

Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism

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I. Introduction

This article argues for acceptance of a legal structure capable of addressing widespread international human rights violations and genocide, when a potential veto of a permanent member of the United Nations (U.N.) threatens to frustrate U.N. Security Council Chapter VII authorization.¹ This article focuses on the specific context of Kosovo where the right of individual or collective self-defense under Article 51 of the U.N. Charter² by possible contributor nations did not exist. While some international legal scholars have argued that humanitarian intervention in such circumstances should be limited under international law to redressing abuses to one's own nationals or those of an ally on foreign territory, recent history in Kosovo dictates that a more flexible regime is required. When a force carefully defines the parameters of their intervention—as in Kosovo—and the force limits its intervention to redressing widespread human rights abuses, the intervention supports the principles of the U.N. Charter addressing human dignity.³ Furthermore, an action done in this manner does not significantly abridge the territorial integrity and political independence of the target state.

Respect for national sovereignty and the commitment to nonintervention have long been at the heart of the international legal structure.⁴ The norm of state sovereignty, however, has never been absolute. Sovereignty has always been subject to certain constraints, whether embodied in other norms of international relations or formalized in international law.⁵ A challenge to the traditional concept of sovereignty arises when a

sovereign state fails to perform such basic functions as providing political stability, equitable distribution of resources, or social welfare. When that failure results in the direct violation of the civil liberties and human rights of a major segment of a state's own population, compromising its health and well-being and generating a humanitarian crisis, the state's body politic is generally responsible to hold the state accountable. When the ethnic majority joins the government in promoting the humanitarian crisis within the community represented by the ethnic minority, as in Kosovo in 1998,⁶ the international community arguably has a corresponding responsibility to help the victims and prevent their genocide. Otherwise, the 1947 Genocide Convention has no meaning.⁷

Professor Louis Henkin succinctly clarified the responsibility of states to address international human rights abuses, stating,

The international system, having identified contemporary human values, has adopted and declared them to be fundamental law. But in a radical derogation from the axiom of "sovereignty," that law is not based on consent; at least it does not honor or accept dissent, and it binds particular states regardless of their objection.⁸

The debate over sovereignty centers on the principle of nonintervention—the duty to refrain from uninvited involvement in a state's internal affairs.⁹ Nonintervention has been a standard

1. See U.N. CHARTER art. 27(3) (requiring an affirmative vote of all permanent members and at least nine members of the U.N. Security Council on decisions under Chapter VII).

2. *Id.* art. 51.

3. *Id.* preamble. "[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . ." *Id.*

4. See Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 2 (1995) (explaining that references to principles of humanitarian intervention originated as early as 1579). After the First World War, the allied powers sought to protect national sovereignty in the Covenant of the League of Nations. See LEAGUE OF NATIONS COVENANT art. 10. Following the Second World War, the principles of national sovereignty and nonintervention were incorporated into Article 2 of the U.N. Charter. U.N. CHARTER art. 2.

5. See Richard Lillich, *Forcible Self Help Under International Law*, in 62 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 135 (Richard Lillich & John N. Moore, eds., 1980).

6. See James Terry, *Response to Ethnic Violence: The Kosovo Model*, BROWN J. WORLD AFF. 233, 235-238 (1999).

7. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277.

8. Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 37 (1995/1996).

9. See U.N. CHARTER art. 2(7). The U.N. Charter binds nations from intervening "in matters which are essentially within the domestic jurisdiction of any state . . ." *Id.*

corollary to the traditional norm of sovereignty. As stated in the U.N. Charter, “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.”¹⁰ Once a government fails to fulfill the basic purposes of its independence, which include providing safety and fundamental human rights to all of its population, that government undermines the principles that guarantee that state’s immunity from intervention.¹¹

This article first examines the legal framework related to humanitarian intervention as it has developed under customary international law and U.N. Charter precedents. Next, the article reviews the potential or actual legal impact the North Atlantic Treaty Organisation (NATO) intervention in Kosovo may have had on that body of law. The article suggests that the NATO action fulfilled the principles of the U.N. Charter, and that Soviet and Chinese opposition would have frustrated those principles if they were allowed to preclude actions other nations deemed necessary to restore peace and security in Kosovo. Finally, the article examines whether criticism of NATO actions in Kosovo is misguided. Such criticism fails to understand that the U.N. Charter regime was designed to be effective, and interpretations of its provisions that make it effective support, rather than destroy, its moral authority.

