

DUKE UNIVERSITY

RE-EXAMINING KOSOVO:
THE ROLE OF AUTHORITY IN LEGITIMATING
ARMED HUMANITARIAN INTERVENTION

PS 200H – HONORS THESIS
DEPARTMENT OF POLITICAL SCIENCE
PROFESSORS JENTLESON, GRIECO AND ELDRIDGE

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DURHAM, NC

APRIL 2, 2002

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INTRODUCTION

When the Cold War ended, the world went through a sizable amount of change. No longer defined by the two superpowers pitted against each other, the international system is now faced with a number of obstacles and challenges that were hardly acknowledged prior to 1991. One of the most intriguing and interesting of these developments has been the re-emergence of the concepts of state sovereignty and intervention as focal points of much debate and controversy.

When it comes to analyzing new ways of thinking about state sovereignty and intervention the sheer scope of these concepts has necessitated a division in questions that researchers examine. Even though they are related, questions of why state sovereignty should be re-defined, how interventions should be conducted and who should conduct these interventions are often dealt with separately for the sheer purposes of plausible research design. Following this mold, this paper seeks to examine the “who” question of the sovereignty and intervention debate – which international actor(s) should carry out an intervention. In particular, the purpose of this paper is to offer a prescriptive analysis of one specific part of this question: the dilemma that arises when international actors intervene without the permission of the UN Security Council or legal sanction by the UN Charter in the internal affairs of another state in response to perceived serious human rights violations.

The central question of this thesis then becomes: *Should armed humanitarian interventions be carried out without the UN’s authorization?* The central answer to this question is that armed humanitarian interventions that are not sanctioned by the UN Charter or explicitly

authorized by the United Nations Security Council should only be legitimated when adequate proof of support by the international community of states has been obtained.

To lay out this argument, the thesis has been divided into four chapters. Chapter One serves as a literature review and offers a brief overview of different proposals to re-define sovereignty and implement interventions. Chapter Two lays out the possible international actors who could conduct the intervention and re-states more clearly the main line of arguments while providing important definitions for terms that will be used throughout the paper. Chapter Three offers an in-depth analysis of the legality and legitimacy of NATO's intervention in Kosovo in 1999. The analysis ultimately concludes that the intervention was illegal because it clearly violated international law and illegitimate because it failed to secure proper international support, which was in turn necessary to dispel important doubts about NATO's authority and motivations to conduct the intervention. Chapter Four defends the provided definition of international support and offers a discussion of why alternate views of legitimizing humanitarian interventions are inadequate when it comes to preventing its possible abuses.

CHAPTER ONE

SOVEREIGNTY AND MILITARY INTERVENTION: A BROAD OVERVIEW

The first clear conclusion that can be drawn from a review of literature on state sovereignty and intervention is the following: no serious scholar in the field of political science actually believes that state sovereignty is absolute and the territorial boundaries of a state inviolable. Although this may seem like stating the obvious, it is nevertheless an important starting point for a discussion of sovereignty and military intervention because it clearly demonstrates the impact of a changing world order on the norms that affect international actors' behavior. It is not just that sovereignty is no longer sacrosanct, as Thomas Weiss writes, but that the whole concept has been undergoing a certain amount of redefinition in order to remain applicable and relevant to the increasingly global problems of most nations.¹ Thus, debates over what state sovereignty really means and when intervention is legitimate gain added significance when they are viewed as reflections of our own views on what kind of a world we would like to live in.

Unsurprisingly, academic debates on such a broad topic with so many diverse views are difficult to divide into a specific number of distinct positions. This is mostly because writing about sovereignty and intervention is a matter of discussing which set of rules and norms should govern state behavior, inter-state and intra-state, in the 21st century. It is an attempt to persuade the audience of the primacy and relevance of one set of norms over others. So although it is possible to make a rough distinction between the interventionists and non-interventionists, even this line is too often fuzzy since prescribing intervention in the affairs of another state is a matter of analyzing a number of different factors and circumstances that are difficult to generalize in a

¹ Weiss 1994a, p144.

meaningful and broadly acceptable manner. And while this may make the research process interesting, it makes the presentation of these findings and views challenging. In the coming pages, I will attempt to clarify the sovereignty and intervention debate by moving from the general claims to the more specific ones.

The first and best question to ask about state sovereignty is the most obvious one: what is it? I believe that Daniel Philpott offers a very useful definition of sovereignty when he puts it in its broadest terms – *supreme legitimate authority within a territory*.² A careful analysis of the italicized words reveals just how much this definition captures. The supremacy part of the definition acknowledges sovereignty's status in world affairs as the ultimate arbiter – there is none higher. The authority part of the definition speaks to the level of control the holder(s) of sovereignty exhibit(s). The territorial specification reminds us that the limits of this authority are indeed based upon boundaries between clearly demarcated units. Finally, the legitimate part of the definition reflects the changing norms that have also accompanied sovereignty, as the concept ultimately has to be recognized and accepted by the international community of states and understood in the context of the world whose actions it governs. As Philpott states: “All particular historical uses of the [sovereignty] term have meant a particular form of supreme legitimate authority, reflecting one or another philosophy in a given epoch; sovereignty is never without an adjective.”³

Although there are certainly outliers and exceptions, it is to this basic definition that most authors tack on their specific re-conceptualizations of sovereignty. For example, Francis M. Deng and Gene Lyons advance an updated definition of sovereignty that incorporates a responsibility to protect the basic human rights of the country's population – this is their view of

² Philpott 1995, 354. For a more robust analysis of sovereignty and the system of states it has helped create see Philpott 2001, Chapters 1-2.

³ Philpott 1995, 355.

what constitutes legitimate internal authority. In turn, how we define this internal authority factors into deciding what comprises a legitimate violation of a state's territorial boundaries. As such, the attempt to ascertain the role of intervention in international affairs is an attempt to discern the exact limits of state sovereignty.

To address these debates, this chapter is divided into two parts. The first part deals with a historical development of the concept of sovereignty and attempts to explain why this term has been employed in international relations for almost 500 years. The second part presents the views of those who believe sovereignty and military intervention should be limited in a number of specific ways.

Sovereignty through the Ages

The common view of how the concept of sovereignty originated holds that individual states replaced the Holy Roman Empire as the holders of sovereignty at the Peace of Westphalia in 1648, right after the Thirty Years' war.⁴ After this series of treaties, individual rulers came to possess internal supremacy within their own respective territories and spheres of influence. What happened in essence was that the ultimate power of arbitration shifted from the Apostolic See in Rome to the local princes, pursuant to alliances and negotiation settlements these actors made between them. Why was it important for the small states to affect such a shift? As Stephen Krasner puts it, "Shorn of the legitimacy [the small states] derived from the empire, they would be even more vulnerable to the predatory attacks of their larger neighbors."⁵ The Peace of Westphalia thus set in motion a process that is still playing itself out today, a standard of justifying control over the internal matters of the state on the basis of territorial integrity.

⁴ Hardly anyone views this as a clean break, but it serves as a good starting point for most authors.

⁵ Krasner 1999, 26.

However, it should be noted that there are those who dispute the conventional historical claims about the nature and impact of the Peace of Westphalia. Andreas Osiander criticizes this accepted IR narrative about Westphalia for its lack of historical basis in fact – he flat out calls it a myth. Osiander contends that the Habsburgs were never powerful enough to threaten the independence of the smaller ecclesiastical states. If anything, “the war was not fought because the Habsburgs were straining to expand their role, but because other actors were seeking to diminish it... the Danish, Swedish, and French crowns all entered, and prolonged, the conflict through deliberate planning, absent any immediate threat, and in order to aggrandize themselves.”⁶ Osiander believes that the Westphalia myth arose during the 19th and 20th century when the industrial revolution finally made it possible to actually treat and govern a state like an independent and sovereign unit. To that end, the myth of Westphalia offered a plausible account of how the modern international system came about. The drawback of this approach is that scholars have failed to notice the transitory character of this state of affairs – sovereignty was only fully appropriate as a cornerstone of international relations at a time when states and societies were very similar.⁷

Still, regardless of its roots, the key question here is why sovereignty as an idea has lasted for almost 500 years. Ian Hurd helps explain the importance of this concept through the ages by emphasizing the power of legitimacy.⁸ In short, legitimacy matters because the power that is afforded by sovereign status controls international relations. Being a recognized sovereign state not only allows for membership in the exclusive club of states – one cannot be a member if one is not sovereign – but it also provides serious and lasting benefits: a norm that the internal

⁶ Osiander 2001, 257. He also argues that the treaty of Westphalia did not plant the seeds of sovereignty but instead only created a system of relations between autonomous political units that can only be explained with a thorough understanding of the constitution of the Empire.

⁷ Osiander 2001, 276-7.

⁸ Hurd 1999

matters of a state are to be handled by that state alone has benefits that are still recognizable today. Hurd explains that:

The internalization of the norm of nonintervention helps to explain the fact that many borders do not appear to represent frontiers between balanced armies and that, despite this absence of deterrent forces, we generally do not see states calculating at every turn the self-interested payoff of invading their neighbors. Most borders are taken for granted (and most states are status quo powers in this respect) so that such an adventure is simply not considered, and when it does happen the reaction of other states usually amply demonstrates the depth of the internalization of this norm.⁹

Thus, one aspect of the power of sovereignty lies in the observation that states believe in its existence and alter their actions in response. In this way, sovereignty as a norm serves as a self-protection pact between states.

After Westphalia, the next push for sovereignty came shortly after World War I with attempts to further institutionalize the workings of the international society and the Wilsonian idea of self-determination – the right of a people to decide upon their own type government or political status without outside influence. This was an important conceptual change. Sovereign states were no longer seen as just territorial masses delineated by their internationally recognized borders – instead, they also became expressions of their inhabitants' aspirations and desires.¹⁰ Self-determination also aligned drives for nationhood with aspirations of self-rule for many national minorities who previously lacked an exclusive state of their own. The disintegration of empires, like the Austro-Hungarian, simultaneously brought about the creation of a number of new sovereign states that later joined the international community.

⁹ Hurd 1999, 11.

¹⁰ This is not to say that borders are no longer key aspects of sovereignty, just that another attribute of sovereignty was added at this point in time.

These ideas of nationalistic self-rule re-emerged after World War II and sparked the rush of anti-colonial movements in the 1960s, one that Philpott terms the second revolution in ideas of justice and political authority, Westphalia being the first.¹¹ Hideaki Shinoda explains that:

Nationalism manifested in the process of decolonization had a normative dimension. Formerly, the power of states determined the degree of sovereignty; full sovereign states were exclusively the European imperial powers. In the post-1945 era the recognition of status as a nation necessarily involved the demand for sovereignty; nations ought to be sovereign.¹²

As a result, Shinoda continues, it soon became necessary to grant sovereignty to former colonies in both moral and political terms.¹³ Thus, the push for sovereignty that came to the forefront of world affairs with many African states' declarations of independence from colonial empires was the expression of an equalizing and legitimizing force whose ultimate gift to former colonies was widespread and accepted international recognition, symbolized most clearly by membership in the United Nations. Also coinciding with this movement was a marked push to protect the rights of ethnic and religious minorities, which further brought them closer to the status of accepted membership in the international society.¹⁴

While these changes in recognition status and procedure may have been a new development, they were by no means isolated or unforeseen. It is important to note that the formations of the United Nations and its failed predecessor the League of Nations were a continuation of the process of diversifying international conferences by adding more and more actors. The fact that the League's and later the UN's universal membership allowed non-Europeans to outnumber the Europeans served as a clear rejection of previously held ideas

¹¹ Philpott 2001, 5.

¹² Shinoda 2000(b), 154; Shinoda 2000(a).

¹³ Shinoda 2000(b), 155.

