

Bombs for Human Rights? Humanitarian Intervention in Kosovo

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Introduction

The following paper asks whether NATO's intervention in the Kosovo crisis in 1999 can be justified as a humanitarian intervention. Humanitarian intervention shall be defined as a military intervention in the internal affairs of a sovereign state to protect human rights.¹

The two grand theories of our time, realism and liberalism, are skeptical with regard to humanitarian interventions - for different reasons. An argument in favor of humanitarian intervention must be supported by two assumptions: first, that moral claims are important in politics and second, that force can be justified.

While realism attacks the former, liberalism questions the latter. A humanitarian intervention forces liberals to decide between the liberal goods of non-violence and human rights protection. Therefore, two liberal traditions coexist: the just war tradition in favor and the non-violent tradition against humanitarian intervention. The just war doctrine as predecessor of a yet to be developed just intervention doctrine faces both a strategic and a normative challenge: it must show realism, why moral arguments matter and demonstrate pacifism why force can be morally justified.

¹ Compare the definitions of Woyke (1994, 218), Heinz (1993, 5) and Reuter (1996, 283)

The moral question clearly distinguishes between realists and liberals, but realists also have different opinions on the use of force. Smith describes two realist schools of thought: isolationists against and pragmatist partly in favor of intervention.² The following matrix shows the possible theoretical approaches to humanitarian intervention according to the relevant factors of morality and force:

Theoretical Claims	Force may be justified	Force may not be justified
Morality is important in politics	Just War Doctrine (liberal)	Pacifism (liberal)
Morality is not important in politics	Pragmatism (realist)	Isolationism (realist) ³

It is difficult to answer the meta-theoretical question, which position is most coherent. However, Apel suggests in his description of transcendental pragmatism to adapt theories, if they cannot be questioned without a performative self-contradiction (a contradiction between language and action).⁴ An application of this criterion to the above mentioned approaches leads to the following results.

Smith demonstrates a problem in the realist argument: "Realists use their apparently non-ethical assumptions (...) to camouflage a specific normative vision on how a nation's interest ought to be defined. (...) Thus, the traditional realist position ends almost ironically: beginning with a dismissal of the relevance of ethical concerns to the issue of intervention, realists often end up offering an implicit (or at least easily inferred) normative argument against interventionist

² Smith (1989, 18)

³ The distinction between pragmatism and isolationism is made according to Schweigler (1994). It is less sharp than the liberal distinction, therefore, realism will be threatened as one coherent position in the following.

⁴ See Apel (1973)

foreign policy on grounds of prudence and moderation."⁵ This is a classic example of a performative self-contradiction and substantially weakens the persuasiveness of the realist argument.

Therefore, the realist attack that liberals use "too" many moral implications, must be rejected. Regarding pacifism, however, there is a valid realist argument. Since the non-violent tradition must be grounded in an ethic of intention (as opposed to an ethic of responsibility), Weber's arguments against this type of ethics apply.⁶ The problem of pacifism is that force may be necessary to stop violence. It is inconsistent to condemn such a force, if the reduction of violence is the goal.

The just war doctrine avoids these contradictions of realism and pacifism. Its central aspects (that morality is important and that force can be justified) cannot be questioned without falling into a self-contradiction. Therefore, it shall build the basis of the following analysis. The position of the just war doctrine is between realism and pacifism. It agrees to pacifism that force is *prima facie* wrong and to realism that the use of force may sometimes be necessary. Childress describes a conflict of values between non-violence and protection of the victims related to attempts to reduce violence.⁷ Since it is impossible to act according to both values, Childress makes a distinction between *prima facie* duties and actual duties. The former constitute presumptions but they can be overridden as exceptions by the latter. According to Childress, *prima facie* duties have the "tendency to make an act right or wrong"⁸ and actual duties refer to the act as a whole. The logic of *prima facie* duties therefore has three implications: first, violations of *prima facie* duties must be justified, second, it is impossible to fulfill all duties at the same time, therefore, some *prima facie* duties must be violated and third, violated *prima facie* duties must effect the

⁵ Smith (1989, 11)

⁶ See Weber (1919), at least it seems to be empirically difficult to defend the notion that force never reduces the level of violence.