II. Legal Concepts for Humanitarian Intervention

Traditionally, humanitarian intervention refers to a forcible intervention designed to stem a large-scale human rights crisis.¹² The late Professor Richard Lillich of the University of Virginia observed that a group of states, not a single state, has ~~traditionally exercised humanitarian~~ intervention in the protection of nationals.¹³ He further stated that the justification for

pre-U.N. Charter humanitarian intervention was that although it obviously was an interference with the sovereignty of the state concerned, it was a permissible one.¹⁴ “Sovereignty was not absolute and when a state did reach this threshold of shocking the conscience of mankind, intervention was legal.”¹⁵

A component of humanitarian intervention is that nations execute interventions without the target government’s consent.¹⁶ Nations usually direct this form of intervention against incumbent regimes, although non-state actors might be the target when the state is weak or unstable.¹⁷ It is important that nations only target humanitarian abuses; addressing other political objectives or interests may take an intervention out of the humanitarian category.¹⁸ Therefore, if the U.N. approves humanitarian intervention, the objective for the use of force must be to address a human rights crisis, and more specifically, the abuses that made intervention necessary.¹⁹ Finally, the rule of proportionality applies to humanitarian intervention, as it would in every case of the use of force.²⁰ Thus, the level of force exerted must be consistent with the magnitude of the specific crisis and the amount of force must not exceed the amount of force necessary to curtail the abuse.²¹ Professor Ved Nanda explains that demanding adherence to the proportional use of force in such operations eliminates the “pretext problem,” which arises when overwhelming force is used to address a situation that quite obviously does not warrant the level of force committed.²²

Many legal experts, however, believe enforcement of the U.N. Charter supplanted the lawful use of humanitarian intervention under customary international law.²³ Their rationale is that the U.N. Charter provides the exclusive authority for the use of force in circumstances under Chapter VII, including humanitarian intervention.²⁴ The contrary view,²⁵ however,

10. *Id.* art. 2, para. 4.

11. *See id.* art. 2, para. 1 (explaining “the Organization is based on the principle of the sovereign equality of all of its Members”).

12. Lillich, *supra* note 5 at 134; *see also* Ruth Gordon, *Humanitarian Intervention by the United Nations*, 31 *TEX. INT’L L.J.* 43, 44 (1996).

13. Lillich, *supra* note 5, at 135.

14. *Id.* at 134.

15. *Id.*

16. ANTHONY AREND & ROBERT BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 113 (1993) (noting that governments are usually more capable than other parties of violating human rights on the scale necessary to justify humanitarian intervention).

17. *Id.*

18. Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 *DENV. J. INT’L L. & POL’Y* 305, 331 (1992).

19. *Id.*

20. *Id.* at 311.

21. *Id.* at 332.

22. *Id.* at 311.

argues that humanitarian intervention remains permissible under customary international law in certain circumstances and only after diplomatic and other peaceful techniques are exhausted and the U.N. Security Council is unable to take effective action (e.g., due to a veto of a permanent member of the U.N.).²⁶

Legal scholars advocating the post-U.N. Charter vitality of the doctrine of humanitarian intervention have urged that a significant credibility gap exists between a strict noninterventionist policy and fulfillment of the principles of the U.N. Charter.²⁷ Examining the U.N. Charter as a whole, they claim, shows that the U.N. Charter's two main purposes are the maintaining peace and security and protecting human rights.²⁸ Article 2(4), U.N. Charter provision relevant to both these purposes, prohibits "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.*"²⁹ Humanitarian intervention by a collective of states or a regional organization (e.g., NATO), acting independently but consistent with the U.N. Charter's purposes, may actually further one of the U.N.'s major objectives. Thus, legal scholars advocating the post-U.N. Charter vitality of the doctrine of humanitarian intervention insist that humanitarian intervention would not run afoul of Article 2(4) provided they do not affect the "territorial integrity" or "political independence" of the state against which they are directed.³⁰ When the U.N. Security Council is unable to act because of a potential veto, humanitarian intervention by a group of concerned states, as in Kosovo, thus becomes critical to upholding the U.N. Charter principles.

This argument is even more attractive legally when reviewing the actual substance of the U.N. Charter. While the U.N.

Charter is admittedly best known for the articles which create a minimum world order system,³¹ as represented by Article 2(4) (prohibition on the use of force), Article 51 (exception for self-defense), and Articles 39-51 (Chapter VII) (addressing Security Council responsibilities), there is certainly an equal emphasis in the U.N. Charter on the protection of human rights.³² The Preamble of the U.N. Charter focuses on the rights of individuals vice the rights of nations, when it states the following purpose of the U.N. Charter:

[T]o save succeeding generations from the scourge of war, which twice in our lifetime have brought unto sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom³³

Article 1(3) of the U.N. Charter reinforces the preamble by stating that the organization's principle purpose is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex,

23. See, e.g., Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 3, 217 (John N. Moore ed., 1974), reprinted in *NATIONAL SECURITY LAW* 151-52 (John N. Moore ed., 1990).

24. *Id.*

25. Professors John Norton Moore and the late Richard Lillich of the University of Virginia; Professors Michael Reisman and the late Myres McDougal of Yale University; Professor Ved Nanda of the University of Denver, and Professor Christopher Green of Great Britain, to name a few, support the contrary view. See generally Daphne Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 *YALE HUM. RTS. & DEV. L.J.* 45, 48 (2003); Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 *HAMLIN L. REV.* 323, 333-34 (2000); Lillich, *supra* note 5.

