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Kosovo and the Law of Humanitarian Intervention

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KOSOVO AND THE LAW OF HUMANITARIAN INTERVENTION

*John J. Merriam**

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INTRODUCTION

On March 24, 1999, United States and NATO warplanes appeared in the skies over Yugoslavia on the first night of what would become a 78-day bombing campaign. Their mission was to systematically attack Yugoslav air defenses, ground troops, and infrastructure in order to drive the Yugoslav army and police forces out of Kosovo. Over the ensuing three months, NATO airpower gradually forced Yugoslavia to accept Western terms for a cease-fire¹ and allow the repatriation of hundreds of thousands of ethnic Albanians.² NATO launched the air strikes with the stated goal of "the unconditional and safe return of refugees . . . [and] unhindered access for the humanitarian relief organisations"³ In addition, NATO demanded an immediate and verifiable end to operations by Serb forces⁴

¹ See Rebecca Grant, *Airpower Made it Work*, AIR FORCE MAGAZINE, Nov. 1999, at 30, 37 (arguing that "the 78-day air campaign brought about an ending that seemed almost impossible back in March."); but see Tim Butcher & Patrick Bishop, *NATO: Bombs not Decisive*, CHI. SUN-TIMES, July 22, 1999, at 25, John Barry & Evan Thomas, *The Kosovo Cover-up*, NEWSWEEK, May 15, 2000, at 23 (arguing that bomb damage was grossly overestimated and actually had little impact on the Yugoslav military).

² See Tani Freedman, *UNHCR to Accompany First NATO Group into Kosovo*, AGENCE FRANCE PRESSE, June 10, 1999, available in LEXIS, News Library.

³ Jamie Shea, *NATO Press Conference*, M2 Presswire, Apr. 15, 1999, available in LEXIS, News Group File.

⁴ See *id.*

and the presence in Kosovo of an international military force that could oversee the return of peace to the region.⁵

The war in Kosovo is significant historically as the first (and quite possibly the last) military operation ever conducted by NATO against a sovereign state.⁶ Of much greater significance is the fact that the war in Kosovo may signify a turning point in the international law of armed conflict. If proponents of the legal doctrine of "humanitarian intervention" have their way, Kosovo will stand as a concrete example of a legitimate use of force for humanitarian ends.⁷ Critics of humanitarian intervention argue that the use of force against a sovereign state violates the most imperative international legal norms, not to mention the Charter of the United Nations. UN Secretary-General Kofi Annan aptly summarized the fundamental dilemma facing parties on either side of the debate: "On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?"⁸

There *is* law to support the doctrine of intervention, but it is unclear exactly what a proper intervention entails, and how the Kosovo operation fits into, or modifies, the legal doctrine. This Note attempts to establish criteria for legal humanitarian intervention and evaluate Kosovo according to those criteria. Section II sets forth the traditional justification for humanitarian intervention, identifies the main criticisms of it, and then explains why a doctrine of intervention remains today. Section III then attempts to identify the components of that doctrine and develop a framework that can be used to evaluate the legality of future interventions. Section IV evaluates the Kosovo intervention using that framework to determine how well it meets the legal requirements of humanitarian intervention. In conclusion, this Note examines the impact of Kosovo on other conflicts and determines its role in the development of international law.

⁵ *See id.*

⁶ *See* Bill Hayton, *Today Kosovo, Tomorrow the World*, NEW STATESMAN, Apr. 2, 1999, at 11.

⁷ For purposes of this Note, humanitarian intervention will be defined as "the unilateral intervention for protection of another state's nationals from human rights violations." Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 366 (1995) (citing Ulrich Beyerlin, *Humanitarian Intervention*, 3 ENCYCLOPEDIA PUB. INT'L L. 211, 212 (1981)). While intervention is often held to include non-military methods of coercion, our discussion will focus only on the use of military force for humanitarian ends. *See infra* note 20.

⁸ Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49. *See also* Law and Right: *When They Don't Fit Together*, ECONOMIST, Apr. 3, 1999, at 19 (outlining the legal bases for humanitarian intervention).

I. LEGAL BACKGROUND: ORIGINS AND EVOLUTION OF THE DOCTRINE OF HUMANITARIAN INTERVENTION

Despite the general prohibition on the use of force in the post WWII era, a legal doctrine of humanitarian intervention survives, embodied in the custom and practice of state actors in the international arena.⁹ The United Nations was formed to accomplish two principle goals: 1) to prevent the use of force as a means of settling disputes; and 2) to protect universal human rights.¹⁰ Those two goals often conflict when force is used to enforce human rights standards.¹¹ A strict interpretation of the UN Charter leads to the conclusion that the prohibition on force is absolute,¹² with two narrowly defined exceptions: 1) self-defense;¹³ and 2) collective action by the UN.¹⁴ However, the UN Charter also requires its members to actively enforce human rights standards.¹⁵ The resulting dilemma imposes upon states a duty to refrain from the use of force, and at the same time a duty to enforce human rights standards. Faced with this impasse, some states have opted to use force as a means of last resort to prevent humanitarian tragedy, while at the same time seeking to establish a self-defense argument in order to avoid UN sanction.¹⁶ As the next section will show, this type of legal gamesmanship is not necessary, as a well-circumscribed legal right to intervene exists.

⁹ See generally David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. Rev. 253 (1992) (providing a comprehensive examination of the doctrine of humanitarian intervention). David Scheffer was Ambassador for War Crimes in the Clinton State Department, and has been a vocal advocate of humanitarian intervention in Kosovo. See *Lawyer Sam's War*, ECONOMIST, Apr. 24, 1999, at 30.

¹⁰ See Steve G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W. INT'L L.J. 117, 124 (1993).

¹¹ *Id.* at 124-25 (“[T]he U.N. system creates a paradox. If one nation allows [another] to violate. . . human rights . . ., the first nation has violated article 55 by failing to promote human rights whereas if the first nation intervenes, she has violated article 2(4) . . .”).

¹² See *id.* at 126.

¹³ See U.N. CHARTER art. 51, reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW 18 (Ian Brownlie ed., 3d ed. 1983).

¹⁴ See *id.* at ch. VII.

¹⁵ See *id.* art. 55, at 18.

¹⁶ For example, India justified its intervention into East Pakistan as self-defense, despite the obvious humanitarian impulse behind India's action. See *infra* note 66.

A. *Moral Rationale for Intervention*

Before considering *whether* international law recognizes humanitarian intervention, it is important to understand the moral justification for using force to prevent humanitarian tragedy. The moral argument for the doctrine of humanitarian intervention is compelling. As one writer puts it, “[t]he right of people not to be killed should not depend on whether the state of which they are citizens is in a position to protect them, wants to protect them, or is itself the source of the danger.”¹⁷ In other words, human rights are so valuable that even the sanctity of “sovereignty” should not serve as a bar to their protection. Ideally, in the post-Cold War world, any military intervention in defense of human rights would be led by the United Nations, which has legal authority to conduct peacekeeping operations.¹⁸ However, as the crisis in Bosnia-Herzegovina demonstrated,¹⁹ the United Nations is not immune to the impediments of international geopolitics. Often the competing interests of rival states make a Security Council action impractical or impossible.²⁰ Under these circumstances, it may be necessary for a state or organization to unilaterally intervene with military force to prevent a massive loss of human life.²¹

Critics of humanitarian intervention raise valid questions over the morality of using force to “prevent” loss of life. Use of force necessarily involves *taking* life, both as the direct result of combat, and as the indirect result of the destruction of roads, shelter, water supplies, and other basic necessities.²² Even assuming that using force would result in *less* harm than

¹⁷ Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT’L & COMP. L. 1, 2 (1995).

¹⁸ See generally U.N. CHARTER ch. VII, reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 13 (laying the legal foundation for U.N. action in response to acts of aggression).

¹⁹ For a firsthand account of the failure of the United Nations to solve the Bosnia crisis, and the ensuing NATO-sponsored peace accord, see RICHARD HOLBROOKE, *TO END A WAR* (1999).

²⁰ See Halberstam, *supra* note 17, at 6. Halberstam writes, “We should be wary, however, of *limiting* humanitarian intervention to collective action authorized by the Security Council. The legality of humanitarian intervention should not be subject to the veto power of any one state.” *Id.*

²¹ Some scholars insist that the definition of “humanitarian intervention” should be broadened to include non-military interventions by humanitarian relief organizations, as well as economic sanctions and other forms of non-military coercion. See Scheffer, *supra* note 9, at 266. However, this Note will focus exclusively on military intervention.

²² This argument was often raised in the debate over Kosovo. Senators and journalists alike questioned the morality of bombing one group of people to save another. However, most of the opposition to the Kosovo mission within the US centered around the wisdom of exposing U.S. troops to danger. See, e.g., Eric Schmitt, *Senators Clash over U.S. Role in a NATO Bombing Campaign*, N.Y. TIMES, Mar. 23, 1999, at A11.

would result from standing aside and waiting for the effect of sanctions or diplomacy, there is something fundamentally problematic about arguing *for* the just war. However, when the choice is between using force for the greater good or inaction in the face of genocide, torture, or “ethnic cleansing,” the morality of humanitarian intervention is in many ways unquestionable.²³ It is imperative to establish a strong legal precedent for humanitarian intervention in order to deter future human rights violations.

More importantly, critics argue, is that the very idea of intervention runs contrary to the concept of national sovereignty. International law is predicated on the idea that each state is sovereign and free to act as it sees fit within its own borders.²⁴ When this principle is undermined, the result is chaos in international affairs and the steady rise of the dominance of strong nations over weak.

However, it may be that our conception of sovereignty is fundamentally flawed. Rather than viewing the doctrine of humanitarian intervention as curtailing or interfering with sovereignty, we should see it as action in a sphere where state sovereignty itself is limited – the sphere of basic human rights. Because “the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.”²⁵ Thus, sovereignty can only be justified as long as the basic right to life is preserved. In this sense, sovereignty *is* limited. In the post-Cold War world, sovereignty remains important,²⁶ but it pales in significance when compared to the basic moral imperative to protect human rights. This re-definition of sovereignty²⁷ allows for the international protection of human rights and thus avoids conflict between sovereignty and humanitarian intervention.²⁸

²³ See Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. U.L.J. 131, 132 (1994). Standing aside may actually compound the problem. Professor Paust notes that “[w]e . . . should have learned that an attempted appeasement of those who commit acts of genocide might not actually promote peace and stability . . .” *Id.*

²⁴ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (4th ed. 1990). Brownlie defines sovereignty as entailing both “a jurisdiction, prima facie exclusive, over a territory and the permanent population living there . . .” and “a duty of non-intervention in the area of exclusive jurisdiction of other states . . .” *Id.*

²⁵ FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 15-16 (2d ed., 1997).

²⁶ See Jost Delbrück, *A More Effective International Law or a New “World Law”? – Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 705-06 (1993) (arguing that sovereignty remains as important as ever, but is paralleled by a growth in international cooperation and cross-border enforcement of international legal norms).

²⁷ See Scheffer, *supra* note 9, at 260. Scheffer argues that:

In addition, the type of humanitarian crisis that prompts intervention is very likely *itself* a threat to state sovereignty. War crimes and crimes against humanity are crimes of universal jurisdiction precisely because they have a profound effect on the interests of all states.²⁹ When war crimes go unpunished, they cause destabilization in surrounding states in the form of displaced refugees and the spread of armed conflict,³⁰ which may lead to a larger war.³¹ It is thus in the general interest of all states to

the exclusive, national premise of sovereignty no longer prevails. It is changing because the pieces on the global chess board are changing There are scores of ethnic groups struggling for self-determination; millions of refugees and displaced people fleeing from war, oppression, and a host of human tragedies; and hundreds of regional and international organizations exercising jurisdiction across national borders. Each one of these can challenge or is actively attempting to challenge the sovereign power of a national government and claim rights independently guaranteed under modern international law.

Id. (citations omitted).

²⁸ W.E. Hall, an opponent of creating a *legal* doctrine, believed that intervention could *only* be justified on moral grounds, and that there was no good legal argument. "There is fair reason . . . for hoping that intervention . . . may be useful and even beneficent. Still, from the point of view of law, it is always to be remembered that states so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one." LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 143 (1973) (citing W.E. HALL, *A TREATISE ON INTERNATIONAL LAW* 309 (4th ed., London, 1895)).

²⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (explaining that "[u]niversal jurisdiction over [war crimes] . . . is a result of universal condemnation of those activities and *general interest in cooperating to suppress them . . .*") (emphasis added).