⁷ Childress (1987, 430)

⁸ Childress (1978, 430)

action: “conduct of war should be as compatible as possible with the overridden prima facie obligations”.⁹

To justify the use of force, Hehir claims that the three questions of why, when and how be answered.¹⁰ Hehir suggests massive human rights violations as a just cause for the use of force and he cites traditional criteria of the just war doctrine to answer the three questions. The following table explains his model:

Presumption: do no harm.(prima-facie duty)

Exception: to protect the innocent (actual duty)

3 Questions: why, when and how?

6 Criteria: just cause (why?), proper authority, right intention, last resort and possibility of success (when?), proportionality (how?)

The following analysis investigates whether the NATO intervention in Kosovo was legitimate according to these criteria. Based on the above mentioned definition of humanitarian intervention, the human rights situation will be the most important aspect to determine a judgement.

Just Cause

Just war theorists often recognize a just cause in the Kosovo crisis: „A clear and just cause appears present in Kosovo: the prevention of ethnic cleansing and genocide“¹¹. Mark Danner describes Milosevic’s actions as a „planned rationality of killing“. Hehir refers to this

⁹ Childress (1978, 433)

¹⁰ Hehir (1995)

judgement: „If the product of this planned rationality does not constitute just cause, it is difficult to know what the category means.“¹²

The claim of state sovereignty is the most important realist argument. Much of the debate about humanitarian intervention can be reduced to the tension of „sovereignty versus suffering“ as former UN Undersecretary General Brian Urquhart called a New York Times article. In this debate, proponents of intervention claim that suffering be more important than sovereignty. For skeptics, the sovereign state is the condition to reduce suffering, be it to protect its citizens (Hobbes), to guard their rights (Locke) or to express their *volonté générale* (Rousseau).

Interventionists rarely question the importance of state sovereignty, they are in favor of intervention because states rights should be transcended by human rights. In this sense, states must earn their sovereignty by guaranteeing human rights. Brock calls the tension between states rights and human rights the central contradiction of the current international law. For him, sovereignty serves the humanitarian goal to prevent war. However, this arguments can be used to justify inventions, if interventions prove to cause less harm in terms of human rights trough the violation of state sovereignty than a sovereign state violating the human rights of its citizens. There is a logical problem in the tradition to grant rights to states, but not to individuals who constitute these states. The notion „human rights trump states rights in international law“ (even more clear in German: „Menschenrecht bricht Voelkerrecht“) leads to humanitarian intervention.

The Kosovo crisis challenges fundamental convictions of realist statecraft. This applies in particular to the distinction between the external behavior of states and their internal policies. The realist motto is: „aggression must be opposed (e.g.; the Persian Gulf War), but not

¹¹ Reese (1999). It can be questioned, whether genocide actually happened, but Hehir (1995) convincingly argue that ethnic cleansing is too close to genocide to react to it differently.

¹² Hehir (1999)

repression.¹³ If individual rights become more important than states rights, the relevance of this distinction decreases. In this sense, both aggression and repression are human rights violations and must be opposed.

The non-violent tradition has to face a similar conflict of values: it is not the realist stability versus justice, but peace versus justice, which leads in part to very similar arguments. The non-violent doctrine must choose between two evils: the comeback of war and the comeback of violent ethnical nationalism. The theologian Reese describes the following dilemma: „This war more than most confronts Christians with choosing between saying „never again“ to war or saying „never again“ to ethnic cleansing and genocide.“¹⁴

„Pax optima rerum“ (peace is the most important good, the essence of the Westfalian Peace and the resulting international system) is the answer of the non-violent tradition. And in fact, it can be argued that the internal peace was violated in Kosovo. However, it is difficult to distinguish between internal and external peace. Human rights violations offer a better category to judge, they include both ethnic cleansing and unjustified war. Even a moderate interpretation of the non-violent tradition could accept a just cause for the Kosovo intervention because it eventually stopped the violence and reduced the amount of human rights violations. Whether it did this proportionally will be investigated in the chapter about proportionality.

The just war tradition considers the (re-) establishment of a just order to be a just cause for war. This aspect plays an important role in the modern development of the international system as President Bush's proclamation of a „new world order“ after the Gulf War shows. The incapacity

¹³ Hehir (1999)

¹⁴ Reese (1999). For historical reasons, this argument played a very important role in the German debate, in particular in the Green Party of Secretary of State Joschka Fischer.

of the international community to cope with the following crisis (such as Somalia, Bosnia or Rwanda) made it difficult to realize and even to promote such a new world order.

