

*United States Marine Corps
Command and Staff College
Marine Corps University
2076 South Street
Marine Corps Combat Development Command
Quantico, Virginia 22134-5068*

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*HUMANITARIAN INTERVENTION: LEGALITY OF NATO ACTION IN
KOSOVO AND IMPLICATIONS FOR U.S. POLICY*

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MAJOR DANIAL D. PICK

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EXECUTIVE SUMMARY

Title: Humanitarian Intervention: Legality of NATO Action in Kosovo

Author: Major Danial D. Pick, United States Army

Thesis: NATO's use of force in Kosovo was legal and represents a growing consensus supporting humanitarian intervention.

Discussion: Sovereign authority over territory by a state's government has been a defining principle of our international system since the Treaty of Westphalia in 1648. However, the inviolability of state sovereignty and the primacy of peace and order have been challenged since WWII through the development of international norms supporting individual rights and justice. The best example of this was the Nuremberg Trials.

Increasingly, limits are being placed on a state's sovereign power when it comes to what it can and cannot do to its own people in terms of violations of human rights as codified in treaties such as the Nuremberg Charter and the Genocide Convention. The tension between these norms was brought to a head when NATO bombed rump Yugoslavia for not accepting an agreement that would have slowed, if not stopped massive human rights abuses. Serb authorities claimed it to be an internal matter and refused to accept an infringement on their sovereignty. The United States and Europe saw the human rights violations as so egregious as to supercede sovereignty and even require military action in accordance with numerous human rights treaties. NATO acted without a UN Security Council Resolution authorizing the use of force because they feared a Russian veto, but the UN Charter allows for action by regional security bodies under Chapter VIII.

After the bombing campaign the UN passed a Resolution authorizing a NATO civil and security force, Slobodan Milosevic stands indicted for crimes against humanity in the Hague, and the region has returned to some degree of tense coexistence. While the ideas of state sovereignty and peace are still the pillars of international relations, NATO action in Kosovo indicates a new level of support for the protection of human rights and the use of force to further the cause of justice.

Conclusion: NATO's humanitarian intervention was legal because it was conducted in order to stop gross violations of human rights and enjoyed broad international support. The broad support for NATO's intervention demonstrates a growing consensus supporting human rights norms. The danger of such intervention without UNSC approval lies in weakening the UN Security Council.

U.S. policy makers must first strive to reinforce the growing consensus regarding human rights and justice so that a state is deterred from violating such norms. The U.S. must also exhaust diplomatic, economic, and informational means of reaching a pacific settlement to any violation of human rights. Finally, there must be a confluence of interests in addition to human rights abuses before conducting humanitarian intervention, and the U.S. should strive for international consensus before acting.

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Introduction

On March 25, 1999, NATO warplanes began a bombing campaign against the former Yugoslavia in hopes of forcing President Slobodan Milosevic's Government to accept a peace deal that would resolve the growing humanitarian crisis in Kosovo. NATO's decision to intervene militarily in order to prevent further human rights violations has been the source of heated debate ever since. While there are many dimensions to the debate, this study seeks to determine whether NATO's use of force in Kosovo was legal. The findings suggest that military intervention was legal and that NATO was the right security institution to conduct the operation under the circumstances. The evidence suggests that a new normative perspective is evolving concerning humanitarian intervention. The contemporary consensus indicates norms favoring the protection of human rights are growing in relative importance when compared to norms respecting traditional state sovereignty. Based upon the change in relative importance of these legal norms, this study finds a growing consensus in support of intervention, particularly when such intervention is militarily feasible and domestically supportable.

In order to determine what the law says about NATO's use of force, Chapter One provides an evaluation of the relevant international legal doctrine. In Chapter Two, the selection of NATO as the security institution of choice will be compared to both unilateral U.S. action and action sanctioned by the United Nations. Chapter Three discusses the conflict between international norms such as state sovereignty versus individual rights, and international order versus justice, with a view to situating NATO's use of force within the normative context. The evaluation of NATO's action will conclude with implications for U.S. National Security Strategy regarding humanitarian intervention.

Prior to beginning the discussion of NATO's action, a brief review of the region's history will help place the event in context. While the history of the conflict between the Serbs and Kosovar Albanians reaches well back into the Ottoman Era, only a brief review of the contemporary period will be provided in this study.¹

Kosovo enjoyed self-rule from 1974 to 1989, at which time President Milosevic terminated the region's autonomous

¹ For a brief, but balanced historical sketch of the region since Roman times see <http://www.cia.gov/cia/di/products/kosovo/index.html>. For a Serbian Orthodox perspective of the historical significance of the region see <http://www.decani.yunet.com/kip.html>. <http://www.albanian.com/main/countries/kosova/index.html> provides a Kosovar Albanian view of the region's history.

status. One interpretation is that the decision to terminate autonomous status was made out of fear that the Kosovar Albanians would seek independence or annexation by Albania. Another perspective is that Yugoslav President Slobodan Milosevic wanted to be associated with the Serb nationalists' campaign in order to stay in power, and therefore ordered the termination of Kosovo's autonomous status. In response to the Serb decision, the Kosovars, who made up 90% of the region's population, pursued peaceful calls for autonomy.²

While the international community supported independence for the major republics, such as Slovenia, Croatia, Bosnia, and Macedonia, it did not support such a move for sub-regions like Kosovo. As a result, the situation in Kosovo was not part of the negotiations at Dayton, and tensions continued to mount. In 1998, the Kosovo Liberation Army (KLA) began resorting to violence and called for independence from Serbia. The violence began after Belgrade had made life miserable for the Kosovar Albanians and precluded any political change. One could argue that the Serbian crackdown which followed was not a response to the KLA as much as it was a deliberate

² The question as to which side first resorted to acts of violence is a matter of much debate and is not addressed in this paper.

and preplanned effort to get rid of the Albanians in Kosovo. Regardless of the relationship of events, once violence broke out the humanitarian situation in Kosovo deteriorated rapidly.³

In response to the deteriorating humanitarian situation in Kosovo, the UN Security Council (UNSC) passed UNSC Resolution (UNSCR) 1160 on March 31, 1998. The resolution placed an arms embargo on Serbia (including Kosovo), and called on both sides to seek a political solution to the conflict.⁴ The resolution also stated the core, and somewhat conflicting, issues of this crisis, when it called for respect for the territorial integrity of Serbia on the one hand, and protection of the rights of the Kosovar Albanians on the other.⁵

On September 23, 1998, the UNSC adopted UNSCR 1199 which called on both sides to implement a cease-fire and "improve the humanitarian situation and to avert the impending humanitarian catastrophe."⁶ The language of the resolution was very strong indeed. For example, it said that the UNSC was "deeply concerned by the rapid

³ Ambassador Richard Holbrooke provided the background leading up to the crisis in Kosovo during a lecture presented on April 7, 1999 at Princeton University.

