

# **NATO'S INTERVENTION IN KOSOVO: THE LEGAL CASE FOR VIOLATING YUGOSLAVIA'S "NATIONAL SOVEREIGNTY" IN THE ABSENCE OF SECURITY COUNCIL APPROVAL**

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*If a tyrant practices atrocities towards his subjects,  
which no just man can approve, the right of human social  
connection is not cut off in such a case . . . . [I]t would follow  
that others may take up arms for them.<sup>1</sup>*

Hugo Grotius

## I. INTRODUCTION

Since the end of the Cold War, military intervention in the internal affairs of a sovereign state to protect civilians from wholesale slaughter by their own government has become the norm rather than the exception in international relations. The senseless murder of civilians in Iraq, Somalia, Haiti, Yugoslavia and East Timor has prompted the United Nations to assume a more active role in preventing human rights abuses and preserving order around the globe. The effect of this trend in favor of humanitarian intervention has been to undermine one of the basic tenets upon which the post-First World War international order has been built: the principle of national sovereignty. Countries that have resisted international intervention, according to United Nations Secretary-General Kofi Annan, will no longer be able to hide behind protestations of national sovereignty when they flagrantly violate the rights of citizens.<sup>2</sup> "Nothing in the

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1. HUGO GROTIUS, *DE JURE BELLI ESTI PACIS* (1853).

2. See Barbara Crossette, *U.N. Wants Faster Action to Avoid Slaughter in Civil Wars*, N.Y. TIMES, Sept. 21, 1999, at A1.

[United Nations] Charter,” he says, “precludes a recognition that there are rights beyond borders.”<sup>3</sup>

The latest example of the erosion of national sovereignty in international relations was NATO’s intervention in Kosovo last spring. Kosovo, a province of Yugoslavia, had for years been a “powder-keg” in the Balkans waiting to explode. The majority ethnic Albanian population there resented Serbian control over the province and the refusal by Serbian President Slobodan Milosevic to grant them their independence.<sup>4</sup> Between February 1998 and March 1999, ethnic tension and violence in Kosovo surged dramatically, resulting in the death or forced expulsion of thousands of ethnic Albanian civilians.<sup>5</sup> Faced with a looming humanitarian disaster in the Balkans, U.S. President Bill Clinton and NATO Secretary-General Javier Solana ordered NATO to launch airstrikes against Yugoslavia to restore order and prevent Serb forces from inflicting further harm on the Kosovar population.<sup>6</sup> The attack was the first uninvited offensive against a sovereign nation by NATO in its fifty year history.<sup>7</sup> After seventy-nine days of bombing Serbian military

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3. *Id.*

4. See Anna Husarska, *Use Ethnic Albanians to Stop Slobodan Milosevic; Yugoslavia: The Prospect of NATO Airstrikes Doesn't Seem to Scare the Dictator. Perhaps Tough Ground Fighter Would*, L.A. TIMES, Mar. 18, 1999, at B9 (commenting on the fact that the Albanians are ready to fight and die for their independence from Milosevic). Prior to the recent civil war, Kosovo had a population of roughly two million people. See R. Jeffrey Smith, *Talks Continue as Serbs Prepare for NATO Airstrikes; Yugoslav Army Said to Set Up Antiaircraft Site*, WASH. POST, Oct. 11, 1998, at A39. Ethnic Serbs made up one-tenth of the population (approximately 200,000 people) in the province. See *id.* 1.8 million were ethnic Albanian. See *id.* Albanians are descendants of the Dardanians, an Illyrian tribe that populated the country until the Romans conquered the region and forced the Illyrians south to what is now Albania in 167 B.C. See *id.* In the 14th Century, many Albanians returned to the Kosovo area with the Ottoman expansion, where their families have taken root to this day. See *id.* They became a majority in Kosovo in the 1950s as a result of a high birth rate and increased migration northward by the Serbs. See *id.* In recent years, the ethnic Albanian majority has been seeking greater autonomy from the Serb-led government in Belgrade and an eventual return to self-rule, a status they enjoyed from 1974 to 1989 when President Milosevic brought that to an end. See *id.*

5. See Ted Baggett, *Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457 (1999).

6. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg. at 1, U.N. Doc. A/SC/3937 (1998) [hereinafter S.C. Res. 1203]; see also John M. Goshko, *U.N. Council Backs Kosovo Pact, Clears Way for NATO Intervention*, WASH. POST, Oct. 25, 1998, at A28 (stating that threats of intervention have been made under an earlier Security Council Resolution, which the United States interpreted as permitting airstrikes if Yugoslav forces remain in Kosovo and continue attacks on ethnic Albanian villages).

7. See Francis X. Clines, *Conflict in the Balkans: The Overview; NATO Opens Broad Barrage Against Serbs as Clinton Denounces Yugoslav President*, N.Y. TIMES ,

positions, supply lines, communications facilities and government buildings throughout Yugoslavia, the government in Belgrade finally agreed to the terms of a settlement proposed by the NATO powers that provides for autonomy for the ethnic Albanian population of Kosovo and the deployment of a 28,000 NATO peacekeepers force in the province.<sup>8</sup> According to President Clinton, “Aggression against an innocent people has been contained.”<sup>9</sup>

The decision by the United States and NATO to intervene in Kosovo for humanitarian purposes is part of an emerging norm in international law. This norm permits armed intervention in the internal affairs of a nation if the aim is to protect civilians from being slaughtered or displaced from their homes. The increased number of humanitarian interventions over the past few decades, some authorized by the Security Council, have challenged the old notion of national sovereignty as inviolable. What was once regarded as an almost absolute right to govern freely within one’s own borders has gradually been eroded by the idea that certain governmental policies which violate their citizen’s basic human rights will not be tolerated by the international community.

This Article examines the recent decision by the United States and its NATO allies to intervene in Kosovo and attempts to explain the implications of this decision in terms of the growing clash between the principles of national sovereignty and humanitarian intervention in international law. Specifically, this paper will focus on the rise of humanitarian intervention as a recognized exception to the principle of national sovereignty embodied in Article 2 of the U.N. Charter, with the Kosovo crisis being the latest example of how the need to protect innocent civilians from being slaughtered by their own government has come to override the presumption in favor of nonintervention in a nation’s affairs in international law. Part I will address the definition, history and rationale behind the concept of “national sovereignty” incorporated in Article 2 of the U.N. Charter and the rare circumstances in which this defense to external

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Mar. 25, 1999, at A1. NATO’s 17 days of airstrikes against Serbian forces in Bosnia in 1995 were conducted at the request of the embattled Bosnian Government. *See id.*

8. *See* Mary Leonard, ‘Victory for a safer world’; *Airstrikes halted as Serbs begin withdrawal; Crisis in Kosovo*, BOSTON GLOBE, June 11, 1999, at A1; Jane Perlez, *U.S. Negotiator at the Kosovo Talks Visits Milosevic*, N.Y. TIMES, Feb. 17, 1999, at A3 [hereinafter *U.S. Negotiator*].

9. *Clinton’s Address*, *supra* note 11, at A15.

aggression can be set aside by the U.N. Security Council. Part II will examine the practice of humanitarian intervention during and after the Cold War and explain how this practice has come to erode the importance of the “national sovereignty” defense in cases where governments grossly mistreat and abuse their own people. Part III will focus on the recent crisis in Kosovo and, in particular, discuss how NATO’s approach to resolving the crisis there this past spring, in the absence of Security Council approval, has both furthered and hampered the idea of humanitarian intervention in international law. This paper concludes by arguing that humanitarian intervention is now accepted by most states as legal under international law whether the Security Council authorizes the use of force to prevent gross violations of human rights or not. As evidenced by NATO’s intervention in Kosovo last spring, governments can no longer rely on the principles of national sovereignty and nonintervention embodied in the U.N. Charter to shield them from armed intervention when they attempt to slaughter or abuse their own people.

## II. THE CONCEPT OF “NATIONAL SOVEREIGNTY” IN INTERNATIONAL LAW

### A. *National Sovereignty Prior to the U.N. Charter*

The concept of “national sovereignty” is well-established in international law. Sovereignty is defined as the “supreme, absolute, and uncontrollable power by which any independent state is governed; . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”<sup>10</sup> Respect for the political and territorial sovereignty of other nations is a fundamental feature of the international system and the key to maintaining a system in which the nation-state is the primary actor in global affairs. Underpinning this concept of sovereignty is the basic rule that nation-states must refrain from intervening in the domestic affairs of another state. This idea of nonintervention in a nation’s internal affairs has been an essential component of the international legal system throughout this century.<sup>11</sup>

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10. BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

11. See THOMAS G. OTTE, ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 9 (Lori F. Damrosch ed., 1993). The norm prohibiting external involvement in the internal affairs of other nations has been

After the First World War, the victorious allied powers sought to protect the sovereignty of the nation-state in the Covenant of the League of Nations.<sup>12</sup> Under Article 10 of the Covenant, the Members of the League agreed to “respect and preserve as against external aggression the territorial integrity and existing political independence of all Members . . . .”<sup>13</sup> It was through this Covenant that the Treaty of Versailles, and other treaties, would be enforced and that future aggression by the defeated powers would be kept in check.<sup>14</sup> This early attempt to prohibit countries from violating the national sovereignty of other states was later embodied in the Kellogg-Briand Pact of 1928.<sup>15</sup> Even though both pacts failed to ensure peace in the end, they served as important precursors to the prohibition against the use of force and the protection of national sovereignty embodied in the U.N. Charter in 1945.

*B. The U.N. Charter and the Principle of “National Sovereignty”*

Following the Second World War, the principles of national sovereignty and nonintervention were incorporated into Article 2 of the U.N. Charter. The idea was to protect the integrity of these two sacred principles by making each one a pillar upon which the Charter rests. Article 2(1) states generally that the United Nations is based on “the sovereign equality of all of its Members.”<sup>16</sup> Paragraphs 2 and 7 of Article 2 set forth the standard for how individual Member nations and the United Nations as a collective entity are to view the concepts of sovereignty and nonintervention under international law.<sup>17</sup> Article 2(4) provides that “All Members

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recognized as customary international law, as well as being codified in a number of treaties this century. *See id.*

12 *See* LEAGUE OF NATIONS COVENANT art. 10

13. *Id.* It was President Woodrow Wilson who, in Point XIV of his Fourteen Points, called for a “general association of nations . . . formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.” *See* 1 F. P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 20 (1952).

14. *See* 1 MARTIN GILBERT, A HISTORY OF THE TWENTIETH CENTURY 576 (1997). The Treaty of Versailles had been established with the intention that the United States would be an active contracting party. *See generally id.* at 575-76. Unfortunately, the U.S. Senate failed to ratify the Treaty, thus forcing the United States to stay out of a peace plan that it took the lead in designing. *See id.*

15. *See* General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, IV Twentieth 5130, 2 Bevens 732.

16. U.N. CHARTER art. 2, ¶ 1.

17. *Id.* art. 2, ¶¶ 4, 7.

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.”<sup>18</sup> This paragraph incorporates the rule set forth earlier in the League Covenant that nation-states may not interfere in the internal affairs of other states, and even extends the rule to “threats” as well as actual uses of force by a state.<sup>19</sup>

Article 2(7), on the other hand, does not address the principle of national sovereignty in terms of individual states intervening in the affairs of other states. Instead, it applies the idea of nonintervention to the United Nations as a whole. According to paragraph 7:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>20</sup>

The framers, by drafting this provision, wanted to ensure governments around the world that the United Nations would continue to treat the nation-states of the world as sovereign and independent actors. At the same time, they did not want to preclude the possibility of U.N. intervention in certain circumstances.