³⁰ Gross human rights abuses often create refugees, which act as a major destabilizing force. See Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT'L L. & POL'Y 689, 689 ("Displacement . . . threatens international peace and security."). Stavropoulou also cites the 1986 Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, which stated that forced displacement and the creation of refugees will "(1) create individual human misery (2) impose political, economic, and social burdens upon the international community and especially on developing countries (3) affect the domestic order and stability of receiving states (4) jeopardize the political and social stability and the economic development of the region and (5) endanger international peace and security." *Id.* at 707 (citation omitted).

³¹ The assumption that peace at any price is better than war has been proven wrong time and again.

It is evident . . . that there are dangers posed by a UN effort to maintain peace and stability at any price. Peace may not serve security in a given circumstance. Similarly, peace may be seriously threatening to human rights and self-determination. Indeed, a lasting peace or peace in the long run may demand that armed force be used "in the common interest" to stop atrocities in violation of human rights and self-determination.

cooperate to prevent and punish war crimes, in order to prevent the outbreak of war and the resulting economic and political upheaval.

B. Legal Underpinnings: Foundation in Customary Law

The legal doctrine of humanitarian intervention finds scholarly support as early as the 17th century, when Hugo Grotius wrote that “where [tyrants] provoke their own people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.”³²

However, international law is not created by scholars in a vacuum – the theory must be supported by either treaty, general principles of law recognized by all states, custom and practice, or (in some cases) judicial decisions in order to become law.³³ Customary law is “the oldest and the original source of international law,”³⁴ and it is the source of the law of humanitarian intervention. When the International Court of Justice was established by the United Nations, its founders were careful to determine exactly what sources of law the international legal system would recognize as valid. Article 38, §1(b) of the Statute of the I.C.J. includes “international custom, as evidence of a general practice accepted as law” among the four sources of international law. From this definition, modern legal scholars have distilled two major requirements.³⁵ First, there must be generality of practice.³⁶ This standard has been interpreted as requiring “no more than a mere handful”³⁷ of states; nevertheless, there must be some common practice shared by several states. Second, there must be acceptance of this practice as *law*.³⁸ The states that share the general practice must do so based on the belief that the law requires it.³⁹

Paust, *supra* note 23, at 131. “Clearly, the attempted appeasement of Nazi genocidal acts and aggression did little to forestall a major war and may have assured an ultimate and more destructive denial of peace.” *Id.* at 132.

³² HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 288 (A.C. Campbell trans., photo. reprint 1993) (1901).

³³ See Statute of the International Court of Justice, ch. II, art. 38(1). See also HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* 240 (1994).

³⁴ L. OPPENHEIM, *INTERNATIONAL LAW* 25-26 (8th ed. 1955), cited in STEINER ET AL., *supra* note 33, at 232.

³⁵ See Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 102 (1991).

³⁶ See *id.* at 102-03.

³⁷ *Id.* at 102.

³⁸ See *id.* at 103.

³⁹ See *id.*

C. Custom and Practice before the UN

A general custom and practice of humanitarian intervention existed as early as the 19th century;⁴⁰ even those critical of intervention concede that the French intervention in Syria in 1860-61 to stop massacres of the Christian minority was a legitimate humanitarian operation.⁴¹ Proponents of intervention also cite the British, French, and Russian intervention in Greece (1827-1830),⁴² the Russian intervention in Turkey (1877-1878), and the Greek, Bulgarian, and Serb intervention in Macedonia (1903) as examples of humanitarian interventions that were regarded as legal operations.⁴³

The Syrian operation is probably the best example of humanitarian intervention in the pre-War period. Shocked by massacres of Maronite Christian minorities in Syria,⁴⁴ France landed troops and patrolled the coast of Syria with naval vessels to prevent recurrence of the massacres. While the Turkish Sultan eventually authorized this intervention by treaty, he did so under strong compulsion from France, Britain, and Russia.⁴⁵ France certainly had other reasons for wanting to influence events in the Middle East, but the primary motive for intervention was to stop wanton killing.⁴⁶

⁴⁰ See Scheffer, *supra* note 9, at 258-59.

⁴¹ See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 340 (1963). For a detailed account of the Syrian intervention, see SOHN & BUERGENTHAL, *supra* note 28, at 143-80.

⁴² See BROWNLIE, *supra* note 41, at 339. Brownlie opposes humanitarian intervention, but concedes in this case that “[t]he substantial motive was the prevention of racial extermination . . .” *Id.*

⁴³ See Scheffer, *supra* note 9, at 254-55 n.4.

⁴⁴ One account of these massacres provided by a “contemporary writer” bears reprinting here because of the striking similarity between it and the Serb atrocities against Albanians in Kosovo. According to this anonymous author, several hundred Maronites took refuge in a walled town under the supposed protection of the Turkish governor. “[A]fter a conversation between the governor and the Druses,] the gate was thrown open and in rushed the fiends, cutting down and slaughtering every male, the soldiers co-operating . . . I have good reason to believe, after a careful comparison of all the accounts, that from 1100 to 1200 males actually perished in that one day.” SOHN & BUERGENTHAL, *supra* note 28, at 145 (alteration in original) (citing 102 Annual Register, pt. 1, at 251-55 (1860)).

⁴⁵ See SOHN & BUERGENTHAL, *supra* note 28, at 156 n.1.

⁴⁶ See R.J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 11 (1974). “France intervened in Syria in 1860 in order to save the Christian Maronite tribes of the Lebanon from the ravages of the Moslem Druses, an act which has been called one of ‘pure humanity’ . . .” *Id.*

D. Treaty Law: the UN Charter and its Prohibition on the Use of Force

Some scholars argue that even if a rudimentary custom and practice of intervention once existed, the formation of the United Nations effectively repudiated this practice by forbidding military intervention.⁴⁷ While the UN Charter nowhere *expressly* forbids humanitarian intervention *per se*,⁴⁸ article 2(7) clearly articulates the principle of non-intervention and the sense of the UN that the United Nations Security Council should conduct all military intervention under Chapter VII.⁴⁹ Furthermore, article 2(4) prohibits the use or threat of force against other states. Several UN Resolutions point towards a strict interpretation of article 2(4)⁵⁰ as prohibiting *any* military action.⁵¹ In particular, the “Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,” adopted by the General Assembly in 1965, emphatically states that interests of sovereignty and non-intervention preclude intervention on any grounds.⁵² In 1970, the UN adopted another Resolution that speaks directly to the possibility of humanitarian intervention. Annex II of the “Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States” specifically identifies the duty of a State to “refrain from the

⁴⁷ See, e.g., BROWNLIE, *supra* note 41, at 342.

⁴⁸ See *id.*

⁴⁹ Article 2(7) reads “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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” U.N. CHARTER art. 2(7), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 13, at 4.

⁵⁰ Article 2(4) reads : “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.” *Id.*, art. 2(4), at 4.

⁵¹ The prohibition on the use of force has two notable exceptions: self-defense, authorized by article 51, and collective U.N. action under Chapter VII. *Id.*, arts. 39-51, at 14-17.

⁵² See G.A. Res. 2131 (XX), 1408th plen. mtg., *in* KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY 1946 – 1996, 26-27 (Dietrich Rauschnig et al. eds., 1997). The Resolution reads in part: “1) No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements is condemned. . . . 4) The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.”

exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States”⁵³

UN Resolutions are not binding under international law – the Statute of the I.C.J. recognizes treaties, but not simple resolutions or declarations. These UN Resolutions should only be used to help interpret the meaning of the UN Charter itself. Taken as a whole, the UN Charter’s prohibition on the use of force and the principle of non-intervention, as expressed by various UN Resolutions, seems to outlaw military intervention of any sort.

E. Conflicting UN Goals: the UN Charter is Committed to Human Rights

Proponents of intervention counter by arguing that the establishment of the United Nations has “neither terminated nor weakened the customary institution of humanitarian intervention.”⁵⁴ First of all, the United Nations Charter emphatically stresses the importance of human rights,⁵⁵ and requires its members to enforce human rights standards.⁵⁶ As human rights have grown in importance in international law, it is no longer possible to rightly claim that human rights abuses within the borders of a sovereign state are solely the “internal” affair of that state. Thus, China, Russia, and other states who continually assert their right to do as they see fit within their sovereign borders are legally wrong.

⁵³ G.A. Res. 103, U.N. GAOR, 36th Sess., 91st plen. mtg., at Annex II(1), U.N. Doc. A/RES/36/103 (1981). This passage forbids *exploitation and distortion* of human rights issues, so it cannot be read to prohibit legitimate humanitarian intervention. Nevertheless, its tone suggests that intervention on humanitarian grounds will be viewed skeptically and frowned upon.

⁵⁴ Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 171 (Richard B. Lillich ed., 1973). “In terms of its substantive marrow, the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights, and appraising its own work.” *Id.* See also Simon, *supra*, note 10, at 131.

⁵⁵ See *id.* at 127 (“The U.N. Charter emphasizes the tremendous importance in recognizing and promoting human rights worldwide. Article 55 of the Charter is devoted solely to human rights, ‘the United Nations shall promote . . . universal respect for . . . and observance of, human rights’ . . .”).

⁵⁶ See *id.* (“Article 56 provides ‘all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.’”)

The UN clearly articulated this principle in one of its first official actions: the formation of the Nürnberg Tribunal. The court that presided over the Nürnberg Tribunal recognized the fact that the Tribunal itself represented a significant modification to international law.⁵⁷ The right of the Tribunal to try offenses formerly protected by the veil of "sovereignty" was asserted as "an authoritative expression of general international law."⁵⁸ The Tribunal stood for the premise that state sovereignty will not serve to immunize perpetrators of human rights violations from criminal culpability.

For almost the entire history of the UN, it has recognized that certain human rights violations are beyond the pale of state sovereignty and constitute a threat to peace and security.⁵⁹ Consequently, proponents of humanitarian intervention argue that the UN has endorsed the notion that sovereignty is secondary in importance to the basic human right to life. If the principles first set forth by the Nürnberg Tribunal are followed to their logical conclusion, humanitarian intervention to prevent war crimes before they occur is just as defensible as prosecuting war criminals after the crimes have been committed.

Secondly, the prohibition on armed attack in article 2(4) is intended to prevent *unlawful* use of force to undermine the sovereignty, political independence, and territory of a state. It does not rule out the *lawful* use of force, so long as it is not used for one of those purposes. This argument, fundamentally textual, hinges on the idea that a lawful humanitarian intervention will not undermine the political or territorial sovereignty of the state over the affected region,⁶⁰ and that any such intervention will not be inconsistent with the purposes of the UN.⁶¹

⁵⁷ See CHARTER AND JUDGEMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS 38, (1949) ("in the view of the Tribunal . . . it is the expression of international law existing at the time of its creation; and to that extent *is itself a contribution to international law.*") (alteration in original) (emphasis added).

⁵⁸ *Id.*

⁵⁹ See *id.* at 71. The Court declared that "international law has . . . made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon its rights in a manner which outrages the conscience of mankind." *Id.*

⁶⁰ See Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, at 149-50 (1992); see also Krylov, *supra* note 7, at 383; but see Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473, 474 (arguing that article 2(4) must be construed to mean *exactly* what it says: peace is the supreme value in international law, even when it comes at the expense of human rights).

⁶¹ For a detailed analysis of article 2(4) according to international legal principles regarding treaty interpretation, see TESÓN, *supra* note 25, at 146-74. Tesón concludes that no method of treaty interpretation leads to a reading of article 2(4) as an absolute prohibition on humanitarian intervention. See *id.*

Finally, article 2(4) does not contemplate situations where the Security Council is paralyzed and unable to reach consensus on how to prevent universal crimes.⁶² In reserving the authority to conduct military interventions, the UN presumes its ability to avoid gridlock and take action where it is appropriate. However, in real-world practice, the UN is susceptible to the same sort of political pressures that any national legislative body faces, and thus quite often it will be unable to act even when it should.⁶³ Supporters of intervention argue that the right to intervene should remain as a stopgap measure to be used when the Security Council is deadlocked and immediate action is required.⁶⁴ Ostensibly, this right to intervene will be strictly circumscribed and governed by international law.

F. A New Paradigm of Customary Law

Despite the apparent contradictions in the Charter and overall purposes of the UN, traditionalists maintain that the UN's voice has been clear regarding the prohibition on the use of force. Nonetheless, the practice of intervention has continued in the post-UN era. There was widespread acceptance of Israel's intervention into Uganda during the Entebbe raid.⁶⁵ India intervened in East Pakistan in 1973, and while it eventually relied on its right of self-defense under article 51 of the UN Charter, India initially defended its action on grounds of humanitarian need.⁶⁶ The fact that India even advanced this argument is evidence that it had "a conception that the practice is required by or consistent with international law."⁶⁷ India's change of position reflects the inherent problem in humanitarian intervention in the era of the UN Charter.⁶⁸ India's true motive was to avert tragedy, but it was forced to resort to "legal gamesmanship"⁶⁹ out of fear that its claim would be repudiated.⁷⁰

⁶² See W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279-80 (1984).