¹⁴ Donnelly 1998, 10-2. See also Donnelly, Jack "State sovereignty and international relations: the case of human rights" in State Sovereignty and International Intervention, Gene M. Lyons and Michael Mastanduno eds., Baltimore: Johns Hopkins University Press, 1995 and Donnelly, Jack International Human Rights Boulder: Westview Press, 1993

concerning authority and legitimacy on the basis of the superior character of certain civilizations.¹⁵ This change redefined the nature of the international community as a whole; in essence, membership rules in the international community of states changed. The recognized international order was now composed of not just the Great Powers, but also of smaller states whose power in terms of strict realpolitik was in some cases negligible.

Put in this context, contemporary debates over sovereignty and the proper scope and nature of intervention can then be viewed as a re-surfacing of older questions about the nature of the international community. One of the reasons why these questions may appear new today is that discussions over such matters were largely stalled and overshadowed for most of the latter half of the 20th century by the Cold War and various splits in the international community. It is therefore hardly a surprise that questions about sovereignty and the UN's role in various military interventions became hot topics as soon as the Soviet Union collapsed in 1991.

Limits on State Sovereignty and Military Intervention

Although absolute sovereignty seems to have fallen out of favor in the modern literature, it is clear that sovereignty of some kind is an important characteristic of the international state system and that its possession offers a number of distinct advantages. Thus, most authors seem to have come to terms with the idea that the concept of sovereignty can be neither accepted in the absolute nor completely discarded – it can only be re-conceptualized to reflect the current state of world affairs. How it should be re-conceptualized is the key question.

Sovereignty is a topic with a rich literature. Perhaps the best way to survey this question of redefinition is to offer an overview of different proposals to limit sovereignty and intervention. I do not believe that it would be appropriate or particularly informative to divide

¹⁵ Shinoda 2000(a).

these proposals into set molds such as interventionists and non-interventionists or realists and liberals – the differences are simply not that clear-cut. Similarly, it is difficult to divide the issue of sovereignty from that of intervention because to offer an opinion on the context of intervention is to also comment on the overall redefinition of sovereignty.

Sovereignty as Responsibility

A good starting point is Mita Bhattachariyya's offer of a rights-based limitation on sovereignty: if the state mistreats its citizens and is found guilty of gross human rights abuses, then that state forfeits the sovereignty that comes with being a moral unit, thus making intervention legitimate.¹⁶ Steven Goldman offers a similar take on sovereignty. Attempting to assess the legal basis for the US interventions in Haiti and Bosnia, Goldman concludes that nation-states have differing levels of legitimacy.¹⁷ He coins the term *partial sovereignty* and uses democracy as his litmus test for how much sovereignty a state should be allowed. His distinction is that non-democratic states can only claim partial sovereignty, whereas democratic states can claim full sovereignty. Goldman bases this claim on the assumption that sovereignty rests solely with the people of a state. For Goldman, Iraq itself is only a concept and as such is not sovereign; but the Iraqi people, on the other hand, are sovereign. Since state sovereignty is thus an extension of a population's right, gradations of state sovereignty should be judged by how well a certain government captures the will of the people. Since democracies are more representative of such will by nature, their level of sovereignty is much higher than that of authoritarian regimes.

Francis M. Deng, Sadikiel Kimaro, Donald Rothchild, I. William Zartman and Terrence Lyons advance a similar but more thorough notion that seeks to reverse the lens on the way we

¹⁶ Bhattachariyya 1994

¹⁷ Goldman 1994

look at sovereignty.¹⁸ Instead of speaking of a right to sovereignty, they speak of a responsibility to sovereignty; Instead of seeing them as the ultimate holders of the right to govern and rule a state, Deng et. al. see governments as being vested with the responsibility of providing for the basic welfare of their population. They purposefully attempt to stay out of any specific definitions of rights that the citizens should be afforded, choosing instead to champion a more universal responsibility for the preservation of basic life-sustaining standards. That is, if a certain regime has proven incapable of providing for its citizens' needs – evidenced by widespread internal conflict and/or famine – the issue at hand for Deng et. al. is not border inviolability but the illegitimacy of a regime's capacity for internal supremacy.¹⁹ Moreover, these authors further point out that in many instances sovereignty within the boundaries of one nation is contested. Although the strength of these challenges certainly varies, there should be some standard for judging the validity of sovereignty – and the authors believe that looking at how well a government is providing for its citizens' basic needs is a good criteria.

Friedrich Kratochwil gives more compelling evidence for why we should limit the scope of state sovereignty by arguing that sovereignty was once closely moderated by ideas of responsibility.²⁰ Kratochwil compares sovereignty to property – he contends that the point in time when sovereignty went off-track was when it came to be divorced from its “background rules.” He claims that property in the Roman times was still held to certain specified limitations of right use. But when territoriality came to be the only necessary justification for property, the limitations on property were lifted and authority became divorced from any concept of proper use. Kratochwil believes that the same thing happened with sovereignty – that through the ages

¹⁸ Deng et. al., 1996.

¹⁹ The International Commission on Intervention and State Sovereignty advances a similar view in its report Responsibility to Protect.

²⁰ Kratochwil 1995

its background rules on proper use and utilization were removed to the point that territorially exclusive units now play a central role in determining sovereignty. However, interestingly enough, he also points out that although human rights abuses may reduce a state's legitimate claim to sovereignty, this reduction in sovereignty does not translate into an obligation or even a right by other states to intervene.

All of these are fine ideas; Deng et. al.'s proposal is especially enticing since it is difficult to defend the Saddam Husseins of the world, dictators whose firm grips on power are a far cry from the desired power arrangements of their citizens. Moreover, one can hardly argue that a state should not, at the very least, provide its citizens with their basic needs as humans. But there are also serious shortcomings with each of these views.

The first problem with such proposals to limit sovereignty and intervention is that it largely ignores the historical pattern of interventions. This is not to say that future systems of international relations should be directly derived from historical patterns – instead, the problem is that the world simply does not work in such clear-cut terms quite yet. As Krasner points out, intervention for the sole purpose of preserving human rights is a very rare case in history.²¹ With the exception of Britain's commitment to the abolition of slave trade, nations are much more likely to commit troops and resources to interventions in cases that threaten the overall well-being of the international system as a whole.²² Although most political leaders probably care deeply about the human suffering that goes on in far-away places, their support for military intervention is most often a response to basic realist concerns about their own security.

This is no small matter. Despite common bonds of humanity, there is a serious question about the philosophical underpinnings of foreign intervention. On what basis should a

²¹ Krasner 1995.

²² Even British motives for the abolition of the slave trade could be put into question: was it a purely moral act or also an economic move meant to undercut the United States, Britain's economic rival?

government justify such action to its own citizens?²³ After all, states are created with the protection of their own citizens in mind; to place its own citizens in harm's way for goals which have little to do with its survival seems to be antithetical to the purpose of the nation state. Even if a part of the explanation is that injustices in far-away parts of the world are threats to justice at home, as seen above, the historical record clearly shows that such human rights abuses have rarely been viewed as threats to national security serious enough to warrant troop deployment.²⁴

Additionally, a number of these proposals suffer from a lack of precision. Neither Goldman nor Bhattachariyya do much to explain how to discern what constitutes a moral threshold beyond which human rights abuses warrant a forfeiture of sovereignty. If sovereignty is conditional on the state being a moral unit, can morality be judged equally across cultures? And even if one is to accept that there is a set standard of morality by which we can judge gross human rights abuses, is it after the 100th or the 1000th dead that the international community determines a regime horrible enough to strip it of sovereignty? Even if the proposal is to deal with such relative matters is to intervene only when the rate of killing in the country exceeds that of the intervener by five times or more, then the more serious question becomes one of implication: is one domestic citizen's life worth five foreign ones?²⁵ Leaving aside the serious difficulty of finding an objective moral and political actor to render such judgment, how is the international community to determine the nature and extent of the intervention that will be needed to restore the nation to its sovereign status once violations have been committed – would

²³ For a good discussion of this question see Buchanan 1999. Also, Stephen Garrett calls this the Dover principle: how should the leaders of military forces explain to the mothers and fathers of those who die or are injured in foreign assignments why such a sacrifice was legitimate? Garrett 1999, 159.

²⁴ This point will also be addressed in Chapter Three. It is important to distinguish that in light of terrorism's demonstrated power on September 11, 2001 this view is starting to change in many ways. For example, one measure of preventive diplomacy is not to allow states to degenerate to conditions favorable for terrorist organizations and extremist regimes like the Taliban. However, at least up until such recent events as the World Trade Center attacks, individual states were reluctant to get involved in areas whose troubles had little impact on their own well-being.

²⁵ O'Hanlon 1999, 22.

all failed states be re-constituted as democracies? And if that is the case, what criteria should the international community use to determine which states are democracies and which are not? Finally, does even a case of a complete abrogation of sovereignty via an oppressive regime justify any type of intervention by just any international actor?

Aside from these definitional questions, there are other potential practical problems with implementing a democracy-based view of sovereignty. What would happen if a democratically elected leader of a certain state started sponsoring human rights abuses – would his state still retain full sovereignty? Also, would states with partial sovereignty have less representation and voting power in the UN than states with full sovereignty, thereby relegating them to second-tier status in the international community?

These are not just attempts to discredit the proposals by straw manning the argument or focusing on small exceptions that ignore the larger picture. The point here is that views of sovereignty based so heavily on respect for human rights cannot be transposed onto the global scale and elevated to the status of a norm because the current lack of cohesion and agreement within the interstate community does not allow a uniform application. What makes traditional definitions of sovereignty, as imperfect as they are, viable is a thorough understanding and acceptance by international actors of terms like territory and authority. Although specific portions of borders that divide the world into states are contested, the overall general structure of current territorial distribution is widely accepted. Claims to the contrary are treated with utmost seriousness and infringements across borders and direct challenges of another state's internal authority are in many ways clear-cut – Iraq's invasion of Kuwait was immediately recognized as a territorial violation and an attempt to shift the authority over certain parts of Kuwait to

Baghdad. The same cannot be said of human rights, a hotly debated and nebulous concept, which is why the uncertainties present in the above questions are an important shortcoming.

Moreover, the consequences of adopting this new view of sovereignty are severe. Under Bhattachariyya's, Deng et. al.'s or Goldman's theory, a state whose government has been pronounced guilty of serious human rights violations is stripped of a number of things – its borders are no longer inviolate and it no longer has ascendancy within its territorial boundaries. But that is just the question: pronounced guilty by whom? The UN's spotty record of conflict management showcases the difficulty of creating an over-arching entity to oversee and minimize something as basic as conflict between states – a problem to whose eradication states have pledged their support more so than to any other. Since differences in interpretations and valuations of rights are numerous and sizable within the international community of states, the attempt to delineate some basic human rights and then allow the process of infringing upon these rights to serve as a basis for decisions to strip states of their sovereignty and condone interventions is not likely to meet with much success or support. If anything, it is more likely to have a large destabilizing effect, as it would only transfer wide disagreements over human rights to the realm of international peace and security, thereby globalizing a problem that is, at least on some level, currently localized.

Thus, the key problem with arguments that seek to make sovereignty conditional on a respect for human rights is that such respect is still in many ways aspirational. Although the role and impact of human rights in international affairs has been on a steady rise for the last half century, a framework that makes sovereignty conditional on a certain government's human rights record is still far too nebulous to allow for use in creating a workable foreign policy. Although the idea of sovereignty should be continually amended to include a proper treatment of citizens

and their rights, justifying interventions on this basis is still a premature act; there is a great lack of clarity that surrounds the overall claim that states essentially give up their sovereignty when they mistreat their citizens. The difference may be subtle, but it is important – the first one calls for an inclusion of human rights as one of the “background” responsibilities of sovereignty for which states should strive while the latter proposes that the idea of sovereignty be re-defined in a way that bases the entire concept on a country’s human rights record. As a result, referring back to Ian Hurd’s explanation of the depth of the internalization of the non-intervention norm, it is truly difficult to accept implicit claims that sovereignty, a deeply seeded norm that forms the foundation of modern international relations, is to be drastically re-defined so relatively quickly.