26. Lillich, *supra* note 5, at 136.

27. See Yoshiko Inoue, *United Nations' Peace-keeping Role in the Post-Cold War Era: The Conflict in Bosnia-Herzegovina*, 16 *LOY. L.A. INT'L & COMP. L.J.* 245 (1993).

28. Brownlie, *supra* note 23, at 148-49.

29. U.N. CHARTER art. 2(4) (emphasis added).

30. *Id.*; see also Brownlie, *supra* note 23, at 147 ("A number of American scholars, however, support the right of humanitarian intervention if carefully limited.")

31. See U.N. CHARTER pmb. (stating the determination "to unite our strength to maintain international peace and security"); *id.* art. 1, para. 1 (stating the purpose of the organization is "[t]o maintain international peace and security, and to that end: to take effective collective measures"); see generally Major James Francis Gravelle, *Contemporary International Legal Issues—The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 *MIL. L. REV.* 5, 57-58 (1985).

32. U.N. CHARTER art. 2(4), 39-51.

33. *Id.* pmb.

language or religion”³⁴ Articles 55-60 of the U.N. Charter directly address international economic and social cooperation.³⁵ Article 55, for example, emphasizes the need to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁶ The fifty-four member U.N. Economic and Social Council, established in Article 61 and addressed in Articles 61-72, provides the means to address the humanitarian objectives set forth in Articles 55-60 and to make recommendations to the U.N. General Assembly or to the U.N. Security Council for action.³⁷

Under the U.N. Charter framework, the U.N. Security Council authorizes measures involving the use of force.³⁸ Article 27(3) of the U.N. Charter, however, requires all permanent party members to support the U.N. Security Council on such measures.³⁹ When not all of the permanent party members agree on the use of force, they can easily frustrate the U.N. Security Council in exercising its decisional authority. This described the situation in March 1999, when despite the support of twelve of the fifteen U.N. Security Council members, the Chinese and Russian delegates refused to support a draft U.N. Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis.⁴⁰

It was precisely this concern, long before the Kosovo crisis, that led to a debate of the criteria that would satisfy the need to address instances of widespread human rights abuses, while preserving U.N. Charter principles. In 1974, Professor Lillich anguished over the U.N. Security Council’s inability to function in matters requiring the unanimous approval of the permanent members for Chapter VII “all necessary means” operations.⁴¹ Professor Lillich argued that, “the most important task confronting international lawyers is to clarify the various criteria by which the legitimacy of a State’s use of forcible self-help in human rights situations can be judged.”⁴² Lillich suggested that consideration of five criteria by a state, collective of states, or regional organization before taking humanitarian action in a foreign state, would still uphold the U.N. Charter principles, despite the lack of U.N. Security Council approval.⁴³ Professor Lillich’s five proposed criteria are as follows: (1) the immediacy of the violation of human rights; (2) the extent of the violation of human rights; (3) the existence of an invitation by appropriate authority; (4) the degree of coercive measures employed; and (5) the relative disinterestedness of the state or states invoking the coercive measures.⁴⁴

Professor Ved Nanda of the University of Denver offers similar criteria in arguing for the continued vitality of the humani-

34. *Id.* art. 1(3).

35. *Id.* art. 55-60.

36. *Id.* art. 55.

37. *Id.* art. 61-72.

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Id. art. 62.

38. *Id.* art. 39-51 (explaining how the U.N. Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression and decides what measures, including the use of armed force, will be taken to maintain or restore international peace and security).

39. *Id.* art. 27(3).

40. See Louis Henkin, *Editorial Comments, Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 4, ¶ 3 (1999).

41. Richard Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plan for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 3, 229 (John N. Moore ed., 1974), reprinted in NAT’L SECURITY L. 152-53 (John N. Moore ed., 1990).

42. *Id.*

43. *Id.* at 153.

44. *Id.* Lillich stated:

Since humanitarian interventions by states, far from being inconsistent with Charter purposes, actually may further one of the world organization’s major objectives in many situations, such interventions run afoul of Article 2(4) only if they are thought to affect the “territorial integrity or “political independence” of the state against which they are directed

Id.

tarian intervention doctrine: (1) a specific limited purpose; (2) an invasion by the recognized government; (3) a limited duration of the mission; (4) a limited use of coercive measures; and (5) a lack of any other recourse.⁴⁵

By far, the most definitive and principled approach has been offered by Professor John Norton Moore of the University of Virginia who is a former Legal Advisor to the Department of State. He suggested in 1974 that intervention for the protection of human rights is permissible under customary international law if the following standards are met: (1) an immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law; (2) an exhaustion of diplomatic and other peaceful techniques for protecting the threatened rights to the extent possible and consistent with protection of the threatened rights; (3) the unavailability of effective action by an international agency or the UN; (4) a proportional use of force which does not threaten greater destruction of values than the human rights at stake and which does not exceed the minimum force necessary to protect the threatened rights; (5) the minimal effect on authority structures necessary to protect the threatened rights; (6) the minimal interference with self-determination necessary to protect the threatened rights; (7) a prompt disengagement, consistent with the purpose of the action; and (8) immediate full reporting to the security Council and compliance with Security Council applicable regional directives.⁴⁶