⁶³ See *id.*

⁶⁴ See, e.g., Simon, *supra* note 10, at 141 ("Since the UN has failed to provide assistance when it was urgently needed, realists argue that society requires retaining the possibility of a unilateral use of force.").

⁶⁵ See *id.* at 144-45.

⁶⁶ See Benjamin, *supra* note 60, at 133. For more on the Indian intervention, see Brian K. McCalmon, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 231-35.

⁶⁷ STEINER ET AL., *supra* note 33, at 240.

⁶⁸ See Benjamin, *supra* note 60, at 131 ("The Indian intervention in East Pakistan in 1971 ('the India case') is a classic example of the problems associated with interpreting state practice and ascertaining whether such practice supports the legitimacy of humanitarian intervention.").

⁶⁹ *Id.* at 134.

The Tanzanian intervention into Uganda, in 1978-1979, is another important example of humanitarian intervention in the post-Charter era. After Ugandan forces invaded and annexed Tanzanian territory, Tanzania launched a military offensive to recapture the territory and then carried the war into Uganda. With the help of Ugandan insurgents, Tanzanian forces eventually took the Ugandan capital, Kampala, and toppled the totalitarian regime of Idi Amin.⁷¹

The Tanzanian offensive to remove Idi Amin went far beyond the legitimate bounds of self-defense under article 51 of the UN Charter.⁷² Though Uganda had first attacked Tanzanian territory, the right of self-defense does not extend to a punitive offensive designed to topple the government of the aggressor state.⁷³ The only justification for Tanzania's action was a humanitarian one⁷⁴ – the dictatorship of Idi Amin was brutal in the extreme, and in eight years of rule, Amin had caused the death of an estimated 300,000 Ugandans.⁷⁵

The significance of the continued resort to humanitarian intervention when diplomacy fails is great. It shows, at the very least, that states are cognizant of some remnant of their right to resort to the use of force when the cause is just, despite UN prohibitions. However, critics question whether these scattered instances of humanitarian intervention rise to the level of “general practice accepted as law.”

According to some legal theorists, “general practice” may mean only a single instance, provided that there is no significant opposition to it.⁷⁶ Michael Reisman argues that customary law is formed each time an international incident occurs, based on the way the international community reacts.⁷⁷ Thus, “[a] high degree of actual tolerance for . . . unilateral action

⁷⁰ In fact, India was treated fairly mildly by the UN. The Security Council took no action to punish India, and the General Assembly passed a resolution calling on Pakistan to stop human rights abuses and for both parties to cease hostilities. Some believe this lack of significant punishment shows the implicit acceptance of the humanitarian argument by the world community. See, e.g. Simon, *supra* note 10, at 149.

⁷¹ See TESÓN, *supra* note 25, at 182-83.

⁷² See *id.* at 188.

⁷³ See *id.*

⁷⁴ See *id.* at 195.

⁷⁵ See Simon, *supra* note 10, at 150.

⁷⁶ This formulation of customary international law is known generally as the “New Haven” approach, and is embodied in the works of Myres McDougal and Michael Reisman. See TESÓN, *supra* note 25, at 17 & n.55.

⁷⁷ See W. Michael Reisman, *International Incidents*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 3, 3-24 (W. Michael Reisman & Andrew R. Willard eds., 1988), for a discussion on defining international law based on international incidents; see also Anthony D'Amato, *The Theory of Customary International Law*, 82 AM. SOC'Y

– words and other verbal condemnations notwithstanding – may be a signal that the international community is willing to accept such unilateral military assertions of right.”⁷⁸ Customary law is fundamentally a summation of the accepted standard of behavior, and the expectations of what is acceptable “are almost entirely derived from the responses of key actors to a critical event.”⁷⁹

An important step in this paradigm is to identify what constitutes “a response” to an international incident. Reisman implies that words of condemnation alone do not show actual opposition; rather, it is the *action* of international elites that should be used to determine the level of acceptance. “Because they require a greater mobilization of resources, actions often indicate the resolve of participants better than words; they may also better reveal the intensity of elite expectations.”⁸⁰ As Professor Chodosh notes, “[p]ractice may take many forms, both affirmative and negative.”⁸¹ The lack of any action in opposition to an intervention may thus constitute a “negative” general practice.

If Reisman’s theory is correct, then the NATO intervention into Kosovo clearly demonstrates that a legal right to intervene exists, based on the lack of any significant international opposition.⁸² This theory of the formation of new customary legal norms may well justify the Kosovo operation by way of hindsight; because nobody did anything to stop it or oppose it, then the law may have embraced it.

INT’L L. PROC. 242, 246 (1990). Professor D’Amato poses a similar dialectic view of the formation of customary law:

Can any state ever violate international law? Yes, but with a qualification. If you have a system that’s not statutory and not precedential, but rather a Hegelian developing system of international law, then every violation contains the seeds of a new rule. Therefore, the development of those rules must consist always of violations of previous rules or else the rules would have frozen centuries ago. So, in one sense a state can violate international law but in another sense it creates the law. Now, how can we reconcile these two possibilities? Well, because of the reactions of other states.

⁷⁸ Reisman, *supra* note 77, at 4.

⁷⁹ *Id.* at 5.

⁸⁰ Andrew R. Willard, *Incidents: An Essay in Method*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS, *supra* note 77, at 25, 36.

⁸¹ Chodosh, *supra* note 35, at 100.

⁸² Many states were opposed to NATO’s use of force, but none took significant *action* in opposition by way of sanctions or other measures. According to Reisman, this signifies “[a] high degree of actual tolerance” for the NATO action. Reisman, *supra* note 77, at 4. Professor Christopher Greenwood points out that “a resolution put before the Security Council condemning the NATO bombing in Serbia was defeated by 12 votes to three on March 26th, implying acceptance of the action as legal.” *Law & Right: When They Don’t Fit Together*, *supra* note 8, at 20.

The record of state action over the past 50 years clearly suggests that a right of humanitarian intervention has survived the formation of the UN. The principles of human rights that form the cornerstone of the United Nations are built on a very weak foundation indeed if no method of enforcing them remains. However, it is equally obvious that not every intervention based on a claim of humanitarian need is a legal intervention. When the United States intervened in Iran in an attempt to free the hostages, it was roundly criticized and the ICJ expressed its opinion (in dicta) that the US had violated international law.⁸³ The difference between the US intervention in Iran and the Israeli intervention in Uganda are only made clear if they can be examined using established criteria. In order to distinguish between the lawful use of force for humanitarian purposes and the unlawful, pretextual intervention, an analytical framework is required.

II. CRITERIA FOR HUMANITARIAN INTERVENTION

The major argument against a legal doctrine of humanitarian intervention is that it would open the door to "pretextual" intervention.⁸⁴ Because this legal doctrine is founded in the custom and practice of states, and because it is so controversial, there has never been a universally accepted standard established for regulating and evaluating humanitarian interventions. Whatever standard exists is only that which can be drawn from the past practice of intervening states, and as such is vague and malleable. A set of guidelines which provide criteria that observers can use to determine the legality or illegality of a military intervention would prevent abuse of the doctrine and enhance its effectiveness as a deterrent to potential human rights violations.

Any framework proposed will have its critics; nevertheless, it is not unreasonable to require certain basic criteria that must be met before a military operation can properly be called a humanitarian intervention. To begin with, the concept of humanitarian intervention presupposes the existence of a humanitarian crisis, and the first four factors proposed in this Note establish the necessary "pre-conditions" allowing humanitarian intervention. First, the intervening power must be in possession of credible evidence of the crisis. Second, the evidence must point to the occurrence or probable occurrence of gross human rights abuses on a large scale. Third, the intervenor must have exhausted all non-forceful methods of averting the crisis. Finally, the victims of the human rights abuses must not be opposed to the intervention.

⁸³ See also Case Concerning United States Diplomatic and Consular Staff In Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

⁸⁴ See David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 238 (1994) ("A traditional reason for preventing unilateral intervention was that it would be widely abused; nations would intervene for territorial rather than humanitarian reasons.").

The second set of criteria concern the nature of the military operation itself, and are really two different ways of demonstrating the basic humanitarian motives of the intervenor. First, any military intervention that claims humanitarian justification must limit its primary objective to ending the crisis, and limit its duration to that time required to resolve the crisis. Humanitarian reasons must not be concocted or used to mask ulterior motives. Second, to the greatest extent possible, a humanitarian intervention should be multilateral in nature. Multilateralism, while never an absolute guarantee, is nevertheless often an indicator of the will of the international community and helps to ensure that the interests of an individual state do not gain primacy over the basic altruism behind the intervention.

In this section, each of these six major factors will be developed in the hope that a workable framework for evaluating humanitarian intervention can be constructed.

A. *Evidence of Human Rights Violations*

Evidence is the cornerstone of legality. The first requirement for a legitimate humanitarian intervention is credible evidence of either existing or impending gross human rights violations.⁸⁵ Critics of the doctrine of intervention most often cite the potential for abuse as reason for their opposition.⁸⁶ Requiring credible evidence of a humanitarian crisis would prevent abuse of the doctrine.

Even with credible evidence, there is a chance for abuse, but it does not logically follow that any doctrine of intervention will be unworkable. In reality, “[a]ny individual state action which is permitted, such as self-defense, may result in potential abuse, but this potential abuse applies to almost every legal rule.”⁸⁷ The ever-increasing level of global communications makes it improbable that any state could get away with such abuse.⁸⁸ Requiring a high standard of evidence and employing modern communications and monitoring technology will minimize the

⁸⁵ Generally, abuse and evidence of it are proportionally related. “The more widespread the abuse, the easier it is to document and confirm its existence.” Benjamin, *supra* note 60, at 153.

⁸⁶ See TESÓN, *supra* note 25, at 108; see also Kresock, *supra* note 84 at 238; see also Krylov, *supra* note 7, at 403-04.

⁸⁷ Benjamin, *supra* note 60, at 147; see also Krylov, *supra* note 7, at 403-04.

⁸⁸ See Kresock, *supra* note 84, at 238 (“The modern system of global communication facilitates confirmation of such [legitimate humanitarian] goals obviating [sic] the need for such a prohibition. Furthermore, should such an abuse occur, the international community has quite convincingly demonstrated its ability to remedy such violations.”).

chance of mistake or abuse of power and thereby give legitimacy to the process.⁸⁹

What constitutes “credible” evidence? The legitimacy of a humanitarian intervention will not be decided in a national court, but rather in the international diplomatic arena. Therefore, whatever evidence forms the basis of the intervenor’s belief that a human rights tragedy is occurring must be of the sort that the international community will accept as true. Credibility will thus hinge on both the substance and the source of the evidence.

1. Substance: Evidence Must Show the Likelihood of Human Rights Violations

The substance of the evidence is very important, for the world will not grant legitimacy to a military operation predicated on the mere suspicion of foul play. *Some* hard evidence is required.⁹⁰ However, the symptoms of the problem will likely be far more visible than its cause, and ultimately more compelling. When solid evidence of human rights abuses is coupled with widespread reports that the abuses are continuous and large in scale, the international community will likely conclude that the requisite evidence exists. The example provided by Kosovo, discussed below, goes a long way toward demonstrating the combination of tangible legal evidence, reports by human rights observers, military intelligence, and anecdotal evidence necessary to make the case for intervention.

⁸⁹ See Benjamin, *supra* note 60, at 144-46. Benjamin reasons that the prohibition on intervention and the protection of state sovereignty is a “remnant of the days when cold war tensions were divisive, and suspicions about pretextual uses of force were preeminent.” *Id.* at 144. Modern technologies obviate the need for this prohibition. Benjamin states:

[B]ecause of this advanced technology, the international community can document human rights atrocities and confirm the actual events occurring within state borders. A pretextual humanitarian intervention can be discovered more easily and the state subjected to sanctions. Meanwhile, altruistic humanitarian interventions will contribute to world peace and end human suffering.

Id. at 145-46.

⁹⁰ Paradoxically, concrete legal proof of human rights violations – evidence of the sort that would stand up in a court of law – is often hard to document until *after* an intervention, especially when international observers have been barred from the affected area. Nonetheless, massive human rights violations are very difficult to hide in the long run, and a variety of international political organizations and NGOs are well equipped to monitor and report atrocities.