Interventions as Regulatory Mechanisms

Nicholas Onuf also subscribes to a version of sovereignty as responsibility for his judgment criterion is the government’s ability to provide for its citizens.²⁶ He argues that at a time when governments were self-sustaining exclusive members in the international society, it made sense to have strict definitions of sovereignty. However, as international non-governmental organizations and movements gained power and influence, the self-sufficiency of the state has started to decline. Thus, Onuf believes that we can reasonably expect the power of the state to decline further as it becomes increasingly difficult for the state to continue to meet the needs of its citizens. As the state’s dependence on the international community grows stronger, so will its position as the sole provider of public goods deteriorate. Moreover, the number of instances where it is acceptable to intervene is bound to grow as the international community continues to become more and more interrelated – as the actions of one state have an increasing effect on the welfare of the entire system of states, intervention will play an increased role as a regulatory

²⁶ Onuf 1995

mechanism.²⁷ Additionally, political leaders could justify troop deployments in far-away nations with more ease if failed states and hotbeds of human rights abuses are seen as threats to national security – the United States’ latest military actions in Afghanistan are a good example.

Marc Trachtenberg believes that this sort of policing has always been the role of intervention throughout history.²⁸ He offers the example of the European balance of states as a primary example of how intervention was once a common occurrence – sovereignty was respected as long as it did not negatively impact the balance of powers. When it did, the European states were quick to intervene. Trachtenberg states:

If the problem in what used to be Yugoslavia is that the different ethnic groups there can no longer live together peacefully, and if for reasons having to do with precedent, proximity, and spillover effects in general, the Western world decides that the continuation of such violence is intolerable, then there is no compelling reason that intervention should be limited to preventing starvation or controlling atrocities – that is, to action aimed only at the most extreme violations of international norms. There is no reason why the outside powers should rule out as illegitimate the very idea of trying to get at the root of the problem – for example, by arranging for an orderly, equitable, and humane exchange of populations.²⁹

Furthermore, although he favors a broad application of it, Trachtenberg also terms intervention as a serious action, one not to be taken lightly. It is also important to note that Trachtenberg’s idea is not based upon any specific set of moral directives; instead, he simply proposes that states should intervene when certain fundamental norms of civilized behavior are being violated – norms whose violations offend and threaten the entire international system. In this manner, Trachtenberg shrewdly sidesteps the questions about complete definitions of moral and proper state behavior. An added benefit of this concept of sovereignty is that the UN Charter would have a more powerful and broader application because interventions would not be carried out to

²⁷ Onuf 1995

²⁸ Trachtenberg 1993

²⁹ Trachtenberg 1993, 31

preserve one nation's idea of a greater good but, instead, simply to enforce the principles that most governments of the world previously agreed to obey.

Thomas Weiss and Richard Haass put forth similar ideas in their writings.³⁰ Weiss contends that the international community, and the UN Security Council specifically, should be more open to intervening in all cases that threaten the community of states. In this way, intervention would be justified not by appeals to higher moral laws but simply as a way of enforcing standard international norms that have already been embodied in the UN Charter. Weiss is cognizant of the limitations of small budgets and wavering public opinions and freely admits that intervention will not be possible in many instances for practical reasons. He suggests that the international community should start getting used to the idea of triage – the process of picking and choosing which wars and conflicts to get involved in on the basis of how much good can be accomplished with the few resources available. Haass advises a similar kind of selectivity when it comes to deciding when and where to intervene, stressing the ability to explain any apparent inconsistencies to the press and the public. However, Haass proposes that the United States play a central role in these actions.³¹

Conclusions

What is thus apparent is that traditional exclusive notions of sovereignty are losing ground to the idea that sovereignty comes with responsibility and that states who do not fulfill these responsibilities can expect to face increased pressure to do so from the international community, in some cases even culminating in military intervention. However, questions over whether responsibility entails providing a country's citizens with basic rights of man affirmed in

³⁰ Weiss 1994; Haass 1997; Haass 1999.

³¹ Haass 1997.

the UN Charter or simply freedom from the most serious cases of state-sponsored terrorism is something that is still up to the international community as a whole to decide. As a result, appeals to such emerging norms should be cautious and limited in nature as long as great uncertainty about the scope and meaning of the concept of human rights remains present on the international level.

Thus, two things are clear. One, international norms are changing to the point that systematic mistreatments of populations are receiving increased international attention and disapproval. Two, scholars and politicians alike seem to be growing more comfortable with the concept of military intervention in state affairs that were once considered strictly internal.

What is necessary to counter the clash between these two trends and traditional notions of sovereignty is a re-conceptualization of the idea of sovereignty to something that is more applicable to the specifics of today's world. For example, Alexander Cooley offers an interesting solution. By analyzing the way empires treat their possessions in colonies from which they withdraw, Cooley puts together an idea of looking at sovereignty as a "bundle of rights." Specifically, he differentiates between *use rights* and *control rights* by drawing on recent examples from the way Russia has negotiated settlements for major parts of the post-Soviet military-industrial complex. He calls this process exchange sovereignty.

Exchange sovereignty occurs when the control rights and use rights of an asset or territory are separated and divided between two contracting states. In a leasing arrangement, the host state retains the control rights to a particular asset or territory, while it transfers the asset's use rights to another state in exchange for a rental payment or other form of quid pro quo.³²

Cooley's delineation of these spheres of action and property offers interesting possibilities for a world where the traditional notion of Westphalian sovereignty has always depended upon mutually exclusive territorial holdings.

³² Cooley 2000, 104.

CHAPTER TWO

THE AUTHORITY TO INTERVENE

Despite realizing that an augmented emphasis on viewing sovereignty as responsibility has resulted in an increase in demands for intervention in countries whose governments have betrayed their obligation to their citizens, the question remains of who should intervene. This is an important question because there are numerous organizations available to do the task, yet their effectiveness levels vary with respect to the problem at hand. And although the literature on this topic is not as voluminous as it is on the question of sovereignty, who intervenes is actually the crux of the question in many discussions of humanitarian intervention.³³

As Kelly Kate Pease and David Forsythe explain, the “who” question is important because debates over intervention are essentially debates over authority in world politics. Pease and Forsyth contend that this view of intervention helps explain why to so many states in the General Assembly protecting the authority vested in them by sovereignty is more important than protecting human rights.³⁴ Lacking the capability to carry out interventions of their own, these weaker states fear that humanitarian action can be misused by stronger states to justify imperialistic motives. Shashi Tharoor and Sam Daws also point out that humanitarian intervention as a whole faces four specific objections: neo-imperialism, vigilantism, double standards and efficacy.³⁵ They argue that the problem is not only in the possibility for misuse of the human rights rhetoric, but that states that have been known historically to have imperialist

³³ The term humanitarian intervention should be clarified here. Although many different definitions of this term can be found in the literature, for the purposes of this thesis the term will refer to armed military interventions in the affairs of another state conducted at least to a significant extent for purposes of protecting human rights or responding to human rights abuses.

³⁴ Pease and Forsythe, 1993.

³⁵ Tharoor and Daws, 2001.

tendencies are now the ones carrying the banner of humanitarianism. In terms of vigilantism, there is growing concern that single-state intervention may create dangerous precedents for the future because it is essentially a matter of one state invoking its own conception of justice that may not always be shared by the rest of the world community. Finally, when it comes to double standards and efficacy, the concern is not just that the interventionist nations sometimes refuse to place themselves under the rules they subject others to, but that their intervention is many times not thorough and sustained enough to produce lasting results.³⁶

Exploring these varying levels of authority is also significant because it goes a long way toward determining the legitimacy of humanitarian intervention as a concept. If it can be proven that a certain international actor does not have the authority to initiate and carry out a military intervention within the territorial boundaries of a sovereign state, the overall legitimacy of such action is put into question. Additionally, clearly outlining the responsibilities of major international actors can go a long way toward putting a stop to ad-hoc interventions and answering ensuing questions about whether such spur-of-the-moment actions are intended to serve as precedent for future interventions.

And while upon first glance humanitarian interventions differ from a conventional inter-state war only in motive – both involve a forcible breach of clearly outlined territorial boundaries of a recognized state – the difference is that humanitarian interventions are intended to restore order to the region and return authority to the state’s inhabitants; inter-state wars are most often an attempt to alter the power relations in a region or perhaps even change territorial boundaries. Yet these motivations are not always easy to discern, and history has taught the world to be wary of just-sounding principles – after all, Hitler invaded Czechoslovakia to protect the Sudeten

³⁶ This paper will not deal with all of these objections; their inclusion here is meant to illustrate the far-reaching effects of the discussion over who should intervene.

Germans. Therefore, the question of who should intervene becomes even more important, because it greatly impacts the judgments we render about the legitimacy of various humanitarian interventions. If the publicly communicated reason for intervention is an impending humanitarian crisis whose sheer brutality offends the human psyche, a broad and diverse coalition of contributing states has more credibility than a single state. Similarly, recognized international bodies whose enumerated powers to intervene stem from treaties signed by the great majority of nation-states currently in existence command more respect from the international community than single states who may only be paying lip service to humanitarian concerns but instead acting mostly in their own national interest. In light of this, it is clear that not all international actors enjoy equal recognition and authority to carry out interventions.

As a result, when discussing this aspect of humanitarian intervention, we are prompted to ask two specific questions: who should perform the intervention and how should the intervention be executed. It is important to note that these questions, although intimately related to the concept of sovereignty and general debates over the legitimacy of military interventions are nevertheless separate questions and should be treated as such. While one deals with questions of ultimate authority to bend – maybe even break – international laws and norms, the other deals with the specifics of how a humanitarian war differs from a regular war. To illustrate their differences in light of the recent NATO intervention in Kosovo, the “who” question begs us to explore the legality and legitimacy of NATO’s 78-day air war. It asks us to consider whether the United Nations should serve as the ultimate arbiter in humanitarian crises and pushes us to create a workable set of criteria that clearly outline a hierarchy amongst international organizations and individual states when it comes to intervention. The “how” question deals with the use of cluster bombs and radioactive ammunition as well as the process of target selection.

Though these questions are both related and important, this paper will only offer an analysis of the “who” question. **The central purpose of this paper is to offer a prescriptive and useful analysis of the dilemma over which international actors should conduct humanitarian interventions.** While the first chapter provided the introductory literature review of sovereignty and intervention, the following section of this chapter will introduce the four types of international actors available to carry out interventions.

Overview of Possible Interveners

There are four basic types of international actors who have varying capabilities to conduct military interventions: the United Nations; regional organizations like the EU and OAS; military alliances like NATO and temporary “coalitions of the willing”; and individual countries acting on their own. Each of these actors presents their own set of advantages and disadvantages when it comes to intervening.

United Nations

While there is no world government it is quite clear that the closest thing that comes to it is the United Nations – with its membership of 189 sovereign countries, no other international organization can claim participation by as many nation-states or signatories to its charter.^{37,38} Moreover, as stated in the UN Charter’s preamble, the express purpose of the United Nations is to save the world from the scourge of war by only using armed force in the common interest of

³⁷ This is not to imply that the UN should be the world government. For one, the UN does not have the ability to create laws. For now, it simply serves as the best approximation of the community of states and as the largest recognized organization of states.