Professor Moore suggested these standards reflect the judgment that intervention for the protection of fundamental human rights should be permitted under customary international law if carefully circumscribed. He explained his position as follows:

Although it is recognized that legitimizing such intervention entails substantial risks, not permitting necessary action for the prevention of genocide or other major abuse of human rights seems to present a greater risk. Opponents of any such standard should at least endeavor to weigh the risks of permitting such intervention as carefully delimited by the suggested standard against the risk of insulating genocidal acts and other fundamental abuse of human rights from effective response.⁴⁷

Each proposal still protects equally significant U.N. Charter values. There are, however, three critical points with respect to the three proposed sets of criteria. First, a humanitarian intervention involving the use of force by a regional organization (such as NATO) is permissible in response to threats of genocide or other widespread arbitrary deprivation of human life in violation of international law if diplomatic and other peaceful means are not available. Next, the U.N. must be unable to take effective action. Finally, the territorial integrity and political independence of the target state must be only temporarily affected.

The three proposed criteria, designed to preserve territorial integrity and political independence during humanitarian intervention, must nevertheless be balanced with the States' right regarding domestic jurisdiction, as set forth in Article 2(7) of the U.N. Charter. Article 2(7) provides: "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 . . . , but this principle shall not prejudice the application of enforcement measures under Chapter VII."⁴⁸ This provision does not mesh comfortably with the requirements in Articles 55 and 56 of the U.N. Charter to cooperate with the U.N. in promoting respect for human rights (nor with the explicit duties of states set forth in human rights treaties).⁴⁹

The fall of the former Soviet Union, however, marked a defining moment in the way many states viewed the proper exercise of domestic jurisdiction. For example, in 1983, when its own declaration of martial law was under severe international criticism, Poland insisted that U.N. organs could not consider human rights questions in a particular state unless there existed a gross, massive, and flagrant violation of human rights and fundamental freedoms, which established a consistent pattern and which endangered international peace and security.⁵⁰ By 1991, however, Poland endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE):

The participating states emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They

45. Nanda, *supra* note 18, at 311.

46. John N. Moore, *Toward an Applied Theory for the Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 3, 24-25 (John N. Moore ed., 1974), reprinted in *NATIONAL SECURITY LAW* 140, 141-42 (John N. Moore ed., 1990).

47. *Id.* at 142.

48. U.N. CHARTER art. 2(7).

49. *Id.* arts. 55, 56.

50. UN Doc. E/CN.4/1983/SR.40/Add.1. (1983) (on file with author).

categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the State concerned.⁵¹

Today, nations rarely raise the issue of domestic jurisdiction in other than a perfunctory manner in U.N. forums or other international discourse.⁵²

III. Humanitarian Intervention in Context

The most significant post-U.N. Charter example of humanitarian intervention absent U.N. Security Council approval, other than Kosovo, occurred in the Republic of the Congo in 1964.⁵³ The Stanleyville⁵⁴ intervention was unlike the 1965 intervention in the Dominican Republic by U.S. Marines, which was ordered by President Johnson solely to save American lives (although third country nationals were ultimately rescued as well).⁵⁵ The leaders of three states (Belgium, the United States, and Great Britain) ordered the intervention into the Congo to protect not only their own nationals, but also the nationals of third states and the Congo. As Professor Lillich explained, “the Congo airdrop was a classic occasion of humanitarian intervention, and the Dominican Republic, at least initially, was a classic case of forcible self-help.”⁵⁶

The Congo crisis in 1964 presented nearly parallel legal issues to those NATO faced in 1999. In early November 1964, the Democratic Republic of the Congo undertook offensive actions against rebel factions, which had received Communist especially Chinese backing.⁵⁷ The rebel government—the Popular Revolutionary Government—was threatened by the offensive along the Uganda border and toward the rebel capital of Stanleyville. The self-proclaimed President of the Popular Revolutionary Government, Christophe Gbenye, announced that he had taken 60 Americans and 800 Belgians as hostages.⁵⁸ The rebels also broadcast threats against the lives of the hostages if the Congolese Army continued their advance on Stanleyville. On 16 November, the rebels announced that Dr. Paul E. Carlson, an American medical missionary on duty in the Congo, would be executed as a spy.⁵⁹ There is no doubt this constituted a violation not only of the U.N. Charter, but also of the Geneva Conventions. No one took issue that the situation presented these violations, but the U.N. Security Council could not agree on a course of action.⁶⁰ The Organization of African Unity was thereafter ceded authority to deal with the situation.⁶¹ It failed miserably.⁶² The United States, seeing no alternative—much as it had in the later Kosovo crisis—cooperated with other concerned states (Great Britain and Belgium) in mounting an airdrop of paratroopers without U.N. Security Council authority into Stanleyville.⁶³ The forces involved in the humanitarian intervention landed at Stanleyville and rescued the hostages.⁶⁴

51. 30 INT'L LEGAL. MAT. 1670, 1672 (1991) (on file with author).