⁴ UN Security Council Resolution 1160 adopted March 31 1998, (<http://www.un.org/Docs/scres/1998/sres1160.htm>, accessed October 21, 2001)

⁵ Ibid.

⁶ UN Security Council Resolution 1199 adopted September 23, 1998, (downloaded from <http://www.un.org/Docs/scres/1999/99sc1244.htm>, October 21, 2001)

deterioration in the humanitarian situation...alarmed at the impending humanitarian catastrophe and emphasizing the need to prevent this...deeply concerned by the reports of increasing violations of human rights and of international humanitarian law, and emphasizing the need to ensure that the rights of all inhabitants of Kosovo are respected...affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region.”⁷ Furthermore, the resolution concluded that the UNSC “decides, should the concrete measures demanded in this resolution not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region.”⁸ The parties failed to comply with the UNSCR and the situation continued to deteriorate.

In October 1998, US Ambassador to the UN, Richard Holbrooke, backed by the threat of NATO force, obtained a tense cease-fire, whereby unarmed observers from the Organization for Security and Cooperation In Europe (OSCE) were placed in Kosovo to monitor the cease-fire. Both the KLA and the Serbs violated the terms of the cease-fire, and on January 17, 1999, 45 Kosovars were massacred at Racak.

⁷ Ibid.

⁸ Ibid.

The Chief Justice of the International Tribunal tried to visit the site of the alleged massacre, but was turned away at the border by Serb authorities. In an attempt to broker a political settlement, the parties gathered in France for negotiations. A two-week recess was called after neither side agreed to the proposed settlement.

On March 18, the Kosovars signed the Rambouillet Accords under significant pressure. The Accords contained three major provisions. The first called for democratic self-government in Kosovo, but not independence. The second regarded security, and called for the deployment of international troops and the withdrawal of many Serb forces from Kosovo, while the third contained a mechanism for final settlement after three years.⁹ The Serbs refused to sign the Accords, considering them an unacceptable infringement on their national sovereignty.

On March 20, in an environment of increasing tensions, the OSCE observers were withdrawn from Kosovo. Over the next several days, U.S. Special Envoy Ambassador Richard Holbrooke made two trips to Belgrade in an attempt to secure an agreement from President Milosevic, and to make clear the consequences of a failure to agree. President

⁹ Understanding the Rambouillet Accords March 1, 1999, (downloaded from http://www.state.gov/www/regions/eur/fs_990301_rambouillet.html, October 18, 2001). For a critical non-U.S. government perspective on the Accords see http://www.accuracy.org/press_releases/PR042899.htm).

Milosevic was adamant in his refusal to allow NATO peacekeepers into Kosovo. In the face of this refusal, the growing reports of human rights violations, and the internal displacement of some 300,000 Albanians, NATO took the decision to begin bombing on March 25, 1999.¹⁰

¹⁰ Ambassador Richard Holbrooke on April 7, 1999 at Princeton University.

Chapter One: What Does International Law Say?

Introduction

To determine what international law is relevant to this situation, one must look to the pertinent treaties and customary international law governing the use of force and human rights. In so doing, one finds the UN Charter as the cornerstone document. In addition to the UN Charter, there is the Nuremberg Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on Genocide, and some twenty other major multilateral treaties in force in the field of human rights. There is also a web of declarations, such as the Universal Declaration of Human Rights, which many argue has assumed the status of customary international law. It is within this body of International Law that the question of the legality of humanitarian intervention will be argued.

The United Nations Charter

The argument against the use of force is built around Article 2 (4) of the UN Charter which states that "All members shall refrain in their international relations from the threat or use of force against the territorial

integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹¹ The only exception to this rule is found in Article 51 of the Charter, which allows for the right of self-defense against an aggressor, either by the victim state, or by a group of states.¹² While a state is allowed to react to aggression in self-defense, keeping in mind the tenets of necessity and proportionality established in 1842 by the “Caroline” case, this allowance is only made until the UNSC can meet and take action.¹³

The UNSC’s power is spelled out in Article 39, whereby “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹⁴ Article 41 outlines the measures not involving force that are available to the UNSC, such as the arms embargo directed in UNSCR 1160. Article 42 empowers the UNSC to “take such action by air, sea or land forces as may be necessary to maintain or

¹¹ “The United Nations Charter” in Barry E. Carter and Phillip R. Trimble, International Law, 2nd ed. (New York: Aspen Publishers, 1995), p. 1302.

¹² Ibid.

¹³ Carter and Trimble, p. 1291-1293.

¹⁴ The United Nations Charter, <http://www.un.org/aboutun/charter/index.html>, November 4, 2001.

restore international peace and security,"¹⁵ just as it did against Korea in 1950 and Iraq in 1991 when there were clear acts of aggression. While the Charter calls for the promotion of human rights, and other very important objectives, they are all subordinated to the maintenance of peace and security.

The restatement by L. Henkins summarizes the Charter's position on the use of force: "Peace was the paramount value. The Charter and the organization were dedicated to realizing other values as well - self-determination, respect for human rights, economic and social development, justice, and a just international order. But those purposes could not justify the use of force between states to achieve them; they would have to be pursued by other means. Peace was more important than progress, and more important than justice...war was inherently unjust."¹⁶

The argument is straightforward according to the Charter: the use of force is unlawful, except by a sovereign, or group of sovereigns, in self-defense against an act of aggression, and then only until the UN Security Council is able to meet and decide whether force is required to restore international peace and security.

¹⁵ Ibid.