³⁸ <http://www.un.org/Overview/brief.html>

all mankind.³⁹ When one considers that becoming a member of the UN constitutes an explicit agreement with the obligations outlined in the UN Charter, this organization represents the best currently available approximation of values the international community wishes to uphold.

The United Nations is actually a system of over 30 affiliated organizations and six main organs. The purpose of this paper requires us to only deal with two: the General Assembly and the UN Security Council. All member states of the UN are represented in the General Assembly and a one-state, one-vote formula is used. Decisions on matters of international security deemed to be of great importance require the support by a two-thirds majority of the voting states. Although these decisions are not binding and do not have the force of a law, they serve as important recommendations and expressions of an approximated will of a large number of states.

The UN Security Council is perhaps the most powerful and prominent acting body of the United Nations. Charter Article 24(1) gives the UNSC “primary responsibility for the maintenance of international peace and security.” Under Article 39, the UNSC also has the authority to “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... to restore international peace and security.”

The Council has fifteen members; ten are elected to two-year terms by the General Assembly and the five are permanent members. These five states are United States, Russia, France, China and Britain and they possess a veto that cannot be overridden. That means that any of these states have the ability to effectively block the UNSC’s decisions. If none of the permanent five exercises its veto, a resolution proposed to the UNSC passes if nine affirmative votes are cast.⁴⁰ Member states are required to follow and carry out the decisions of the UNSC.

³⁹ <http://www.un.org/Overview/Charter/preamble.html>

⁴⁰ <http://www.un.org/Overview/brief.html>

The power of the council is limited by the fact that the United Nations does not have a standing army at its disposal. Thus, the Council's recommendations for a military response in grave humanitarian crises rely on military contributions by the member states or on granting authorization to member states to use "all necessary means," as was the case in the Gulf War against Iraq.

There is no doubt that this arrangement of the United Nations is imperfect – it does not account for many things. For one, the General Assembly makes no distinction between the relative military and economic strengths of its member states – Iceland's vote carries as much weight as that of the United States. The same can be said of the permanent members of the Security Council, whose relative powers have greatly shifted since the UN's inception in 1945. Additionally, the Security Council can often be stymied if just one of the permanent five nations decides to use the veto. During the Cold War, the UNSC was greatly hampered as the American and Soviet delegations utilized their vetoes and often halted any decisions that did not conform to their national interest.⁴¹ After the shift from a bipolar to a unipolar world a decade ago, the Security Council has been more active in voting on resolutions and issuing directives to the General Assembly.

Regional Organizations

Regional organizations are the toughest to define because they vary in nature, size and power. For example, organizations like the European Union (EU), Organizations for Security and Co-Operation in Europe (OSCE) and the Organization of African Unity (OAU) all have

⁴¹ However, there were a number of successful interventions and peacekeeping missions like Congo in 1960. For a more thorough history of UN and unilateral interventions see Alexander 2000, 403.

varying purposes, sizes and levels of authority over its members.⁴² The EU has 15 member states, the OSCE has 55 member states while the OAU has 53 members. Finally, their mandates are of varying nature as well. While the OSCE is more concerned with crisis management, conflict prevention, early warnings of conflict and post-conflict rehabilitation of regions the OAU's charter states among its objectives to "defend [the members'] sovereignty, their territorial integrity and independence" and "to eradicate all forms of colonialism from Africa."⁴³

Judging their ability and authority to intervene, these types of organizations vary widely as well. While the EU represents a very potent economic and political force, other organizations like the OSCE are better suited for auxiliary support during peacekeeping missions and as general agents of conflict prevention. The reason for this is simple – most of these organizations cannot wield an armed force capable of intervening. With this limitation in mind, organizations like the OSCE usually work within the framework of the United Nations, either entering the scene after much of the political and military uncertainties have been resolved or working on preventative measures before the armed conflict erupts. For example, before the Kosovo war, OSCE was in charge of the unarmed verification missions whose key duty was to monitor Slobodan Milosevic's compliance with signed agreements. Once the conflict started, the OSCE staff pulled out. Additionally, after the conflicts were brought to an impasse or a seemingly permanent solution, OSCE has been greatly involved in running elections and key institutions in both Bosnia and Kosovo.⁴⁴ In the case of Bosnia, OSCE commissioned international experts to design a permanent electoral law aimed at increasing inter-ethnic cooperation.

⁴² In recent years with the integration of the EU members and the switch to the new currency, the EU is becoming more like a conglomeration of states whose borders are becoming less relevant and who are debating the possibility of unifying their armed forces.

⁴³ See www.osce.org/general and <http://www.oau-oua.org/history.htm>.

⁴⁴ The OSCE currently runs missions in many of post-Yugoslavia countries.

Military Alliances and Coalitions of the Willing

The definition of these international actors is somewhat nebulous as well. Primarily, such designations refer to geographic military alliances, lasting or temporary, and they often serve the role of pre-existing organizations which are primed for a multilateral intervention. Another example of this type of military actor are “coalitions of the willing,” arrangements of states composed from willing participants in various military actions. A good example of this was the coalition that carried out the intervention into Iraq during the Gulf War in 1991 under the directions of the UN Security Council’s resolution.

While these organizations are usually formed with a defensive purpose in mind, they can grow into powerful military alliances with broad capabilities for peace preservation and enforcement. The North Atlantic Treaty Organization (NATO), a collection of 19 mostly European countries and the United States, is a great example of such an alliance. Initially conceived as a defensive organization meant to keep the Soviet Union contained and in check, it has since the end of the Cold War expanded into an important security organization and an effective tool for military intervention as evidenced by its actions in Bosnia and Kosovo.

In many instances, from Iraq to Somalia to Bosnia, such international actors are the UNSC’s primary method of executing its decisions. Since the UN lacks a standing army, organizations like NATO are often better suited to carry out surgical strikes against the oppressors and aid greatly in the subsequent peacekeeping missions. Additionally, as was clearly shown in Kosovo, international actors like NATO have the ability to wage their own wars and serve as foreign policy outlets for states that are not satisfied with the outcomes of the Security Council’s decision-making process, thus making multilateral interventions not sanctioned by the UN Security Council possible.

Such alliances could also figure prominently into the future of preserving peace in the international community. In Reluctant Sheriff, Richard Haass sees the United States as just that – a reluctant sheriff whose new foreign policy may have to be one of “regulating” the world order by way of selective interventions conducted through multiple alliances and coalitions custom-made for the specific tasks at hand.⁴⁵

Single States

Finally, a single state’s intervention in the internal affairs of another state is an example of unilateral intervention. Since all states have defensive and offensive military capabilities, interventions by single states can be either committed without the UN’s approval or sanctioned by a specific UN resolution or Charter provision. There are a number of examples of single-state intervention with varying outcomes and justifications.⁴⁶ While Iraq’s intervention in Kuwait was largely deemed a breach of sovereignty, the same cannot be said for US intervention in Haiti – the context in which the interventions were carried out differed greatly in international support.

Immediate unilateral humanitarian intervention as a first resort without any form of international approval has generally met with opposition.⁴⁷ Louis Henkin summarizes the reasoning behind the desire to retain laws against unilateral humanitarian interventions by pointing out that such laws are “the moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely.”⁴⁸ Stephen Garrett adds that one reason why unilateral interventions are not so popular is that “multilateral interventions are less likely to

⁴⁵ Haass 1997.

⁴⁶ A few that come to mind are India’s invasion of Bangladesh in 1971 and Vietnamese invasion of Cambodia in 1978 as well as the Belgian intervention in Congo in 1960 and US intervention in Nicaragua.

⁴⁷ But the possibility of intervening at later stages of the conflict after other multilateral attempts at conflict mediation, including the UN’s attempts, have failed is often met with greater acceptance.

⁴⁸ Henkin 1999, 824-5.

arouse violent reactions from local political forces, or even by the society at large, than a display of power by one intervener alone.”⁴⁹ He also believes that objections about violations of national sovereignty tend to be more muted if it appears that the international community as a whole, or a significant part of it, are carrying out the intervention.⁵⁰

However, the nature of single-state intervention may very well change in the near future. With a combination of the already clichéd observation that the United States is the sole remaining superpower and the recent terrorist attacks that occurred on September 11, 2001, intervention in areas of the world that serve as hotbeds of terrorist activity may very well increase. Thus, it is conceivable that the role of single states may be enlarged if individual governments, made aware of their vulnerability to terrorism, decide to expand their defensive structures to include military intervention as a form of coercive prevention. Current US actions in Afghanistan are a prime example of this intervention which could be conducted legally under the auspices of Article 51 of the UN Charter as an appropriate response to armed attacks regardless of whether they were carried out by an officially recognized state or a group of individuals who reside in a specific state.

The Central Question

Thus, interventions can take place under a number of possible international types of actors: multilateral interventions with the UN’s blessing, multilateral interventions within a recognized international organization, military alliances and coalitions of the willing, and unilateral interventions by a single state. As I aim to show through the rest of the paper, the primary tension here is between international actors that possess the UN’s approval to intervene

⁴⁹ Garrett 1999, 150.

⁵⁰ Ibid.

versus those that do not. The key distinction here is one of authorization – the UN certainly does not have to carry out all the interventions within its powers of peacekeeping. Instead, it can “contract out” such security duties to coalitions of the willing or specific military alliances.

Whether interventions should be carried out with the UN’s approval is not a point of much contention – if such approval can be obtained, it is clearly advantageous to act on it. The broad support and recognition that the United Nations currently enjoys provides a partial yet compelling, self-evident and immediate answer that the UN should have the primary authority to intervene. Indeed, if a resolution has already been issued by the UN Security Council that there needs to be an intervention of a military nature and the principal actors needed to carry it out have been located, there is hardly any doubt that the action should be conducted under the auspices of the UN. The legitimacy afforded by working within the UN framework is about as strong as it gets – it is difficult to imagine a more broad coalition than the 189 charter signatories and member nations of the UN. To work within the UN essentially translates into the support of the most recognized international body currently known to man.

Thus, if this were the only question to consider, there would not be much of a dilemma. Yet, a thornier problem can and does emerge, as seen in the case of Kosovo in 1999. If the UNSC is split or halted by a permanent five veto while a humanitarian crisis is unfolding, what is to be done? If the UNSC cannot be budged to action should a regional organization or even a single state be allowed to step in and conduct a full-scale military intervention of another sovereign state?

Shinoda highlights this difference particularly well when he frames the discussion in terms of the UN having a primary versus an exclusive right to intervene. That is, although the “UN-first” approach may hardly meet with much opposition, the “UN-only” approach has met

with plenty. It seems that for Shinoda it is difficult to explain allowing for continued human suffering as a result of a few nations vetoing a Security Council resolution. Thus, he proposes a tiered system: if the UN is incapable of intervening that regional associations of states should be allowed to do so.⁵¹

Therefore, perhaps the most succinct way to frame the dilemma of this paper is by asking: **Should armed humanitarian interventions be carried out without the UN's approval?**

The answer to this question is a conditional *yes*. Throughout this paper I will advance one specific argument concerning the international actors' authority to intervene; mainly that *armed humanitarian interventions* which are not *sanctioned by the UN Charter* or *explicitly authorized* by the United Nations Security Council should only be legitimated when *adequate proof of support* by the *international community of states* has been obtained. I will expand on the italicized terms more in the paragraphs below as well as offer a detailed and specific presentation of this argument's utility and impact by analyzing the legitimacy and legality of NATO's actions in Kosovo in Chapter Three.

I will use the term armed humanitarian intervention to signify a forcible breach of the territorial boundaries of a recognized nation-state carried out against that state's will. Also, military intervention sanctioned by the UN Charter falls under the exemption cited in Article 51 of the UN Charter, a matter which will be thoroughly explored in the legality section of Chapter Three. The UN Security Council's explicit authorization is in essence a UNSC resolution that gives coalitions of the willing or other multilateral or unilateral actors the permission to act on issues of peace and security. A good example of this is Resolution 678 the Council passed in

⁵¹ Shinoda 2000(b). Thomas Weiss also proposes something similar: he sees the UN as the primary actor in interventions, with regional organizations as complements to UN's actions, perhaps even subcontractors. Weiss 1994(b).