52. See Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

53. See Major Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, 109 MIL. L. REV. 1, 18 (1985).

54. Kisangani, formerly Stanleyville, is a city in north-central Democratic Republic of the Congo. See Columbia Encyclopedia, Sixth ed., 2001 at <http://www.bartleby.com/65/ki/Kisangan.html> (last visited Aug. 5, 2004).

55. See MAX HILAIRE, *INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE 60-65* (The Hague; Boston: Kluwer Law International, 1997) (outlining President Johnson's rationale for the intervention as protecting American citizens and also preventing the establishment of another communist government). But see Riggs, *supra*, note 53, at 18 (explaining that the humanitarian intervention in the Congo was commenced by the United States after the rebel government announced that foreigners in Stanleyville, including sixty-three Americans—a minority—would not be permitted to leave).

56. Lillich, *supra* note 5, at 137.

57. Lieutenant Colonel William H. Glasgow, *Operations Dragon Rouge and Dragon Noire*, at http://unx1.shsu.edu/~his_ncp/Dragon.html (last visited July 29, 2004) (outlining Operations Dragon Rouge and Dragon Noire, the military operations for the hostage rescue in the Congo).

58. *Id.*

59. *Id.*

60. Lillich, *supra* note 5, at 135. Lillich relates:

There was no doubt that this constituted a violation not only of the UN Charter, but also of the Geneva Conventions. No one really took issue with that at all. But the United Nations got bogged down in debate upon it. They finally decided to let the Organization of African Unity do something: they tried and were very, very unsuccessful.

Id.

61. *Id.*

62. *Id.* “Why should Gizenga, on his last legs, give up these hostages? He made the maximum propaganda use of them. There were broadcasts indicating they would skin these people alive and do all kinds of other horrendous things unless peace was made on his terms.” *Id.*

It is interesting to note that while there was much political criticism of the allied intervention, led by the Russian Ambassador to the U.N., there has been little scholarly legal criticism alleging a violation of Article 2(4) of the Charter in the Stanleyville operation.⁶⁵ Not one legal commentator has found the use of limited force—represented in the collective effort of Britain, Belgium, and the United States—to have impaired the long-term territorial integrity or political independence of the Congolese state. One can in fact argue that the resolution of the hostage crisis enhanced the stability of the Congolese.⁶⁶

A similar judgment can be reached in the case of Kosovo. The province of Kosovo in the former Yugoslavia contains a mix of about 1.8 million Albanians (who are predominantly Muslims) and two hundred thousand Serbs (who are Eastern Orthodox Christians).⁶⁷ Kosovo is a province to which Serbs have strong emotional ties, since many regard it as the cradle of their nation. Kosovo enjoyed political autonomy until 1989 when the Serb-dominated Government of the Federal Republic of Yugoslavia (FRY) terminated Kosovo's autonomy. The Kosovo Liberation Army (KLA), a group seeking to expel Serbian authorities and establish an independent state of Kosovo, sporadically attacked Serbian police and civilians in Kosovo during 1997-1998.⁶⁸ In response, FRY police and Serbian forces,

beginning in late February 1998, violently cracked down on the KLA, as well as on ethnic Albanians.⁶⁹ The U.N. responded to the extreme violence with three Security Council Resolutions 1160, 1199, and 1203.⁷⁰ When fighting continued after these resolutions, NATO leadership threatened airstrikes,⁷¹ which led to negotiations between U.S. Envoy Richard Holbrooke and the FRY leadership, including President Milosevic. President Milosevic concluded an agreement with Mr. Holbrooke that outlined FRY compliance with Resolution 1199.⁷² On 15 October 1998, NATO and the FRY signed an agreement supporting FRY's compliance with Resolution 1199⁷³ and on 16 October 1998, the Organization for Security and Cooperation in Europe (OSCE) signed an agreement with the FRY governing the terms of OSCE deployment to Kosovo.⁷⁴ These efforts culminated in peace negotiations in March 1999 at Rambouillet, France. The Kosovar Albanian delegation signed the agreement, but the Serbian delegation failed to reach agreement on the peace settlement.⁷⁵ The Serbs once again escalated the violence against ethnic Albanians in Kosovo.⁷⁶ NATO forces commenced airstrikes in FRY (Operation Allied Force) as part of a humanitarian intervention to force the Serb forces from Kosovo and end the violence against the ethnic Albanian citizens of this province.⁷⁷

63. See Glasgow, *supra* note 57.

64. Lillich, *supra* note 5, at 136.

65. See H.L. Weisberg, *The Congo Crisis in 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972) (discussion).

66. See Lillich, *supra* note 5, at 136.

67. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 161, 167 (1999).