Since then, „Operation Allied Forces“ is the first attempt, which can be interpreted in this direction. Habermas cautiously supports the intervention because it puts the transformation of the classical international law of states to a cosmopolitan right of an international civil society on the agenda. Human rights thereby get a double relevance: on the one hand, the intervention should improve the local human rights situation and on the other hand, it should promote the perspective of an international order determined by human rights. These standards for just cause were met in Kosovo: both, the local and the global development of human rights needed to be improved.

Right intention

The human rights violation in Kosovo constituted a just cause for the NATO intervention. The question remains whether this cause was just used rhetorically to hide other motives or whether the protection of human rights actually was the intention of the intervening powers.

There are several attacks to NATO's motives: dominance¹⁵, humanitarian rhetoric¹⁶, double standards with regard to Albanian and American lives¹⁷ and the question why other human rights violations were ignored.¹⁸

¹⁵ Compare Ali (1999, 62)

¹⁶ See Kavanaugh (1999, 1) and the Friedensgutachten (1999, 5)

¹⁷ See Reese (1999, 1) and Enzensberger, 28)

¹⁸ Compare Kissinger (1999, 1) and the Friedensgutachten (1999, 8)

Mayer considered the selectivity to be responsible because interventions in Chechenya or Tibet would lead to conflicts with major powers.¹⁹ Selectivity is better than inactivity in so far as it at least increases the importance of human rights in international relations.

Habermas does not find convincing reasons to doubt NATO's intentions. He thinks that neither a policy of influence nor the definition of a new NATO purpose nor the defense against waves of immigrants explains such a costly and risky intervention.²⁰ The realist attack against NATO's "good intentions" can in fact be used to defend NATO against cynicism: „After Somalia, Haiti and Bosnia, Kosovo marks the outer limits of this administration's foreign policy of good intentions. In war, good intentions are no excuse. They are instead the road to hell, as many Kosovars and Serbs can testify.“²¹ This attack is not convincing, because it just illustrates the above mentioned contradiction of realism, but it shows at least that there are reasons to believe that NATO had the right intention to intervene.

Habermas describes, however, a difference among the NATO states concerning right intention. The USA view human rights policy as national mission of a super power based on its power. Most European governments view human rights policy as the project of a development of international law.²² The European approach is closer to the described concept of world order as a just cause, because it is not very likely that a "pax americana" can guarantee human rights worldwide. Therefore, the relatively low level of attention to international law because of American dominance must be seen as a problem in NATO's intention for the intervention.

Possibility of Success

¹⁹ Mayer (1999, 297)

²⁰ Habermas (1999, 7)

²¹ Krauthammer (1999)

²² Habermas (1999, 9)

The judgement on the possibility of success of the NATO intervention depends on the definition of goals. In his televised speech on March 24, President Clinton defined four goals: first, protection of the Kosovo Albanians, second, stability of the region, third, prevention of a broader war²³ and fourth, the preservation of NATO.²⁴

In human rights terms, the first aspect is the most important, but the others have effects on the human rights situation in Kosovo and beyond as well. The question defining success is: was it likely, that the intervention improved the human rights situation in Kosovo (and beyond)?

The actual development in Kosovo allows a positive answer, because the ethnic cleansing was eventually stopped, Milosevic was weakened to stabilize the region, the war was contained and NATO kept its unity. However, no goal was achieved completely. Krauthammer even claims that all four aspects failed²⁵ and Mandelbaum calls the whole operation “a perfect failure”.²⁶ It is hard to see why Mandelbaum feels that the intervention went against the well-being of the Albanian Kosovars, because they were very much in favor of the intervention.

Even supporters of the intervention consider the criterion of success to be problematic: „ The tension inherent this norm lies between the possibility of success and proportionality. If strategic advocates propose that success can be attained only by violating noncombatant immunity, the moral judgment is simple: There is no justifiable war that is pursued by murderous conduct. A more complex decision arises when the proposal is that standards of proportionality must be loosened to achieve success.”²⁷ Vice versa, it can be necessary to decrease the likelihood of

²³ Many scholars were afraid of a spread of the war to Albania and Macedonia, compare for example Ackermann (1998), Deslondes/Rapper (1998), Stavrou (1998) and Bougarel (1998).