1990 condemning Iraq's invasion of Kuwait, in which the Council "authorized Member states... to use all necessary means to uphold and implement [previous UNSC resolutions] and to restore international peace and security in the area."⁵² Additionally, adequate proof of support from the international community of states refers to a two-thirds majority vote in the United Nations General Assembly, a specific provision which will receive its due attention in the legality section of Chapter Three. Finally, to answer Thomas Weiss' call for clarity when using the term international community, I want to clarify that repeated use of this term throughout the paper refers strictly to recognized nation-states.⁵³ Non-governmental organizations such as Amnesty International, the Red Cross and the UNHCR are not a part of this equation because this thesis deals with armed humanitarian intervention – enforcements of human rights standards that may necessitate a substantial application of force. Thus, the next chapter will offer an analysis of NATO's intervention in Kosovo and a more detailed look at the tension between the responsibility and authority to intervene.

⁵² <http://www.un.org/Docs/scres/1990/678e.pdf>

⁵³ Weiss 2001

CHAPTER THREE

KOSOVO CASE STUDY: THE LEGALITY AND LEGITIMACY OF INTERVENTION

Perhaps the best place to begin a discussion of the legality and legitimacy of NATO's intervention in Kosovo is with an analysis of the most exhaustive document to address this dilemma – the International Commission on Kosovo's report. Published in late 2000 by a panel of international experts and jurists, the report squarely takes on a number of poignant issues, among them the overall legality and legitimacy of the intervention.⁵⁴

The first distinction to notice is that the Commission differentiates legality from legitimacy. Thus, from the start, the Commission recognizes that there may very well be a dissonance between the needs and requirements of commonly accepted views of justice and the international legal codes that exist to protect them. I will present my analysis of NATO's intervention in Kosovo in a similar manner; the issue of legality will be judged separately from that of legitimacy.

Yet even though I agree with the Commission's approach, our final analyses differ. Whereas the Commission deems the NATO intervention to be an "illegal but legitimate" affair, I will argue that NATO's 78-day Kosovo war was neither legal under international law nor legitimate under any other recourse to commonly accepted norms and responsibilities of human behavior. The 1999 humanitarian war over Kosovo was illegal and illegitimate.

⁵⁴ The Kosovo Commission has met with some criticism for the way it was composed. Simon Goldsworthy writes that: "More than once we are told that [the Commission's] members include citizens of many non-European, non-Western societies. Who might these be? Set up on the initiative of the Swedish government and co-chaired by a Swede and a white South African (who served as a judge under the apartheid regime) the Commission's members included a Canadian, a Briton, two Americans, a German, a Frenchman and Czech. The Palestinian and Russian members of the fell by the wayside and were not associated with the report." Goldsworthy 2001. Still, I believe that the overall value and strength of the arguments and research presented in the Commission's report should be its ultimate judgment criteria. Therefore, despite such criticisms, the work of the Kosovo Commission is heavily relied upon in this paper.

Kosovo Case Background and History

Well thought-out theoretical arguments about hypothetical interventions are certainly a worthy venture as they help us construct criteria and prepare recommendations for situations that could conceivably arise in the future. Yet what is so interesting about this debate over the authority to breach the territorial boundaries of a sovereign state is that a contentious and controversial case of just such an intervention took place in the real world when in the spring of 1999 NATO forces carried out a series of bombing campaigns against the forces of Yugoslav President Slobodan Milosevic. This chapter will offer an analysis of NATO's authority to conduct its war over Kosovo by judging the overall legality and legitimacy of the alliance's actions and in the process showcase the importance of asking the "who" question when analyzing humanitarian intervention. This consideration of the authority to intervene will at most render NATO's actions illegitimate and at least impose serious qualifications and limitations upon the lessons we can draw from what happened in Kosovo.

On March 24, 1999, North Atlantic Treaty Organization officials made good on their previous threats and issued the order to start a limited bombing campaign of military installments in Yugoslavia. Justifying this action as necessary for the prevention of a brewing ethnic conflict and an impending humanitarian crisis, as well as the protection of vital security interests in the region, NATO warplanes carried out a systematic air war against Serbia and Montenegro, the two constituting republics of the Federal Republic of Yugoslavia.⁵⁵ The initial intention was to conduct only a short bombing campaign and force Milosevic back to the negotiating table. But the war did not come to an end until two and a half months later when on June 9, 1999 NATO

⁵⁵ For the purposes of this paper the term Federal Republic of Yugoslavia (FRY) – or just Yugoslavia – will be used. The term Serbia will also be used when referring to events that strictly dealt with that part of Yugoslavia's territory. As no bombing took place in Montenegro, it is equally correct to say that NATO carried out its actions against Serbia.

and Yugoslav commanders reached a Military-Technical Agreement that mandated a pullout of Serbian troops from Kosovo. The next day NATO suspended its air operations and the UN Security Council passed resolution 1244 which brought about the end of the war. The resolution reaffirmed Yugoslavia's territorial integrity and sovereignty under the auspices of the UN, restored autonomy to Kosovo for the first time since 1989, and mandated the deployment of an armed UN-sponsored peacekeeping force in the province.

But why was this massive air war fought? The issue in question was the once-autonomous province of Serbia called Kosovo, a region with a predominantly Albanian population. This region has also been the hotbed of competing ethnic interests for at least a century. To the Serbs, the region is a sacred cradle of their civilization dating back to a famous Kosovo battle against the Ottoman Empire in 1389; To the Albanians, Kosovo is their current home, a land that they currently occupy in great majority. Since the late 1980s, the Kosovar Albanians had been clamoring for secession and control over their own state with consistent appeals to self-determination. However, Serbian authorities were never too keen on this idea, especially under the rule of Slobodan Milosevic, a demagogue and a strongman who rose to power in 1987 and jarred the embers of latent Serb nationalism in 1989. In that same year, Milosevic stripped Kosovo of its autonomous status within the old Yugoslavia and began an increasingly brutal campaign of trying to solidify Serbian rule in the region.⁵⁶ During the 1990s, which saw an increased isolation and animosity toward Serbia as a result of Milosevic's policies, the Kosovars grew increasingly restless with the international community. They were especially disheartened by the results of the Dayton Accords, which in 1995 brought an end to the Bosnian

⁵⁶ In the previous decade the Kosovar Albanians enjoyed high levels of personal freedom and even fully functional bilingual education institutions.

war. Dayton made many promises to solving ethnic conflicts in Bosnia, but made no mention of the rising tensions in Kosovo.

As a result, in late 1997 a new group rose to prominence on the Kosovo political scene – the Kosovo Liberation Army or the KLA who intended to compete with the existing independence movement headed by a highly pacifist literature professor Ibrahim Rugova since the early nineties. Led by an elite group of individuals who had been educated in Kosovo's bilingual education system, the KLA wanted to force a military challenge to the Serbian rule in Kosovo and it attempted to do this with classic guerrilla tactics which ranged from ambushing Serbian soldiers to organizing defense systems throughout Kosovo's many villages.⁵⁷

The conflict escalated. Serbian military and para-military forces grew increasingly hostile, brutal and indiscriminate in their suppression techniques, no doubt a factor of the increased corruption that had come to infest Yugoslavia by the late 1990s. While the Yugoslav military, essentially Serbs wearing Yugoslav uniforms, retaliated by often times flattening whole villages, the paramilitary units were even worse, committing documented atrocities that could not be justified under any rules of war. These reports trickled out of Serbia at increased rates and, prompted by several human rights groups, the international community began to worry that another conflict on par with the horrors of Bosnia was approaching.⁵⁸

A formal mediation process had begun in 1998, but it met with only sporadic success. On October 13, to avoid NATO's threat of impending air strikes, Milosevic agreed to withdraw the required forces from Kosovo demanded under UNSC Resolutions 1160 and 1199. He also agreed to NATO's demands that an international verifying body of unarmed monitors be let into Kosovo. NATO further forestalled the commencement of air strikes on October 27 because of

⁵⁷ Judah 2000, 21-5; Pettifer 1999, 26-31; Alexander 2001, 410; Malcolm 1998.

⁵⁸ Mertus 2000a, 1745; Judah 2000, ch. 10; Falk 1999a, 848; Daalder and O'Hanlon 2000, ch. 2.,

seeming compliance by Milosevic to their demands. Yet the sporadic skirmishes throughout Kosovo continued and by the start of 1999, the negotiated lull in fighting had all but disappeared. This was especially obvious with the murder of 45 civilians in the village of Racak in January of 1999.

Intent on working out a peaceful solution, US Secretary of State Madeleine Albright arranged for prolonged negotiations between the Serb and Albanian representatives in Rambouillet, France in February of 1999. Under the watchful eye of the Contact Group (Britain, France, Russia, United States, Germany and Italy) the proposed solution attempted to restore Kosovo's autonomy, install a NATO peacekeeping force, reduce the Serbian troop presence in the region, and disarm the KLA. However, the negotiations failed as neither side wanted to accept the agreement.⁵⁹

Another version of the agreement was drafted; this one of much stronger wording and with ostensible infringements of Yugoslavia's sovereignty.⁶⁰ On March 18, despite the fact that the Kosovar delegation had reluctantly signed the draft, the Yugoslav delegation refused to back the agreement even after repeated warnings about possible uses of force.⁶¹ After several more last-ditch attempts at shuttle diplomacy by the architect of the Dayton Accords Richard Holbrooke it became obvious that Yugoslav President Slobodan Milosevic would not budge –

⁵⁹ Mertus 2000a, 1744-6.

⁶⁰ There is much confusion and secrecy over the exact nature and timing of the introduction of this ultimatum. While some have called it a simple document much like the Dayton Accords, others have described it as “a surrender treaty following a lost war.” The key sticking points were rights afforded to NATO troops of “unrestricted passage and unimpeded access through the FRY, including associated air space and territorial waters,” along with immunity from “all legal process” which included criminal law. A bitter piece of history here is that Serbia rejected a similar ultimatum from Austria-Hungary in 1914, thereby making it even less likely that the nationalist delegation could swallow such a pill. Pilger 1999a and 1999b.

⁶¹ Daalder and O'Hanlon, 2000.

banking on the lack of NATO's resolve that he had been able to use to his advantage so skillfully in the earlier Bosnian crisis, Milosevic was willing to call NATO's bluff.⁶²

On the early morning of March 24th, NATO delivered. Whether this intervention was legal and legitimate is the central question of this section.

Legality

Although the Commission offers a convincing view that NATO's intervention was illegal because it clearly violated Article 2(4) and did not meet the criteria necessary for exemption under Article 51, not everyone shares this view. In fact, there are a multitude of separate viewpoints on why NATO's Kosovo intervention was legal under international law. Broadly speaking, these arguments can be summed up in the following manner:

- The way they are currently interpreted, international laws and the UN Charter in particular are too restrictive to allow for the preservation of basic human rights. What is now needed – and what NATO's intervention in Kosovo provided – is a broader conception of international law. A more careful reading and interpretation of key articles within the UN Charter as well as a broader view of emerging norms in international law show that NATO's intervention was legal.
- The NATO alliance had the authority under previously-passed UNSC resolutions to carry out its humanitarian war over Kosovo.

This section will examine the aforementioned two arguments.