68. *Id.* at 168.

69. *Id.*

70. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3836th mtg., U.N. Doc. S/RES/1160 (1998) (determining that the situation in Kosovo constituted a threat to international peace and security and condemning the excessive use of force by Serbian police forces and all acts of terrorism by the KLA); S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998) (demanding that, "all parties, groups and individuals immediately cease hostilities and maintain a cease-fire in Kosovo"); S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998) (endorsing the October 1998 cease-fire agreement and further condemning all acts of violence and terrorism).

71. See generally North Atlantic Treaty Organisation, *NATO's Role in Relation to the Conflict in Kosovo*, at <http://www.nato.int/kosovo/history.htm> (last visited July 30, 2004) [hereinafter NATO] (providing background information on the Kosovo conflict and an overview of NATO's goals and methods).

72. *Id.*

73. Murphy, *supra* note 67, at 169. The 15 October 1998 Agreement between the FRY and NATO, established an Air Verification Mission for NATO forces to enforce the requirements of S.C. Res. 1160 and 1199. *Id.*

74. *Id.* at 169-70. The 16 October 1998 Agreement between the OSCE and FRY established the terms for monitoring by the OSCE observers of relief groups assisting Albanian Kosovar refugees. *Id.* at 169. The OSCE is a fifty-five member body, which serves as an instrument for early warning, conflict prevention, and crisis management in Europe. Both the U.S. and Russia are members. There is no military arm of this organization. See generally Organization for Security and Co-operation in Europe, at <http://www.osce.org/> (last visited July 30, 2004).

75. NATO, *supra* note 71.

76. *Id.*

The NATO determination to intervene in Kosovo, without U.N. Security Council authority, came after the Russian and Chinese Permanent Representatives advised the U.N. Security Council in early March 1999 that their governments would not support a draft resolution that would authorize the use of force to stop Serb attacks in Kosovo.⁷⁸ This occurred after neither Russia nor China impeded passage of earlier Security Council Resolutions 1160, 1199, and 1203. These three Security Council Resolutions under Chapter VII of the UN Charter called on both Serb and KLA forces to end the fighting, withdraw, cooperate with investigators and prosecutors from the War Crimes Tribunal at the Hague, and support OSCE missions.⁷⁹ Operation Allied Force continued until 9 June 1999.⁸⁰ In its first eight days, the U.N. High Commissioner for Refugees (UNHCR) reported that Serbian forces forcibly expelled some 220,000 persons from Kosovo to neighboring states, principally Albania.⁸¹ The OSCE Verification Mission in Kosovo estimated that over ninety percent of the Kosovo Albanian population—some 1.45 million people—had been displaced by the conflict when it ended.⁸²

Although the U.N. Security Council never authorized the intensive bombing campaign, it endorsed the political settlement and resolution of conflict that NATO action achieved, and agreed to deploy an extensive “international security presence” along with a parallel “international civil presence.”⁸³ The U.N. Security Council detailed considerable responsibilities for each of these missions in their 10 June 1999 Resolution, 1244.⁸⁴

IV. Legal Rationale for the Intervention in Kosovo

Immediately following the start of bombing on 24 March 1999, NATO representatives of the five member states on the U.N. Security Council claimed, “NATO’s actions were necessary to avoid a ‘humanitarian catastrophe.’”⁸⁵ The German Foreign Minister, Klaus Kinkel, earlier argued, “Under these unusual circumstances of the current crisis situation in Kosovo, as it is described in Resolution 1199 of the U.N. Security Council, the threat of and if need be the use of force by NATO is justified.”⁸⁶ Foreign Office Minister Anthony Lloyd stated the British position on the use of force in Kosovo in January 1999, before the House of Commons Select Committee on Foreign Affairs. In response to a question concerning whether there was a legal right for NATO to intervene in the humanitarian crisis in Kosovo to save lives absent Security Council authorization, Minister Lloyd stated, “Within those terms yes. International law certainly gives the legal basis in the way that I have described . . . [w]e believe[] . . . that the humanitarian crisis was such as to warrant that intervention.”⁸⁷

Professor Christopher Greenwood, who represented Great Britain before the International Court of Justice defending NATO’s action in the Case Concerning the Legality of the Use of Force in Kosovo, further explained Britain’s legal position when he stated:

[T]here is a right of humanitarian intervention when a government—or the factions in a civil war—create a human tragedy of such magnitude that it creates a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so. It is from

77. The NATO executed Operation Allied Force on 24 March 1999. See Press Release, United Nations Security Council SC/6657, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo (Mar. 24, 1999) (on file with author) [hereinafter Security Council Press Release SC/6657].

NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo, United Nations Security Council, Press Release SC/6657, 24 March 1999, available at <http://www.un.org/News/Press/docs/1999/19990324.sc6657.html>.

78. See Terry, *supra* note 6, at 233.

79. S.C. Res. 1160, *supra* note 70; S.C. Res. 1199, *supra* note 70, S.C. Res. 1203, *supra* note 70; see also James Terry, *The Importance of Kosovo to NATO*, 1999 A.B.A NAT’L SECURITY L. REP. 1, 2, 4.

80. See W. Gary Sharp, Sr., *A Short History of the Kosovo Crisis*, A.B.A NAT’L SECURITY L. REP. 3, 6 (1999).

81. See Stephen Dycus, A. Berney, W.C. Banks, & P. Raven-Hanssen, *U.S. and NATO Intervention in Kosovo: Operation Allied Force*, in NAT’L SECURITY L. 410 (3d ed. 2002).

82. OSCE Online, *Kosovo/Kosova: As Seen, As Told, Volume 1*, at http://www.osce.org/documents/mik/1999/11/1620_en.pdf (last visited July 30, 2004).

83. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

84. *Id.* S.C. Res. 1244 also sets forth President Milosevic’s 9 June 1999 agreement to comply with NATO’s schedule for a Serb withdrawal from Kosovo. *Id.*

85. See generally Security Council Press Release SC/6657, *supra* note 77.

86. Deutscher Bundestag: Plenarprotokoll 13/248 vom 16.10.1998, 21329 (on file with author).

87. House of Commons Minutes of Evidence taken before Foreign Affairs Committee, 26 Jan. 1999, at 35 (on file with author).

this state practice that the right of humanitarian intervention on which NATO now relies has emerged. Those who contest that right are forced to conclude that even though international law outlaws what the Yugoslav Government is doing . . . if the Security Council cannot act, the rest of the world has to stand aside. That is not what international law requires at the end of the century.⁸⁸

Professor Antonio Cassese, in defending the Kosovo humanitarian intervention from an ethical, but not legal perspective, has nevertheless stated that under certain strict conditions, “resort[ing] to armed force may gradually become [legally] justified even absent any authorization by the Security Council.”⁸⁹ The criteria Cassese would require for legal justification are as follows:

(i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;

(ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that these authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;

(iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power . . . ,

(iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted . . . ,

(v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of the Member states of the UN;

(vi) armed force is exclusively used for [the] limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed force.⁹⁰

It is significant to note that the Kosovo crisis precisely satisfies each of the factors required by Cassese to provide legal justification for humanitarian intervention outside U.N. Charter parameters. It is also striking how similar and parallel in content Cassese’s six criteria for humanitarian intervention are to the eight criteria proposed by Professor Moore twenty-five years earlier.⁹¹

If the British justification for resorting to force under the doctrine of humanitarian intervention per Professor Greenwood was the clearest and most compelling, the United States’ legal rationale was the least centered, and most confusing. In fact, the official government statements of legal justification for United States participation never mentioned the doctrine of humanitarian intervention. The United States, however,

88. Christopher Greenwood, *Yes, But Is It Legal?*, OBSERVER, 28 Mar. 1999, at 2.

89. Antonio Cassese, *Ex Iniuria Ius Oritur: Is International Legitimization of Forcible Humanitarian Countermeasures Taking Shape in The World Community?* 10 EUR. J. INT’L L. 23, 25 (1999). Antonio Cassese is a Professor of International Law at the University of Florence, and former President of the International Criminal Tribunal for the Former Yugoslavia. *Id.*

90. *Id.* at 25-26.

91. Compare *id.* with Moore, *supra* note 46.

addressed a number of factors—some legal, some policy-driven—that justified NATO action.⁹²

On 29 March 1999, after five days of NATO bombing, then-U.S. President Bill Clinton offered the following rationale for U.S. participation: “Make no mistake, if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors, . . . hesitation is a license to kill. But action and resolve can stop armies and save lives.”⁹³

Before the U.N. General Assembly, President Clinton stated:

By acting as we did, we helped to vindicate the principles and purposes of the U.N. Charter, to give the U.N. the opportunity it now has to play the central role in shaping Kosovo’s future. In the real world, principles often collide, and tough choices must be made. The outcome in Kosovo is helpful.⁹⁴

As international legal scholar and writer Gary Sharp has accurately summarized, the former President’s justifications focused

on “moral imperative[s]” and the political interests of America and NATO, and his War Powers Report did not refer to any international legal authority for the airstrikes against Serbia-Montenegro. The White House argued, however, that the NATO bombing campaign was backed internationally by Security Council Resolutions 1199 and 1203 because they affirmed “that the deterioration of the situation in Kosovo constitutes a threat to the peace and security of the region.”