¹⁶ L. Henkins, "The Use of Force: Law and US Policy," in Carter and Trimble, p. 1303.

Serbia did not violate the sovereignty of any other state, and the Security Council stopped short of authorizing the use of force against it. Any alleged acts of human rights violations, however terrible they might be, do not authorize a state or collective security organization to violate the fundamental rule of the UN Charter forbidding wars of aggression against sovereign states.

On the other hand, there are several arguments in favor of humanitarian intervention. The first argument concerns the right to self-defense. The Security Council passed several resolutions that deemed Serbia's actions a threat to peace and security. By doing so, the UNSC recognized the effect of Serbia's actions as extending beyond its borders and threatening the sovereignty of its neighbors. The UNSC resolutions called on Serbia to take specific actions to remedy the situation, which it did not take. Serbia was, therefore, explicitly in violation of UNSC Resolutions concerning international peace.¹⁷

Therefore, the states neighboring Serbia and threatened by its actions could exercise their right of self-defense under Article 51. Furthermore, they could call on others,

¹⁷ Fred Halliday, "Are NATO Actions Prudent and Are They Legal," Irish Times, April 1, 1998, <http://www.ireland.com/newspaper/opinion/1999/0401/opt3.htm>.

such as NATO, for collective self-defense until the UNSC was able to meet and decide on appropriate action.

The second argument hinges on the idea that it is legal to intervene when serious violations of humanitarian law occur. Since 1945, there have been over twenty multilateral treaties signed in the field of human rights, all of which create legally binding obligations for the nations that are parties to them. The most important of these is the UN Charter itself. Article 55 of the UN Charter calls for "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."¹⁸ Articles 13, 55 and 56 charge the UN with "promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁹

The Nuremberg Charter

In addition to the UN Charter, the Nuremberg Charter stands as a milestone in the development and codification of international law pertaining to the use of force and

¹⁸ The United Nations Charter, p15.

¹⁹ Ibid.

helps build the case for humanitarian intervention. The Nuremberg Charter and trials established important precedents both for the general norms limiting a state's use of force and for the responsibility of individuals.

The Charter codified three categories of crimes. The first category is crimes against peace, which include planning, initiating or waging a war of aggression. The second is war crimes, namely violations of the law or customs of war, including murder, deportation of a civilian population, murder or ill-treatment of prisoners of war, and wanton destruction of cities, towns or villages not justified by military necessity. The third is crimes against humanity, namely murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population, *whether or not in violation of the domestic law of the country where perpetrated.*²⁰ Perhaps the most significant achievement of the Nuremberg Charter was that it pierced the veil of state sovereignty and held individuals responsible.

²⁰ The Nuremberg Charter in Carter and Trimble, p. 1300.

The Convention on the Prevention and Punishment of the Crime of Genocide

In addition to the Nuremberg Charter, in December 1948, the UN General Assembly passed a resolution that proposed a Convention on the Prevention of Genocide for signature and ratification by member states, which entered into force in January 1951. The Genocide Convention further strengthens the human rights regime by requiring signatory countries to "undertake to prevent or punish" perpetrators of genocide, effectively establishing an obligation to act.²¹ This further erodes the protection offered by the sovereignty defense. For example, the International Criminal Tribunal for the former Yugoslavia, which traces its roots to the Nuremberg Tribunal, is pursuing its cases against certain individuals charged with violations of humanitarian law, including genocide.²² It is important to note that at the time NATO took the decision to bomb, the international community refrained from calling the human rights violations occurring in Kosovo "genocide," preferring instead to call them a "humanitarian

²¹ Convention on the Prevention and Punishment of the Crime of Genocide, http://www.unhcr.ch/html/menu3/b/p_genoci.htm, accessed February 27, 2002.

²² The former Yugoslav President Slobodan Milosevic stands indicted for crimes against humanity and violations of the laws or customs of war for acts perpetrated in Kosovo and elsewhere. His trial, which began in February 2002, represents the first time that a head of state has been brought before an International Criminal Tribunal (ICT). For more information regarding the ICT for the former Yugoslavia see <http://www.un.org/icty/index.html>

catastrophe." By not using the term "genocide," states retained flexibility as to how to respond to the crisis.

The significance of the Nuremberg Charter, the Genocide Convention, and the ongoing actions of the International Criminal Tribunal are that they clearly define certain violations of international human rights law as illegal, and remove the time-honored protection of sovereignty as a viable defense.

A counter-argument to this is that even if the parties in the former Yugoslavia were guilty of violating international human rights law (IHL), it would not justify NATO's attack. The Nuremberg Charter considers Crimes against Peace, namely "planning, preparation, or waging a war of aggression, or a war in violation of international treaties" to be illegal.²³ By waging an air war against the former Yugoslavia, it could be argued that NATO was guilty of Crimes against Peace. However, this is a weak counter-argument since NATO's action, like that of the Allies in World War II, cannot be described as a war of aggression.

International Judicial Options

Rather than military intervention, perhaps the appropriate judicial body should have dealt with

allegations of violations of international human rights law (IHL). This brings up the issues of the competence of the courts to hear such a case and the timeliness of judicial action. The UN Security Council established the International Criminal Tribunal for the former Yugoslavia and vested it with jurisdiction over many of the crimes alleged to have taken place within the former Yugoslavia. Thus, the court certainly enjoyed subject matter jurisdiction. However, could sufficient evidence have been gathered in a war zone to allow the court to competently hear the case? Furthermore, could the accused have been brought before the court? One could argue that years from now perhaps the evidence could have been gathered, the accused apprehended, and the cases heard, but what of the timeliness of the judicial process?