Legal Authority within the Context of the UN Charter

A useful first step in determining authority to intervene is to address issues of international law and consult the UN Charter. The UN Charter is the greatest source of international law for it is not only the most binding but can also boast the largest number of signatory countries. There are several relevant parts of the UN Charter that aid greatly in

⁶² Falk 1999(b) 12-3.

determining the legality of NATO's actions; they are Articles 2(4), 2(7), and 51-53. Perhaps the best place to start is Article 2(4) which states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁶³

The most common interpretation of this text is as a clear prohibition against non-UNSC sponsored intervention, as any military intervention clearly violates the territorial integrity and/or the political independence of a sovereign state. Combined with Article 2(7), which states that:

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 VII⁶⁴

these two pieces of international law have historically been interpreted as clear signs that intervention in the internal matters of a recognized state is illegal. Specific articles in Chapter VII, starting with Article 39 which affords the UN Security Council the right to “maintain or restore international peace and security,” further define the exceptions to this general norm of non-intervention. The ones that most pertain to the Kosovo case are Articles 51, 52 and 53.

Chapter 7, Article 51 states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶⁵

⁶³ <http://www.un.org/Overview/Charter/chapter2.html>

⁶⁴ <http://www.un.org/Overview/Charter/chapter1.html>

⁶⁵ <http://www.un.org/Overview/Charter/chapter7.html>

In the case of Kosovo, arguing that this part of the UN Charter confers legality upon the intervener at first appears as if it holds water. For example, the current war on Afghanistan that the United States is waging could fall into this category in light of the September 11, 2001 attacks. However, it is the actual *armed attack* upon a member state of the UN that confers the legal right and legitimacy upon various international actors to intervene, not the impending humanitarian disaster for whose sake the intervention may be taking place. In the case of Kosovo, there was no threat or armed attack by the state of Yugoslavia upon any member states of NATO.⁶⁶ As such, this exception to the prohibition on the use of force found in Article 2(4) does not apply here.⁶⁷ Moreover, even though Article 52 states that “Nothing in the present Charter precludes the existence of regional arrangements or agencies from dealing with such matters relating to the maintenance of international peace and security...” article 53 clearly enforces the primacy and the ultimate authority of the UN Security Council when it states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”⁶⁸ Therefore, even if one were to consider NATO as a regional organization acting to maintain peace, its bypassing of the UNSC clearly violated article 53 of the Charter.⁶⁹

⁶⁶ Falk 1999a, 847. Additionally, there was no request filed for assistance and protection from NATO by a recognized state – Kosovo has never been considered as having a separate national identity and as such, could not legally request such protection from NATO. See Mertus 2000a, 1746.

⁶⁷ NATO also never made the claim that its intervention was a matter of self-defense. However, it should be noted that nations have tried to justify interventions under Article 51 without being attacked first and failed. In 1986 the International Court of Justice ruled that United States broke international law when it intervened in Nicaragua. The US claimed self-defense in an attempt to justify its military intervention in Nicaragua. But the ICJ rejected this argument, pointing out that the Nicaraguan government had not requested help from the United States prior to the intervention – as a result, the US lost the case and could not claim that it had engaged in collective self-defense. Rowles 1986, 1279; Charney 1999, 837.

⁶⁸ The argument that the UNSC did authorize NATO’s use of force will be addressed in the next subsection.

⁶⁹ Mertus, 2000a, 1747

Therefore, upon a first glance of the UN Charter, the extent to which NATO intervened in Kosovo without prior authorization from the Security Council is simply not legal as multiple violations were committed; specifically, violations of Articles 2(4) and 2(7).

However, some authors believe that there is more to the UN Charter and international law than meets the eye. Julie Mertus advances the most cogent legal justification of NATO's actions in Kosovo.⁷⁰ In support of her broader claim that the UN Charter's prohibition on the use of force is less strict than commonly believed, Mertus offers three distinct arguments which, when taken together, she believes form a sound legal basis for NATO's right to intervene. In order, Mertus believes that the intervention was not a violation of Article 2(4); that it was consistent with the overall stated purposes of the United Nations and that such intervention was furthermore mandated by the terms of existing human rights provisions; and that humanitarian military intervention as a stopgap measure is legal under international law. After elaborating further on these arguments, I intend to show why, individually and collectively, they fail to legally justify NATO's intervention in Kosovo.

Re-interpreting Article 2(4)

Mertus believes that the type of intervention Article 2(4) seeks to prohibit is not the type of intervention that occurred in Kosovo. Specifically, her analysis focuses on two key terms used in Article 2(4): *territorial integrity* and *political independence*. She contends that if a humanitarian intervention is carried out to prevent an impending genocide, the purpose of the use of force is not to attack the territorial integrity or political independence of the state. On the contrary, the purpose is to preserve these attributes of a state and at the same time protect its population – to return the state to a condition of lawfulness and order. Moreover, under an

⁷⁰ Mertus 2000a; Mertus 2000b

understanding of state sovereignty like the one advanced by Deng et. al. in the first chapter, one that fully incorporates human rights and stresses state responsibility to protect these rights, NATO's intervention would be legal in light of the reported atrocities in Kosovo. Once we add to this equation the increased inter-relatedness of states and the erosion of physical boundaries that separate them, refugee flows and destabilizing internal strife easily become a matter of international security. Thus, if an intervention's aim is to stabilize the region and protect basic human rights of its inhabitants, Mertus argues that humanitarian intervention outside of the auspices of the UN does comply with Article 2(4). Mertus writes:

By its very terms, the Charter does not prohibit all threats or uses of force. Article 2(4) prohibits force against the "territorial integrity or political independence of any state...." As interpreted in the treaties and diplomatic history, "territorial integrity" refers not to the "territory of a state" but to the "integrity of the territory." An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of fundamental human rights norms.... Humanitarian intervention in such a case falls below the threshold set in Article 2(4) since the interveners do not seek to deprive the state of its integrity but, rather, to enhance it.⁷¹

Mertus' argument is particularly powerful when combined with that of Mitchell A. Meyers, who proposes a view of sovereignty similar to that of Steven Goldman. Instead of constructing a concept of partial sovereignty, Meyers proposes that by virtue of seriously mistreating its citizens a state can give up its sovereignty, territorial integrity and political independence, thereby making interventions like NATO's legal under Article 2(4).⁷²

When addressing this argument, the first point to make is that this is in essence a discussion over interpretations of the Charter. Where Mertus sees extensions and new applications of the UN Charter, others see an unacceptable amount of twisting and straining of international law. Richard Falk, for example, believes that:

⁷¹ Mertus 2000b, 533.

⁷² Meyers 1997. This argument is similar to something Fernando Teson proposed as well in Humanitarian Intervention: An Inquiry into Law and Morality. New York: Transnational, 1997. p173-4.

There is no ultra literalistic reading of the Charter provisions that does not strain credulity as to the intentions of the founders of the United Nations. The basic undertaking of the Charter was to assign exclusive control over non-defensive uses of force to the Security Council, and to accept the limits on response that this entailed as a result of vesting the five permanent members with a right of veto.⁷³

The Kosovo Commission's report subscribes to a similar rejection of Mertus' re-interpretation of Article 2(4) when it proposes that "the main difficulty with such a line of argument is that Charter restrictions on the use of force represented a core commitment when the UN was established in 1945 – a commitment which has reshaped international law."⁷⁴ Although the report does acknowledge that the idea of protecting human rights has evolved significantly in the fifty-plus years since the drafting of the UN Charter, the Commission was still unwilling to accept the premise that traditional interpretations of the limitation to intervene have changed as much as Mertus claims.

Unfortunately, neither the Kosovo Commission nor other authors address Mertus' specific claim concerning the inapplicability of Article 2(4) to NATO's intervention. In light of this, I believe that there are two additional points to be made.

The first point is that Mertus' argument raises a broader question of how a state can be said to retain its territorial identity or political independence if it lacks a basic monopoly on force within its borders and suffers from an inability to protect its citizens from armed attacks by an outside agent. The issue here is not so much one of NATO's bombing techniques but of the alliance's direct challenge to the authority and ascendancy of President Milosevic's regime which it should be noted, for all its faults, was still democratically elected. And while the bombing campaign itself did place Serb and Kosovar Albanian civilians in danger, the broader

⁷³ Falk 1999a, 851.

⁷⁴ The Kosovo Report 2000, 167. This commitment also included a prohibition on intervention in internal matters of the state under article 2(7). However, the interventions of the 1990s suggest that this interpretation is changing and that states are more willing to accept the idea of UNSC mandated or sponsored interventions in humanitarian crises such as Somalia and Haiti.

point here is that it seriously undermined the FRY's ability to maintain peace and security within its own borders.⁷⁵ Even if the bombing raids had been confined to targets of strictly military value, the consequent reduction in strength of such military forces would have hampered the country's ability to defend itself against foreign invasion or the internal forces of chaos. When one considers that the prolonged bombing led to the destruction of communication towers, television broadcast facilities, electricity power grids, bridges and related infrastructures used for transportation, it becomes clear that NATO's actions also damaged the FRY government's ability to maintain certain standards of living to which its citizens had been accustomed. One could equally argue that FRY's resulting economic burden of post-intervention reconstruction and the economic loss that accompanied the closure of trade routes during the war were all serious blows to Yugoslavia's territorial integrity and as its political independence.⁷⁶

Additionally, a glance at the Military-Technical agreement that ended the Kosovo war points to serious concessions of overall control and independence by the FRY. Limitations on the size and movement of Yugoslav troops in Kosovo as well as a permanent, armed international presence in the region is a clear infringement upon the territorial integrity and the political independence of a country. Moreover, the earlier intentions of supporting a referendum on Kosovo's future by the middle of 2002 that were embodied in the initial Rambouillet documents clearly point to a possible redefining of Yugoslavia's territorial integrity.⁷⁷ Although such talk has now subsided, if Kosovo does become an independent state in the near future, it will be hard to argue that NATO's intervention did not directly contribute to a re-drawing of Yugoslavia's

⁷⁵ This distinction becomes especially crucial when considered in light of the earlier definition of sovereignty as supreme legitimate authority within a territory.

⁷⁶ Although the EU recently provided the country with much financial assistance in rebuilding efforts, that is still only a fraction of the total damages and costs. In Kosovo, for example, the springtime intervention sent the economy into a tailspin as it completely eliminated most farmers' anticipated harvest gains. ICG 2000.

⁷⁷ The Kosovo Report 2000, Appendix.

internal borders. It is thus unrealistic to divorce a military intervention of such breadth and magnitude from its obvious impacts on the subject country. Regardless of motive, carrying out a twelve week air war against a state is likely to have consequences far-reaching enough to shake the nation's foundations.

The second point deals with Mertus' argument that NATO's bombing was not directed against the political independence of the FRY because "there was no attempt to takeover its government; indeed, NATO kept trying to negotiate with its government."⁷⁸ This seems like a strange interpretation of the alliance leaders' stated goals. After Milosevic's indictment by International Criminal Tribunal for former Yugoslavia one of the war's goals became bringing the Yugoslav President to Hague to be tried for his crimes. From Javier Solana and Robin Cook to Tony Blair and Madeleine Albright, NATO leaders made their dislike of and opposition to Milosevic's regime clear from the beginning, starting with the bombing of his personal residence in Belgrade. Thus, although it can be said that NATO never intended to take over the FRY's government – that much is technically true – the alliance waged its war in a way that clearly attempted to overthrow the existing government of Yugoslavia.

To be fair, Mertus does point out that there is a clear distinction between the Yugoslav people and Milosevic's government, stressing that the war was fought against the latter and not the former. In fact, a key portion of her argument is that flagrant mistreatments of the Albanian majority in Kosovo by the Serbian government throughout the 1990s essentially waived the FRY's right to claim that its sovereign rights should be protected. As Mertus bluntly states, "A regime built on and sustained by intense human rights violations, such as the one led by

⁷⁸ Mertus 2000a, 1749.