2. Source: Evidence Must Be Provided and Accepted By Objective Observers

The source of the evidence is in many cases even more important for evaluating credibility than the content of the evidence. Ideally, the evidence provided will come from independent sources without an interest at stake in the outcome of the crisis. The closest thing to such an independent source is the United Nations itself; in theory, the competing interests of all the member states ensure that it operates with objectivity.⁹¹ Other sources widely regarded as credible will include the various non-governmental organizations⁹² dedicated to protecting human rights, such as Helsinki Watch, Doctors Without Borders, and the International Red Cross. Finally, evidence provided by the intelligence agencies of the intervening state or organization can be used to augment the evidence provided by objective bodies. Evidence provided by a national intelligence agency may be suspect unless it is supported by evidence from other, disinterested sources.

It is one thing to collect and present the evidence, it is another to say with certainty that the evidence has been accepted by the international community. To require that *every* state accept evidence of human rights violations would make intervention impossible. The offending state will certainly deny wrongdoing, and it may very well persuade its allies that the evidence has been fabricated or is overblown. In determining the legitimacy of intervention, one must again look to the degree of acceptance by the United Nations, which is the only body that can truly claim to speak for the international community in an objective manner.

B. Gross Human Rights Abuses

Determining the level of violations sufficient to justify intervention presents a dilemma. Inevitably, any lower limit established will meet with criticism from human rights groups. On the other hand, allowing intervention for *any* human rights violation is akin to having no doctrine at all; states may claim that policies that are counter to their own are “human rights violations” and elect to intervene. In order to justify military force, the human rights violations must meet two conditions. First, they must violate the *highest* norms of human rights – the right to life and the right to be free from physical abuse. Second, the violations themselves must be widespread and large in scale.

⁹¹ It should be noted, however, that the decision-making machinery on the use of force has been concentrated in the elite group sitting on the Security Council. This situation invariably gives more weight to the interests of Security Council members, so the objectivity of the UN is in no way certain. See DJURA NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 88-98 (1970).

⁹² Hereinafter “NGOs.”

1. Rights Protected by Humanitarian Intervention

The term “human rights” encompasses a wide variety of physical, political, and economic rights, most of which were enumerated by the UN in the Universal Declaration of Human Rights.⁹³ However, humanitarian intervention is a remedy designed only to protect the highest and most basic, physical human rights – the right to life, and the right to be free from torture and physical abuse. It would be hard to justify an aggressive military action to protect the right to marriage,⁹⁴ the right to a free press,⁹⁵ or the right to unionize,⁹⁶ all of which are enumerated in the Declaration. While these rights are very important, they do not involve an immediate risk of physical injury or death, and they lack the urgency required to justify a war.⁹⁷

2. Level of Abuse Warranting Intervention

Similarly, humanitarian intervention cannot be used to prevent a very small-scale violation of human rights. The imminent death of 100,000 refugees may well justify a full-scale military intervention, but the unlawful execution of one political prisoner would not. It is impossible to quantify exactly what would constitute the minimum required number of deaths, and such an exercise would be inhumane and degrading to the very values that human rights seek to uphold. Therefore, the standard for a justifiable intervention must remain vague; humanitarian intervention is only proper when human rights violations are “large-scale”.

The conventional solution to this problem is to apply a “shock the conscience” standard, under which intervention is warranted when the human rights violations place many people in immediate danger of injury or loss of life.⁹⁸ This standard requires a diplomatic solution to controversies where rights are violated, but where the threat of death or serious injury to *many* people is not present. The “shock the conscience” standard therefore requires proof of human rights abuses likely to lead to the physical harm or death of a large group of people before force can be used as a response.

⁹³ See Universal Declaration on Human Rights, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 13, at 250.

⁹⁴ See *id.*, art. 16, at 253.

⁹⁵ See *id.*, art. 19, at 254.

⁹⁶ See *id.*, art. 23(4), at 254.

⁹⁷ See Krylov, *supra* note 7, at 392. Krylov argues that “[T]he response should match the abuse, and interventions should not be allowed for small-scale abuses.” *Id.*

⁹⁸ The conventional standard for humanitarian intervention was articulated by Oppenheim, who stated in 1905 that atrocities which “stagger humanity” would warrant intervention by outside powers. See HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 170 (Richard B. Lillich ed., 1973) (citing L. OPPENHEIM, INTERNATIONAL LAW 347 (1905)).

Torture, expulsion, systematic rape, war crimes, and genocide are examples of abuses that would satisfy this standard. This should not be understood to mean that other human rights are not worthy of protection, nor that a single individual's rights are unimportant. The "shock the conscience" standard merely limits the circumstances where military force will be an acceptable method of protecting of human rights.

C. Exhaustion of Non-Forcible Options

Use of force must be the last resort when a state or group of states attempts to resolve a humanitarian crisis. To the greatest extent possible, other means, such as diplomacy, sanctions,⁹⁹ and the efforts of humanitarian relief agencies¹⁰⁰ must be employed before exercising the military option during "the period of time during which the humanitarian need has not reached crisis dimensions."¹⁰¹

However, since most human rights crises are by definition emergencies, many of those other means may not be practical. To require that *every* other means must be exhausted would make every humanitarian intervention ineffective by virtue of being too late to prevent a tragedy. Exhaustion in the context of a humanitarian crisis should thus be a two-step process, with a "pre-crisis" phase and a crisis phase. During the "pre-crisis" phase, as tension in the region builds and indications of what is to come arise, other methods of preventing the tragedy are required. These include trade sanctions, political pressure, and attempts at mediation. Once the crisis begins, a state or group of states can intervene unilaterally only

⁹⁹ See Scheffer, *supra* note 9, at 291 (arguing that military intervention should be undertaken only when "[a]lternative peaceful remedies, including economic sanctions, have been exhausted . . .").

¹⁰⁰ It is here that non-military means of "intervention" should be employed. See *id.* at 266-67.

Humanitarian intervention should be understood to encompass non-consensual, non-forcible methods, namely intervention undertaken without military force to alleviate mass human suffering within sovereign borders. This type of intervention would include the work of non-governmental organizations, such as the International Committee of the Red Cross ("ICRC") and the *Médecins sans Frontières*, which normally interfere only with the consent of the subject government, but sometimes operate on hostile territory with the ignorance of or grudging acquiescence by governmental authorities. . . .

. . .

Another type of non-forcible humanitarian intervention is represented by the actions of the UN Security Council in insisting on the provision of humanitarian assistance. . . .

Id.

¹⁰¹ *Id.* at 291.

when faced with a deadlocked Security Council.¹⁰² By attempting to initiate Security Council action, the intervening power adds further weight to the legitimacy of the intervention by establishing a record of humanitarian intent.¹⁰³

This criterion assumes that there will be an adequate period of time for the international community to act to defuse the crisis before it reaches the critical point – a true “pre-crisis” phase. However, it is possible that a humanitarian crisis may erupt suddenly, catching the world by surprise. In that case, a Security Council deadlock will allow for immediate intervention, without requiring the exhaustion of non-forcible methods.

D. Desire of the Victims for International Relief

The right of states to be free of the fear of foreign intervention is fundamental. However, the people who live in that state also have fundamental human rights that outweigh the rights of the state.¹⁰⁴ It follows, therefore, that when a group of people whose human rights are being systematically abused by their own government actually *wants* international protection, theirs are the primary rights that need to be enforced. “[U]nless the victims themselves prefer to tolerate their government rather than see their state invaded . . .,”¹⁰⁵ there is no right to autonomy worth protecting.

An understanding of this fundamental prioritization of rights leads to the conclusion that a humanitarian intervention can only be legitimate when “the victims of human rights violations welcome the foreign invasion.”¹⁰⁶ According to Professor Tesón, this requirement is met when “subjects are actually willing to revolt against their tyrannical government.”¹⁰⁷ On the other hand, if the evidence suggests that the

¹⁰² David Scheffer says unilateral intervention is legal when “[t]he Security Council is deadlocked indefinitely on the issue and has not explicitly prohibited intervention to meet the humanitarian crisis.” *Id.* at 290.

¹⁰³ See Benjamin, *supra* note 60, at 156-57. Benjamin argues that:

[l]egalization of humanitarian intervention should not require the intervenor to exhaust all peaceful means to prevent abuse before acting, but the steps an intervening state does employ before using force is probative of the legality of the intervention A state with altruistic motives, however, would be exonerated if it acted hastily in the face of impending danger.

Id.

¹⁰⁴ See TESÓN, *supra* note 25, at 53.

¹⁰⁵ *Id.* at 91.

¹⁰⁶ *Id.* at 126.

¹⁰⁷ *Id.* Tesón further qualifies this requirement. “For there are situations where tyrants exercise extreme forms of terror . . .” that make it impossible for the victims to formally

“victims” prefer to tolerate the abuse rather than see a foreign power intervene, humanitarian intervention cannot be allowed.

In attempting to determine whether this standard has been met, allowance must be made for the effects of a tyrannical government on the willingness or the ability of the oppressed people to speak out. The fact that the victims make no formal request for international relief cannot be taken as a sign that they would prefer to see the abuse continue rather than allow foreign intervention. On the other hand, care must be taken to ensure that any request for international relief comes from a person or organization that is truly representative of the will of the oppressed populace. A rogue leader of a minor faction calling for intervention does not meet this test. There must be evidence that the populace as a whole desires relief.

E. Limited Force

Humanitarian intervention is founded on the idea that when human rights and state sovereignty come in conflict, *certain* human rights will trump state sovereignty as an international legal norm.¹⁰⁸ Implicit in this idea is the fact that state sovereignty remains of great importance. It would be a misinterpretation of the doctrine to say that sovereignty has *no* value in the face of human rights abuse. In formulating a workable doctrine of intervention, it is therefore important that state sovereignty remains a norm that is protected to the greatest degree possible. This can be accomplished by imposing limits in both objective and duration on the actions of the intervenor that will provide pressure on the intervenor to keep the intervention focused on providing humanitarian relief.

1. Limited Objective

The sole objective of intervention must be to end the humanitarian emergency and prevent its resurgence. The purposes of the intervention should not be extended to include territorial conquest or liberation, the break-up of a state, or the toppling of a government. Such aims would destroy the disinterested humanitarian intent that is required for a legitimate intervention. In acting within the territory of a sovereign state, every attempt must be made to comply with the spirit of article 2(4) of the UN Charter, which forbids “the threat or use of force against the territorial

request, or even openly acknowledge their desire for, foreign intervention. *Id.* “In most cases the victims of oppression must actually be willing to receive outside help.” *Id.* However, where repression is so extreme that such a request is impossible, it may still be legitimate to intervene if such a desire manifests itself in other less obvious ways.

¹⁰⁸ Thus, Brownlie describes humanitarian intervention as involving “no change in sovereignty” because a state that commits human rights abuses has “abused its sovereignty” and “made itself liable to action by any state which was prepared to intervene.” BROWNIE, *supra* note 41, at 338. This model regards sovereignty as maintaining its full importance – sovereignty is not lost when intervention occurs, merely waived in the face of a higher norm.

integrity or political independence of any State, *or in any manner inconsistent with the Purposes of the United Nations.*"¹⁰⁹

This basic recipe for limited objectives immediately runs into problems when applied to the real world. Rational state actors are simply not capable of completely separating considerations of self-interest from decisions to use force,¹¹⁰ nor should they be expected or required to. It is the careful consideration of self-interest that often makes use of force the option of last resort instead of first. Military operations are too costly and risky to be undertaken lightly. Furthermore, ending the humanitarian crisis may require the removal of a hostile regime; this may be a secondary objective, but it clouds the issue when attempting to determine the basic humanitarian motives behind an intervention.

It goes without saying that virtually no military action will be completely free of self-interest. However, the requirement is simply that the basic interest of human rights is foremost, not that it be the exclusive interest.¹¹¹ "Just cause for war is stopping the willful violation of human rights."¹¹² The intervenor must be able to show that while self-interests may also be present, the *primary* motivation for the military action is the preservation of human rights and *not* the acquisition of territory or the military overthrow of a hostile regime. As is evident in Kosovo, this balancing of interests proves difficult when protecting human rights requires the overthrow of a regime antithetical to humanitarian goals.

2. Limited Duration

Closely linked to the limited objectives are limits in duration of the intervention. The intervenor must not remain in occupation of the sovereign territory of another state any longer than necessary to accomplish the humanitarian mission.¹¹³ This prevents humanitarian reasons from being used to mask an otherwise naked land-grab. The limited duration of a unilateral intervention should be monitored and enforced by the United Nations.

¹⁰⁹ U.N. CHARTER, art. 2(4), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 13 (emphasis added).