Specifically, the United States contended that Resolution 1199 authorized the use of force by United Nations members’ to compel compliance with its terms because it is a Chapter VII resolution, even though the resolution does not explicitly authorize the use of force. The United States also contended that Resolution 1203 was to protect personnel monitoring the cease-fire, even though the

monitors had been withdrawn before the NATO airstrikes began.⁹⁵

The justifications of a number of U.N. contributors, including the United States, reflect an uneasy recognition that the U.N. Charter system inadequately addresses certain humanitarian crises that may come before the U.N., if unanimity among the five Permanent Members of the U.N. Security Council continues to be a requirement. Among NATO participants, only the United Kingdom, Belgium, and Germany have directly addressed this matter, finding authorization of the U.N. Security Council was not necessary in Kosovo since the action was supportive, rather than contrary, to the values represented in Article 2(4),⁹⁶ thereby obviating a need for the Security Council to consider the matter. The United States, unfortunately, fashioned a rather contrived and disingenuous approach to justification for intervention by claiming the U.N. Security Council provided the necessary authorization by implication in its earlier resolutions on Kosovo.⁹⁷

V. Kosovo’s Implications for Future Charter Application

Kosovo requires that we reexamine the law of humanitarian intervention as it relates to U.N. Charter values on the one hand, and required U.N. Charter procedures on the other. Kosovo is especially appropriate for consideration since it presumably met all the requirements for humanitarian intervention under pre-U.N. Charter law. The horrendous crimes against humanity, mass expulsions, and war crimes were widely recognized and little disputed as breaches of customary international law. The purpose of humanitarian intervention in Kosovo was only to redress the threat to international peace and security and end the abuses resulting from the Serb forces’ mass violations, not to disturb FRY’s territorial integrity or political independence. Equally important, the intervention was collective in nature, based on NATO’s decision—a responsible body acting to carry out the will of the world community—a community unable to act through a U.N. Security Council resolution under Chapter VII of the U.N. Charter.

Professor Louis Henkin suggests the likely result of the Kosovo humanitarian intervention, unless the unanimity requirement is removed from U.N. Security Council decisions on humanitarian intervention, is a precedent where states or collec-

92. See Murphy, *supra* note 67, at 628, 629-31; see generally Jules Lobel, *American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT’L L. 19, 33 (2000).

93. *The President’s News Conference*, 35 WKLY. COMP. PRES. DOC. 471, at 25-26 (1999).

94. President William J. Clinton, Statement of President Clinton before UNGA (Sept. 21, 1999), *quoted in* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 661-62 (2d ed., 2000).

95. W. GARY SHARP, SR., *JUS PACIARI: EMERGENT LEGAL PARADIGMS FOR U.N. PEACE OPERATIONS* 313-14 (1999) (citations omitted).

96. U.N. CHARTER art. 2(4).

97. Unfortunately, neither U.N. S.C. Res. 1199 nor 1203 provided specific authority to intervene. See S.C. Res. 1199, *supra* note 70, S.C. Res. 1203, *supra* note 70.

tives of states, confident that the U.N. Security Council will acquiesce in their decision to intervene, will act instead of seeking authorization in advance and challenge the U.N. Security Council to terminate the action.⁹⁸

Professor Henkin argues that this procedure may be what Kosovo already achieved.⁹⁹ He suggests that “[f]or Kosovo, Council ratification after the fact in Resolution 1244—formal ratification by an affirmative vote of the Council—effectively ratified what earlier might have constituted unilateral action questionable as a matter of law.”¹⁰⁰ The actions of the North Atlantic Council, the principal policy and decision-making institution of NATO, and the subsequent action of the U.N. Security Council in adopting U.N. Security Council Resolution 1244, clearly reflect a step toward changing the law. While it is unlikely there will be a formal change in the U.N. Charter, NATO actions in Kosovo support an interpretation of international law in which regional organizations can authorize humanitarian intervention, absent U.N. Security Council authorization, provided their actions are consistent with the purposes of the U.N. When these organizations carefully apply the strictures suggested by Professor Moore to ensure they neither

impact the territorial integrity nor the political independence of the target state, they will successfully avoid implicating Article 2(4) of the U.N. Charter.

In Kosovo, NATO’s use of military force to prevent the continuation of massive human rights abuses supported state practice, which has established the lawfulness of humanitarian intervention, as Moore, Lillich, Nanda, Reismann, McDougal, and Greenwood carefully circumscribed. International law requires the community of nations first consider all means short of force to address threats to international peace and security. When diplomacy fails after the international community finds egregious human rights violations, states cannot be confined by pre-U.N. Charter references to principles of non-intervention and sovereign immunity or to the U.N. Charter requirement for U.N. Security Council approval, especially when the lack of approval is contrary to the values for which the U.N. Charter stands. Therefore, it is important for the principle of humanitarian intervention under customary international law to be recognized as a legal action separate from the confines of the U.N. provided such action is strictly circumscribed.

98. Louis Henkin, *Editorial Comments: NATO’s Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT’L L. 824, 827 (1999).

99. *Id.*

100. *Id.*