The Tribunal was incapable of stopping the ongoing violations of humanitarian law, nor bring the accused and the necessary evidence before the court in such a way as to affect the ongoing violations. Therefore, one must conclude that while the court could eventually obtain competency to try cases and effect international law after the fact (which it is indeed doing), it lacked the ability to enforce the law at the time the alleged violations were

²³ The Nuremberg Charter, Carter and Trimble, p. 1300.

occurring. The lack of timely judicial recourse supports the notion that humanitarian intervention may be necessary, and therefore legal, where international human rights law is clearly being violated contrary to the UN Charter, the Nuremberg Charter, and countless other Human Rights treaties, resolutions, and declarations.²⁴

Recognition of Statehood

Paul Williams, a renowned legal scholar, who served as a legal expert in the U.S. Department of State and is a Professor of International Law at American University, makes another argument supporting NATO intervention in the Balkans. He argues that the former Yugoslavia was still in the process of breaking up or "dissolving." Since the international community did not recognize Serbia as the Successor State to the former Yugoslavia, it did not enjoy full rights of sovereignty and territorial integrity under international law. Therefore, concerns relating to illegitimate interference in "internal affairs" were minimized.²⁵ In addition to withholding recognition due to the dissolution of a state, recognition may also be withheld if the new state is not deemed to be fulfilling

²⁴ At the time NATO was deciding on a course of action some 300,000 Albanians had already been forced from their homes, establishing a clear pattern of violation of international human rights law.

its international obligations. For example, the U.S. withheld recognition of the USSR, the PRC, and Vietnam for some time on this basis.

On the other hand, according to the Montevideo Convention of 1933, ratified by sixteen Western Hemisphere countries, including by the US, a state should possess the following: "(a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states."²⁶ According to this definition, the entity of the former Yugoslavia is a state, with its government in Belgrade, and thus entitled to treatment as such. Furthermore, Kosovo has been a part of Serbia since early in the twentieth century, and was not even a separate republic such as Bosnia, Slovenia, and Croatia. Since Kosovo never enjoyed official status as a separate republic, nor did the international community support its independence, it was improper to question the legitimacy of the Belgrade government and its entitlement to the protections of a sovereign state.

Even if one accepts that Serbia met the standards for statehood established under the Montevideo Convention, the issue of whether Serbia could claim to be the successor

²⁵ Paul Williams, Legal Basis for NATO Military Action Taken Against Serbia/Montenegro, April 1, 1999, <http://www.balkanaction.org/media/legal499.html>, p. 1.

²⁶ Carter and Trimble, p. 457.

state to Yugoslavia remains. The Badinter Commission, which consisted of senior European jurists charged with arbitrating the status of Yugoslavia and its republics, established that Yugoslavia was indeed dissolving into its constituent parts, rather than suffering from the secession of some of its republics. However, the Commission did not take an authoritative position on which newly independent state, if any, would have the right to claim successorship to Yugoslavia.²⁷

While the Badinter Commission failed to identify the specific parts into which Yugoslavia was dissolving, the case can be made that Kosovo should have been considered one of those parts and afforded the opportunity for self-determination as allowed for under the UN Charter and the 1974 Yugoslav Constitution. Kosovo functioned at the federal level as a de-facto republic within the Yugoslav system until the termination of its autonomous status by President Slobodan Milosevic.²⁸ Since the 1992 Constitution only mentions Serbia and Montenegro, and Serbia's claim to Kosovo is tenuous at best, then Kosovars have a legitimate

²⁷ Noel Malcolm, "Kosovo and Bosnia: Three Points," Bosnia Report, (London, Mar/May 1998), p. 10-11. For more on the recognition of states and the requirements for statehood set forth by the EU for the former republics of Yugoslavia, see European Journal of International Law, Vol 4 (1993), No. 1 at <http://www.ejil.org/journal/Vol4/No1/art4.html>.

²⁸ The amended 1992 Yugoslav Constitution, which makes no mention of Kosovo as an autonomous region, is generally considered to have been forced through the Kosovo Assembly illegally.

legal case for self-determination since the former Yugoslavia no longer exists.

Law as Process

Yet another doctrinal argument that may support humanitarian intervention considers law as process. Essentially, bad laws must be broken and replaced by new, better, ones. Michael J. Glennon, a Professor of International Law and fellow at the Woodrow Wilson Center, who also served as a legislative assistant on the Senate Foreign Relations Committee, argues that laws are constantly being broken and new ones established in accordance with new norms.²⁹

The international law regime is strengthened when "bad" or "anachronistic" laws are challenged and "new" laws better suited to the contemporary context are made. One could argue that this is what happened with NATO action in Kosovo. Some argue that NATO may have broken international law by bombing Serbia, but when Russia proposed a UNSC Resolution to halt the bombing, it was resoundingly defeated. The international community also viewed the NATO action positively for the most part. This could be interpreted as approval by the international community for

NATO's new "states practice" and thus considered new customary international law.³⁰

Conclusion

To summarize, the Nuremberg Charter and Genocide Convention clearly removed the time-honored protection of state sovereignty as a defense against crimes against humanity by holding individuals responsible for their actions. However, the means by which an individual should be brought to justice for such violations must be carefully considered.

According to the UN Charter, only the UN Security Council may authorize the use of force as the means to resolving breaches of human rights law. The exception being that states may act under their treaty obligations until such time as the UNSC is able to meet and determine a course of action. Had the international community referred to the human rights violations as genocide, this would have triggered obligatory action by signatory states, which would have rendered NATO's action legal under international law. However, by not calling the crimes genocide, NATO's action would only have been legal if it were attacking in

²⁹ For further discussion of international norms and their relationship to law see Chapter Three.

³⁰ Michael J. Glennon, "The New Interventionism," Foreign Affairs, (May/June 1999), p. 2-4.

self-defense. Therefore, the former Yugoslavia should only have been attacked if it had first attacked another state. While the UN Security Council identified the actions taking place within the former Yugoslavia as threats to international peace and security, it stopped short of authorizing the use of force because China and Russia would have vetoed such a Resolution. The Security Council thus implied that diplomatic means should have been pursued rather than armed intervention to bring any human rights violators to justice.

However, the argument that law is process and changes to reflect new international norms seems to hold true in this case. While the UNSC did not initially authorize military intervention, on 10 June 1999, it passed UNSCR 1244 authorizing the deployment of civil and security forces under Chapter VII of the UN Charter.³¹ Such international consensus regarding the need for withdrawal of Serbian military, security and paramilitary forces, the protection of human rights, and the establishment of a significantly autonomous Kosovo region seems to legitimize the means by which these ends were achieved. The most compelling aspect of this argument is that it reconciles

³¹ United Nations Security Council Resolution 1244 adopted June 10, 1999
<http://www.un.org/Docs/scres/1999/99sc1244.htm>, accessed November 15, 2001.

law with reality by acknowledging law as a dynamic process, rather than as a static framework.³² This argument suggests that within the international legal process, new norms regarding humanitarian intervention may be emerging.