¹¹⁰ See TESÓN, *supra* note 25, at 108 ("[I]n international affairs, states are very rarely impartial, and their own interests are bound to weigh heavily in shaping their policies.") (quoting S.I. BENN & R.S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 361 (1959)).

¹¹¹ See Krylov, *supra* note 7, at 397-98 ("The intervening states' motives are particularly important. To constitute humanitarian intervention, these motives should be genuinely humanitarian.").

¹¹² TESÓN, *supra* note 25, at 106.

¹¹³ See Simon, *supra* note 10, at 152.

There are several problems with this factor. What is the intervenor to do when the humanitarian crisis has been averted but the political or cultural conditions make it inevitable that conditions of chaos will return if the intervenor leaves? What about independence movements? What is the role of the UN in all of this?

NATO will have to promptly address these questions in Kosovo. The fundamental inquiry lies in whether the right to intervene brings with it a duty to remain as a guarantor of continued protection of human rights. For reasons outlined in the next section, it is more logical to presume that the right does create a duty, and that an intervenor may have to stay as long as necessary.

Hopefully, conditions will so normalize that the intervenor can withdraw without fear of resurgence in the crisis. This may result from a political solution to the problem, or from the UN agreeing to take over the peacekeeping mission after the crisis is averted. Whatever the reason for withdrawal, requiring a limitation in duration helps to avoid pretextual interventions and annexation of territory. Just as with the level of abuse required for intervention, this standard must remain somewhat vague, requiring that the intervenor not stay any longer than necessary to restore peace and security. A more specific time frame will inevitably cause problems in real-world application, as intervenors scramble to meet the withdrawal deadline, often at the cost of the very peace and security they hoped to provide. This standard will be difficult to enforce, but insisting on it will help ensure that intervenors are conscious of the need to maintain the legitimacy of their intervention by avoiding annexation or indefinite occupation of the territory of another sovereign state.

F. Multilateralism

Humanitarian intervention should be multilateral whenever possible. The more states that are involved in the intervention, the greater the legitimacy of the intervention,¹¹⁴ and therefore the less likelihood of an abuse of the doctrine.¹¹⁵ However, this should not be understood to *require*

¹¹⁴ Barry M. Benjamin notes that “[w]hile collective action does not legitimize the action, seeking the cooperation of other states in the face of inaction by the United Nations . . . lends credibility to a claim of intervention based largely on altruistic motives. When other states apart from the intervenor agree with the use of force, such collective action is probative of the action’s genuine character.” Benjamin, *supra* note 60, at 155; *see also* Krylov, *supra* note 7, at 396-97 (explaining that collective action is preferable to unilateral action).

¹¹⁵ W.E. Hall, though opposing the legality of intervention, conceded that:

[a] somewhat wider range of intervention than that which is possessed by individual states may perhaps be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant. In the general interests of Europe, for example, an end might be put to a civil war by the compulsory separation of the parties to it, or a particular

the presence of more than one state's military forces in the affected area.¹¹⁶ It may be that only one state will have the logistical capacity and requisite military power to intervene. Rather, this criterion requires that the endorsement of intervention be multilateral. A humanitarian intervention must be supported by many voices, and the existence of a humanitarian crisis be accepted by the world community as a whole. Any signs that the UN has endorsed intervention will further add to its legitimacy.

III. CRITERIA APPLIED TO KOSOVO

The criteria outlined above are not original; rather they are largely a synthesis or restatement of the ideas of earlier commentators on intervention and observations of the past practice of intervening states. As such, one may not properly call these criteria the "new" law of intervention. Yet, at the very least, they provide a framework for analysis of operations like the one in Kosovo. Ultimately, it is the interventions themselves, and the reaction of the world to them, that will shape the international law of armed conflict. However, if legal scholars can agree on a set of standards to evaluate these interventions, the doctrine itself will become more widely accepted and its effectiveness as a deterrent will be enhanced. With that in mind, the next section will focus on how well the Kosovo intervention holds true to the principles and requirements outlined above and on what kind of precedent it sets for future interventions.

A. *Evidence of Human Rights Violations in Kosovo*

In building the case for intervention in Kosovo, the UN and NATO possessed a large amount of evidence of human rights abuses. UN observers on the ground tracked the refugee situation as it approached crisis dimensions.¹¹⁷ The evidence pointed toward an organized campaign to rid Kosovo of its Albanian majority, by whatever means necessary.¹¹⁸ The volume of evidence obtained, and the extent to which that evidence was

family or a particular form of government might be established and maintained in a country, if the interests to be guarded were strictly international, and if the maintenance of the state of things set up were a reasonable way of attaining the required object.

SOHN & BUERGENTHAL, *supra* note 28, at 142. Hall, though writing more than a hundred years before the war in Kosovo, unknowingly advanced some of the same arguments for intervention into Yugoslavia. This passage also bears particular relevance to the limitation on the goal of the intervenor, since Hall implied that dissolution of the sovereign state may not exceed the bounds of intervention.

¹¹⁶ Benjamin calls multilateralism a "useful caveat," as opposed to an "absolute prerequisite." Benjamin *supra*, note 60, at 154, 152.

¹¹⁷ See *infra* notes 119-133 and accompanying text.

¹¹⁸ See *id.*

available to the international community, set a new standard for the legal use of force. NATO presented its case *very* well, and substantially raised the bar for future actors contemplating intervention. The content and the source of this evidence will be the focus of the discussion below.

1. Substance: Evidence Pointed to Widespread, Systematic Human Rights Violations

Initially, the evidence provided a startling picture of the developing crisis in Kosovo. For several years, Serb military and paramilitary forces had been engaged in a low-level conflict with Kosovo Liberation Army rebels advocating an autonomous or independent Kosovo. However, what began as a police operation shortly became an organized purge of the civilian population.¹¹⁹ By late 1998, the United Nations High Commissioner for Refugees¹²⁰ estimated that “the indiscriminate use of force by [Yugoslav forces] . . . resulted in numerous civilian casualties and . . . the displacement of over 230,000 persons from their homes”¹²¹ A few months later, a scant two weeks before the NATO bombing began, the UNHCR increased its estimate, stating “the year-long conflict has driven 400,000 people out of their homes.”¹²² The UNHCR also reported that “shelling and intimidation by the security forces and the Yugoslav Army are not only causing Albanian villagers to flee, but are fueling a cycle of violence and fear”¹²³ Compounding the problem, Yugoslav forces continued to harass Albanians as they attempted to escape, and were actively hindering efforts to provide relief.¹²⁴

¹¹⁹ See U.S. Department of State, *Erasing History: Ethnic Cleansing in Kosovo* (visited Sept. 16, 2000) <http://www.state.gov/www/regions/eur/rpt_9905_ethnic_ksvo_2.html>.

¹²⁰ Hereinafter “UNHCR.”

¹²¹ UN SC Resolution 1160.

¹²² *Ogata Says Situation Deteriorating in Kosovo, Urges Action to Avert Disaster* (last modified Mar. 11, 1999) <<http://www.unhcr.ch/news/pr/pr990311.htm>>.

¹²³ *Id.*

¹²⁴ USAID reported that:

[r]elief organizations continue to experience incidents of harassment and physical assault by Serb forces and civilians. In one of these incidents, a soldier in a Yugoslav Army (VJ) truck smashed the windshield of a mobile clinic vehicle with a bat In another incident, a brick was thrown through the rear window of an NGO vehicle as it traveled through Pristina On March 9, the VJ denied an assessment team, two mobile health clinics, and one water/sanitation team access to two villages On March 12, a joint UNHCR/NGO assessment team was unsuccessful, for the third day in a row, in locating IDPs [internally displaced persons] living in the open hills . . . due to ongoing conflict . . .

Hard evidence of *specific* war crimes was also coming to light. A UN humanitarian team uncovered evidence of a mass execution in early January,¹²⁵ and reports by journalists and NGOs of many other such incidents were plentiful. Often, Yugoslav forces made it difficult to pin down the exact nature and location of alleged mass executions by destroying evidence and transporting bodies by truck to be buried away from the site of their death.¹²⁶ Nevertheless, observers on the ground were able to correlate accounts provided by refugees with discoveries of actual mass graves.

By March 20, 1999, a humanitarian emergency faced the world. UN observers gazed in shock as the stream of refugees grew into a flood of incredible proportions. The UN reports were supported by NATO intelligence indicating that, on March 20, the day after OSCE¹²⁷ observers were withdrawn from Kosovo, the Yugoslav army launched a final campaign to forcibly expel thousands of Albanians from their homes.¹²⁸ In Pristina, thousands of Albanians were rounded up and expelled from the city, and parts of the city were shelled by the Yugoslav army. Though this

USAID Kosovo Fact Sheet #11 (last modified Mar. 18, 1999) <http://www.usaid.gov/hum_response/ofda/kosofs11.html>.

¹²⁵ See *id.*; see also *NATO's Role in Relation to the Conflict in Kosovo* (last modified July 15, 1999) <<http://www.nato.int/kosovo/history.htm>> (“In January 1999, evidence was discovered, by a United Nations humanitarian team, of the massacre of over 40 people in the village of Racak.”). The massacre at Racak was the incident that prompted Louise Arbour, Chief Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, to issue an indictment of Slobodan Milosevic and four of his top lieutenants on May 22, 1999. They were charged with deportation (a crime against humanity), murder (a crime against humanity and a violation of the laws or customs of war), and persecutions based on political, racial, and religious grounds (a crime against humanity). See *Indictment of Slobodan Milosevic, et al., presented at the International Criminal Tribunal for the Former Yugoslavia, The Hague, The Netherlands, May 22, 1999, available at* <http://www.state.gov/www/regions/eur/990527_kosovo.indictment.html> (last visited Sept. 17, 1999).

¹²⁶ See *Report: Kosovo Killings 'crime against humanity'*, (Mar. 17, 1999) <<http://www.isgkc.org/2cnn031799.htm>>. Other times, however, Yugoslav soldiers were quite brazen and made no attempt to hide the atrocities they committed.

[T]he news from Kosovo is of a truck load of bodies driven into one of the villages targeted by the Serb security police and dumped in a central square. The people of the village, Srbica, were told to claim and bury their dead before Serbia dumped them into a mass grave. An Associated Press television crew was invited to film the spectacle.

Michael Moran, *Ethnic Cleansing, Act II, in Kosovo*, (Mar. 9, 1998) <<http://www.isgkc.org/lmsnbc030998.htm>>.

¹²⁷ The Organization for Security and Cooperation in Europe.

¹²⁸ See U.S. Department of State, *Kosovo Chronology: Timeline of events 1989-1999 Relating to the Crisis in Kosovo* (visited Sept. 8, 2000) <http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html>.

incident occurred *after* the bombing campaign began, the expulsion of citizens from Pristina “followed a certain pattern and was conceivably organized well in advance.”¹²⁹

The past practice of ethnic cleansing¹³⁰ by Serbs in Bosnia, and the last decade of Yugoslav policy in Kosovo,¹³¹ made the mounting evidence of a *pattern* of forced expulsion and killing even more compelling. The International Criminal Tribunal for the Former Yugoslavia¹³² had extensively documented Serb war crimes in Bosnia,¹³³ and media reports indicated that the policy of ethnic cleansing had been orchestrated and supported by the leadership in Belgrade.¹³⁴ Aggressive action by Belgrade in suppressing Albanian political movements and destroying Albanian culture during the period 1992 to 1999¹³⁵ painted a picture of a similar campaign to drive Albanians from Yugoslavia and create an ethnically pure state.¹³⁶

One notable failure on the part of NATO was the underestimation of abuse perpetrated by the Kosovo Liberation Army¹³⁷ against Serbs. KLA “freedom fighters” had been bombing and assassinating prominent Serbs for years in Kosovo.¹³⁸ NATO reports during the crisis tended to paint a one-sided picture, which overlooked the terrorist acts of the KLA. However, while KLA abuses were serious (and have continued since the NATO occupation),¹³⁹ one must avoid the temptation to use them to justify

¹²⁹ Steven Erlanger, *Monitors' Reports Provide Chronicle of Kosovo Terror*, N.Y. TIMES, Dec. 5, 1999, at 1.

¹³⁰ Ethnic cleansing has been described as “a well orchestrated plan of elimination of a group of people, from a certain territory, with the goal that they not return, by means that cover the range of international humanitarian law violations.” M. CHERIF BASSOUNI & BASSIOUNI PETER MANKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* §8.5.1.1, at 611 (1996).

¹³¹ Following the rise to power of Milosevic in 1989, Kosovo was deprived of its traditional autonomy within Yugoslavia and brought under the direct control of Belgrade, a move vigorously opposed by the Kosovars. *See NATO's Role in Relation to the Conflict in Kosovo*, *supra* note 125.