Paragraphs 2 and 7 are compatible with one another. Both articles prohibit the use of force or intervention in the domestic affairs of another state.<sup>21</sup> In addition, Article 2(7) specifically preserves the right of the United Nations to take enforcement actions under Chapter VII, an important caveat to what would otherwise be an absolute right of sovereignty for every nation.<sup>22</sup> This caveat is a definite limitation on the principle of national sovereignty embodied in the Charter and a continuing subject of controversy to this day. Though the language of Article 2(4) does not make any reference to Chapter VII’s enforcement powers, such enforcement action applies in instances where Article 2(4) has been breached by another state.

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18. *Id.* art. 2, ¶ 4.

19. *Id.*

20. *Id.* art. 2, ¶ 7.

21. *Id.* art. 2, ¶¶ 4, 7.

22. *Id.* art. 2, ¶ 7.

Under Chapter VII, the United Nations has the power to authorize the use of force in order to maintain or restore peace and security both inside and outside of a nation's borders.<sup>23</sup> Article 39 provides the U.N. Security Council with the discretion to determine when a nation has breached, or threatens to breach, the peace in international relations.<sup>24</sup> If such a breach has occurred, the Security Council may authorize sanctions under Article 41 or the use of force under Article 42 against the state responsible for that breach.<sup>25</sup> In authorizing the use of force under Article 42, the Security Council may call upon all Members to make available "armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."<sup>26</sup> Moreover, the Security Council under Chapter VIII may utilize regional arrangements or agencies for enforcing military action under Article 42.<sup>27</sup> However, no enforcement action may be taken by a regional arrangement, or by regional agencies, without the Security Council's approval.<sup>28</sup>

In the absence of Security Council authorization, no Member of the United Nations or regional arrangement is allowed to use force unless such force is required for self-defense.<sup>29</sup> According to Article 51, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>30</sup> The standard for the use of force in self-defense is the presence of an "armed attack" or some immediate or imminent imperilment to the state.<sup>31</sup> Self-

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23 *See id.* art. 39.

24. *See id.* Article 39 provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

25. *Id.* arts. 41, 42 (art. 41 authorizes sanctions and other nonmeasures not involving the use of force to give effect to its decisions; art. 42 authorizes the use of force or other action necessary to maintain or restore international peace and security).

26. *Id.* art. 43, ¶ 1.

27. *Id.* arts. 53, 54

28. *See id.*

29. *See id.* art. 51.

30. *Id.*

31. *See Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27) (separate opinion of Judge Ago).. The necessary conditions for the right of "anticipatory" self-defense to be triggered were set forth by U.S. Secretary of State Daniel Webster in a diplomatic note to the British in 1842 following the famous Caroline incident. *See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS* 927

defense can be individual or collective. This exception to the prohibition against the use of force has long been recognized as an established principle of international law.<sup>32</sup>

### III. THE DOCTRINE OF HUMANITARIAN INTERVENTION: THE EMERGENCE OF A SPECIAL EXCEPTION TO THE PRINCIPLE OF NATIONAL SOVEREIGNTY

The textual guarantee in the Charter that a nation's political independence and territorial integrity is inviolable unless that nation breaches the peace, threatens to breach the peace, or commits an act of aggression against another state leaves little room for the international community to maneuver when violations of human rights are taking place within that state's borders. There is no explicit language in the Charter which authorizes a state to intervene in the domestic affairs of another state in order to prevent that state from abusing its own people. Nonetheless, individual states and the Security Council over the years have employed a rather liberal construction of Articles 51 and 39 of the Charter, respectively, to justify armed intervention on humanitarian grounds. This section examines the evolution of humanitarian intervention over the last forty years in order to emphasize two key points: (1) that unilateral humanitarian intervention in the absence of Security Council approval is nothing new in international law; and (2) that the Security Council has come to play a more active role in authorizing the use of force to protect human rights — at the expense of the principle of national sovereignty embodied in the Charter — since the end of the Cold War.

#### A. *Unilateral Humanitarian Intervention and U.N. Inaction During the Cold War Period*

During the Cold War period, there were several instances of unilateral intervention by a state in the affairs of another state for humanitarian reasons without the prior consent of the Security Council. The Belgian Action in Stanleyville (1961), the U.S. invasion of the Dominican Republic (1965), India's action in Bangladesh (1971), the Entebbe Incident in Uganda (1976), the Tanzanian overthrow of Ugandan leader Idi Amin (1979), and the U.S. invasions of Grenada (1983)

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(3rd ed. 1993). Webster stated that self-defense must be confined to cases in which “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” *Id.*

<sup>32</sup> See *Nicaragua*, 1986 I.C.J. at 103.

and Panama (1989) were all efforts by individual states to intervene in another country's domestic affairs in order to save human lives. These interventions can be divided into two categories: (1) interventions by a state to protect its own nationals and (2) interventions by a state to protect non-nationals. The former has been referred to as a form of self-defense or self-interested intervention aimed at securing the safety of one's own nationals who are either being held hostage or under direct threat of harm in another state.<sup>33</sup> The latter form of intervention has been described as altruistic or disinterested humanitarian intervention in which little, if any, overriding national interests play a role in a state's decision to intervene in another state's internal affairs.<sup>34</sup>

### 1. *Unilateral Intervention to Protect One's Own Nationals*

The intervention by a state to protect its own nationals who were either being held hostage or being threatened with violence in foreign countries has been justified on several occasions under Article 51 of the Charter.<sup>35</sup> In most of these cases, the self-defense argument was interpreted rather broadly, extending the concept of "political sovereignty" under Article 2(4) to nationals who were located within the territorial jurisdiction of a foreign state.<sup>36</sup> The intervention by Israeli special forces at Entebbe field in Uganda to free Israeli hostages from a hijacked plane was a clear example of a state which took unilateral action to protect its own nationals on the basis of a self-defense claim without Security Council approval.<sup>37</sup> The Israeli Government argued that the inherent right of self-defense embodied in Article 51 of the U.N. Charter extended to the protection of nationals being held hostage within another country's borders.<sup>38</sup> It is unclear whether the framers of the U.N. Charter intended to include

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33. See, e.g., HENKEN ET AL., *supra* note xx, at 934.

34. See W.D.Verwey, *Humanitarian Intervention Under International Law*, 32 NETH. INT'L L. REV. 357, 371 (1985).

35 See Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT INTERNATIONAL LAW AND THE USE OF FORCE 37, 41-42 (1991).

36 See *id.*

37. See 15 I.L.M. 1224, 1224-29 (1976) (reporting that in July of 1976, an Air France airliner with Israeli passengers on board was hijacked and forced to fly to Entebbe field in Uganda. Failing to obtain the required consent to intervene from the Government of Uganda, the Israeli Government decided to send Israeli special forces to Uganda in a clandestine effort to rescue the hostages. Israeli special forces flew in Hercules transport planes over Arab countries undetected by radar all the way to Entebbe and rescued the hostages. Over 100 hostages were freed and only three hostages lost their lives).

38. See *id.* (reproducing U.N. Document S/PV 1939 which explains the official Israeli defense of its actions at Entebbe).

foreign interventions aimed at protecting one's own nationals in a hostage situation—the “Entebbe principle”—under Article 51.<sup>39</sup> The reality in terms of state practice, however, indicates that even in the absence of consent from the state possessing proper jurisdiction or authorization from the Security Council, such interventions to protect nationals in a hostage situation are permitted under international law.<sup>40</sup>

The Belgian intervention in the Congo in 1960 and the U.S. invasions of Grenada and Panama during the 1980s were examples of military action taken by individual states to protect their own nationals in a foreign country endangered by local violence.<sup>41</sup> The Belgian intervention in the Congo occurred shortly after the Congolese gained their independence from Belgium on June 30, 1960.<sup>42</sup> Immediately following the Congolese takeover of the government, the Congolese army began looting and raping Belgian nationals.<sup>43</sup> To protect its nationals, Belgium deployed paratroopers to the country without the consent of the Congolese government.<sup>44</sup> The Congolese government argued that the intervention constituted an aggressive act and was therefore a violation of the Congo's sovereignty.<sup>45</sup> The U.N. Security Council did not adopt the Congolese viewpoint that the intervention was an act of aggression.<sup>46</sup> But, it did conclude that the intervention violated Congolese sovereignty.<sup>47</sup> In response to situation, the Council passed a resolution calling for the immediate withdrawal of Belgian troops from the Congo and the introduction of a United Nations force.<sup>48</sup>

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39 See Henkin, *Use of Force: Law and U.S. Policy*, *supra* note 29, at 39.

40. See *id.* at 41-42 (maintaining that there may be a limited right of unilateral intervention in hostage situations where “the territorial state cannot or will not do so”).

41. See Donald W. McNemar, *The Postindependence War in the Congo*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 244 (Richard A. Falk ed., 1971) (discussing the invasion of Congo); Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 *CORNELL INT'L L.J.* 225, 249-50 (1996) (documenting the invasions of Panama and Grenada).

42. See Commander Byard Q. Clemmons & Major Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 *NAVAL L. REV.* 217, 237 (1998).

43. See *id.*

44. See *id.*

45. See Michael J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, 26 *N.Y.U. J. INT'L L. & POL.* 655, 661 (1994).

46. See *id.* at 662.

47 See *id.*

48. See S.C. Res. 143, U.N. SCOR, 15th Sess., at 5 U.N. Doc. S/INF/15 (1960).

The U.S. invasions of Grenada and Panama were also based on the theory that a state's national sovereignty could be violated to protect nationals of the intervening state from local violence.<sup>49</sup> In Grenada, a multinational invasion was launched under U.S. leadership in 1983 against the island's military government without any real or imminent threat being imposed on the United States (or another country in the region).<sup>50</sup> The purpose of the mission, according to the U.S. Government, was to rescue American citizens on the island from both a volatile political situation and the possibility of being captured and taken hostage by the Communist government.<sup>51</sup> At the time of the intervention, the head of the People's Revolutionary Army had set a curfew, closed schools and warned that "anyone who seeks to demonstrate or disturb the peace will be shot."<sup>52</sup> The Reagan Administration considered the use of force to protect nationals in this type of environment to be well-reasoned and defensible under international law.<sup>53</sup> Unfortunately for the United States, the armed intervention in Grenada was considered by the international community to be unacceptable and has, to this day, been treated as a clear violation of Articles 2(1) and 2(4) of the U.N. Charter.<sup>54</sup>

Similar to the U.S. intervention in Grenada, the U.S. Government claimed a right of self-defense on behalf of its own nationals to justify its invasion of Panama in 1989.<sup>55</sup> The invasion was a response by the Bush Administration to the actions of the brutal dictator Manuel Noriega, who had declared war on U.S. forces in Panama and conducted several acts of violence against American troops.<sup>56</sup> The purpose of the invasion was to protect American military personnel and their families and defend the integrity of U.S. rights under the Panama Canal Treaties.<sup>57</sup> The U.S. Government claimed that it had a right to intervene militarily

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49 See Regensburg, *supra* note 35, at 249-50.

50. See Christopher C. Joyner, *The United States Action in Grenada: Reflections On the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 131-33 (1984).

51. See *id.* at 132.

52. See Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year perspective*, 33 VA. J. INT'L L. 765, 776 (1993); Regensburg, *supra* note 35 at 250.

53. See Regensburg, *supra* note 35, at 250.

54. See Joyner, *supra* note 44, at 141.

55. See Marian Nash Leich, *Use of Force*, 84 AM J. INT'L L. 545, 546 (1990).

56. See *id.* (reporting that forces under Noriega shot and killed one American serviceman, wounded another, brutally beat a third, and threatened sexual abuse against the wife of another serviceman during a brutal interrogation).