Having explored the relevant international legal doctrine with regard to humanitarian intervention, Chapter Two of the study will focus on the relevant security institutions.

³² While the will of the international community may have been accomplished by NATO's action as legitimized by the defeat of Russia's proposed UNSC Resolution to halt the bombing and the passage of UNSC Resolution 1244, which legitimized NATO's action *ex post facto*, one must acknowledge that the supremacy of the UNSC was challenged. For further discussion regarding the UN and NATO see Chapter Two.

Chapter Two: Was NATO the Right Institution?

Introduction

For the purposes of this paper, three institutional options for military intervention in Kosovo will be considered: multilateral (UN), regional (NATO), and unilateral (US). Since the UN is the premier multilateral organization in the world today, UN-sanctioned action is often seen as the most legitimate and the most legal. One need not look past the example of Iraq in 1991 to see how the UN can legitimately and legally act within the framework of the Charter to resolve a "breach of international peace and security." In the case of Iraq, the UNSC passed a series of resolutions beginning with a condemnation of Iraq's invasion of Kuwait and a demand for it to withdraw. Then the UNSC methodically increased international pressure on Iraq to comply, first by invoking its authority under Article 41 to order an economic embargo, then by adding maritime and air embargoes. Finally, the UNSC authorized member states to take "all necessary means" to restore peace under Article 42 of the UN Charter, which allowed a US-led coalition of states to conduct the Gulf War, thereby restoring the territorial integrity of Kuwait. The UN actions enjoyed nearly

universal approval by the 184 member states of the UN, and one could argue that it has become the blueprint for the legitimate use of force by the international community.

Multilateral Option (United Nations)

While the case of the former Yugoslavia differs in that it did not invade a neighboring state, one could argue that its actions in Kosovo and the cross-border flow of refugees represented a threat to peace and security. In fact, that is what the UNSC called the rump Yugoslavia's actions in UNSC Resolution 1199, which it passed in September 1998. The Council also demanded a cease-fire and an improvement in the humanitarian situation in the same resolution.³³ The authorities in Belgrade failed to comply with the UNSC Resolutions. Had the UNSC proceeded with a resolution authorizing member states to use "all necessary means" to restore peace, the ensuing military intervention would have enjoyed the cloak of legitimacy provided by the UN Security Council, and would have been legal under the UN Charter.

A counter-argument to the UN-authorized use of force would be that Russia was allowed to deal brutally with the Chechens while the world looked on. The situation in

Chechnya was correctly treated as an internal matter, while the Serbs were unfairly singled out for attempting to suppress a terrorist group. Therefore, the UNSC Resolution authorizing humanitarian intervention would have been little more than another example of the five permanent members of the Council establishing one standard for themselves and another for the rest of the world.

However, a very strong case can be made for UN-sponsored humanitarian intervention, despite the counter-arguments. What if the five permanent members of the Security Council cannot reach a consensus on a resolution authorizing the use of force for humanitarian reasons? In the case of the former Yugoslavia and the situation in Kosovo, such a resolution was never proposed because Great Britain, the US and France feared a Russian veto.

Regional Option (NATO)

In the case where a consensus cannot be reached within the UN, was humanitarian intervention conducted by a regional security organization legal and legitimate without specific authorization by the UNSC? The UN Charter provides a mechanism for legitimizing armed NATO

³³UN Security Council Resolution 1199, adopted September 23, 1998.

intervention. Regional arrangements are expressly permitted under Chapter VIII of the Charter, where Article 52(1) clearly states that "nothing in the present charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." ³⁴

That said, Article 53 of the Charter prohibits enforcement action, as distinguished from action in self-defense, by regional agencies without UNSC authorization. According to Frederic Kirgis, a Professor of International Law at Washington and Lee University, "In 1962 the International Court of Justice said that enforcement action is coercive action in the context of Chapter VII, which deals with threats to the peace, breaches of the peace and acts of aggression. If the NATO action was designed to coerce the Yugoslav Government to accept the allied peace plan for Kosovo, it would require UNSC authorization under Article 53. On the other hand, if the NATO action is designed to ensure humanitarian relief for the people of

³⁴ Ibid.

Kosovo or merely to help them repel armed aggression, one could argue that a Security Council resolution may not be necessary." ³⁵

Therefore, there are two arguments for legal and legitimate NATO action in Kosovo without UNSC approval. The first argument is for limited humanitarian intervention to aid groups exposed to great danger or held captive. The argument is strongest when a nation is acting to protect its own nationals, as in the case of Israel when it raided the airport in Entebbe, Uganda, in 1976 to rescue its nationals. The extended argument put forth by Frederic Kirgis is that "in exceptional cases where peaceful means of alleviating a humanitarian crisis inflicted by a state on its own nationals have failed, and where the Security Council has recognized a threat to international peace, forceful intervention would be lawful so long as it is proportional to the situation." ³⁶

In addition to the limited humanitarian intervention argument, there is the argument of collective self-defense. The right to self-defense is provided for by Article 51 of the Charter, if the Security Council has not acted to deal with an armed attack. While the traditional interpretation

³⁵ Frederic L. Kirgis, "The Kosovo Situation and NATO Military Action," March, 1999, <http://www.asil.org/insights/insigh32.htm>.

of Article 51 was the right of *states* to self-defense, one could argue that it is also applicable to oppressed groups seeking self-determination. If the Kosovars are seeking self-determination and the international community is willing to recognize them, then they have the right to defend themselves and to call upon NATO, or other states and organizations for collective self-defense.³⁷

The counter-argument to self-defense is that, as nationals of the sovereign state of Yugoslavia, the Kosovars had no right to self-defense. Such an interpretation of Article 51 was never even considered by the framers of the Charter. Moreover, it is the former Yugoslavia which has the right to self-defense against NATO aggression, and to call upon other states, such as Russia, for collective self-defense. Furthermore, international support for external military intervention in support of self-determination has lessened sharply since the passing of the colonial era.³⁸

Turning from the legal arguments for and against NATO as the institutional choice, the legitimacy of the NATO option will now be discussed. One could argue that NATO's

³⁶ Ibid. There are numerous examples of such forceful intervention, including European intervention in the Ottoman Empire in the 19th century, whereby Serbia obtained its independence.

