary of State Daniel Webster and his British counterpart, Lord Ashburton, who avowed responsibility for the incident as a public act of force, in self-defense. Webster acknowledged the principle of self-defense when he wrote:

> The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this Government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. . . . [*W]hile it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'*[15]

These words by Webster are sacred in the eyes of international lawyers, and the *Caroline* is cited as a definitive expression of the customary principle of the right of self-defense, even though nations had been exercising that right for centuries prior to the establishment of the United States. However, the context of the case is important because the British authorities acted not in the face of an armed attack, but in the face of the threat of an armed attack. It is also notable that Webster articulated what is closer to the domestic right of self-defense rather than the international principle. In domestic law, the right of self-defense is an *in extremis* right, and it has been said that, in order to justify the use of deadly force, one's "back must be to the wall" before the defense is justified. Hence Webster's reference to "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" really articulates the domestic concept of self-defense rather than the international principle that had been practiced for centuries. The customary international law of self-defense is not that demanding, and most international legal practitioners agree that use of force in self-defense does not require that there be a preceding or even simultaneous armed attack.

Although there are eminent legal scholars who would disagree, most international law practitioners recognize that, in an age of supersonic aircraft armed with supersonic missiles, as well as cruise and intercontinental ballistic missiles, it would be folly to insist that one must

15. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *at* http://www.yale.edu/lawweb/avalon/diplomacy/br-1842d.htm#web2.

absorb the first strike before exercising the right of self-defense. As aptly put by Secretary of State George Schultz after the 1986 U.S. air raid on Tripoli and Benghazi: "[T]his nation has consistently affirmed the right of states to use force in exercise of their right of individual or collective self-defense. The UN Charter is not a suicide pact."[16]

Most international legal practitioners also agree that the right of self-defense is an extraordinary right involving four basic elements, which are derived largely from the *Caroline* incident: 1) an armed attack, actual or impending which is objectively illegal; 2) the state exercising that right must show a direct and immediate danger; 3) the act of self-defense must not be excessive, going no further than to avert or suppress the attack; and 4) it must not be continued after the needs of defense have been met.

It is also generally recognized that the right of self-defense extends to the right of sovereign states to intervene in the territory of foreign states in order to protect their nationals, but this right is severely circumscribed by the constraints of the UN Charter. Thus, in the case of Grenada, the United States, in addition to justifying its actions as collective self-defense in response to the OECS, also relied on the protection of its nationals as legal grounds for its intervention, since there were approximately one thousand American citizens living and studying on the island when chaos ensued.

But what if the situation is not one in which one's nationals are imperiled? What if the situation is that which existed in Kosovo in March of 1999? What legal grounds are there for intervening in the sovereign territory of a foreign nation when the government of a nation is abusing its own citizens? There are a number of legal concepts which deserve attention and analysis.

First, under pre-Charter customary international law, there was a right of intervention which made it legally permissible to intervene "when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind."[17] Post-Charter law has seen this right of humanitarian intervention very tightly constrained, although both the United Kingdom and France employed this legal rationale in support of Operation Provide Comfort and Operations Southern and Northern Watch in Southern and Northern Iraq after the Gulf conflict.

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16. George Schultz, *Low Intensity Warfare: The Challenge of Ambiguity*, DEP'T ST. BULL., March 1986, at 15, 17.

17. LASSA OPPENHEIM, INTERNATIONAL LAW § 137, at 312 (8th ed. 1955); *cf.* LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW: LAW OF PEACE § 131, at 442-44 (Robert Jennings & Arthur Watt eds., 9th ed. 1992).

The United States has not typically relied on the concept of humanitarian intervention as a legal basis for the use of force, because we have been concerned that such a concept is a double-edged sword. If we choose to invoke humanitarian intervention as our legal rationale for the use of force, what is to prevent other states from invoking that same concept in support of their uses of force, particularly uses of force that may not be justified by the facts on the ground? Humanitarian intervention is a slippery slope, because it is quite subjective in nature; it is not defined; and quite frankly the concept is subject to abuse by strong states against weak states, so it carries with it quite a lot of baggage. The United States has consequently been very wary of invoking humanitarian intervention as justification for the use of force. The impact of the UN Charter is important also, because absent a UNSC Resolution, the only legal justification it recognizes for the use of force is individual or collective self-defense. Humanitarian intervention does not neatly fit within the concept of self-defense, particularly when one is not defending one's own nationals.

In the absence of the humanitarian intervention rationale, what other legal theories are available with respect to the Kosovo situation? Keep in mind that we had NATO approving an activate order authorizing the use of force in Kosovo to enforce the requirements of UNSC Resolution 1199. The UNSC Resolution invoked Chapter VII of the UN Charter—the Chapter which provides the Security Council the authority to employ the use of force—but the UNSC Resolution did not expressly authorize the use of force, as did those resolutions dealing with Iraq's invasion of Kuwait and the restoration of the legitimate government in Haiti. Is invocation of Chapter VII by the UNSC sufficient to authorize an independent regional security organization to employ the use of force to enforce the resolution? Are there any other factors that would add to the case for the use of force without the Security Council's express authority?

I think that there are a number of factors, the particular combination of which supported NATO's use of force. These factors not only involve principles of necessity, proportionality and humanity, but also implicate elements of collective self-defense. Think of the situation in Kosovo and in the Balkans in March, 1999.