57. See *id.* at 547.

in Panama under Article 51 of the U.N. Charter and that such action was necessary to protect American lives in imminent danger.<sup>58</sup> Some scholars have argued that this claim by the U.S. Government was not a valid justification for the use of force under Article 51 because no “armed attack” had occurred against the United States.<sup>59</sup> Nonetheless, American military action was welcomed with the consent of the democratically-elected government of Panama -- the government of President Guillermo Endara -- which Noriega had illegally kept out of office.<sup>60</sup> Such consent by what was seen at the time as the legitimate government of Panama undercut any claims by the Noriega regime that U.S. military intervention was a violation of Panama’s “sovereignty” under Article 2(4) of the Charter.<sup>61</sup>

In each of these situations, an individual state circumvented the Security Council’s authority to enforce peace on the basis that self-defense, or the protection of one’s own nationals, necessitated unilateral military action.<sup>62</sup> Since then unilateral humanitarian intervention has become more widely used and accepted in circumstances where a country’s own nationals are faced with impending death or harm. But what about situations where another country’s nationals are faced with impending death or harm? Does the law permit a state to intervene unilaterally in the affairs of another state when non-nationals of the former state are being slaughtered or mistreated?

## 2. *Unilateral Intervention to Protect Non-nationals*

During the Cold War period, there were three notable examples of unilateral military intervention by a state for the purpose of preventing civilians, who were not nationals of the intervening state, from being killed or harmed: India’s action in Bangladesh in 1971, the Vietnamese invasion of Cambodia in 1978, and the Tanzanian overthrow of Ugandan leader Idi Amin in 1979.<sup>63</sup> In each of these cases, humanitarian

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58. *See id.* at 548.

59. *See, e.g.*, Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293, 305-06 (1991); *see also* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963) (arguing that intervention to protect nationals has no legal basis under international law).

60. *See* Leich, *supra* note 49, at 547.

61. *See* Henkin, *The Invasion of Panama*, *supra* note 53, at 295.

62. *See, e.g., id.*

63. *See generally* Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269 (1994) (reviewing the doctrine of human intervention using the events in Bangladesh, Cambodia,

concerns coupled with security interests prompted unilateral military action in another state's domestic affairs when the U.N. Security Council refused to act.<sup>64</sup>

India's invasion of Bangladesh in December 1971 was the first internationally recognized humanitarian intervention on behalf of non-nationals since the birth of the U.N. Charter. In response to a crackdown by the Pakistani army against its own civilians in East Pakistan, in which nearly a million people were killed and millions more were forced to flee the country, India invaded Pakistan.<sup>65</sup> The U.N. Security Council failed to act on the crisis, leaving India with the decision to intervene unilaterally in order to secure its border and protect nonnational civilians from being slaughtered.<sup>66</sup> During the intervention, no territory was taken from the Pakistani government nor was the government removed from power in East Pakistan.<sup>67</sup> The International Commission of Jurists concluded that India's actions were justified under the doctrine of humanitarian intervention.<sup>68</sup> The Indian intervention was also justified under the doctrine of self-defense, given the fact that Pakistan, in anticipating an Indian move, had launched a preemptive air strike against Indian airfields.<sup>69</sup> In the end, the Security Council did not determine whether or not Article 2(4) was violated.<sup>70</sup> The invasion became a precedent for future interventions based on humanitarian grounds.

The Vietnamese invasion of Kampuchea (Cambodia) in 1978 was another example of a state intervening in the affairs of another state to protect non-nationals without Security Council approval.<sup>71</sup> The invasion was sparked primarily by years of civil unrest and violence in Cambodia

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and Uganda as case studies).

64 See Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 230 (John Norton Moore ed., 1974).

65. See Burmester, *supra* note 57 at 286.

66. See *id.* at 286-87 (citing that the reasons for U.N. inaction were two-fold: (1) the Security Council was hesitant to intervene in the internal affairs of Pakistan and (2) the Soviet Union had vetoed Security Council resolutions calling for a cease-fire).

67 See *id.* at 288.

68. See RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 495 (1979) (concluding that in view of the U.N.'s reluctance to become involved in the Pakistani violence and the fact that India's involvement militarily was limited in scope, resulting in the acquisition of no territory, the invasion did appear to be underscored primarily by a humanitarian purpose).

69. See *id.* at 486, 495.

70 See *id.* at 491-92.

71 See Burmester *supra* note 57 at 293.

caused by the country's ruling party, the Khmer Rouge.<sup>72</sup> The Khmer Rouge, under the leadership of Pol Pot, had been conducting a campaign of genocide against the Cambodian people for nearly four years, causing the deaths of more than a million people.<sup>73</sup> The mass slaughter was one of the worst in human history and the Security Council did nothing to stop it.<sup>74</sup> In response to the violence, the Vietnamese Army and a group of Cambodian expatriates invaded Cambodia, captured its capital, and overthrew Pol Pot and the Khmer Rouge in 1978.<sup>75</sup>

Unlike the Indian intervention, where no territory was taken and no government was removed from power, Vietnam helped to install a new government and retained political and military control of the country for more than a decade.<sup>76</sup> Although Vietnam never claimed that its actions were prompted by humanitarian concerns, the intervention had a tremendous humanitarian impact.<sup>77</sup> In view of the positive global response to the intervention and the ouster of Pol Pot, U.N. Security Council resolutions denouncing the invasion were never implemented.<sup>78</sup>

The third episode of unilateral humanitarian intervention to protect non-nationals in the absence of Security Council authorization occurred in 1979 when Tanzania invaded Uganda.<sup>79</sup> The purpose of the Tanzanian invasion was to overthrow Uganda's leader Idi Amin, who had conducted a reign of terror against his own people for seven years.<sup>80</sup> During the time of Amin's rule, Government forces executed approximately 300,000 people.<sup>81</sup> Again, the United Nations did nothing to stop the humanitarian tragedy taking place there. In response to these acts, Tanzanian forces invaded Uganda, defeated the Ugandan army and overthrew Amin.<sup>82</sup> During the invasion, Tanzanian forces engaged only in

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72 *See id.* at 292.

73. *See* Burmester, *supra* note 57 at 292-93.

74 *See id.*

75. *See id.* at 293.

76. *See id.*

77. *See id.*

78. *See* *Democratic Kampuchea and Viet Nam*, 1979 ANN REV. U.N. AFF. 72-73 (citing U.N. Docs S/13022, S/13027, S/13162).

79. *See* Burmester, *supra* note 51, at 289-90.

80. *See id.*

81. *See id.*

82. *See* Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 *FORDHAM INT'L L.J.* 120, 137-38 (1992-93).

limited destruction in Uganda.<sup>83</sup> Such restraint sent a clear signal to the rest of the world that Tanzania's actions were driven primarily by humanitarian, rather than political, motives. The invasion was another milestone on the road to legitimizing unilateral humanitarian intervention when the Security Council fails to act in a humanitarian crisis.

The few instances of unilateral humanitarian intervention on behalf of nationals and non-nationals that occurred during the Cold War period marked a turning point in international law. No longer could governments commit atrocities against individuals in their own land and expect to be protected by the principle of national sovereignty or gridlock in the Security Council. The idea of humanitarian intervention had emerged as an exception to the golden rule of nonintervention through state practice. Such practice validated the presence of foreign troops on a nation's soil when the mass slaughter of civilians was taking place. Though the Security Council, by the end of the Cold War, had never authorized multilateral intervention for humanitarian purposes -- primarily because of the Soviet veto -- the collapse of the Soviet Union would eventually open the door for the United Nations to join in the effort to recognize gross violations of human rights as a legitimate basis for intervention in a sovereign nation's domestic affairs.

*B. U.N.-authorized Humanitarian Intervention During the Post-Cold War Period*

Since the end of the Cold War, the U.N. Security Council has assumed a more active role in protecting human rights around the globe. Consequently, U.N.-authorized military intervention in the internal affairs of sovereign states for humanitarian reasons has become more widely accepted by the international community. In one respect, such recognition has enabled the United Nations to gain legitimacy and broaden its role in the area of conflict management. At the same time, this more assertive humanitarian role has meant the steady erosion of the concept of "national sovereignty" as a bedrock principle of the current international legal order. The resulting clash between "national sovereignty" and humanitarian intervention in international law stems directly from the U.N.'s most recent incursions into Iraq, Somalia, Haiti and Yugoslavia. In each of these cases, the Security Council has authorized the use of

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83. See *id.* at 138.

military force to prevent dictators or military regimes from abusing their own people within their own borders.

1. *U.N. Intervention in Iraq*

In 1991, following the Gulf War, the Security Council authorized collective humanitarian intervention in Iraq.<sup>84</sup> The measures were part of an overall U.N. effort, led by the United States, to protect and provide aid to the Kurdish minority who were being brutally treated by Saddam Hussein's forces.<sup>85</sup> The Security Council justified its actions on the basis of international security concerns, finding that Iraq's treatment of the Kurds and the resulting flood of refugees into neighboring Turkey and Iran threatened international peace and security in the region.<sup>86</sup> The Security Council acted under Article 39 of the Charter, calling for measures to prevent further breaches of the peace by Iraq or acts of aggression against the Kurdish people.<sup>87</sup> The intervention was authorized notwithstanding claims from Baghdad that such action violated Iraq's national sovereignty.<sup>88</sup>

The ramifications of the Security Council's decision to authorize collective military intervention in Iraq were significant. First, the intervention represented an expansion of the definition of what constitutes justifiable intervention under the U.N. Charter. The attempted slaughter of a minority group by a government within that government's borders through the use of chemical weapons and other means was deemed to be a threat not only to the Kurds, but to international peace and security as well.<sup>89</sup> In addition, the Security Council proved that it was willing to authorize the use of force in situations that previously had been dealt with through unilateral solutions. Finally, the U.N.'s willingness to intervene in the internal affairs of Iraq sent a powerful signal

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84. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/RES/688 (1991).

85. See *id.*

86. See *id.*

87. See Michael J. Reppas, Note, *The Lawfulness of Humanitarian Intervention*, 9 ST. THOMAS L. REV. 463, 475-76 (1997) (citing Marc M. Boutin, Note, *Somalia: The Legality of U.N. Forcible Humanitarian Intervention*, 17 SUFFOLK TRANSNAT'L L. REV. 138, 148-49).

88. See *id.*

89. See S.C. Res. 688, *supra* note 62 (condemning the repression in areas of Iraqi civilian population as well as Kurdish-populations areas and concluding that such repression is a threat to international peace and security); Norman Kempster, *U.S. Says Iraqi Use of Poison Gas on Kurds is 'Abhorrent'*, L.A. TIMES, Sept. 9, 1988 at 9.

to oppressive regimes around the world. No longer could they hide behind the principles of national sovereignty or nonintervention embodied in the Charter. The precedent had been established that as long as human rights violations within a country could be broadly construed to mean that a threat to international peace and security existed, the United Nations could authorize the use of military force within a nation's borders to prevent such violations from occurring.

## 2. *U.N. Intervention in Somalia*

The humanitarian crisis in Somalia, which prompted U.N. peacekeeping forces to intervene in 1991, was different from the crisis in Iraq. In Iraq, the decision by the Security Council to intervene on behalf of the Kurds came immediately following the Gulf War, in which the United Nations had already authorized the collective use of force against Iraq for invading Kuwait and violating Article 2(4) of the Charter.<sup>90</sup> The decision to use force in Iraq was taken on the basis of collective self-defense under Article 51 of the Charter.<sup>91</sup> In Somalia, there was no direct breach of the peace or violation of Article 2(4) committed by the Somali government. The collapse of the Somali government coupled with a severe drought led to intertribal conflict, which in turn resulted in violence against civilians and mass starvation among the Somali people.<sup>92</sup> Thousands of people in Somalia had died or fled the country and more than a million were threatened with imminent death.<sup>93</sup>

In response to the escalating humanitarian crisis, the Security Council decided to intervene. Acting under its Chapter VII enforcement authority, the Security Council called for an arms embargo under Article 41 of the Charter in January 1992.<sup>94</sup> However, the death toll in Somalia

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90. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 1, U.N. Doc. S/RES/678 (1990) (authorizing member states to use all necessary means of force against Iraq as a result of the invasion of Kuwait).