¹³² Hereinafter “ICTY.”

¹³³ *See generally* BASSIOUNI & MANKAS, *supra* note 130, app. I, at 65.

¹³⁴ *See* Roger Cohen, *C.I.A. Report Faults Serbs in 90% of Bosnia Ethnic Cleansing*, N.Y. TIMES, Mar. 9, 1995, at A1.

¹³⁵ *See Kosovo Chronology*, *supra* note 128.

¹³⁶ OSCE reports prepared from refugee interviews clearly indicate the intent of the Serbs to destabilize their neighbors and destroy ethnic Albanian monetary and political power. *See Erlanger*, *supra* note 129.

¹³⁷ Hereinafter “KLA.”

¹³⁸ This behavior has continued since the NATO occupation of Kosovo. *See* Paul Watson, *Reports Detail Cycle of Violence in Kosovo*, L.A. TIMES, Dec. 7, 1999, at A9.

¹³⁹ *See id.*

the actions of the Yugoslav government. At the same time, NATO must put an end to retributive violence by ethnic Albanians against their former oppressors if the credibility of its peacekeeping mission is to survive.¹⁴⁰

Kosovo provides us with a clear and convincing record when it comes to establishing evidence of human rights abuses. As time goes on, and the work of the ICTY brings more forensic evidence to light, the full picture of ethnic cleansing in Kosovo can be pieced together.¹⁴¹ In a shocking discovery in early 2001, investigative reporters apparently uncovered evidence that hundreds, and possibly thousands, of Albanian bodies were incinerated in an attempt to destroy evidence of war crimes.¹⁴² According to Serbian sources who participated in the destruction of these bodies, this effort to mask the atrocities was done "under orders from Serbian leader Slobodan Milosevic's senior commanders."¹⁴³ NATO Commander General Wesley Clark was in possession of satellite photos which showed the convoy of bulldozers and trucks dispatched to the site shortly after it was named in the UN indictment of Milosevic for war crimes.¹⁴⁴ Thus, at the time NATO decided to intervene, it possessed substantive evidence that clearly showed the existence of a widespread pattern of killing, torture, and forced expulsion, and an effort reminiscent of that undertaken by the Nazis in the closing days of World War II to eliminate evidence of these crimes.

2. Source: Wide Variety of Sources and Objective Nature of Reports Lent Credibility to NATO's Case

States contemplating intervention in some future conflict will have to take note of the extent and objectivity of the sources NATO used to make

¹⁴⁰ The UN police force sent in to augment NATO military peacekeepers has begun to redress this problem, arresting Albanians who continue to attack Serbs. *See UN Police Arrest Kosovo Albanians for Murders*, AGENCE FRANCE PRESSE, Dec. 20, 1999, available in LEXIS Newsfile.

¹⁴¹ The U.S. State Department has now adjusted its estimate of the total number of Albanians killed by direct Serb action to 10,000. To date, war crimes investigators have exhumed 2,108 bodies from mass graves (according to ICTY investigators). In addition, State Department estimates of the number of displaced persons in Kosovo has been revised upward to 1.5 million. *See Philip Shenon, State Dept. Now Estimates Serbian Drive Killed 10,000*, N.Y. TIMES, Dec. 10, 1999, at A12.

¹⁴² *See All Things Considered, Burning the Evidence: Kosovo War Crimes* (NPR radio broadcast, Jan. 25, 2001).

¹⁴³ *Id.*

¹⁴⁴ *Id.* General Clark recognized what was probably going on. "Not only had the Serbs killed civilians and were trying to hide them, but there was a system behind this in which they were responding to discoveries [announced by the ICTY]. And so for us, this was an important finding. It deepened the recognition that the Serb high command in some way was involved in this." *Id.*

its case before taking action in Kosovo. NATO combined its own military and civilian intelligence, reports from UNHCR and OSCE observers on the ground, refugee interviews conducted by humanitarian relief organizations, and media coverage to paint a clear and convincing picture of a crisis in need of immediate resolution. The many and varied sources of evidence, employing the whole range of modern communications and monitoring technologies, as well as old-fashioned, on-the-spot investigations and refugee interviews, gave this evidence a credibility that was hard to dispute. The credibility of the evidence was further enhanced by the objective, disinterested nature of the sources, particularly the UNHCR and the OSCE. As precedent, Kosovo therefore set a relatively high standard for the evidentiary requirement. Future intervenors must ensure that similarly disinterested observers provide and verify evidence of humanitarian crisis before intervening.

B. Gross Human Rights Violations: Nature of Rights Being Violated, and Scale of the Violations, Warranted Intervention

The crisis in Kosovo placed hundreds of thousands of people in grave danger of losing their lives, and so the basic requirement of impending physical harm was clearly present. Gross human rights violations on a scale that warranted international military protection had occurred. The forced expulsion of ethnic Albanians left them without protection from the elements. In Resolution 1199, the Security Council pointed out that “50,000 [refugees] [were] without shelter and basic necessities”¹⁴⁵ as the winter months approached. UNHCR reported children “dying in the cold.”¹⁴⁶ The ongoing abuse by Serb forces, the massacres, and the indiscriminate shelling were verified by a wide variety of objective observers. These violations constituted a grave threat to life and “shocked the conscience” of the NATO countries. The level of human rights abuses in Kosovo did not substantially alter international law, as forced expulsion and mass execution (“ethnic cleansing”) were already clearly recognized as human rights offenses of a grave nature.¹⁴⁷

However, it was not until the OSCE observers were withdrawn and the Serbs launched their largest offensive that NATO chose to intervene.¹⁴⁸ NATO could have made a good case for intervention several months before the war, as the Yugoslav offensive had created hundreds of thousands of

¹⁴⁵ S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. at 2, U.N. Doc. S/RES/1199 (1998).

¹⁴⁶ *Kosovo: Ogata Condemns Atrocities, Appeals for Access* (last modified Jan. 18, 1999) <<http://www.unhcr.ch/news/pr/pr990118.htm>>.

¹⁴⁷ See BASSIOUNI & MANIKAS, *supra* note 130, §1.5.2, at 48.

¹⁴⁸ See *Kosovo Chronology*, *supra* note 128.

refugees by late 1998.¹⁴⁹ However, until the unsatisfactory conclusion of the Rambouillet peace talks, NATO still held out hope that a diplomatic solution could be reached. When the Yugoslav army began its final push, diplomacy had clearly failed. A line had been crossed that made intervention an option. This illustrates the principle of exhaustion – resorting to force only after all other means had failed.

C. Exhaustion of Non-Forcible Options

The NATO intervention in Kosovo sets a good example of exhaustion, as diplomacy in the “pre-crisis” phase had failed, and the UN Security Council was deadlocked. Deadlock is a problematic issue, difficult to demonstrate conclusively and yet impossible to ignore. Kosovo illustrates some of the problems increasingly evident in the structure of the UN Security Council, and why it is likely that deadlock will persist as an impediment to resolution of humanitarian crises.

1. Pre-Crisis Diplomatic Initiatives Had Failed

The Kosovo operation was preceded by months¹⁵⁰ of diplomatic efforts to resolve the region’s problems peacefully.¹⁵¹ The United Nations,¹⁵² the OSCE,¹⁵³ NATO,¹⁵⁴ the US, and the Balkans “Contact

¹⁴⁹ See *Ogata Says Situation Deteriorating in Kosovo, Urges Action to Avert Disaster*, *supra* note 122.

¹⁵⁰ Indeed, Richard Holbrooke’s account of the Dayton Peace talks during the Bosnian crisis shows that at least initial diplomatic efforts to forestall the Kosovo crisis were taken several years before military action. See HOLBROOKE, *supra* note 19, at 234 (recounting Holbrooke’s disagreement with Milosevic over whether or not Kosovo was an internal matter).

¹⁵¹ For a chronology of events, including major diplomatic initiatives, see *Kosovo Chronology*, *supra* note 128.

¹⁵² See S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); see also S.C. Res. 1199, *supra* note 145.

¹⁵³ The OSCE, in a decision a full year before the start of the NATO bombing campaign, expressed its disapproval of Yugoslavia’s policies, and authorized increased monitoring of the situation by OSCE civilian and military observers. In a strongly worded statement, the OSCE called upon the Yugoslav government to “initiate a meaningful dialogue with [the Kosovars] which will lead to . . . resolution of ongoing political problems . . .” and to “allow access to Kosovo for the International Committee of the Red Cross and other humanitarian organizations.” Org. for Sec. & Co-operation in Eur., Decision 218 on the Situation in Kosovo, Mar. 11, 1998.

¹⁵⁴ NATO threatened air strikes on October 13, 1998, in an attempt to add force to diplomatic efforts. See *NATO’s Role in Relation to the Conflict in Kosovo*, *supra* note 125.

Group”¹⁵⁵ all participated in increasingly urgent diplomatic moves in an effort to curb the violence and reach a political solution.

The diplomatic efforts increased throughout the year before the war. In September 1998, the UN Security Council issued a formal demand for the cessation of hostilities by Serb forces against the Kosovars. UN Security Council Resolution 1199 stated in part:

[a]cting under Chapter VII of the Charter of the United Nations, [the Security Council] . . . [d]emands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe¹⁵⁶

The invocation of Chapter VII gave Yugoslavia clear notice that the international community regarded the human rights abuses in Kosovo as a grave threat to international security and a violation of accepted human rights standards. In short, the UN, the OSCE, NATO, and the US all devoted massive diplomatic efforts towards a peaceful solution.

The diplomatic effort culminated in February 1999. The Rambouillet peace talks, where the Contact Group attempted to coax a settlement out of the Yugoslav government and the Kosovars,¹⁵⁷ ended without a satisfactory settlement.¹⁵⁸ Despite reaching an “interim agreement,” the talks soon deteriorated and the fighting resumed.¹⁵⁹

¹⁵⁵ The Contact Group established by the London Conference on the Former Yugoslavia sponsored the Rambouillet peace talks. *See id.*

¹⁵⁶ S.C. Res. 1199, *supra* note 145.

¹⁵⁷ Though conducted by the Contact Group, the Rambouillet talks were endorsed by the UN Security Council, the EU, and the OSCE. *See* Robin Cook, Opening Remarks at the Kosovo Peace Talks (Feb. 6, 1999) (transcript available at <<http://www.Britain-info.org/bistes/fordom/Balkans/kosovo/6feb99-2.stm>> (visited Nov. 18, 1999)).

¹⁵⁸ The Interim Agreement signed by the Kosovars (but not the Yugoslav government) at Rambouillet included guarantees of political autonomy for the Kosovars and continuing sovereignty over the region by Belgrade. *See Rambouillet Interim Agreement* (visited Sept. 1, 2000) <http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html>.

¹⁵⁹ When the Yugoslav government refused to sign the Rambouillet Accords, the Co-Chairs of the Kosovo Peace Talks (French Foreign Minister Hubert Vedrine and British Foreign Secretary Robin Cook) issued a terse statement, insisting that the Rambouillet Accords were the “only peaceful solution to the problem” and accusing the Yugoslavs of

2. Security Council Was Deadlocked as Situation Became Critical

By early March 1999, the situation had become grave. Thousands were suspected dead or missing, and hundreds of thousands of refugees massed on the Yugoslav-Macedonian border were in immediate danger of losing their lives. A true humanitarian crisis now existed. At this time the UN should have intervened. However, the UN could not do so because the Security Council was deadlocked on whether to authorize military action.¹⁶⁰ In the face of a paralyzed Security Council, and cognizant of the UN's earlier failure to avert the crisis in Bosnia,¹⁶¹ NATO elected to act unilaterally. The fact that the Security Council would not act allows NATO to rightfully claim that all other means had been exhausted.

One criticism of the NATO action is that the UN Security Council took no formal vote on UN intervention because Russia and China had made it clear that they would veto such a proposal.¹⁶² The US and NATO did not want to risk a "no" vote, because it may have been construed as an express prohibition on unilateral intervention. However, without the existence of a recorded vote, critics question whether there was true deadlock in the Security Council.