²⁴ Cited according to Krauthammer (1999)

²⁵ See Krauthammer (1999, 2)

²⁶ Compare the debate between Mandelbaum (1999) and Steinberg (1999) in *Foreign Affairs*. Steinberg, though as member of the Clinton administration bound through political considerations, argues much less polemically and more convincing in defense of the intervention.

²⁷ Hehir (1999, 5)

success (for example through the exclusion of ground troops)²⁸ to have a better relation of means and ends.

It can be argued, that the trade-off between success and proportionality must be decided in the discussion of the latter, because proportionality includes costs and benefits. The project to strengthen human rights in international relations in general and the Kosovo intervention in particular include significant chances and risks. The above mentioned chances already provide a positive answer to the question of possibility of success. These chances must be compared with the risks in the discussion of proportionality.

Last Resort

Another important aspect for the legitimacy of the intervention is the question, whether it was the last resort and all other have been tried. It cannot be argued that NATO immediately used force because long negotiations took place before the military escalation. The Kosovo conflict is an example of the importance of preventive diplomacy, since there have been warnings that the conflict could escalate many years ago.²⁹ The long duration of the conflict is, however, not necessarily a sign of a responsible use of force but rather a sign for the shortcomings of preventive diplomacy. Critics attack NATO because it did not support the non-violent efforts of the Kosovo Albanians under Rugova³⁰ and reacted just because of the terrorist activities of the KLA and the following military escalation.³¹

²⁸ Many authors discussed the question, whether ground troops should have been used or at least threatened, compare for example Hehir (1999, 5), Krauthammer (1999), Mayer (1999) and Rueb (1999).

²⁹ Examples can be found in Calic (1998), Hoffnung (1998), Nation (1998) or Troebst (1999).

³⁰ See Troebst (1999, 794)

³¹ Lutz (1999, 1)

An effective preventive diplomacy would have increased NATO's legitimacy, but it cannot be argued that it did not have the right to intervene because of its bad crisis management. On the contrary, the NATO states rather had the duty to intervene (Militarily, if necessary) to deal with a catastrophe for which they were at least in part responsible.³²

Kavanaugh³³ questions whether the last resort criterion is met, because some non-military alternatives have not been tried, in particular the integration of the Kosovo problem to the Dayton agreement, more observers in Kosovo or acceptance of Serb interests in Rambouillet.³⁴ The Dayton argument is not so easy to judge; the Dayton agreement was the result of very difficult negotiations, it ended the war in Bosnia and the inclusion of the Kosovo problem could have led to a failure of the Dayton talks. The Rambouillet negotiations failed because of the military, not because of the political part.³⁵ Therefore, it is difficult to argue that Rambouillet was against the interests of the Serbs. It rather shows that military consideration were already more important for Milosevic than political plans.

Most scholars are of the opinion that further non-military options had no possibility of success.³⁶ Therefore, the intervention can be described as a last resort. The bad preventive diplomacy does not effect this judgement. On the contrary, further hesitation could have led to even more human rights violations in Kosovo.³⁷

Legitimate Authority

³² Mayer (1999, 301)

³³ Kavanaugh (1999, 1)

³⁴ See Spillmann (1999, 41)

³⁵ See Weller (1999)

³⁶ Compare Calic (1999) and Mayer (1999, 300)

³⁷ This opinion is explained by Hoffmann (1996) for the case of Bosnia.

In the Middle Ages, legitimate authority was the authority of the church. Nowadays, it is much more difficult to say what constitutes legitimate authority. Possible sources of authority are international law, natural law and a yet to be developed law of global citizens.

The relation of the NATO operation to international law is at least problematic. Lutz is of the opinion, that NATO violated international law, in particular Article 2, 4 UNCh in combination with Articles 24, 39 and 40 UNCh, the UN monopoly of force.³⁸ Furthermore, some authors see a violation of NATO's founding document, the north Atlantic treaty.³⁹ These arguments led the Federal Republic of Yugoslavia to go to the International Court in Den Hague. However, this position is not clear. Some international law experts consider the intervention to be covered by international law because they interpret the UN Charter as mandating human rights protection or see legitimate reasons for the exceptional violation of the Charter.⁴⁰

Since the juridical legitimacy of the intervention is at least problematic, attempts have been made by Habermas and others to justify it on the basis of an anticipation of a future law of global citizens.⁴¹ Habermas' approach is less strict than the legalist, that the rule of law can never be violated, and more ambitious than the dominant (American) NATO trend to go directly from moral to political decision almost without any legal considerations. Since the establishment of human rights in a new (legal) world order has been called a just cause for intervention, NATO's disrespect with regard to international law (or its future development) is an important deficit of the legitimacy of the operation. Therefore, the NATO states should at least develop a convincing concept of future international law, which can provide an ex post justification of the intervention.