91. See *id.*

92. See Neil Henry, *Evacuees Tell of Somalia's Chaos, Carnage: Bodies Said to Litter Capital After Week of Fighting Between Rebels, Troops*, WASH. POST, Jan. 7, 1991, at A17. Clan warfare erupted in Somalia following the overthrow of Siad Barre by rebel groups in January 1991. See *id.* As the clans fought one another for control over the country, the general population suffered from starvation, disease and violence. See *id.*

93. See Keith B. Reichburg, *Diseases Sweep Somalis, Kill More than Famine*, WASH. POST, Oct. 2, 1992, at A1. Over the next several months, the death rate reached 300 people per day in some cities. See *id.* Many more fled across Somalia's border into neighboring Kenya. See *Somali Refugees Flee Fighting Into Kenya; Eight Dying Each Day*, SAN DIEGO UNION-TRIBUNE, Jan. 31, 1992.

94. See S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. at 2, U.N. Doc.

continued to rise over the next several months, prompting the Security Council to send peacekeeping forces in order to ensure that humanitarian aid reached the people in the midst of the civil war.<sup>95</sup> Unfortunately, the U.N.'s initial efforts at peacekeeping proved to be ineffective as Somali clans invaded warehouses where food and medicine were stored and stole supplies from U.N. trucks.

In November of 1992, the United States decided to intervene in order to ensure that relief supplies were protected and delivered to civilians.<sup>96</sup> But rather than act unilaterally like India or Tanzania had done during the Cold War period, the United States sought U.N. authority to intervene in Somalia with the hope that after a limited period of time U.N. peacekeepers would take over the operation and allow American troops to withdraw.<sup>97</sup> The Security Council authorized the unilateral intervention of American troops under Article 42 of the Charter and, on December 9, 1,800 American marines landed in Somalia.<sup>98</sup> For the next six months American forces provided protection for those delivering food and medicine to the people and even managed at times to coordinate negotiations between clan leaders. When U.N. blue-helmets arrived in Somalia on May 4, 1993, the United States turned over control of the operation to the U.N. Commander.<sup>99</sup>

The joint U.N.-U.S. operation in Somalia was significant for two reasons. First, it represented an important change in the way that humanitarian interventions were conducted in international affairs. It showed that the United States, as well as other individual nations, could actually look to the United Nations for support and authorization when deciding to intervene unilaterally in the internal affairs of another state

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S/Res/733 (1992).

95. See S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg. at 1-2, U.N. Doc. S/Res/775 (1992).

96. See Don Oberdorfer & John Lancaster, *U.N. Chief Weighs Use of U.S. Troops in Somalia: Security Council to Consider Options for Protecting Relief Supply Lines*, WASH. POST, Nov. 27, 1992, at A1.

97. See *id.*

98. See S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 2-4, U.N. Doc. S/RES/794 (1992); *Marines Land in Peace*, ST. LOUIS POST, Dec. 9, 1992.

99. See Keith B. Richburg, *U.N. Takes Command of Troops in Somalia: U.S. General Departs, Replaced by Turk*, WASH POST, May 5, 1993, at A23. Unfortunately, the transition did not go as smoothly as expected. See George J. Church, *Anatomy of a Disaster*, TIME, Oct. 18, 1993, at 40. U.N. peacekeepers, including several Americans, found themselves the target of attacks by forces loyal to General Mohammed Farah Aideed. See *id.* Following the attacks, which were televised on CNN, the United States withdrew its forces from Somalia. See *id.*

to protect basic human rights. For the first time since the establishment of the U.N. Charter a humanitarian intervention operation was carried out both unilaterally and collectively under the authority of the Security Council. Second, the fact that the United Nations, in conjunction with the United States, was willing to intervene in a situation that could not easily be characterized as a threat to international peace and security in the region was a remarkable development in international law. Though there were refugees flooding across the border into Kenya at the time of the civil war, the armed conflict in Somalia did not amount to a clear violation of Article 2(4) of the Charter. The Security Council's decision to intervene under Chapter VII was prompted primarily by the need to prevent a humanitarian disaster from becoming worse.<sup>100</sup> This decision to authorize intervention in Somalia set the stage for similar action by the Security Council down the road.

### 3. *U.N. Intervention in Haiti*

The intervention in Haiti in 1993 was another example of U.N. meddling in the internal affairs of a sovereign state to protect human rights. In Haiti the army overthrew the democratically-elected government of Jean-Bertrand Aristide and embarked upon a violent campaign of repression throughout the island in 1991.<sup>101</sup> As a result of the violence, a flood of refugees set out across the Florida Straits in boats and makeshift rafts to find sanctuary.<sup>102</sup> Following limited sanctions imposed upon the military regime by the Organization of American States (OAS), the Security Council intervened in 1993, imposing economic sanctions against the island in an effort to persuade the military government to refrain from violating human rights.<sup>103</sup> But such measures made economic circumstances worse for the Haitian people, causing more to flee the island.

The torrent of refugees fleeing the island for the Florida coast prompted the United States to seek a solution of its own to the crisis. Rather than intervene unilaterally, though, the United States, consistent with its approach during the

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100. See S.C. Res. 775, *supra* note 72.

101. See W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L.J.* 794, 798-99 (1995).

102. See Barbara Crossette, *135 Feared Lost As Haitian Boat Sinks Off Cuba*, *N.Y. TIMES*, Nov. 22, 1991, at A1.

103. See S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg. at 2-3, U.N. Doc. S/RES/841 (1993).

Somali crisis, sought proper authorization to send troops to Haiti from the Security Council.<sup>104</sup> “The United States insisted that the Council treat the exodus of refugees as a threat to international peace and security in the region.<sup>105</sup> On July 31, 1994, the Security Council authorized the United States to “use all necessary means to facilitate the departure from Haiti of the military leadership ... and the restoration of the legitimate authorities of the government of Haiti” under Article 42 of the U.N. Charter.<sup>106</sup> As U.S. forces were preparing for a military invasion of the island, a final diplomatic effort led by former President Jimmy Carter succeeded in putting an end to the crisis.<sup>107</sup> Negotiations between Carter and Haitian military leaders resulted in an agreement that would restore Aristide to power and guarantee amnesty for the outgoing military government.<sup>108</sup> The United States then sent 20,000 troops to supervise the transition to power and to reestablish a secure environment on the island.<sup>109</sup> The mission marked the first time that the Security Council ever authorized the use of force under Article 42 of the Charter to restore democracy in a country.<sup>110</sup>

The Security Council’s approach taken in Haiti was similar to that taken in Somalia, even though the outcomes were different. In both cases, the “threat to peace” and “breach of the peace” requirements in Article 39 of the U.N. Charter were interpreted broadly to justify the use of military force under the U.N’s Chapter VII enforcement powers.<sup>111</sup> In addition, the Security Council, in both instances, authorized the United States to use force in order to protect civilians from the brutal acts of their own government.<sup>112</sup> With these

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104. See Reisman, *supra* note 78, at 799.

105. See Regensburg, *supra* note 41, at 244.

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

107. See Douglas Jehl, *Showdown with Haiti: Overview; Holding Off, Clinton Sends Carter, Nunn and Powell to Haitian Junta*, N.Y. TIMES, Sept. 16, 1994, at A1; *Mission to Haiti: Text of Agreement Averting U.S. Invasion of Haiti*, N.Y. TIMES, Sept. 20, 1994, at A12.

108. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1, 7 (1996).

109. See Regensburg, *supra* note 41, at 245.

110. Captain Davis Brown, *The Role of Regional Organizations In Stopping Civil Wars*, 41 A.F.L. REV. 255, 259-260 (1997).

111. See *id.* at 272-73.

112. See Richard Falk, *Symposium: The United Nations Family: Challenges of Law and Development: The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT’L L.J. 341, 341 (1995) (authorizing U.S. to use force in Haiti); see also Walter Gary Sharp, Sr., *Symposium: The United Nations, Regional Organizations, and Military Operations: Article: Protecting the Avatars of International*

actions, the United States was looking more and more like the world's policeman, charged with the task of protecting basic human rights through U.N.-authorized intervention. At the same time, the Security Council was making it clear to governments around the world that it would no longer tolerate regimes who abuse or murder their own people and then seek to hide behind claims of national sovereignty and nonintervention.<sup>113</sup> The successful U.N.-authorized intervention in Haiti was another victory for humanitarian intervention during the post-Cold War period and another setback for the idea of national sovereignty in international law.

#### 4. *U.N. Intervention in Yugoslavia*

The international effort to restore peace in the former Yugoslavia has been the U.N.'s greatest challenge during the post-Cold War period. The conflict began in June of 1991 after Croatia and Slovenia declared independence from Yugoslavia, prompting Serb forces in Croatia and Bosnia-Herzegovina to take up arms against Croatian and Muslim forces.<sup>114</sup> Ethnic conflict between Serbs, Croats and Muslims was nothing new to the Balkans. But the level of violence committed by the three parties, which resulted in ethnic cleansing, expulsions and gross violations of human rights, was unprecedented.

The Security Council had been involved since the early phases of the war, applying a general arms embargo<sup>115</sup> against all of the former Yugoslavia and calling for an end to the hostilities in Bosnia.<sup>116</sup> In February of 1992, the Security Council established a United Nations Protection Force (UNPROFOR) to be deployed in Bosnia for peace-keeping purposes.<sup>117</sup> In May of 1992, following U.N. recognition of Croatia, Slovenia, Bosnia and the Former Yugoslav Republic

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*Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 105 (1996) (authorizing U.S. to use force in Somalia).

113. See Lori Fisler Damrosch, *ASIL Insight: Recent Security Council Actions Concerning Internal Conflicts: Economic Sanctions*, ASIL NEWSLETTER, Jan. 1994.

114. See Eric Black, *Breakup of Yugoslavia Had Many Causes; Nationalism, Old Grudges, Ethnic Hopes Contributed*, STAR TRIBUNE, April 25, 1999, at 4A.

115. See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 4, U.N. Doc. S/Res/713 (1991) (imposing weapons embargo on all areas of the former Yugoslavia) [hereinafter S.C. Res. 713].

116. See S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. at 2, U.N. Doc. S/RES/752 (1992).

117. See S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg. at 1, U.N. Doc. S/RES/743 (1992).

of Macedonia as independent states,<sup>118</sup> the Security Council took more aggressive action by calling for economic sanctions against Serbia and Montenegro for supporting Serb military activities in Bosnia.<sup>119</sup> The Security Council also expanded UNPROFOR's mandate to enable it to perform immigration and customs functions on the international borders of Croatia in an effort to regulate the mass exodus of refugees resulting from the war.<sup>120</sup>

The authorization to use force, however, did not come until August 1992. Under Articles 42 and 53(1) of the U.N. Charter, the Security Council passed Resolution 770, calling upon "States to take nationally or through regional agencies or arrangements all measures necessary" to facilitate the delivery of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia-Herzegovina.<sup>121</sup> Subsequently, a "no-fly" zone was established over Bosnia to "ensure the safety of the delivery of humanitarian assistance in Bosnia."<sup>122</sup> NATO was charged with the responsibility of enforcing the ban on flights within the zone.<sup>123</sup> Moreover, safe areas were established to protect civilians in towns throughout Bosnia experiencing food shortages and violence.<sup>124</sup> Each of these measures was taken to prevent further

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118. See S.C. Res. 753, U.N. SCOR, 47th Sess., 3076th mtg. at 1, U.N. Doc. S/RES/753 (1992). The official break-up of Yugoslavia did not occur until May 1992. See *id.* (recommending Croatia be recognized as an independent state); S.C. Res. 754, U.N. SCOR, 47th Sess., 3077th mtg. at 1, U.N. Doc. S/RES/754 (1992) (recommending Slovenia be recognized as an independent state); S.C. Res. 755, U.N. SCOR, 47th Sess., 3079th mtg. at 1, U.N. Doc. S/RES/755 (1992) (recommending Bosnia-Herzegovina be recognized as an independent state); S.C. Res. 817, U.N. SCOR, 47th Sess., 3196th mtg. at 1, U.N. Doc. S/RES/817 (1992) (recommending the Former Yugoslav Republic of Macedonia be recognized as an independent state).