³⁷ Ibid.

³⁸ A notable exception to the decline in international support for self-determination is the international community's effort in East Timor, which followed NATO's intervention in Kosovo.

action in the Balkans enjoyed a high degree of legitimacy for several reasons. First, member states tried to reach a peaceful resolution by using OSCE monitors in Kosovo per UNSC resolutions, and then by sponsoring peace talks in France. Second, NATO is a credible collective security organization authorized by Chapter VIII of the UN Charter, and acting to preserve stability in its region. Third, UNSC Resolutions 1160 and 1199, as well as various human rights treaties and declarations, legitimize NATO intervention.

The arguments against NATO legitimacy point out that NATO's use of force beyond the borders of its member-states places it in a position of fundamental competition with the UN. Thus, to accept NATO's action as legitimate is to delegitimize the UNSC as the security body of choice.³⁹

Unilateral Option (United States)

Suppose that NATO's nineteen member states had failed to reach a consensus on action in the Balkans. Would unilateral humanitarian intervention by one or more states have been legal and legitimate? Unilateral action lacks the legality and legitimacy conferred upon regional organizations by Chapter VIII of the Charter. However,

the same arguments of limited humanitarian intervention and self-defense could still be made for unilateral action.

The international legal community has widely accepted that the UN Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives.⁴⁰ The case of Israel's raid on Entebbe stands as the prime example of unilateral humanitarian intervention. Professor Henkin elaborates on humanitarian intervention by saying that an outside state has "a right to liberate hostages if the territorial state cannot or will not do so. It has not been accepted practice, however, that a state has a right to intervene by force to topple a government or occupy its territory even if that were necessary to terminate atrocities or liberate detainees. Entebbe was acceptable, but the occupation of Cambodia by Vietnam was not. The US invasion and occupation of Grenada, even if in fact designed to protect the lives of US nationals, also was widely challenged."⁴¹

However, W. Michael Reisman, a distinguished Professor of International Law at Yale University and an expert on human rights law, goes further towards justifying broader unilateral action on behalf of human rights by arguing that

³⁹ Jeffrey Laurenti, United Nations Association of the United States of America Newsletter, April 1999, p1.

⁴⁰ L. Henkins, "The Use of Force: Law and US Policy," in Carter and Trimble, p. 1305-6.

⁴¹ Ibid.

"since rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights." ⁴²

One could also argue that since the UNSC has identified the rump Yugoslavia's actions as a threat to regional peace and security, neighboring states that are threatened by the flow of refugees have the right to self-defense under Article 51. Those neighboring states could then turn to other states such as the US and call for collective self-defense.

Unilateral action in support of humanitarian intervention or collective defense would be the most difficult to legitimize of the three options evaluated here. However, that does not mean that a limited unilateral use of force could not be legitimized, such as that by a country to free its own nationals. However, had the U.S. intervened unilaterally to stop violations of human rights in the former Yugoslavia, it would have been very easy to build a case against it. For example, the argument against the legitimacy of such an action would have been that the government in Belgrade was dealing with

⁴² W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," American Journal of International Law, 84, (1990), p. 866-876.

an internal situation, and while it was a grisly internal conflict, there were Serb casualties as well as Kosovar. Also, Serbia had not violated the territorial integrity of any of its neighbors.

Conclusion

Clearly, the institution of choice is the UN Security Council when it comes to the legitimate use of force. Had the UNSC authorized "all necessary means to restore peace and security," NATO's action would have had the most international legitimacy. As it turned out, NATO's action was approved after the fact by UNSCR 1244, which called for the deployment of NATO forces under Chapter VII. By acting without UN Security Council approval, one could argue that NATO undermined the Council's authority. Despite being far more legitimate than unilateral action, NATO's military intervention outside the borders of its member states could be seen as a challenge to the UN Security Council's mandate. In the next chapter, the normative questions surrounding NATO's humanitarian intervention will be evaluated.

Chapter Three: Should Humanitarian Intervention Be Legal?

NATO's action in the Balkans highlights tensions that exist between competing norms in international law.

Perhaps the most significant tension is that between the idea of state sovereignty versus popular sovereignty, or a state's rights versus the rights of individuals or groups. These normative conflicts are expressed doctrinally in the UN Charter. Article 2(4) codifies the traditional norm of state sovereignty when it charges all members "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."⁴³ Article 55, for its part, calls for "respect for the principle of equal rights and self-determination of peoples."⁴⁴ Although the tensions have existed in codified form since the framers of the UN Charter first wrote it, the tensions have not been brought into such stark contrast until now.

Arguably, there has been growing popularity since 1945 for humanitarian intervention and intervention for self-determination as additional exceptions to Article 2(4) of the UN Charter. Perhaps what we are seeing in the form of

⁴³ The UN Charter, p15.

⁴⁴ Ibid.

NATO action in the Balkans is a continuation of this normative trend away from the primacy of state sovereignty towards a more liberal norm that holds individual and group rights as prime in certain cases.

W. Michael Reisman claims that with the adoption of the UN Charter and the landmark passage of the Universal Declaration of Human Rights, the sovereign has finally been dethroned in international law.⁴⁵ Reisman is referring here to the idea that the traditional concept of state sovereignty no longer provides a cover for actions taken by the government against its own people. Rather, with the passage of the Universal Declaration of Human Rights, and a variety of other treaties and declarations, the concept of popular sovereignty is gaining more and more prominence in international law.

M.S. McDougal and F. Feliciano argue that "in modern international law, (popular) sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner."

⁴⁵W. Michael Reisman, op. cit.

⁴⁶ If one agrees that the norm should be one where popular sovereignty supersedes state sovereignty in certain cases (such as gross human rights violations), then NATO actions in the Balkans are justified.