Proportionality

³⁸ Lutz (1999, 1)

³⁹ Friedensgutachten (1999, 6)

⁴⁰ See for example Ipsen (1999, 20)

⁴¹ See Habermas (1999)

Proportionality is the most important criterion to test, whether a humanitarian intervention protects or violates human rights. It includes both costs (last resort) and benefits (possibility of success) of an intervention. To judge the effect of the intervention on the human rights situation, three aspects must be investigated: first, the existing costs before the intervention, second, the costs in case of non-intervention and third, the costs and benefits of the intervention. Since it has already been said, that the first two aspects were reasons for an intervention, the analysis shall concentrate on the third aspect.

Proportionality refers not only to *jus ad bellum* (the right to war) but also to *jus in bello* (the conduct of war). There are different opinions about proportionality. Kavanaugh attacks NATO's conduct of war because it violated non combatant immunity.⁴² Habermas respects NATO's intention not to hit civilians.⁴³ However, NATO was willing to accept so called "collateral damages", i.e. unintended civilian casualties. According to the just war doctrine, this is not necessarily wrong, but it may be seen as a sign that other aspects were more important than human rights considerations.

Concerning the goal of the establishment of a human rights order, one can ask, whether NATO's relation to international law was proportionate. Mayer thinks that NATO damaged a positive development of international law because it ignored the UN.⁴⁴ Cassese hopes that "ex inuria ius oritur" the violation of the law creates a better law, i.e. an acceptance of the norm of humanitarian intervention in international law.⁴⁵

⁴² Kavanaugh (1999, 1)

⁴³ Habermas (1999, 1)

⁴⁴ Mayer (1999, 311)

⁴⁵ Cassese (1999)

The most important question with regard to proportionality is whether the just cause of the intervention (to stop the human rights violations against the Kosovo Albanians) could have been achieved with appropriate means. The NATO intervention may have caused a short term intensification of the human rights violations⁴⁶ but it eventually stopped them and they would probably have continued without the intervention. Therefore, it is justified to say that the intervention created more good than harm in terms of human rights in Kosovo. Furthermore, it deterred potential human rights violators from similar actions and focused international attention on human rights issues.

The criterion of proportionality was met in Kosovo, but the result would have been better, if human rights were more important in the conduct of the war. In sum, the intervention was better than the inactivity of the NATO states in similar crisis, but there is a lot to improve for future humanitarian interventions.

Conclusion

According to the criteria of the just war doctrine, NATO's operation in Kosovo can be called a just intervention for the following reasons:

- Massive human rights violation constituted a just cause
- The protection of human rights seem to be the right intention of the intervening states
- The intervention was successful
- Force was used as a last resort
- NATO tried to find multilateral support for the intervention
- NATO tried not to violate non combatant immunity
- Proportionality was respected in terms of human rights violations

⁴⁶ This in an attack by Kananaugh (1999) and others.

However, the just war criteria show weaknesses of the intervention too. There are other interests than human rights involved, the success is difficult to sustain, and the reputation of international law was damaged. Above all, few efforts have been made to compensate these problems, in particular to develop a concept for the future development of international law. This may cause long term problems in the future.

Nevertheless, the Kosovo intervention can be seen as a progress in the international crisis management, because it had a positive effect on the human rights situation and was therefore better than the inactivity of the NATO states in similar cases.

The intervention was the first application of a development in international relations from states rights to human rights, it contains both enormous chances and risks. It showed the chance, that the enforcement of a global human rights order is possible and simultaneously it made the risk obvious that such an attempt could destroy progress already made in international law instead of supporting a positive future development. Whether the chances or the risk are more important, will depend on NATO's capacity to ground further humanitarian interventions on a convincing political, legal and moral justification.

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