119. See S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg. at 3-4, U.N. Doc. S/RES/757 (1992).

120. See S.C. Res. 769, U.N. SCOR, 47th Sess., 3104th mtg. at 1, U.N. Doc. S/RES/769 (1992). Even before Yugoslavia had disintegrated into separate states, the Security Council deemed the human rights situation and the resultant exodus of refugees to be a threat to international peace and security in the region). See S.C. Res. 713, *supra* note xx, at 4

121. S.C. Res. 770, U.N. SCOR, 47th Sess., 3105th mtg. at 1, U.N. Doc. S/RES/770 (1992).

122. See S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg. at 1, U.N. Doc. S/RES/781 (1992) (creating a no-fly zone over Bosnia); see also S.C. Res. 816, U.N. SCOR, 47th Sess., 3191st mtg. at 1-2, U.N. Doc. S/RES/816 (1993) (authorizing NATO to enforce the no-fly zone).

123. See S.C. Res. 816, *supra* note xx, at 1-2.

124. See S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg. at 2, U.N. Doc. S/RES/819 (1993) (establishing a safe area around Srebrenica); S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg. at 1, U.N. Doc. S/RES/824 (1993) (establishing safe areas around Tuzla, Zepa, Gorazde, and Bihac).

atrocities against Bosnian civilians and to restore order in the region. The acceptance by NATO members of Chapter VIII responsibilities in Bosnia was a new development in the emerging area of human rights law. For the first time in history, the Security Council authorized NATO, a regional military organization, to intervene in a conflict for humanitarian reasons. This was an important development considering the fact that NATO's role throughout the Cold War period had been primarily defensive, designed to combat a Soviet conventional military attack on Western Europe from the East.<sup>125</sup> Since the end of the Cold War, NATO has been searching for a new role in Europe to justify its existence.

Intervention in Bosnia to protect human rights and restore order on the ground was NATO's first real military challenge in its new role as Europe's "policeman". The contribution of member states to European security through their participation in the NATO-led Implementation Force (IFOR) and its successor Stabilization Force (SFOR) were critical to the successful implementation of the military aspects of the Dayton Peace Accords signed by the three parties to the conflict in 1995.<sup>126</sup> It was clear from this mission that the NATO members had successfully restructured their forces so they could bring force to bear in future regional conflicts. At the same time, there was still recognition of the fact that the Security Council must remain the primary international authority under whose aegis future operations proceed.<sup>127</sup> The next challenge in the Balkans, which came not long after the Bosnian conflict ended, would put NATO members to the test in order to see how far they would go to prevent a humanitarian catastrophe when the Security Council refused to act.

#### IV. THE CRISIS IN KOSOVO AND THE LEGAL BASIS FOR NATO'S INTERVENTION IN YUGOSLAVIA

The decision by NATO members to intervene in Kosovo in the spring of 1999 is the subject of controversy in

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125. See Christopher J. Eggert, *Symposium: European Security on the Threshold of the 21st Century: Current Development and Future Challenge: The Legal Effect of Nato's Improved Relations with Russia and Ukraine*, 5 WILLAMETTE J. INT'L L. & DISPUTE RES. 55, 56 (1997).

126. See *Bosnian Choice*, FINANCIAL TIMES, LONDON EDITION, July 4, 1997, at 17.

127. See Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1 (1999).

international policy circles today. At the heart of the dispute is the issue of whether NATO acted with or without the Security Council's approval.<sup>128</sup> Unlike other post-Cold War humanitarian interventions, which were authorized by the Security Council, NATO intervened in Kosovo without a clear mandate from the Security Council to do so.<sup>129</sup> Fearing a veto from Russia or China, the United States and its European allies decided to circumvent the Security Council to prevent the murder or forced expulsion of thousands of ethnic Albanians from Kosovo. The Security Council eventually endorsed the action, but not until the bombing campaign had ended and more than a million refugees had been expelled from the province.<sup>130</sup> While some may regard NATO's decision to use force in Serbia as a breakthrough for international human rights, others see it as an infringement on the Security Council's jurisdiction over matters of international security and a violation of Articles 2(4) and 53(1) of the U.N. Charter.<sup>131</sup> What was the legal rationale for NATO's decision to use force in Kosovo? What effect has this decision had on the inviolable rule of national sovereignty embodied in the U.N. Charter?

A. *The Kosovo Conflict: A Humanitarian Disaster Averted*

1. *The Road to Airstrikes in Serbia: February 1998-March 1999*

The conflict in Kosovo erupted between Serbian forces and the Kosovo Liberation Army (KLA) in March 1998, following attacks by ethnic Albanian guerrillas on Serbian police forces.<sup>132</sup> In response to the attacks, Serbian forces raided dozens of villages over the next several months in an apparent effort to drive the KLA forces from populated

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128 See Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 A.J.I.L. 828, 833 (1999).

129 See *id.*

130. See Judith Miller, *Crisis in the Balkans: United Nations; Security Council Backs Peace Plan and a NATO-Led Force*, N.Y. TIMES, June 11, 1999, at A12 (noting that 14 of the Council's 15 members voted in favor of a resolution authorizing NATO to send a force into Kosovo to keep the peace and place the United Nations in administrative charge of the province).

131 See Wedgwood, *supra* note 123, at 830-31.

132. See Colin Soloway, *Serbia Attacks Ethnic Albanians*, WASH. POST, Mar. 6, 1998, at A1. The KLA, a rebel group of ethnic Albanians fighting for an independent Kosovo, claimed responsibility for a series of violent attacks against Serbian troops in March 1998, triggering warfare that forced thousands to flee into neighboring Albania.

areas.<sup>133</sup> To dissuade civilians from supporting the KLA, Serbian forces conducted massacres, burned villages, raped innocent women and looted towns all over Kosovo.<sup>134</sup> Thousands of ethnic Albanian civilians fled their homes into the densely wooded hills surrounding their villages.<sup>135</sup> Many crossed the border into the neighboring states of Albania and Macedonia, while some even made it as far as Italy.<sup>136</sup>

In response to the crisis, the Security Council passed a resolution in the spring of 1998, condemning the violence and requesting that the parties come together and negotiate a solution to the conflict.<sup>137</sup> Unfortunately, the Security Council's initial call to order was ignored, leading to a second resolution on September 28 demanding an immediate cessation of hostilities, an end to attacks by Serbian forces on ethnic Albanian civilians, and a withdrawal of special Serb military units used for civilian repression.<sup>138</sup> Notwithstanding this second call to order by the Security Council, Serbian forces continued to engage KLA forces and inflict harm on the civilian population.<sup>139</sup>

In late-September, the discovery of mass graves west of Pristina, Kosovo's capital, prompted NATO and the international community to call for tougher measures against Serbian forces.<sup>140</sup> NATO members warned the Serbs that the alliance would conduct airstrikes if Serbian forces in Kosovo

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133. See Theresa Agovino, *The Warpath*, NEW REPUBLIC, May 18, 1998, at 14-16.

134. See *id.*; Justin Brown, *Kosovo Rebels May Revert to Tactic That Won Early Gains*, CHRISTIAN SCIENCE MONITOR, Aug. 14, 1998, at 6; Jack Kelley, *Serbs Raping Women, Girls, Witnesses Say 'The Violence is Increasing: This is Only the Beginning'*, USA TODAY, Apr. 14, 1999, at 3A.

135. See Wedgwood, *supra* note 123.

136. See Kelley, *supra* note 129; Alessandra Stanley, *Italy Swamped By Waves of Boat People*, ORANGE COUNTY REGISTER, Nov. 1, 1998, at A30.

137. See S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 2-3, U.N. Doc. S/RES/1160 (1998).

138. See S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. at 3-4, U.N. Doc. S/RES/1199 (1998).

139. See Paul Wood, *Kosovo Crisis: Kosovo Villagers Plead for NATO Bombs*, THE INDEPENDENT, Oct. 8, 1998, at 18.

140. See *World: Europe UN Meets to Criticise Kosovo Massacres*, BBC ONLINE NETWORK (Oct. 1, 1998) <[http://new.bbc.co.uk/hi/english/world/europe/newsid\\_183000/183685.stm](http://new.bbc.co.uk/hi/english/world/europe/newsid_183000/183685.stm)> (noting that the bodies of 14 ethnic Albanians were found in the central Kosovo village of Gornje Obrinje and another 17 corpses were located in Vucitern. The victims were stabbed to death and several had been decapitated. One child survived, protected from the bullets by the body of its mother. Local people said the killings had been carried out by Serbian police).

did not comply with U.N. demands.<sup>141</sup> Announcing the decision to authorize the use of airstrikes, NATO Secretary General Javier Solana said, “[w]e have taken this decision after a thorough review of the situation in Kosovo. Yugoslavia has still not complied with UN resolution 1199 in a way that can be verified.”<sup>142</sup> As NATO began laying the groundwork for an air assault on Serb positions, President Milosevic agreed to a cease-fire on October 13 during a meeting with U.S. Special Envoy Richard Holbrook in Belgrade.<sup>143</sup> For the time being, the Serbian crackdown in Kosovo had come to an end.

The peace deal reached on October 13 was designed to put an end to the conflict in Kosovo without favoring one side over the other.<sup>144</sup> It called for a 2000-strong verification force furnished by the Organization for Security and Cooperation in Europe (OSCE).<sup>145</sup> The responsibility of the verification force was to ensure compliance by both parties with U.N. Security Council Resolutions 1160 and 1199 and to oversee the withdrawal of Serb special forces from Kosovo.<sup>146</sup>

The agreement also called for NATO reconnaissance planes to supervise the cease-fire from the sky.<sup>147</sup> If Serb forces tried to cheat, NATO warplanes were authorized to carry out airstrikes against Serb positions as a punitive measure.<sup>148</sup> As one senior European official put it, “[w]hether

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141. See David J. Lynch, *NATO Poised for Airstrikes: Attack on Yugoslav Forces Could Come As Early As Today*, USA TODAY, Oct. 12, 1998, at 1A.

142. *Countdown Begins to Kosovo Strikes*, BBC ONLINE NETWORK (Oct. 13, 1998) <<http://news2.thls.bbc.co.uk/hi/english/world/europe/newsid%5F192000/192253.stm>>.

143. See R. Jeffrey Smith, *Kosovo Accord Eases Crisis*, WASH. POST, Oct. 14, 1998, at A1.

144. See *Kosovo: Beginners' Luck*, ECONOMIST, Jan. 16, 1999, at 48 (explaining that the underlying policy purpose for the cease-fire arrangement was to avoid a looming humanitarian disaster during the winter months and to buy time for the warring parties to work out their differences. At the time, thousands of civilians had been displaced from their towns and villages and many were hiding out in the woods while the violence was being carried out. According to Balkan trouble-shooter Richard Holbrook, the original point of the deal brokered in October and the OSCE mission was to “buy a few months for diplomacy”).