However, there are several critiques of this normative concept. The first critique turns on the idea of consistency. If the idea was to intervene when a clear popular consensus was being suppressed or when gross humanitarian atrocities were occurring, then why was NATO only concerned with the plight of the Kosovars? If the norm were applied equally, then the international community should act against Turkey's oppression of the Kurds, and the developing countries should care as much about Iran's human rights violations as they do about Israel's. Perhaps NATO intervention was not about enforcing a new norm, as much as it was a demonstration of the political nature of humanitarian intervention and the gross double standard in its application.

The counter argument to this critique is that states and regional organizations such as NATO, as well as the UN, are political bodies and should be expected to act politically. One can support the argument that an

⁴⁶ M.S. McDougal and F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, (New Haven: Yale University Press, 1961), p. 657.

international humanitarian consensus is emerging, and still accept the role of self-interest of states and their electorates. The interaction between self-interest and humanitarian action will continue to foster selectivity. Self-interest, as construed by politicians, will dictate the limits of those interventions and other humanitarian actions. This will also mean that selectivity will continue to operate, justified on grounds of practicality, feasibility and level of domestic support, and by the lame but not invalid argument that it is better to try to do some good than none at all.⁴⁷

If one acknowledges the inherent political nature of humanitarian intervention and the impact of self-interest, then a realist critique would argue that intervention of this sort will only be used by the great powers to interfere in the internal affairs of weaker states in order to further great power interests. Proponents of this perspective argue that the great powers will take advantage of a situation where no clear consensus exists within a state to shape the domestic power situation to their liking in the name of democracy.⁴⁸

⁴⁷ Fred Halliday, *op. cit.*

⁴⁸ W. Michael Reisman, *op. cit.*

There is another approach to the state sovereignty vs. human rights argument that questions the nature of "threats to peace and security." The UN Charter is grounded on a premise that assumes that the core threat to international security comes from interstate violence. Michael Glennon argues that this is no longer the case. The recurrent problem today is intrastate violence, such as in Haiti, Somalia, Rwanda, Sudan, and Indonesia, which is not addressed effectively by the Charter.

If the nature of conflict is changing, perhaps international law should evolve to deal more effectively with today's realities, and perhaps Kosovo is establishing a new type of intervention not easily categorized. Glennon argues that challenging a law is not the same as challenging the rule of law. Quite to the contrary, challenging an unjust law, as NATO has done with the UN Charter, can actually reinforce the legal regime. The normative changes championed by the West afford less deference to the old idea of sovereignty and afford a greater weight to humanitarian crises, to the point of deeming military intervention appropriate when the

humanitarian costs are too high.⁴⁹ Glennon argues that if power is used to do justice, then law will follow.

A critique of this view is that the primacy of international peace and security overrides the notion of justice and human rights for good reason. The Treaty of Westphalia established the idea of the modern sovereign nation-state and denounced armed conflict *because* the European powers of that time had devastated one another in the pursuit of justice. More recently, the UN Charter was written to reinforce the primacy of international peace and security with the memory of two world wars still fresh in the minds of the framers. The idea of using power to do justice has led to untold human suffering, which is precisely why the pursuit of justice has been subordinated to the maintenance of peace and security.

On the other hand, proponents of human rights argue that respect for human rights is necessary in order for international peace and security to exist. Conflict should be risked to establish a just world order. Only a just world order can assure true international peace and security.

⁴⁹ Michael J. Glennon, *op. cit.*

Conclusion

As for the legality of NATO's air campaign against the former Yugoslavia, the more compelling argument under international law seems to favor the action. It must be stressed, however, that no clear legal consensus has emerged for future humanitarian intervention. Rather, it was the confluence of individual states' interests, the gross human rights violations that occurred in Kosovo, and the feasibility of success, which led to sufficient consensus to cause NATO to act. The UN Security Council's subsequent passage of Resolution 1244 further legitimized NATO's intervention.

On the other hand, NATO action has challenged the very foundation of the international legal order by calling into question the UN Charter's rules on the use of force, by highlighting the codified contradictions between the need to maintain international order and the need to use force in the name of justice.

NATO's use of force without UNSC approval also threatens to change the traditionally complementary relationship between NATO and the UNSC into a competitive one. Many perceive NATO's unsanctioned actions as usurping the authority vested in the UNSC. This may set a dangerous

example for other "regional security groups" to take action without UN approval. Finally, NATO action has brought the normative tension between the old idea of state sovereignty and the new growing consensus on human rights to the forefront.

In terms of legal doctrine, the alleged acts perpetrated by the Serbian military and special police are clear violations of human rights law according to the UN Charter, the Universal Declaration of Human Rights, the Nuremberg Charter, the International Covenant on Civil and Political Rights, and the Torture and Genocide Conventions, to name a few. The UNSC recognized Belgrade's role in the humanitarian crisis and demanded a cease-fire and improvement in the humanitarian situation by passing UNSC Resolutions 1160 and 1199. The Organization for Security and Cooperation in Europe (OSCE) made significant attempts to bring the crisis to a peaceful resolution to no avail.

In the face of an impending humanitarian disaster, NATO, acting in its role as a regional security organization under Chapter VIII of the UN Charter, used force to restore peace and stability to the region and is working in conjunction with international relief organizations to minimize human suffering. The fact that the Russian-sponsored Security Council Resolution to halt

the bombing failed miserably, that NATO's efforts largely met with approval from the international community, and that the Security Council later passed Resolution 1244 authorizing a NATO security force under Chapter VII suggests a legal consensus in favor of NATO's humanitarian intervention.

However, the international legal norms in favor of peace and security and the protection of state sovereignty remain strong indeed. Kosovo technically remains part of the former Yugoslavia and there is no international consensus for imminent Kosovar independence. NATO must walk a fine line between using force to relieve the humanitarian crisis and using force to impose specific terms on Belgrade. The international community seems prepared to allow the former, but not the latter.

Ultimately, international legal norms regarding humanitarian intervention will also be influenced by international efforts that followed the bombing campaign against Serbia. The extent to which the NATO Kosovo Force (KFOR) and the UN Interim Administration Mission in Kosovo (UNMIK) civil and military forces are able to establish peaceful and fair conditions for Serbs and Albanian Kosovars to coexist will ultimately answer the question of

whether force was used to do justice.⁵⁰ When asked how NATO action would affect international legal norms and the role of the UN, Richard Holbrooke said, "We're in the middle of a movie, and we don't know the ending yet."⁵¹ To continue the metaphor, one can predict the ending by what we've seen of the movie so far. What we have seen so far is international support for NATO's intervention, the sound defeat of the Russian proposal to stop the bombing, and the UNSC approval of NATO's action ex post facto, through the passage of UNSC Resolution 1244. These factors strongly suggest that NATO's action was legal and the norms regarding international human rights are growing stronger.