Despite the lack of an official recorded vote, deadlock was readily apparent to all observers even before the crisis broke out.¹⁶³ The UN had

trying to "unravel the Rambouillet Accords". Hubert Vedrine and Robin Cook, Statement of Co-Chairs of Kosovo Peace Talks (Mar. 19, 1999) (transcript available at <<http://www.kosovo.mod.uk/statements/htm>> (visited Sept. 20, 2000)). The Co-Chairs, speaking for the Balkans Contact Group, went on to "solemnly warn the authorities in Belgrade against any military offensive on the ground and any impediment to the freedom of movement and of action of the [Kosovars] . . ." *Id.*

¹⁶⁰ No formal vote was taken on UN intervention, most likely because of the implied threat of a veto by China, Russia, or both. See Elisabeth Zingg, *Beijing on the same wavelength as Moscow on Kosovo*, AGENCE FRANCE PRESSE (Mar. 24, 1999). According to this report, "China has repeatedly voiced in recent days strong in-principle opposition to military intervention in Yugoslavia, calling for Western countries to find a political solution to the crisis." *Id.* China called the problem "an internal affair of Yugoslavia" and called for the problem to be solved "through dialogue on the basis of respect for the sovereignty and the territorial integrity of Yugoslavia . . ." *Id.* For an example of Russian opposition to intervention, see Xenia Kolpakova, *Russia Duma Speaker Against NATO Intervention in Kosovo*, ITAR-TASS NEWS AGENCY (Jan. 19, 1999).

¹⁶¹ See HOLBROOKE, *supra*, note 19.

¹⁶² China's foreign minister Tang Jiaxuan said in a speech before the UN General Assembly that non-intervention and respect for sovereignty are "'the basic principles governing international relations'" and decried "such arguments as 'human rights taking precedence over sovereignty' and 'humanitarian intervention.'" Barbara Crossette, *China and Others Reject Pleas that the UN Halt Civil Wars*, N.Y. TIMES, Sep. 23, 1999, at A13.

¹⁶³ See Judith Miller, *Security Council Relegated to Sidelines*, N.Y. TIMES, Mar. 14, 1999, late edition, at 14. Reasons for the increasing ineffectiveness of the Security Council are

been increasingly ineffective at averting such tragedies since Somalia, with notable failures in Rwanda and Bosnia.¹⁶⁴ A paralyzed Security Council was unable to act in either case to prevent a horrible humanitarian tragedy.¹⁶⁵ The NATO powers had no reason to expect anything different in regard to Kosovo, which put Yugoslavia (a traditional ally of Russia)¹⁶⁶ in direct opposition to NATO. While Russia defended Yugoslav sovereignty based on ethnic and political ties, China did so to avoid any action that could later be used to undermine the legitimacy of Chinese occupation of Tibet.¹⁶⁷ It was clear that hundreds of thousands would die while the UN continued to debate the merits of intervention. Furthermore, NATO rightly feared that the instability caused by these universal crimes, and the spillover of refugees into Macedonia and Albania, could potentially spread the conflict into another Balkan war. Faced with this unacceptable situation, NATO elected to act unilaterally.¹⁶⁸

The precedent set in Kosovo on exhaustion is clear and convincing – a state may unilaterally intervene only when all possible diplomatic initiatives have been pursued and the UN Security Council is unable to act.¹⁶⁹ Future intervenors must ensure that they can establish an equally solid track record of diplomatic effort and UN deadlock.

many, according to this article, including “Russia’s decline as a world power and its determination to prove that it is still a force to be reckoned with by vetoing, or threatening to veto, many American-backed proposals in the Security Council.” *Id.* Others blame the US, claiming that Washington “uses the Council ‘selectively,’ to find multilateral cover for its policies, relying on regional organizations instead to legitimize force when a Russian or Chinese veto seems likely.” *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ German Foreign Minister Joschka Fischer has proposed a novel way of avoiding Security Council deadlock by requiring that any veto be explained by the state who uses it. *See Crossette, supra* note 162.

¹⁶⁶ Belgrade’s long-standing status as a client of Russia dates back to the original Ottoman occupation of Byzantine Europe, when Orthodox Serbs turned to Moscow for religious and cultural leadership. The continuing relationship between Yugoslavia and Russia has prompted fears of a future Russian-Yugoslav military action to retake Kosovo. Gennady-Sysoyev, *Milosevic Wants to Get Kosovo Back With Russia’s Help*, KOMMERSANT-DAILY, Sept. 10, 1999, at 4. Thus far, Russia has carefully avoided any official statement on the potential for such a venture, and confines its remarks to expressions of disapproval over the current situation in Kosovo. *Id.*

¹⁶⁷ *See Crossette, supra* note 162.

¹⁶⁸ The UN had explicitly endorsed NATO’s role in attempting to defuse the crisis, which may have led NATO to believe it had authority to intervene militarily when diplomacy failed. *See Miller, supra* note 163.

¹⁶⁹ David Scheffer proposes a procedure for determining when to act in the face of deadlock, by analogizing ‘intervention’ to a self-defense action.

In the law of self-defense, there is the right of immediate unilateral or collective action until the Security Council activates the collective

D. Desire of the Victims for International Relief

Both the Kosovar leadership and the ethnic Albanian people welcomed the NATO intervention in Kosovo.¹⁷⁰ On January 2, 1999, moderate Albanian political leader Ibrahim Rugova called for direct NATO intervention to secure the peace.¹⁷¹ In his New Years message, Rugova stated “[w]e are convinced that the [international] verification mission and permanent NATO attention can calm down tensions [in Kosovo].”¹⁷² He went on to ask for NATO action, claiming that “only the deployment of NATO troops in Kosovo can bring about greater security for all the people – a precondition for the political settlement of the Kosovo problem.”¹⁷³ There was also wider evidence of a majority opinion among the oppressed populace. When NATO forces finally occupied the region on June 12, 1999, enthusiastic and hopeful crowds waving banners welcomed the troops to Kosovo.¹⁷⁴

These overt signs of a desire by the ethnic Albanians for international relief must be coupled with Professor Teson’s requirement of victims willing to revolt against their oppressor.¹⁷⁵ Given the active efforts of the KLA to fight a guerrilla war against the Yugoslav Army, the Kosovar will to revolt was not in doubt. Clearly, the NATO intervention in Kosovo met the requirement that the victims of the human rights abuses welcome the intervention.

security system But with respect to humanitarian intervention, an inverted procedure might be more appropriate: first, await action, if any, by the Security Council, and when no such action occurs, a right to intervene for humanitarian purposes without Council approval might arise

Scheffer, *supra* note 9, at 290-91.

¹⁷⁰ See *Strike Against Yugoslavia: NATO Begins Airstrikes Against Yugoslavia* (CNN television broadcast, Mar. 24, 1999, transcript #99032402V00) (stating that the ethnic Albanians feel intervention was long overdue and welcome the NATO action).

¹⁷¹ See Ismet Hajdari, *Ethnic Albanian Leader Calls for NATO Troops to Bring Peace*, BIRMINGHAM POST, Jan. 2, 1999, at 8A.

¹⁷² *Id.* (second alteration in original).

¹⁷³ *Id.*

¹⁷⁴ See John Kifner, *Kosovars Venture Out, Finally, to Welcome NATO Troops*, N.Y. TIMES, June 13, 1999, at 31.

¹⁷⁵ See TESÓN, *supra* note 25 at 126.

E. Limited Force

1. Limited Objective

The NATO operation provides an interesting problem in limited force. First of all, its objective at the outset was clearly limited. NATO stated its goals in intervening as achieving

a verifiable end to all Serb military actions and the immediate end of violence and repression; the withdrawal of all [Serb] military police and paramilitary forces; the stationing in Kosovo of an international military force; the unconditional and safe return of refugees . . . ; unhindered access for the humanitarian relief organizations; and . . . the credible assurance of a willingness to work towards a political framework based on the Rambouillet Agreement.¹⁷⁶

The language clearly avoids any mention of a surrender of sovereignty by Yugoslavia over Kosovo. The US expressly stated at the time of intervention that it did not support Kosovar independence, and had no intention of forcing Belgrade to allow Kosovo's secession.

A problem arises when the victims of human rights violations demand independence after they are rescued by intervention. NATO confronts this problem now in Kosovo.¹⁷⁷ If the Kosovars succeed in gaining independence or a transfer of territory to Albania proper, will the NATO intervention become illegitimate? Since sovereignty remains an important norm of international law, a military action that leads to the territorial breakup of Yugoslavia may violate that norm, in direct contravention of article 2(4).¹⁷⁸

There are several possible solutions to this problem. First of all, NATO's original intention was proper, in that the intervention had as its primary objective a resolution to the refugee crisis.¹⁷⁹ To some degree, the

¹⁷⁶ See NATO press conference, *supra* note 3.

¹⁷⁴ The KLA's original insistence on independence for Kosovo has been moderated, but only slightly. Hashim Thaci, Kosovo Albanian leader of the Party for the Democratic Progress of Kosovo, continues to assert that "an independent Kosovo must now be achieved through political means." Kosovo press news agency, *Party of Leader of Former Rebel Army Outlines its Future Strategy*, BRITISH BROADCASTING CORP. (summary of world broadcasts), Jan. 6, 2000, available in LEXIS, News Group File.

¹⁷⁸ See U.N. CHARTER art. 2(4), reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 13.

¹⁷⁹ See generally *The Crisis In Kosovo: ABC Special Report* (ABC television broadcast, Mar. 24, 1999) (address by President Clinton to the nation) ("[T]o protect thousands of

political outcome of the Kosovo problem is a thing separate and distinct from the humanitarian crisis. NATO did not continue to prosecute the air war once the cease-fire was signed and NATO forces occupied the province. Had NATO invaded the rest of Yugoslavia and sought to overthrow the Belgrade government, then NATO's motives would be seriously called into question. As it is, any eventual independence for Kosovo is a separate matter. The cease-fire signed by Milosevic requires a return to the semi-autonomy Kosovo enjoyed before he took power, but Kosovo remains within the sovereignty of Yugoslavia.¹⁸⁰

There is some precedent to this argument, particularly in the Indian intervention into East Pakistan in 1972.¹⁸¹ India intervened to stop rampaging Pakistani military forces from the slaughter of thousands of East Pakistanis.¹⁸² By the time the conflict had ended, East Pakistan had seceded and a new state, Bangladesh, was born.¹⁸³ India and Pakistan were sworn enemies, and it certainly advantaged India to see its rival divided. However, India defended its action on the grounds that intervention was required to prevent a human rights tragedy, and argued that what happened afterwards was a separate event.¹⁸⁴ According to this argument, so long as the original intent of the intervenor is limited to preventing or ending a crisis, then the breakup of the state is a secondary effect and does not illegitimize the action.¹⁸⁵

A second solution is to invoke the principle of *self-determination* as superior to *sovereignty*. Under this model, an intervention will be

innocent people in Kosovo from a mounting military offensive . . . to prevent a wider war, to defuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results.") This statement acknowledges NATO's own security interest in defusing this threat on its borders, but maintains the *primary* motive as saving lives.

¹⁸⁰ See Grant, *supra* note 1, at 37.

¹⁸¹ See Benjamin, *supra* note 60.

¹⁸² See *id.* at 133.

¹⁸³ *Id.*

¹⁸⁴ For India's argument before the Security Council, see 26 U.N. SCOR, 1606th mtg. at 15, 16, 18, U.N. Doc. S/P.V.1606 (1971), cited in STEINER ET AL., *supra* note 33, at 1055-56.

¹⁸⁵ David Scheffer endorses this view.

In some cases, the humanitarian imperative may indeed bring the downfall or rout of a genocidal or repressive government. Despite their diplomats' pro forma objections invoking legal principles of non-intervention, the world community quickly accepted the creation of a new state and government in Bangladesh following the Indian intervention of 1972, the fall of the repressive government of Idi Amin after Tanzania's intervention in Uganda in 1979, and the rout of Pol Pot's Khmer Rouge government during Vietnam's invasion of Cambodia in late 1978.

Scheffer, *supra* note 9, at 291.

legitimate so long as the right to self-determination (as distinguished from sovereignty) in the target area is preserved.¹⁸⁶ Self-determination is rapidly being recognized as an important legal norm. The United Nations is committed to preserving the right of any people to determine their own form of government.¹⁸⁷ The protection of sovereignty in international law is designed to preserve the right of states to act. The protection of self-determination is designed to preserve the right of *people* to act, and to decide how they will be governed.

Ultimately, the intervention must be limited to a goal that is consistent with humanitarian intent. This does not preclude secondary motives – the intervenor should not be required to look with favor on any regime that has perpetrated gross violations of human rights, and it may well desire a political outcome that includes the secession of the victimized group.¹⁸⁸ What is required is that the humanitarian motive be the predominant one,¹⁸⁹ and that the intervention itself be limited to protection of human rights.

The self-imposed limited goals of the NATO operation have established a precedent for future humanitarian intervention. From the outset, NATO declared that it would cease hostilities once the Yugoslav army withdrew from Kosovo. NATO pointedly avoided demanding that Yugoslavia surrender sovereignty over the region. By clearly outlining the goals of the operation, NATO sent a clear message to other would-be intervenors that this operation should not be used to justify military intervention for non-legitimate means.