145. See Jane Perlez, *Milosevic Accepts Kosovo Monitors, Averting Attack*, N.Y. TIMES, Oct. 14, 1998, at A1 [hereinafter *Milosevic Accepts Kosovo Monitors*].

146. See Text: UN Security Council Resolution on Kosovo, October 24, 1998 (last modified Oct. 26, 1998) <[http://www.fas.org/man/dod-101/ops/docs/98102603\\_tlt.html](http://www.fas.org/man/dod-101/ops/docs/98102603_tlt.html)>.

147. See *Milosivic Accepts Kosovo Monitors*, *supra* note 145.

148. See William Drozdiak, *Accord Puts NATO in Uncharted Territory*, WASH. POST, Oct. 14, 1998, at A23.

we like it or not, NATO has become the sheriff in Europe's wild southeast."<sup>149</sup>

Two weeks after Milosevic announced the cease-fire, the Security Council passed Resolution 1203, which sought to protect unarmed monitors on the ground who were overseeing the cease-fire.<sup>150</sup> Specifically, the resolution affirmed that "in the event of an emergency, action may be needed to ensure [the monitors] safety and freedom of movement. . ."<sup>151</sup> It also provided for "relevant equipment for the sole use of the Verification Missions. . .," which NATO countries interpreted to mean weapons.<sup>152</sup> There was no explicit authorization granting NATO or any other military organization the right to use force in Kosovo for purposes other than to protect unarmed monitors in an emergency. The United States and other NATO supporters contended that Resolution 1203 gave NATO the necessary authority to use its military power to enforce the cease-fire agreement and protect civilians in Kosovo.<sup>153</sup> In the words of A. Peter Burleigh, acting head of the U.S. delegation to the United Nations on the Kosovo matter, "[t]he NATO allies, in agreeing on Oct[ober] 13 to the use of force, made clear that they had the authority and the means to resolve this issue. We retain that authority."<sup>154</sup>

In December 1998, the cease-fire was disrupted when ethnic clashes between Serbian troops and KLA guerrilla units erupted again. The agreement unraveled completely following the discovery of a mass grave site containing more than forty murdered ethnic Albanians on January 15, 1999 in Racak, Yugoslavia.<sup>155</sup> The Racak slaughter led to cries of outrage throughout Europe and North America.<sup>156</sup> NATO ambassadors condemned the killings as a "flagrant violation of international humanitarian law."<sup>157</sup> The President of the Security Council condemned the massacre and called upon

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149. *Id.*

150. See S.C. Res. 1203, *supra* note 7.

151. *Id.*

152. *Id.*; see Goshko, *supra* note 9.

153. See Goshko, *supra* note 9.

154. *Id.*

155. See *40 Slain Ethnic Albanians Are Buried in Kosovo*, N.Y. TIMES, Feb. 12, 1999, at A12.

156. See *id.*

157. William Drozdiak, *Top NATO Generals to Warn Milosevic*, WASH. POST, Jan. 18, 1999, at A17.

all parties to cease acts of violence immediately in Kosovo.<sup>158</sup> At the same time, the President reaffirmed the Council's commitment to the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia."<sup>159</sup> In response to the discovery of the grave site, fighting escalated between Serbian and KLA forces.<sup>160</sup> NATO officials warned Milosevic that the patience of Western governments was running out and that airstrikes against Serbian military targets would be certain if the government in Belgrade did not accept a permanent settlement to the conflict.<sup>161</sup> Officials from both of the warring sides and a six-nation Contact Group, consisting of the United States, Russia, Britain, France, Germany and Italy, met in Rambouillet, France in February to reach a solution to the conflict, but to no avail.<sup>162</sup> After one last failed effort by Holbrook to broker a deal with Milosevic on March 22, the United States and its European allies ordered NATO forces to intervene in Kosovo.<sup>163</sup>

## 2. *NATO Intervenes in Yugoslavia*

On March 24, NATO authorized airstrikes against Serbia.<sup>164</sup> U.S. President Clinton announced that if "Milosevic is not willing to make peace, we are willing to limit his ability

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158. See Statement by the President of the Security Council, Jan. 19, 1999, S/PRST/1999/2, 1, *available in* <<http://www.un.org/Docs/sc/statements/1999/prst992.htm>>.

159. *Id.*

160. See Melissa Eddy, *Fighting Erupts Near Site of Latest Kosovo Massacre*, WASH. POST, Jan. 18, 1999, at A19.

161. See *U.S. Negotiator*, *supra* note 9, at A3 (reporting NATO has authorized Secretary General Solana to order air strikes against Serbian military targets in Kosovo and in other parts of Serbia if Milosevic does not accept a settlement that has at its heart a 28,000-strong NATO peacekeeping force).

162. See Jim Hoagland, *Kosovo Disaster*, WASH. POST, Feb. 28, 1999, at B7; Jane Perlez, *Conflict in the Balkans: The Overview; NATO Authorizes Bomb Strikes; Primakov, In Air, Skips U.S. Visit*, N.Y. TIMES, Mar. 24, 1999, at A1 [hereinafter *Primakov*] (reporting Secretary of State Madeleine Albright orchestrated a diplomatic effort that culminated in peace talks in Rambouillet, France in February. During the talks, the Albanians, including the KLA, signed an agreement that gave Kosovo autonomy rather than the independence they were seeking. However, Milosevic rejected the agreement and treated the talks with contempt. The talks eventually collapsed on March 19).

163. See *id.*

164. See Barton Gellman, *U.S., Allies Launch Air Attack on Yugoslav Military Targets; Two MiGs Reported Shot Down*, WASH. POST, Mar. 25, 1999, at A1 (noting all NATO nations supported the execution of Operation Allied Force on March 24, 1999, with thirteen members deploying military forces).

to make war on the Kosovars.”<sup>165</sup> The goal of the air campaign was to destroy the ability of Serbian police units and Yugoslav soldiers to wage war in Kosovo.<sup>166</sup> “We must stop an authoritarian regime from repressing its people in Europe at the end of the 20th century,” argued Solana.<sup>167</sup> “We have a moral duty to do so.”<sup>168</sup>

The air attacks prompted both positive and negative responses from the international community. U.N. Secretary-General Annan endorsed the airstrikes, blaming Yugoslavia’s persistent rejection of a political settlement for the resort to force.<sup>169</sup> At the same time, Mr. Annan reprimanded NATO for having acted without Security Council authorization.<sup>170</sup> However, Russian President Boris Yeltsin denounced the airstrikes and contended that the United States and its allies were intervening in a civil war against the wishes of a sovereign state, Yugoslavia.<sup>171</sup> The Russians were so disappointed with Clinton’s announcement that Prime Minister Yevgeny Primakov ordered his aircraft to turn around over the Atlantic Ocean as it was heading for Washington, postponing a planned three-day visit to the United States.<sup>172</sup>

The air campaign lasted for more than two months. During that time, allied planes systematically destroyed Serbian installations, bridges, communication towers, planes, helicopters, anti-aircraft guns and missiles.<sup>173</sup> It was the largest allied military assault in Europe since World War II.<sup>174</sup> NATO troops also built tent cities in neighboring Macedonia and Albania for thousands of ethnic Albanian civilians who had fled the violence in Kosovo since the

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165. *Primakov*, *supra* note 150.

166 *See id.*

167 *Id.*

168. *Id.*

169. *See* Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13.

170. *See Id.*

171. *See* Michael R. Gordon, *Russian Anger at U.S. Tempered by Need for Cash*, N.Y. TIMES, Mar. 25, 1999, at A1.

172. *See Primakov*, *supra* note 150, at A1 (stating the Russian Government had made it clear that Primakov would take it as a slap in the face if Serbia was attacked during the Prime Minister’s visit to the United States).

173 *See* Thomas W. Lippman & Dana Priest, *NATO Builds Forces for 24-Hour Airstrikes; Russia to Try to Coax Milosevic Back to Talks; U.S. May Order Helicopters to Kosovo*, WASH. POST, Mar. 30, 1999, at A1.

174 *See* William Drozdiak, *NATO Leaders Struggle to Find a Winning Strategy*, WASH. POST, Apr. 1, 1999, at A22.

violence began.<sup>175</sup> Over one million ethnic Albanians in Kosovo had been driven from their homes and more than 500 villages had been destroyed.<sup>176</sup>

After 72 days of continuous bombing by NATO warplanes, a breakthrough in the conflict was achieved. Milosevic finally accepted an international peace plan for Kosovo negotiated between NATO and Russia.<sup>177</sup> The Kosovo plan that Yugoslavia had approved was based on principles agreed to in early May by foreign ministers of the Group of Eight industrialized countries.<sup>178</sup> The main demands in that plan were an “immediate and verifiable” end of violence and repression in Kosovo, the withdrawal of Serb military and police forces from the province, the deployment of 50,000 foreign troops under a U.N. flag, the safe return of all refugees to their homes, and the establishment of an “interim administration” for Kosovo to be decided by the U.N. Security Council to ensure conditions for a “peaceful and normal life for all inhabitants” of the province.<sup>179</sup> Even though Milosevic had finally yielded to Western pressure, the bombing was not suspended until Serbian troops began withdrawing from Kosovo on June 10.<sup>180</sup>

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175. See William Drozdiak, *NATO Strengthens Presence in Albania and Macedonia*, WASH. POST, Apr. 10, 1999, at A15.

176. See John Kifner, *Crisis in the Balkans: Horror By Design -- The Ravaging of Kosovo*, N.Y. TIMES, May 29, 1999, at A1 (reporting by early May, the State Department had calculated that 90 percent of all ethnic Albanians in Kosovo had been expelled from their homes; 900,000 were driven across the province's borders and 500,000 more were displaced inside Kosovo. An additional 4,600 were reported killed); see also William Branigin, *U.S. Report Details Expulsions, Attacks; 90 Percent of Ethnic Albanians Displaced*, WASH. POST, May 11, 1999, at A13.

177. See Steven Erlanger, *Crisis in the Balkans: The Overview; Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo*, N.Y. TIMES, June 4, 1999, at A1 (noting the peace proposals were worked out between American Deputy Secretary of State, Strobe Talbott, and Russian envoy, Victor Chernomyrdin, who was acting for Belgrade. Once Chernomyrdin agreed on the basics of the deal with Talbott, Milosevic, who was indicted for war crimes a week earlier, felt that he had no choice but to accept the plan or endure further destruction).

178. See *The Questions at Hand Series: The Kosovo Conflict*, THE STAR-LEDGER, June 9, 1999, at 13; *World Leaders Vow to Rebuild Kosovo as G-8 Summit Ends; Members to Meet Again in Balkans to Review Reconstruction Plans*, BALTIMORE SUN, June 21, 1999, at 6A (stating the G-8 is comprised of Britain, Canada, France, Germany, Italy, Japan, the United States and Russia).

179. *Crisis in the Balkans; Kosovo Peace Accord: 10 Steps to a Verifiable End of Violence*, N.Y. TIMES, June 4, 1999, at A20; Erlanger, *supra* note 165.

180. See R. Jeffrey Smith & Molly Moore, *Kosovo Pullout Set to Start Today; NATO-Led Contingent to Enter Province*, WASH. POST, June 10, 1999, at A1.