Slobodan Milosevic in Belgrade, is not entitled to make claims of territorial integrity.”⁷⁹ This matter was fully addressed and explored in greater detail in Chapter One in the discussion over states giving up sovereignty by committing gross human rights violations. The important thing to realize here is that this first part of Mertus’ overall argument is not really a defense of NATO’s values and intentions to intervene but, instead, a rephrasing of a broader claim that a state which commits egregious human rights violations should not be considered a body sovereign enough to claim protection from intervention. As such, arguments about the aspirational nature of such views, advanced earlier in the paper, apply here as well.

Additionally, a strong case could be made for Milosevic’s legitimacy as a rightful leader of Yugoslavia. The intent here is not to glorify Milosevic but to point out important matters that Mertus misses in her analysis of legality. Although it was a far cry from a model democratic institution, the Milosevic-led government was nevertheless a representative democracy that had won clear mandates in multiple free elections and was a key part in a working coalition within the Yugoslav parliament composed of numerous other opposition parties. Put simply, Milosevic was a democratically elected president and his presidency was a clear expression of the will of the Yugoslav people.⁸⁰ Milosevic was also not an indicted war criminal when the war started; neither was he a ruthless dictator by many stretches of the word. His own legitimacy, as well as his socialist party’s, was challenged and tested on numerous occasions throughout the 1990s in various free elections – Milosevic emerged victorious in each. Also unlike rogue states such as

⁷⁹ Mertus 2000a, 1749-50; White House National Security Adviser Samuel R. Berger justified NATO’s intervention on similar grounds when he wrote: “It is important to note that Serbian President Milosevic initiated an aggressive war against the independent nation of Croatia in 1991; against the independent nation of Bosnia-Herzegovina in 1992; and is currently engaged in widespread repression of Kosovo, whose constitutional guarantees of autonomy he unilaterally abrogated in 1989. Arguments based on Serbian ‘sovereignty’ are undercut by this history.” Kitfield 1999, 47.

⁸⁰ Ironically, Milosevic’s popularity ratings even rose after NATO commenced its bombing and despite a standing indictment from the ICTY he remained in power for more than a year after the Kosovo war until a narrow defeat in October of 2000 forced him to resign his post and withdraw from political life.

Iraq or Afghanistan, Yugoslavia was a troubled yet functional democracy throughout the 1990s. A recognized and public opposition movement to Milosevic existed since the late 1980s, comprised of political parties who held seats in the Parliament and often participated in government formation.⁸¹

Thus, even if the country was far from being a shining example of a lawful society, deeming the Yugoslav government fit for an overthrow is not clear-cut decision but a matter of great interpretation and debate. It requires a significant shift in judging governmental legitimacy from analyzing its election procedures and the extent of the rule of law within its borders to adding an analysis of its human rights record. The question that remains then is whether an imperfect representative democracy that still serves as a fair representation of its people's will should be subject to foreign intervention on the basis of its human rights record. But as far as this portion of NATO's standing on legal grounds, the intervention was indeed a violation of Article 2(4) as it infringed upon the territorial integrity and the political independence of Yugoslavia.

Consistency with the underlying purposes of the UN Charter

Mertus' second argument relies on the strong belief that certain central principles advanced in the UN Charter could not be protected in Kosovo without intervention. As the main purpose of the United Nations is to preserve peace and security of the international order, NATO's actions were consistent with this ideal firmly entrenched in Article 1 of the Charter. As it became abundantly clear that these could not be protected while the UNSC was in a gridlock military intervention against the FRY became the only remaining option. The third argument is

⁸¹ At the time when NATO's intervention commenced, Vuk Draskovic, one of Milosevic's most ardent critics and organizer of numerous anti-Milosevic rallies throughout the 1990s, was the vice-President of Serbia. Draskovic's appointment was a necessary concession by Milosevic after the opposition parties performed well in one round of municipal elections. Draskovic resigned in late March of 1999 in protest against the bombing.

an extension of the second, inasmuch that it further describes NATO's actions as mandated by human rights provisions contained in the Charter itself as well as subsequently signed treaties and documents. Specifically, Mertus cites Articles 55 and 56 which implore member states to "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," as well as the 1948 Universal Declaration of Human Rights and the Genocide Convention.⁸²

A thorough analysis of the claim that military intervention of the kind that NATO performed was the last remaining option for preserving human rights in Kosovo is beyond the scope of this paper; the topic is a controversial one and currently without a clear answer. However, whether NATO had the legal authority to intervene even if all negotiation attempts had been exhausted is the topic of this paper.

Specifically, the fact that Articles 55 and 56 are located in a section entitled International Economic and Social Co-Operation casts doubts that such vague language should trump the clearer dictum of Article 2(4). In its report the Kosovo Commission argues that the level of vagueness given to human rights in the Charter clearly points to the primacy of traditional interpretations of rules concerning international security:

The Charter provisions relating to human rights were left deliberately vague, and were clearly not intended when written to provide a legal rationale for any kind of enforcement, much less a free-standing mandate for military intervention without UNSC approval. Human rights were given a subordinate and marginal role in the UN system in 1945, a role that was understood to be, at most, aspirational.⁸³

Of course, this is not to say that the role of human rights should remain aspirational but it does point to a certain hierarchy of values that the UN deems should be protected. On this point, the

⁸² <http://www.un.org/Overview/Charter/chapter9.html>; Mertus 2000a, 1753.

⁸³ The Kosovo Report 2000, 168.

international community's dedication to human rights is still wavering and uncertain, whereas its commitment to preserving peace and security is more proven with the existence and growth of the United Nations. Whereas there are enforcement measures in place to guide the world's response to threats to peace and security, such as the powers vested into the Security Council, most human rights documents and treaties still lack such enforcement mechanisms. Additionally, the entire structure of the United Nations currently implies that the international community is more willing to look past human rights abuses than threaten the stability of the current world order. Just the fact that the veto system is set up the way it is – with any permanent member having the ability to block action – and that the General Assembly lacks specific power to override a deadlocked Council points to the international community's preference for peace and security over other competing values. As such, although NATO's intervention did support important human rights provisions of the Charter, its potentially destabilizing effect in international politics appears to be of greater concern to the world.

Moreover, such a reversal of the implicitly understood value structure of the Charter's provisions can set dangerous precedents. Bartram Brown writes that, "any doctrine that opens the door to legally sanctioned military intervention on the territory of a state and against its government has the potential to destabilize the entire international system."⁸⁴ Although Brown's claim is rather sweeping, it does point out the overall danger of making rules too flexible and too broad; while it could certainly assist in enforcing humanitarian norms it could also serve as a double-edged sword. When combined with the classical interpretation of territorial sovereignty and non-intervention, Article 2(4) offers states valuable legal protection from aggressive neighbors and attempts to re-interpret its meaning or alter its scope can have rather deleterious effects. This danger has prompted Jonathan Charney's to ask in no uncertain terms whether "the

⁸⁴ Brown 2000, 1710.

international community wishes to authorize individual states or groups of states, by themselves, to use force against a non-consenting state in such situations?”⁸⁵

The responsibility to compensate for the UN’s shortcomings

Mertus’ final and perhaps most interesting argument is one that criticizes the UN’s inability to act in the Kosovo matter. She contends that if the UN functioned as it was intended, interventions like NATO’s would be unnecessary. Here, Mertus cites Wil Verwey’s “link theory,” which argues that member states signed on to the UN Charter expecting the United Nations to function properly and greatly eliminate the need for state-to-state conflict or intervention.⁸⁶ However, as the UN proved to be incapable of handling such a task, the need for intervention steadily rose. Mertus cites Article 43 as an example:

Article 43 of the Charter envisioned a system wherein states would make available to the Security Council, “on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.” These agreements were to be “negotiated as soon as possible on the initiative of the Security Council.” Negotiations were effectively abandoned, however, by 1950.⁸⁷

Thus, NATO’s intervention was legally justified as a temporary way of bridging this gap.

Mertus’ argument here can be combined with a broader criticism of the UN system put forth by Michael J. Glennon, who sees the Kosovo intervention as a welcome abandonment of “old rules” concerning the proper situation for international involvement – old rules that, according to

⁸⁵ Charney 1999, 839.

⁸⁶ Verwey 1998, 180, 194.

⁸⁷ Mertus 2000a, 1755

Glennon, were rarely successful in preventing both inter-state and intra-state violence due to the veto power held by the five permanent members.⁸⁸

But Thomas Franck defends the UN and points out that the overall UN system is not to blame for the organization's unimpressive record of the past half-century. Instead, Franck believes that "old rules work as well, or as badly, as states want or allow them to."⁸⁹ More specifically, Franck believes that:

Russia and China, in opposing military action to support Kosovar autonomy, reflected their own insecurity over Chechnya and Tibet. The veto is a metaphoric ritual like the lifting of a skunk's tail. It signals "Proceed with care." It therefore serves as a valuable aid to rational risk assessment. That we deplore its use in the circumstances of the Kosovo debacle does not mean either that the veto has lost its usefulness or that it has become an insuperable bar to action.... It is assuredly not fear of the Chinese veto that prevents more forceful Western action on behalf of Tibet.⁹⁰

A similar argument can be extended to Mertus' and Verwey's complaint that the military agreements meant to strengthen the reach and power of the UN were never negotiated. To a great extent, this delay means that key members of the international community are not comfortable with strengthening the United Nations in such a way, be it because they fear losing control over such an assortment of armed forces or because they simply do not see the utility in such a commitment. In either case, another way to view this outcome is that a significant portion of the international community is not ready for such a development. For Mertus and Verwey to argue that the initial signings of the UN Charter took place due to promises that the military agreements will be completed shortly thereafter would require on their part a more extensive

⁸⁸ Glennon 1999(a), 2; Rieff 1999; Reisman 1999, 861. Rieff offers a discussion of why the UN Security Council is not the best body to approve interventions due to too many conflicting political interests to expect satisfactory action.

⁸⁹ Franck et. al. 1999, 117.

⁹⁰ Franck et. al. 1999, 117-8.

analysis of historical records and archives that clearly documents specific motivations of the signatory states.

Additionally, it is difficult to prove that the lack of a development such as the one mandated by Article 43 implies the right to break other well-respected rules of international order. In this instance, the articles in question are unrelated – in Kosovo’s case the problem was not the lack of transitional agreements on the creation of a UN force that would be readily available to carry out the Security Council’s recommendations; instead, the problem was that two permanent members on the Council were intent on blocking any prescription for Kosovo that so much as alluded to possible uses of force. Thus, the lack of such specific negotiated agreements under Article 43 had little to do with the UN’s inaction in Kosovo – the basic problem was still one of politics and fundamental disagreements between permanent UNSC members about the role of humanitarian intervention in international affairs.

Also, it does not follow that a single state or a group of states should be allowed to intervene in the affairs of another state simply because the UN Charter does not work quite the way that it was intended – or the way certain members would like to see it work – even if such interventions are intended to serve as stopgaps. International law, and all laws in general, depend on consistent and uniform application in order to remain viable. To renege on the signed agreements when the political outcome is not favorable not only shows an overall disrespect for the legal process, but is also very damaging to the UN’s overall authority in handling peace and security matters in general. Although the UN’s lack of action is to be lamented, filling in the perceived holes in its Charter is an even more dangerous act. Most importantly, when this act is justified by nothing more than the alleged shortcomings of the system, the final outcome is

injurious to international order.⁹¹ This is a point that will receive further attention in Chapter Four.

Even though Mertus and other authors offer a number of well-researched and supported arguments that attempt to prove the legality of NATO's actions in Kosovo by pointing out various provisions, exemptions, specific interpretations as well as shortcomings of the UN Charter, in the end it is difficult to reconcile all the objections to their claims and give the intervention a stamp of legality.