¹⁸⁶ Thus, during the Tanzanian intervention in Uganda, Tanzanian President Nyerere insisted that the overthrow of Idi Amin must only be accomplished with the *support and consent of the Ugandan people*. The right of Ugandans to determine their own government was seen as important enough to justify helping Ugandan rebels overthrow Amin. See TESÓN, *supra* note 25, at 183.

¹⁸⁷ This commitment by the UN to the principle of self-determination is found in both the UN Charter (articles 1(2) and 55 both include among the purposes of the UN a “respect for the principle of equal rights and the self-determination of peoples”) and in many subsequent international covenants. See THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 62-77 (1997). For specific covenants recognizing the importance of self-determination, see, e.g., International Covenant on Civil and Political Rights, Mar. 23, 1976, part I, 999 U.N.T.S. 171, 173.

¹⁸⁸ See Benjamin, *supra* note 60, at 156 (“An absolute disinterestedness requirement, by which a state must have no political, economic, or strategic motive for the intervention, is impractical The real question is whether the humanitarian motives predominate over other self-interested, political motives.”).

¹⁸⁹ See *id.*

2. Limited Duration

It remains to be seen how NATO will deal with the Albanian secessionists and the problem of limiting the *duration* of its presence. Now that Albanians have returned to the region, NATO has assumed the role of providing relief for the refugees and assisting them in resettlement.¹⁹⁰ By claiming the right to intervene, NATO has incurred a duty to remain until the political situation stabilizes enough to warrant withdrawal without fear that ethnic violence will once again break out. It would defy reason for an intervenor to argue that stopping human rights abuses requires intervention, and then to withdraw after the immediate crisis has passed and allow the abuser to return. Now that NATO forces are on the ground and securing the peace, they must remain until it is realistic that the crisis will not resume after their departure. It may be that NATO will slowly turn the operation over to the UN, which has already formally endorsed it¹⁹¹ and accepted responsibility for civil administration and refugee relief.¹⁹² NATO may also decide to stay until all of the major war criminals indicted by the Hague tribunal are in custody. Some argue that only then will Kosovo's ethnic Albanians be truly safe.¹⁹³ As new conflicts in the region emerge, the role of NATO continues to evolve.¹⁹⁴ NATO needs to pay close attention to the duration and objectives of its KFOR¹⁹⁵ mission, and avoid turning a legitimate humanitarian intervention into something else altogether.

F. Multilateralism

The NATO operation in Kosovo provides an example of the advantages of multilateralism in humanitarian intervention. NATO is neither a neighboring state, nor an ally of either warring party, but a

¹⁹⁰ Technically, the UN has assumed the role of providing civil administration in the province. *Problems Faced by NATO Peacekeepers in Kosovo* (NPR radio broadcast, Jan. 13, 2000). However, NATO was the intervenor, and the ultimate responsibility for the plight of the Kosovars rests with NATO.

¹⁹¹ See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. ¶ 5, at 2, U.N. Doc. S/RES/1244 (1999) (announcing the Security Council's decision to send civil and military forces to the region, under the auspices of the UN).

¹⁹² See *id.* There are many indications that the UN and NATO are both failing in this mission. See *UN Force Fails to Prepare Kosovo People for the Winter*, IRISH TIMES, Jan. 25, 2000, at 23.

¹⁹³ NATO also has a duty to protect the minority Serbs, now that the Albanians have returned. Reprisals against Serbs are an ongoing problem. See Erlanger, *supra* note 129.

¹⁹⁴ NATO officials now find themselves forced to contend with other separatist groups in the region, as well as spill-over conflicts in Macedonia and around the edges of the NATO zone. See Matthew Kaminski, *NATO Takes On the Role of Balkan Peace Broker*, WALL ST. J., Mar. 5, 2001, at A19.

¹⁹⁵ The acronym assigned to the "Kosovo Force."

multilateral military alliance consisting of nineteen sovereign states. Certainly NATO did not act as an entirely disinterested party. After all, NATO was created to ensure the security of Western Europe. However, because of the nature of the alliance, its primary objective in the Kosovo intervention was to prevent humanitarian tragedy, and thereby maintain the peace and stability of Europe as a whole. The humanitarian and security concerns of the NATO allies were intertwined and overlapping, but preventing a humanitarian tragedy was ultimately the primary goal because it was the most effective way to ensure security. The fact that so many different countries participated in the planning and waging of the war in Kosovo lent credence to NATO's claim of humanitarian intent by ensuring that the interests of one particular state did not overcome the genuine humanitarian impulse behind intervention.

As an added benefit, the show of political unity that came from concerted action of so many states may actually have done more to end the conflict than any amount of NATO bombs.¹⁹⁶ This illustrates another reason to favor multilateralism: it isolates the violating state and creates an added pressure to capitulate and allow the presence of peacekeepers.

Undoubtedly, the intervention was very difficult, both politically and militarily, for NATO. After all, this sort of operation is hardly what the defensive alliance was designed for. But the effectiveness of regional security organizations as intervenors in humanitarian crises is clear. A regional military alliance like NATO is far better equipped to intervene in a hostile environment than the UN, which ordinarily must wait until the warring parties agree to a cease-fire before inserting peacekeepers.¹⁹⁷ Furthermore, the involvement of a regional security organization sends a powerful message that the international community views the humanitarian crisis as a threat to peace and stability. Finally, the involvement of many states helps prevent the interests of one state from overcoming the humanitarian motive behind intervention.¹⁹⁸ Multilateral intervention is thus both more effective and more legitimate than intervention by one state.

Kosovo was not a UN operation, so NATO cannot claim that the *entire* international community supported it, but on the whole it sets a strong precedent for multilateral action. Notably, the United Nations has never condemned the NATO action as illegal, which implies a tacit

¹⁹⁶ See Butcher & Bishop, *supra* note 1; see also Barry & Thomas, *supra* note 1.

¹⁹⁷ Interestingly, UN Secretary-General Kofi Annan has himself insisted that it is "natural" for NATO to handle Kosovo, and that the UN favors allowing "regional organizations" to deal with such conflicts. Miller, *supra* note 163.

¹⁹⁸ Of course, it is sometimes impossible to completely eliminate different national interests, even in the context of a multilateral intervention. For example, Albanians have in recent days accused the French KFOR forces of favoring Serbs and refusing to adequately protect Albanians. See *British Troops Battle Kosovo Albanians*, N.Y. TIMES, Feb. 2, 2001, at A10.

acceptance of the right to intervene.¹⁹⁹ The UN also sponsored the final NATO-Yugoslav peace talks signed on June 10, 1999, and the NATO forces that now occupy Yugoslavia are under the auspices of the UN.²⁰⁰ These unofficial links between NATO and the UN confirm the impression that the UN has accepted (through lack of any significant condemnatory response) the NATO intervention.

IV. CONCLUSION

The practice of humanitarian intervention is still fundamentally flawed in its current form, because it is applied unevenly and it has not been evaluated against a clear set of criteria. The ongoing crisis in the Russian province of Chechnya highlights this problem: intervention there is highly unlikely, because Russia is too powerful a state to oppose.²⁰¹ Many wonder what the differences are between Yugoslav treatment of ethnic Albanians in Kosovo and Russian treatment of Chechens.²⁰² As one journalist noted, "the difference . . . is that some countries are more sovereign than others."²⁰³ Humanitarian intervention will not even be considered unless there is the sense by some powerful state or group of states that their interests are threatened and that they have the military and political capability²⁰⁴ to intervene effectively. Until international protection of human rights is practiced equally across the globe, the legal doctrine of intervention alone will fall short of achieving a significant guaranty of human rights.

However, the NATO intervention *was* effective in saving the lives of hundreds of thousands of Albanian Kosovars in immediate peril of losing their lives. More importantly, the crisis in Kosovo clearly illustrated the weakness inherent in the UN as ultimate arbiter of all conflicts.²⁰⁵ Until the

¹⁹⁹ See *supra* notes 80-82 and accompanying text. See also *Law & Right: When They Don't Fit Together*, *supra* note 8, at 20.

²⁰⁰ See Simon Houston, *War is Over; Surrender: Milosevic Agrees to Pull Out of Kosovo*, SCOTTISH DAILY RECORD, June 10, 1999, at 1; see also Colum Lynch, *UN Seizes Chance to Reverse a Trend, Reassert its Influence*, BOSTON GLOBE, May 8, 1999, at A8.

²⁰¹ See Craig R. Whitney, *Hands Off: The No Man's Land in the Fight for Human Rights*, N.Y. TIMES, Dec. 12, 1999, sec. 4, at 1.

²⁰² See *id.*

²⁰³ *Id.*

²⁰⁴ Limited capability, when honestly addressed, makes the doctrine of humanitarian intervention as currently (unevenly) practiced seem cynical in the extreme. "One Russian diplomat asked a State Department official what was the difference between Chechnya and Kosovo. 'You had nuclear weapons' came the answer." *Where Do America's Interests Lie?*, ECONOMIST, Sept. 18, 1999, at 29.

²⁰⁵ "Numerous instances exist of the obvious failure of the U.N. collective security measures to provide the international security for which they were designed. The most

UN becomes a body capable of rapid and effective intervention to resolve these crises, some legal power to intervene must be retained by states and regional security organizations.²⁰⁶ The question that remains is what Kosovo means to current and future humanitarian crises.

In September 1999, the small Indonesian province of East Timor erupted into violence.²⁰⁷ Indonesian-backed militia groups, opposed to the recent vote to secede from Indonesia, launched a series of assaults on pro-independence groups in East Timor.²⁰⁸ Comparisons between East Timor and Kosovo were quickly drawn, and many began to clamor for a similar resolution to the crisis.²⁰⁹

Before any unilateral intervention was contemplated, the UN was able to reach consensus and peacekeepers were dispatched, though only after the damage had been done.²¹⁰ Nonetheless, Kosovo may have played a significant role in the UN's resolution to intervene. To those opposed to a legal doctrine of intervention, it may signal the sense of the world community that NATO had gone "a bridge too far" in Kosovo, and thus serve as a re-assertion of the UN's authority. On the other hand, had Kosovo *not* happened, it is an open question whether the UN would have intervened. The crisis in Kosovo reaffirmed the singular importance of human rights, and NATO's decision to intervene there may have significantly influenced Indonesia's decision to allow UN peacekeepers. Many hope that the precedent set by Kosovo will allow "mere words," and the threat of *potential* intervention, to deter current and future human rights abuses.²¹¹

Humanitarian intervention will no doubt continue to be hotly debated.²¹² However, barring some fundamental restructuring of the United Nations and the methods it uses to enforce human rights standards,

recent examples include the former Yugoslavia, Somalia, Sudan, and Iraq." Benjamin, *supra* note 60, at 140.

²⁰⁶ UN Secretary-General Kofi Annan, stopping just short of condoning unilateral action, has recognized the fact that internecine conflict will continue to rage unchecked until the UN finds a way to unite. See *Kofi Annan's Critique*, Editorial, N.Y. TIMES, Sept. 22, 1999, at A26.

²⁰⁷ See John Roosa, *Fatal Thrust in Timor*, N.Y. TIMES, Sept. 15, 1999, at A29.

²⁰⁸ See *id.*

²⁰⁹ See Barbara Crossette, *A Push to Intervene in East Timor is Gathering Backers at the U.N.*, N.Y. TIMES, Sept. 7, 1999, at A1.

²¹⁰ See Barbara Crossette, *Council Ready to Transfer East Timor to U.N.*, N.Y. TIMES, Oct. 22, 1999, at A11.

²¹¹ Whitney, *supra* note 201.

²¹² This Note is intended to analyze the *legality* of humanitarian intervention. It is *not* intended as an endorsement of intervention as sound US policy, which is problematic on many levels. For a brief overview of several arguments against intervention as US policy, see *Where Do America's Interests Lie?*, *supra* note 204.

humanitarian intervention will stand as the last legal line of defense in the fight to protect human rights.²¹³ How it will function, and how other states react to it, will continue to develop the law of intervention as a legal doctrine. So long as states retain the right to intervene when the elaborate machinery of international security fails to protect the innocent, intervention will have a place in international law.

²¹³ "Armed intervention by the West will necessarily be rare – undertaken only when the case for it is strong, when the risks are limited . . . , and when it can be carried out successfully. Other, regional or UN, peacekeepers will often have to step in. And prevention will always be a better option if it can be achieved. But the need for intervention, and for peace-making in general, will not go away. Better to strive for a less violent world and fail, than to stand back and watch the killing continue." *Other People's Wars*, ECONOMIST, July 31, 1999, at 13, 14.