Implications for U.S. Policy

There are several implications of the legality of NATO's humanitarian intervention for U.S. National Security Strategy. Perhaps the most significant is that the U.S. must carefully evaluate the second order effects of its actions and ensure that it is not doing more harm than good to international order.

By leading NATO against the former Yugoslavia without UN Security Council approval, has the primacy of the

⁵⁰ Despite continued tension between Serbs and Kosovar Albanians, the recent elections in Kosovo represented a positive move towards the establishment of a stable multi-ethnic government in the region.

Council in authorizing the use of force in support of international norms been undercut? The Council's subsequent passage of Resolution 1244 appears to have been approval after the fact, as a way of legitimizing NATO's action. The weakening of the Council, even on behalf of noble objectives, should be carefully weighed. The time may come when China intervenes on behalf of ethnic Chinese in Southeast Asia, or Russia acts to relieve pressure on ethnic Russians in the Baltics, the Ukraine, or Kazakstan without Security Council approval and cites the Kosovo intervention as establishing the precedent.

With that in mind, it appears that the U.S. National Security Strategy document subordinates support of human rights to the maintenance of international peace and security, just as the UN Charter does.⁵² This prioritization leads one to believe that the U.S. will support humanitarian intervention selectively only when other interests, such as regional stability, are threatened and the feasibility of success is encouraging. Even then, international legal norms will cause it to seek UN Security Council approval for military intervention with a coalition. This standard was borne out by the lack of U.S.

⁵¹ Ambassador Richard Holbrooke talked about NATO action in the Balkans during a lecture at Princeton University on April 7, 1999.

military intervention, and a delay of UN-mandated intervention in Rwanda to halt genocide in 1994.⁵³

The implications of NATO's campaign in Kosovo for U.S. strategy can be seen in a more recent example of humanitarian intervention, albeit under permissive rather than forced entry and under UN auspices, in East Timor. Here the U.S. played a supporting role in an Australian-led mission. The UN Transitional Administration in East Timor (UNTAET) has enjoyed a fair degree of success in preventing further human rights violations and in establishing civil authority.⁵⁴

While Indonesian acquiescence to the deployment of foreign military personnel to East Timor was based on a complex set of circumstances, one element on the mind of the Indonesian leadership had to be the NATO bombing campaign, which had taken place only six months prior. A liberal view of this may be that U.S. support for NATO humanitarian intervention has strengthened the norm of individual rights at the expense of state sovereignty. As a result, Indonesia surrendered its sovereignty to a UN-led

⁵² A National Security Strategy for a New Century May 1997, <http://clinton2.nara.gov/WH/EOP/NSC/Strategy/>, accessed December 10, 2001.

⁵³ Some argue that intervention in the Balkans was driven at least in part by guilt over not having acted in Rwanda.

⁵⁴ While this case was UN-sanctioned because the Security Council was able to agree on the action, one could argue that one of the reasons it gained Security Council approval was due to the strengthening of international human rights norms by NATO's action in Kosovo.

force because it believed that the international community, led by the U.S., would support humanitarian intervention if it did not.⁵⁵ By following up on NATO's action through efforts such as playing a supporting role in a peace keeping operation in Indonesia, and providing support to International Criminal Tribunals, U.S. policy makers will be able to strengthen human rights regimes and the rule of law in a variety of troubled regions.

As for specific policies that the U.S. should pursue, the first should be lending support for the establishment of the International Criminal Court. While this may subject Americans to prosecution, particularly Americans in uniform, it would firmly establish an international judicial body to enforce human rights law, among other statutes.

American diplomacy, for its part, should focus on promoting the rule of law and respect for human rights through effective public diplomacy. Public Diplomacy organs, such as the Voice of America, should be expanded to take advantage of internet and satellite T.V., which has access to hundreds of millions of people around the world. The message should demonstrate that ethnic and religious

⁵⁵ A realist view may say that this was nothing more than a weaker state buckling to the U.S.-backed demands of the UN. Without the threat of U.S. force UN Resolutions have no effect, just as Resolutions calling for the establishment of a Palestinian State and respect for Palestinian human rights have no effect.

minorities in the U.S. enjoy a high degree of equality, representation, and opportunity to succeed. This message should be contrasted with the destructive positions taken by regimes promoting a particular ethnic group or religion.

The U.S. should continue to use economic leverage to discourage violations of international human rights law, understanding that economic sanctions require years to have any effect and that effect is felt by innocents in the target country, as well as those perpetrating human rights violations. Depending on the situation, respect for human rights may be furthered through economic "carrots" rather than "sticks." An example of this is how the U.S. has dealt with China, by renewing Most Favored Nation (MFN) trading status and leveraging World Trade Organization (WTO) membership to garner changes in behavior from the PRC.

Lastly, the U.S. should be prepared to intervene militarily when large-scale violations of human rights occur. Such intervention should seek a UN-mandate, and, where that is not possible, a robust coalition or alliance, such as NATO. In the end, unilateral action may be required.

In reality, the U.S. will undertake humanitarian intervention when other interests are at stake, when there

is domestic support, and when the operation is militarily feasible. Requiring such a confluence of factors for humanitarian intervention is not hypocritical, or inherently unjust; rather, it places support for international humanitarian law within the context of the real world. When there is a confluence of factors that support humanitarian intervention, as there was for NATO action in Kosovo, human rights regimes will be strengthened.⁵⁶

⁵⁶ The U.S. must continue to play a strong role in the Middle East Peace Process in order to resolve the violations of human rights occurring there. The political pressures that drive the U.S. to support Israel must be balanced with the need to see an end to the oppression in the Occupied Territories. The credibility of the U.S. as a supporter of human rights continues to be damaged by international perception that it supports Israel and therefore condones Israel's policies in the territories.

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