First, there was plainly a threat to peace and security in the region. In the Kosovo situation, we had an armed conflict, which had generated thousands of refugees. These refugees had spilled over into neighboring provinces and countries, and had themselves contributed to instability in those countries. The fighting in Kosovo had also generated armed clashes across the Albanian border, and threatened to engulf NATO allies Greece and Turkey in the regional conflict. Even though there did not appear to be a threat of imminent armed attack

against NATO allies, there was a very real possibility that the entire area could erupt into armed conflict, and that armed conflict could involve NATO allies. Moreover, this threat to peace and security in the region had been recognized by the UNSC. In Resolution 1199, the Council invoked its authority under Chapter VII of the Charter, and expressly affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security.[18]

Second, NATO itself has a unique role in the Federal Republic of Yugoslavia ("FRY"). With the repeated approval of the UNSC, NATO has assumed special responsibilities in the FRY. Moreover, the presence of our forces in Bosnia gave us a special stake in threats to peace in the region.

Third, the contemplated action in Kosovo resulted from multilateral, not unilateral, decisions. And these decisions were made by an organization—NATO—which has played a unique and historic role in maintaining peace in Europe.

Fourth, there was an imminent threat of a humanitarian catastrophe. As the Secretary-General had reported, the lives of hundreds of thousands of civilians in Kosovo had been placed at risk by actions of the FRY. While the United States has historically, and properly, been leery of the concept of "humanitarian intervention" as a basis for the use of force, the humanitarian threat in Kosovo was real, and was certainly one factor to be taken into account in evaluating the possible use of force.

Fifth, also recall that at the time NATO was deciding whether or not to take military action, diplomatic and political efforts to resolve the crisis in Kosovo and the threat to regional neighbors had been unavailing, largely because of the intransigence of the president of the FRY, although the insistence of the Albanian Kosovar leadership on total independence had contributed to the situation. Thus, there appeared to be no reasonable alternative to the use of force in order to avoid the direct and immediate threat of hostilities to regional peace and security.

Finally, all these factors coalesced in the Balkans, an area with a unique and violent history, and a region that has frequently been a tinderbox, sparking broader conflicts.

All of these factors combined presented a clearly threatening situation in Kosovo. The point is not that any one of these factors, in isolation, would have been sufficient to justify the use of force. Rather, the unique combination of these factors provided, in my view, and in

18. Security Council Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. at 1, U.N. Doc. S/RES/1199 (1998).

the view of the U.S. interagency legal community, a persuasive argument in support of the use of force by NATO.

Of course, part of the equation in this instance was the fact that NATO had no other hidden agenda for Kosovo, that is, it was not seeking to occupy territory, promote any particular ideology or obtain resources; neither would it stay longer than necessary to restore and maintain peace and security. Furthermore, the proposed military operation was directed solely at military and paramilitary targets, designed to defeat the FRY's ability to threaten peace and security in the region and to restart the diplomatic and political processes, which would lead to a resolution of the crisis. The operation was to be limited, focused, and directed only at legitimate military and paramilitary targets. It was not designed to punish or seek revenge against the FRY and its President; it was designed instead to terminate the unlawful attacks against the civilian population of Kosovo, to deter any future attacks, and to bring the FRY to the negotiating table to resolve a situation which posed a direct and immediate threat to NATO in the region.

The NATO action in respect to the situation in Kosovo, however, is truly an extraordinary event, even more so when one examines the nature and purpose of the North Atlantic Alliance. NATO was, after all, established for the purpose of confronting a massive threat of invasion and occupation posed by the Soviet Union and its allies following WWII. The North Atlantic Treaty reaffirmed the faith of its members in the purposes and principles of the UN Charter and in the rule of law. The parties committed to maintaining their individual and collective capacities to resist armed attack, and agreed that an armed attack against one or more of them in Europe or North America would be considered an attack against them all. They agreed to assist the party or parties attacked, by taking such action as they deemed necessary, including the use of force, to restore and maintain the security of the North Atlantic area. The alliance has always been essentially defensive in nature.

Therefore, it is in some ways quite unusual to have NATO as an organization using force in a situation such as Kosovo, and doing so in the absence of an express authorization from the UN Security Council.

On the other hand, given the extent of the conditions in the Balkans, it is not at all extraordinary that NATO could, and would, take this action. That brings me to my final point on NATO, which is simply to note that before Bosnia, NATO had never really undertaken a real world military operation, with all that implies operationally in terms of command and control, Rules of Engagement, interoperability, National Atlantic Council decision-making, et cetera. I think we can all, on reflection, recognize how much NATO and the interna-

tional security landscape have changed since the initiation of action in Bosnia and the use of force in Kosovo.

The burning question is whether these events have signaled a fundamental change in the post-WWII international security paradigm and its legal underpinnings? Can we expect NATO to continue to operate "out of its box" so to speak, and if so, what does this portend for other regional security organizations? Is the international community willing to accept the use of force, for example, by the Arab League or the Organization for African Unity under circumstances similar to Kosovo? We might prefer that they do so, in view of the wholesale carnage in Rwanda and Burundi caused by internal armed conflicts. On the other hand, it is easy to see the "slippery slope" aspects to the Kosovo situation, and the distinct possibility that the precedent set by NATO may be employed by other regional organizations as a justification for more aggressive conduct.