The halt in the bombing after 78 days set the stage for the Security Council to approve a resolution that calls for 50,000 international peacekeepers to move into Kosovo and to help more than one million ethnic Albanian refugees return to their homes.<sup>181</sup> The resolution also authorizes member states and relevant international organizations to establish an international security presence on the ground in Kosovo and to use “all necessary means to fulfil its responsibilities...” there.<sup>182</sup> Furthermore, the resolution offers the ethnic Albanians “substantial autonomy and self-government in Kosovo.”<sup>183</sup> The effect of this provision is to undermine any future claims of sovereignty over Kosovo by the Yugoslav Government in Belgrade. Kosovo will have “substantial autonomy” within Yugoslavia but for all intents and purposes, will have little to do with the Yugoslav state.<sup>184</sup> The resolution was passed by a 14-0 vote with China abstaining.<sup>185</sup> Peter Van Walsum, U.N. representative of the Netherlands, said “the vote reflected a profound shift in the balance between respect for human rights and for national sovereignty.”<sup>186</sup> “Today,” he stated, “no sovereign state has the right to terrorize its own citizens.”<sup>187</sup>

*B. The Legal Rationale for NATO’s Intervention in Kosovo*

The U.N. Charter does not permit a state or regional military organization to violate another state’s sovereignty to prevent the slaughter of innocent civilians unless the state consents to the intervention or the Security Council authorizes it.<sup>188</sup> Until the Kosovo crisis, all prior interventions during the post-Cold War period had either the consent of the target state or the approval of the Security Council before

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181. *See id.*; *see also* S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. at 1-2, U.N. Doc. S/RES/1244 (1999).

182. S.C. Res. 1244, *supra* note 169.

183. *Id.*

184. *See* Erlanger, *supra* note 165. A special U.N. representative is to oversee the transition to “self-government” and the safe return of refugees to their homes. The operation is established for twelve months initially but it continues after that “unless the Security Council decides otherwise.” S.C. Res. 1244, *supra* note 169.

185. *See* Miller, *supra* note 99. Adoption of the resolution needed nine positive votes in the 15-seat Security Council and no veto from its five permanent members—the United States, Russia, China, Britain and France. *See* U.N. CHARTER arts. 23, para 1, 27, para 3.

186. *Id.*

187. *Id.*

188. *See* U.N. CHARTER art. 53, para 1.

the intervention actually took place.<sup>189</sup> The NATO bombing of Kosovo, however, was different. It marked the first time that a multilateral peacekeeping force intervened in the affairs of another state before actually obtaining the Security Council's authorization or the target state's consent to intervene there.<sup>190</sup> This is because the United States and its NATO allies knew that it would be difficult, if not impossible, to obtain Russian or Chinese support for a NATO bombing campaign against Serbia in the Security Council.<sup>191</sup> Thus, the allies assumed authority over the conflict without the Security Council's approval, hoping that the Council would eventually support the effort.<sup>192</sup>

In circumventing the Security Council's authority, NATO members threatened to undermine the post-World War II international security framework by setting a dangerous precedent for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances in the future.<sup>193</sup> What was the legal rationale for the Western Alliance's actions in Kosovo? Did NATO's recent intervention in Kosovo undermine the Security Council's authority to manage conflict around the globe? Has the interest in protecting basic human rights come to supplant the interest in protecting a country's sovereignty under international law?

### 1. *The Humanitarian Argument*

Ever since the early stages of the Kosovo conflict, the desire to prevent further violence being inflicted on the Kosovar civilian population by Serbian forces was the main driving force behind NATO's willingness to intervene there. According to U.S. Secretary of State Madeleine Albright during a press conference in London last October, "[T]he reason that the international community has focused so much on what is happening in Kosovo is, to a great extent, the humanitarian catastrophe that is looming in the hills and the fact that there are tens of thousands of people wandering around and winter is coming."<sup>194</sup> The United States

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194. Secretary of State Madeleine K. Albright, Statement after the Contact Group Ministerial (Oct. 8, 1998), *available in* <http://secretary.state.gov/www/statements/1998/981008a.html>.

interpreted Security Council Resolutions 1199 and 1203 broadly to justify its own policy favoring NATO airstrikes as a means to quell the violence in Kosovo.<sup>195</sup>

The Clinton Administration believed that it had a moral obligation to intervene in Kosovo, even without explicit Security Council approval, because this was the only hope of survival for many ethnic Albanians.<sup>196</sup> The systematic killing of civilians in Kosovo was a powerful reminder of the Holocaust in Europe during World War II, where millions of innocent people were slaughtered by the Nazis. In addition, the international community had learned an important lesson from the Rwandan crisis in 1993 when Hutu militiamen slaughtered thousands of Tutsis in cold blood.<sup>197</sup> Had the Security Council or a coalition of states been prepared to act in defense of the Tutsi population prior to the genocide that took place there, thousands of lives may have been saved. In view of the lessons learned from past experiences, the United States and its allies felt obliged to intervene in Kosovo in order to prevent another mass slaughter of civilians from occurring in Europe's own backyard.<sup>198</sup>

Not everyone, however, agreed with the Clinton Administration's position that moral concerns outweighed the Security Council's authority or respect for Yugoslavia's national sovereignty in this situation. The Russian envoy to the United Nations criticized the United States and its allies for violating the U.N. Charter and Yugoslavia's sovereignty.<sup>199</sup> China also condemned NATO airstrikes in Yugoslavia, arguing that the "moral imperative" President Clinton cited

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195. See Norman Kempster, *Crisis in Yugoslavia Leaders and Scholars Clash Over Legality International Law*, L.A. TIMES, Mar. 26, 1999, at A26. In the words of Albright, "the Alliance has the legitimacy to act to stop a catastrophe." Secretary of State Madeleine K. Albright, Statement by the Secretary of State on the Situation in Kosovo (Oct. 8, 1998), available in <<http://secretary.state.gov/www/statements/1998/981008.html>>.

196. See Kempster, *supra* note 188.

197. See, e.g., Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545 (1998). 198

199. See *Conflict in the Balkans; Russia Takes Protest to the U.N. Council*, N.Y. TIMES, Mar. 26, 1999, at A13. Russian disapproval of NATO air strikes against the Serbs was shaped largely by its own special historical and cultural relationship with the Serbs. Moreover, Russia has its own troublesome minorities -- Muslims in Chechnya and Dagestan -- and did not want a precedent established that could limit its own ability to use force in settling future conflicts on Russian soil. See Gordon, *supra* note 166.

for American military involvement in Kosovo does not exist.<sup>200</sup> Both the Russian and Chinese governments disagreed with the American interpretation that NATO airstrikes were authorized under Security Council Resolutions 1199 and 1203.<sup>201</sup> These measures, they argued, did not explicitly authorize the use of force, and U.S. diplomats never sought such authorization because they knew such language would draw vetoes from Russia and China in the Security Council.<sup>202</sup>

From a legal perspective, NATO's authority to intervene in Kosovo came not from recognized provisions of the U.N. Charter, but from an emerging body of international law that permits armed intervention for humanitarian purposes. Humanitarian intervention proved to be necessary in this case because the Security Council was unable to reconcile two equally compelling interests — universal legitimacy and effectiveness in defense of human rights.<sup>203</sup>

The failure of the Security Council to agree on a common approach to halt the gross violations of human rights taking place within Kosovo made it impossible for NATO to intervene in order to save lives and comply with international law at the same time. In the words of U.N. Secretary-General Annan during a recent meeting before the U.N. General Assembly, “the Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defense of our common humanity.”<sup>204</sup>

Thus, the “moral imperative” prevailed over the principle of national sovereignty in this instance, setting the stage for future interventions by regional arrangements to protect human rights when the Security Council fails to take action in a crisis situation.

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200. See *Reaction to Kosovo Bombing Along East-West Lines*, Agence France Presse, Mar. 25, 1999, available in LEXIS, News Library, News Group File. China, too, had every right to be critical of NATO intervention in Kosovo, given its own history of repression and human rights abuses against dissident forces.

201. See Kempster, *supra* note 184.

202. See *id.*

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204. Secretary-General Kofi Annan, Secretary-General Presents His Annual Report to the General Assembly, Press Release SG/SM/7136, GA/9596, (Sept. 20, 1999), available in <[http://srch1.un.org:80/plweb-cgi/fastweb?state\\_id=953493670&view=unsearch&numhitsfound=1&query=sg%2Fsm%2F7136;%20GA%2F9596&&docid=78&docdb=pr1999&dbname=web&sorting=BYRELEVANCE&operator=adj&TemplateName=predoc.tmpl&setCookie=1](http://srch1.un.org:80/plweb-cgi/fastweb?state_id=953493670&view=unsearch&numhitsfound=1&query=sg%2Fsm%2F7136;%20GA%2F9596&&docid=78&docdb=pr1999&dbname=web&sorting=BYRELEVANCE&operator=adj&TemplateName=predoc.tmpl&setCookie=1)>.

## 2. *The “Powder-Keg” Argument for Intervening in Yugoslavia*

In its crusading zeal to protect ethnic Albanian civilians from being abused by Serbian forces, NATO also had contained a conflict that had the potential of spreading throughout the region. This had been one of the Clinton Administration’s main objectives during the air campaign. “We act to prevent [sic] a wider war, to defuse a powder keg at the heart of Europe, that has exploded twice before in this century with catastrophic results.”<sup>205</sup> The idea of a “powder-keg” igniting in the heart of Europe has been a major concern of the NATO Alliance since the Bosnian crisis exploded in 1992. “Let a fire burn here in this area,” Clinton remarked, “and the flames will spread. Eventually key U.S. allies could be drawn into a wider conflict, or we would be forced to confront later only at far greater risk and greater cost.”<sup>206</sup>

The Balkans have long been regarded as the “powder keg” of Europe given the history of intense ethnic conflict in the region.<sup>207</sup> The assassination of Archduke Ferdinand of Austria-Hungary by a Serb in 1914 was the spark that ignited the Balkan “powder-keg” into the first Great War of this century.<sup>208</sup> In addition, the recent war between Bosnia, Croatia and Serbia from 1992 to 1995 began as an internal squabble between Bosnian factions in Sarajevo which eventually spread throughout the Balkans, drawing in ethnic groups from all directions.<sup>209</sup> Kosovo is located in the heart of this “powder keg”.<sup>210</sup> If violence breaks out there, ethnic groups from the entire region might be drawn into the conflict, creating security problems for other central and southern European countries, such as Macedonia, Albania, Greece, Turkey and Hungary. According to Deputy Secretary of State Strobe Talbott:

Kosovo is the most dangerous of all the powder kegs in the Balkans. That’s because of where it is -- on the

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205. *Clinton Warns Kosovo “Powder Keg” Could Trigger Third Global War*, Agence France Presse, Mar. 25, 1999, available in LEXIS, News Library, News Group File [hereinafter *Powder Keg*].

206. *Kosovo: Clinton’s Greatest Test*, STATESMAN, Apr. 2, 1999.

207. See *Powder Keg*, *supra* note 196; Roger Cohen, *Decay and Suffering in ‘Greater Serbia’; Retreat of an Illusion/ Croats During the Retreat*, INT’L HERALD TRIB., Sept. 18, 1995. See generally ANTHONY D. SMITH, *ETHNIC ORIGINS OF NATIONS* (1986) (explaining the permanent and visible social chasms dividing the society).

208. See JAMES JOLL, *ORIGINS OF THE FIRST WORLD WAR* 9 (1984).

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210 See *Powder Keg*, *supra* note 166.

fault line between Europe and the Near East. A full-scale explosion there could ignite tinder all around -- to the northwest, in Bosnia, where a fragile peace is only beginning to take hold; to the southwest, where Albania is already in danger of coming apart at the seams; to the southeast, where the fourth Balkan war of this century could bring in two of our NATO Allies, Greece and Turkey, on opposite sides.<sup>211</sup>

To ensure that the violence in Kosovo last spring did not escalate and spillover into neighboring states, the United States and its NATO partners took a hard-line with the warring parties there, particularly the Serbian government. Experience has taught the Western Alliance that the Serbs will only comply with U.N. demands if military force is used to deter them from committing acts of aggression. "All of our previous experience with Mr. Milosevic," Talbott explains, "including 3 years ago down the road in Dayton, is a reminder that he won't get serious in negotiations unless and until we hold a gun to his head."<sup>212</sup> The air assault in Kosovo was the only way to prevent Milosevic from carrying out his campaign of ethnic cleansing and to ensure a just and peaceful regional order in the Balkans.

One of NATO's primary strategic priorities since the end of the Cold War has been to prevent smaller regional conflicts from blowing up into larger ones that may undermine stability in Europe.<sup>213</sup> At present, the OSCE has been criticized for moving too slowly in deploying a 2,000-strong verification mission to Kosovo to monitor the cease-fire.<sup>214</sup> Having spent billions of dollars on supplies, personnel and peacekeeping measures to keep the peace in Bosnia, and along the borders of Macedonia, Albania and Serbia, the last

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211. Deputy Secretary Talbott, A Foreign Policy Homecoming, Lecture to the Cleveland Council on World Affairs (Oct. 9, 1998), *available in* <[http://www.state.gov/www/policy\\_remarks/981009\\_talbot\\_forpol.html](http://www.state.gov/www/policy_remarks/981009_talbot_forpol.html)>.

212. *Id.*

213. The OSCE also plays a vital role in the area of conflict prevention in Europe. The OSCE comprises all the European states with the exceptions of the Federal Republic of Yugoslavia, Russia, the former Soviet republics, the United States and Canada. "It describes itself as a pan-European security organization established as a primary instrument in its region for early warning, conflict prevention, crisis management and post-conflict rehabilitation in Europe. Since 1995, it has been involved in almost all the countries of the former Yugoslavia (Serbia, Bosnia, Croatia and Montenegro) and in 1997 it monitored elections in Albania." *Role of the Unarmed OSCE*, BBC ONLINE NETWORK (Jan. 19, 1999) <[http://news2.thls.bbc.co.uk/hi/english/special\\_report/1998/kosovo/newsid\\_192000/192394.stm](http://news2.thls.bbc.co.uk/hi/english/special_report/1998/kosovo/newsid_192000/192394.stm)>.

214. See *A War Too Far for Milosevic*, *ECONOMIST*, Nov. 14, 1998, at 53.

thing the United Nations needed was a war in the Balkans to undermine the “fragile” peace arrangements in these areas. NATO’s intervention in Kosovo was intended, in part, to prevent the violence there from spreading to these other potentially volatile areas in southeastern Europe. Fortunately, the strategy worked and the “powder-keg” did not ignite in this instance.

### 3. *The Civil War in Kosovo and the International Refugee Problem*

In almost any war, international or civil, violence against civilians often causes massive displacement and cross-border migrations of people seeking to stay out of harm’s way. Most of the displaced leave their homes and head for the hills or surrounding areas within their country’s borders, while others seek asylum across the border in neighboring states. For those who make it across the border, added economic and social burdens are placed on the governments that choose to absorb or provide sanctuary for these refugees. The conflicts in Somalia, Haiti and Bosnia were all examples of situations where civilians fled the country in great numbers to escape violence or terror being imposed upon them by their own government.

During the civil war in Kosovo last spring, the mass exodus of ethnic Albanian civilians and the subsequent burden these refugees placed on neighboring states was a compelling factor in NATO’s decision to use force in Yugoslavia.<sup>215</sup> Serbian forces intentionally created “an atmosphere of fear and oppression through the use of force, threats of force and acts of violence in order to drive out Kosovo’s majority Albanian population.”<sup>216</sup> Nearly one million ethnic Albanians fled the country in order to seek sanctuary from the violence.<sup>217</sup> The social and economic burdens placed on the neighboring countries of Albania, Macedonia, and Italy by the mass migration of people was enormous.<sup>218</sup> Although thousands of refugees have returned to Kosovo since the end of the conflict in June, many still remain in neighboring states with nowhere to go.<sup>219</sup>

Some governments argued throughout the conflict that the mass migration of people from Kosovo constituted a

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216. Kifner, *supra* note 164.

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breach of the peace and a threat to international security in the region.<sup>220</sup> The Italian Government, in particular, described the recent wave of refugees from the Balkans as a national emergency and a direct threat.<sup>221</sup> Most of the refugees, according to the Italian government, came by boat at night from Albania, Kosovo, and the former Yugoslavia, among other places.<sup>222</sup> To deal with the rising tide of illegal immigration, the Italian government passed a series of temporary measures granting refugees short-term aid and asylum on humanitarian grounds.<sup>223</sup> Notwithstanding these measures, the growing number of refugees and their uncertain fate brought matters to a boiling point in Italy, prompting calls for international intervention in Kosovo to stop the exodus of people.<sup>224</sup>

In addition to Italy, the mass exodus of refugees from Kosovo created enormous problems for Albania and Macedonia. In Albania, Europe's poorest country, thousands of refugees poured across the border seeking shelter from the violence.<sup>225</sup> Food and medical supplies were flown in by NATO planes, and tent cities had to be built to accommodate the huge influx of people.<sup>226</sup> Moreover, the government in Tirana was forced to pass measures granting short-term aid and asylum on humanitarian grounds.<sup>227</sup> The government's main concern was that the refugee crisis would undermine Albania's precarious stability and spark violence at home.<sup>228</sup>

In Macedonia, also a poor country, the situation was worse. Slavs and ethnic Albanians have been at odds with each other since the republic became independent from Yugoslavia in 1991.<sup>229</sup> The arrival of Albanian refugees and the horror stories of death and suffering brought with them helped fuel resentments between the two ethnic groups.<sup>230</sup> Until the intervention last March, xenophobia and racism

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221. See Stanley, *supra* note 131.

222. See *id.*

223. See *id.*

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225. See *Analysis: Albania's Dilemma*, BBC ONLINE NETWORK (Feb. 5, 1999) <[http://news.bbc.co.uk/hi/english/world/europe/newsid\\_109000/109578.stm](http://news.bbc.co.uk/hi/english/world/europe/newsid_109000/109578.stm)>.

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228 See *Id.*

229. See *Macedonia: Albanian Calm*, ECONOMIST, Nov. 7, 1998, at 53.

230. See Uli Schmetzer, *Serbs Escaping Kosovo Find No Welcome in Serbia to Milosevic, A Hurtful Reminder*, CHI. TRIB., July 10, 1999, at 3.

had been on the rise in Macedonia as citizens became more concerned that refugees and immigrants would undermine their financial and cultural well-being. The Macedonian government stated all along that unless NATO intervened in Kosovo and restored peace to the region, the whole country could be dragged into a war it does not want.<sup>231</sup>

From an international legal perspective, the conditions were ripe for the Security Council to authorize NATO to use force in Yugoslavia under its Chapter VII enforcement powers in the U.N. Charter. Military intervention in Kosovo was justified under Article 39 of the Charter on the basis that the tension refugees brought to neighboring states threatened peace and security beyond the zone of conflict.<sup>232</sup> Unfortunately, the Council could not agree on a common approach to deal with the Kosovar refugee problem. Even though in its resolutions, it had labeled the crisis a threat to international peace and security in the Balkans, it did not authorize the use of force against Yugoslavia. Thus, NATO's decision to intervene in Kosovo was a clear breach of the U.N. Charter. It was also a breach of NATO's own founding document, the 1949 North Atlantic Treaty, which binds NATO members to act within the U.N. Charter.<sup>233</sup>

Notwithstanding these prohibitions, the legal case for intervening in Yugoslavia without Security Council approval can be made under customary international law. Consistent with previous interventions in Somalia, Haiti and Bosnia, the decision to intervene in Kosovo was made to protect human rights and prevent the exodus of refugees from destabilizing the region. The Security Council had already determined that the crisis threatened regional peace and security in the Balkans. But political differences among the Council's five permanent members prevented the United Nations from carrying out its duty to maintain peace and order in the region. Thus, the United States and its NATO allies were left

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231. *See Macedonians Fear They Could Be Next*, BBC ONLINE NETWORK (Mar. 11, 1998) <[http://news.bbc.co.uk/hi/english/special\\_report/1998/kosovo/newsid\\_64000/64531.stm](http://news.bbc.co.uk/hi/english/special_report/1998/kosovo/newsid_64000/64531.stm)>.

232. U.N. CHARTER, art. 39. One of the primary justifications advanced by the Security Council in justifying intervention in the Bosnian conflict was the threat to international peace and security that large numbers of refugees posed to neighboring countries. U.N. SCOR, 46th Sess., 3009th mtg. at 6, U.N. Doc. S/PV.3009 (1991).

233. *See North Atlantic Treaty*, Apr. 4, 1949, arts. 1, 5, 7, 63 Stat. 2241, 2242, 2244, 34 U.N.T.S. 243, 244, 246, 248 (stating that Articles 1 and 7 of the treaty explicitly bind NATO countries to act within the U.N. Charter, and Article 5 endorses the use of force only to repel an armed attack against a NATO member).

with no alternative but to intervene without Security Council approval. This action was justified given the circumstances.

## V. CONCLUSION

Throughout this century, the concepts of national sovereignty and nonintervention have been central tenets of the international legal system and widely supported by members of the NATO alliance. The lessons learned from the two World Wars underscored the need to embrace these concepts in order to prevent armed aggression from occurring between states. These concepts were incorporated first in the League of Nations Covenant and then in the U.N. Charter. Articles 2(1), 2(4) and 2(7) of the Charter safeguard the independence and authority of the nation-state to determine for itself its own destiny without outside intervention, while the U.N. Security Council is charged with the task of enforcing the terms of the Charter under its Chapter VII and Chapter VIII enforcement authority. According to the Charter, no nation is allowed to use force in violation of these concepts unless authorized to do so by the Security Council.

Over the last few decades, however, the growth of human rights law and a series of humanitarian interventions, some authorized by the Security Council, have challenged the old notion that national sovereignty is inviolable. India's invasion of Bangladesh, to halt appalling atrocities, and Vietnam's invasion of Cambodia, to put an end to the barbaric rule of Pol Pot, during the 1970s, were not authorized by the Security Council, but were widely accepted by the outside world as legitimate interventions on behalf of human rights. The same was true of the American interventions in Iraq, Somalia, and Haiti and NATO's intervention in Bosnia during the 1990s, where the Security Council granted the necessary authority to use force to protect civilians from being slaughtered.

Under existing international law, the Security Council remains the primary international authority under whose aegis humanitarian intervention operations are conducted. All governments should look to the Security Council first before intervening in the domestic affairs of another state. However, the Security Council is not the only source of authority for governments to look to in deciding whether or not to intervene in another state's internal affairs for humanitarian purposes. A state may also look to customary international law, given the widespread acceptance of humanitarian intervention in cases involving ethnic cleansing

or the mass slaughter of civilians. This does not mean that the doctrine of humanitarian intervention would free any country to use force whenever it likes. Customary international law may be invoked only if three conditions are satisfied: (1) a humanitarian crisis exists; (2) the government of that state is responsible; and (3) the crisis poses a threat to international peace and security. If these three elements are present and the Security Council fails to act, then a country or regional organization may take action to prevent a humanitarian crisis from becoming worse.

The decision by NATO to intervene in Kosovo last spring followed precisely this line of reasoning. In the absence of a Security Council directive, NATO was forced to intervene there to prevent the Serbian government from eliminating the ethnic Albanian population from the province. There was clearly a humanitarian crisis at hand being facilitated by the government in Belgrade, and the Security Council had determined that the crisis posed a threat to international peace and security in the region. Thus, NATO had no choice but to intervene. By showing its readiness to use force in Yugoslavia, NATO, the world's strongest military alliance, made it clear to the world that the principles of national sovereignty and nonintervention were no longer inviolable when the Security Council fails to act in situations involving ethnic cleansing or gross violations of human rights.