Legal Authority Under UNSC Resolutions

From the beginning of 1998 to the end of 1999, there are five adopted UN Security Council resolutions that pertain to the events and actions in Kosovo – UNSC resolutions 1160, 1199, 1203, 1239 and 1244. Some NATO leaders pointed to parts of these resolutions as affording the organization the ability to intervene. Specifically, NATO leaders felt that Resolutions 1160, 1199 and 1203, while not justifying the use of force explicitly, still made it possible to conduct a military intervention.⁹² Aside from demands that both sides take steps to avert a widening of the conflict, comply by the agreements brokered earlier in the year by the Contact Group and enter into meaningful negotiations, Resolution 1199 also decided that “should concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to *consider* further action and additional measures to maintain or restore peace and stability in the region” (*italics added*).⁹³ Resolution 1203, adopted October 24 1998, further expressed deep

⁹¹ A general problem with advocating intervention as a stopgap measure is that it is difficult to determine when these actions should stop and who should stop them. To advocate states acting outside of the UN Charter necessitates providing some measures of check and control as well – thus, the appropriate question to ask is who would have the authority or the ability to mandate a stop to such adventures.

⁹² Shinoda 2000(b), 516

⁹³ <http://www.un.org/docs/scres/1998/sres1199.htm>

concern “at the continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe” and further “re-emphasize[d] the need to prevent this from happening.”⁹⁴ Ruth Wedgewood adds that some provisions of Resolution 1203 alluded to the use of force when the Council affirmed that “in the event of an emergency, action may be needed to ensure the safety and freedom of movement” for the Verification Missions to which the Yugoslav government consented earlier in the year.⁹⁵

These arguments concerning NATO’s legitimacy are difficult to accept. Judging by the UNSC’s resolution 678 concerning Iraq invasion of Kuwait prior to the Gulf War, the UNSC has a clear way of sanctioning the use of force by calling for the co-operating states to use “all means necessary” in the enforcement of previously passed resolutions. To construe the Kosovo resolutions in such a way requires one to interpret the Council’s words with a lot of freedom. The argument here is that if the Council had wanted to call for a use of force on such a large scale, the language of the resolutions would have been significantly stronger.⁹⁶ In fact, it should be noted that resolution 1203 also reaffirmed that “under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council.”⁹⁷ Even though the resolution used the word *primary* and not *exclusive*, it is clear from this statement alone that the Council at no point in time wished to delegate its responsibility over the Kosovo matter to any other international organization. As was seen from the previous subsection, acting without the express permission of the UN is not a legal act within the UN Charter.

⁹⁴ <http://www.un.org/docs/scres/1998/sres1203.htm>

⁹⁵ Wedgewood 1999, 830.

⁹⁶ Franck 1999, 858-9.

⁹⁷ <http://www.un.org/docs/scres/1998/sres1203.htm>

Additionally, the act of stretching the authority afforded under such resolutions is not a good practice for strengthening the international community in general. States wary of the overall idea of military intervention will be less inclined to sign on to any kind of a resolution if the militarily strong states and alliances of the world will later use such benign and vague references to possible future action as a rallying cry for full scale wars.⁹⁸ The Kosovo Commission states that such interpretations are “likely to encourage an even greater reliance on the veto by those Permanent Members who fear expansive subsequent interpretations.”⁹⁹

One also has to admit that it would be difficult to live in a world where laws were interpreted so broadly that a warning that the unarmed members of a verification mission may require rescuing and armed protection is eventually used to justify a twelve week long non-stop bombing campaign of over one thousand different targets, many of them located hundreds of miles away from the actual verification mission. The legal authority of the UNSC would be only further diluted and diminished.¹⁰⁰ It is easy to see then why such interpretations do not find much support across the globe. The Kosovo Commission once again explains this point lucidly, referring to NATO’s involvement in Kosovo:

[While] “Coalitions of the willing” provide a subsidiary source of protection for a beleaguered people that cannot summon a response from the UN System, this in turn creates a concern about the loosening of legal restraints on war and intervention. The Rwanda genocide reinforced a perception that effective action to prevent such a tragedy should not be inhibited by deference to the UN or to outmoded or overly rigid restrictions governing use of force. But much of the non-Western world remains unconvinced and is suspicious of validating uses of force that endow the powerful countries of the North with such discretionary option in this regard. This suspicion is associated with the sort of open-ended mandate provided by the UNSC regarding the use of force against Iraq to recover the sovereignty of Kuwait in 1990-91, and the indefinite prolongation of this use of force without a subsequent renewal of the mandate.¹⁰¹

⁹⁸ Glennon 1999(b), 34.

⁹⁹ The Kosovo Report 2000, 173.

¹⁰⁰ Chinkin 842, The Kosovo Report 2000, 172.

¹⁰¹ The Kosovo Report 2000, 170

In assessing the legality of NATO's intervention, The Kosovo Commission proposes to judge it in terms of degree. In this light, the Commission suggests that the resolutions could be seen as a small contribution to the overall legality of the action. A particular event that the Commission believes affords some legality to NATO's actions took place on March 26 1999, two days after the commencement of the bombing campaign; Russia sponsored a resolution submitted by Belarus, Russia and India to bring about an "immediate cessation for the use of force against the Federal Republic of Yugoslavia."¹⁰² The vote fell short as it was 3 for and 12 against the resolution – the only states on the UN Security Council in support of the resolution were Russia, China and Namibia.

Although the Commission only pointed out that this rejection gives some measure of legality to the intervention, some believed that this unwillingness to put a stop to NATO's actions was a de-facto UNSC approval of the intervention. The United States representative argued that a rejection of the resolution re-affirmed the requirements that had been put forth before the Belgrade leadership. His expressed view was that "NATO's actions were completely justified [as] they were necessary to stop the violence and to prevent a further deterioration of peace and stability in the region."¹⁰³ Louis Henkin plainly argues that "the NATO action in Kosovo had the support of the Security Council. Twelve (out of fifteen) members of the Council voted to reject the Russian resolution of March 26, thereby agreeing in effect that the NATO intervention had been called for and should continue."¹⁰⁴

But the problem with Henkin's approach is that equating a decision not to stop an action with outright support is a risky maneuver that completely ignores the purpose and existence of

¹⁰² <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>

¹⁰³ <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>

¹⁰⁴ Henkin 1999, 825.

the permanent five's veto. If all it takes to simulate UNSC support is to start an intervention and then watch as the Council has trouble mustering enough votes to stop it, then the veto is obviously all but useless. Additionally, while a 12-3 vote against the resolution was a decisive defeat for Russia, one should not forget the fact that China and Russia voted for the resolution is no small matter – these two countries' population totals are higher than the rest of the Security Council's combined.¹⁰⁵ Another important question remains unanswered: would Henkin still advocate that the UNSC's support exists if the vote total had been different or if France, Britain or the United States had to resort to using their veto to prevent the resolution from passing? I do not believe that such re-writing of the rules of what constitutes legal support would be a step forward in bringing the international community closer together and increasing the respect for and importance of the UNSC. If anything, such actions can only trivialize the veto power of the permanent five, prompting these members to seek alternate, non-UN ways of guaranteeing peace and security. After all, when the political consensus between permanent members is not there, the purpose of the veto is exactly that – to halt the use of force by an overzealous major power.¹⁰⁶ It is for that reason alone, if not all others mentioned above, that the idea of intervening militarily in the affairs of another state without the express permission of the UN Security Council must be considered an illegal act. It is thus difficult to claim that NATO had the international community's support

Finally, if such rejections of proposed resolutions are to be used to support a certain idea of what is legal, I believe it is also necessary to examine why some of the countries who voted

¹⁰⁵ There is an additional fact to consider – the vote took place immediately after the bombing began. One has to wonder whether the vote would have been so decisive had it been taken two months into the war. This, however, is pure speculation that suffers from another uncertainty – if Russia had felt that the war's prolonged nature had caused some of the UNSC members to change their vote, would the Russian delegates bother to submit another draft resolution?

¹⁰⁶ Falk 1999(a), 850.

against the resolution did so. Bahrain and Canada believed that further negotiations would not bear any fruit and the Netherlands saw force as the only remaining alternative since the peace negotiations had broken down.¹⁰⁷ France and Slovenia thought that Yugoslavia had reneged on its previous agreements to withdraw some of its troops from Kosovo. Argentina and Britain believed that delaying NATO's attacks would not help in averting the "imminent humanitarian catastrophe." Although the Malaysian representative mentioned that the recourse to force should be a last resort, sanctioned by the Security Council, he also believed that the tragedy of Kosovo required an appropriate and prompt action by the world community. The Ukrainian delegation held a similar view, stressing the primacy of Security Council's authority to intervene, but also acknowledging Belgrade's failure to comply with the demands of the previous resolutions.¹⁰⁸

What is important to note here is that none of the reasons behind the votes dealt with the legality of NATO's actions – instead, they implicitly expressed the members' belief that Council support by a direct vote could not be secured. None of the dozen votes against the draft resolution even mentioned the legality of NATO's acts. It appears that the reason why the vote failed was that most states on the UNSC feared the use of a permanent veto by China or Russia in any attempt to sanction the use of force against Yugoslavia and chose the lesser of two evils: illegal action by NATO over further broken promises by President Milosevic.¹⁰⁹

This discussion of the reasons for the Security Council defeat of the Russian-sponsored vote serves as a good transition point to the next segment of the Kosovo case discussion – that of legitimacy. What is obvious from the aforementioned reluctance to call a halt to NATO's military intervention is that twelve members of the Security Council were willing to forgive the

¹⁰⁷ <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html> This electronic document is a lengthy UN press release regarding the draft resolution. In the press release, various state representatives' comments are included.

¹⁰⁸ <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>

¹⁰⁹ Shinoda 2000(b), 517. Wheeler comes to a similar conclusion, except that he alleges that many of the states had political and economic reasons not to antagonize the United States. See Wheeler 2001, 118.

illegal nature of the intervention and instead put their faith in NATO to resolve the Kosovo situation, be it by bombing Milosevic back to the negotiating table or by hampering the Yugoslav Army's ability to carry out its brutal war against the KLA and much of the Kosovar civilian population. In other words, though they may have viewed it as illegal, these states obviously thought that NATO's intervention was a legitimate response to the latest developments in Kosovo.

Conclusions

The aforementioned analyses of both the legal authority to intervene under the UN Charter as well as prior UNSC resolutions clearly shows that NATO's actions in Kosovo were illegal under widely accepted standard statements of international law such as the UN Charter. However, this is not the end of the story as several key issues still remain unaddressed. One is the clear dissonance between the needs of justice and the capabilities of international law, a broader point of the legitimacy to intervene despite the action's illegality, an argument which will be addressed in the next section. Another issue that will only receive cursory attention in the next section as well is a policy adaptation and extension of Rothchild et. al's definition of sovereignty as a responsibility on a state's part to provide for the basic needs of its citizens – the idea that if a state fails in this endeavor it essentially gives up its rights and protections of sovereignty. I will hold off on this discussion until the final chapter.

Legitimacy

Prior to ultimately pointing out the illegality of NATO's actions, the Kosovo commission puts the intervention in its proper context.

Any assessment of the legality of recourse to force in Kosovo and Serbia under NATO auspices should not lose sight of several elements of the surrounding circumstances. There was an impending and unfolding humanitarian catastrophe for the civilian Kosovar Albanian population against the backdrop of events in Bosnia (i.e. recent diplomatic failure to act decisively enough to avoid tragic consequences).... After the autumn of 1998, authorization of coercive action appeared politically impossible to secure under UN auspices, because of the expected Russian and Chinese veto.¹¹⁰

These facts are used later in the report as the cornerstone of the Commission's argument that even though NATO's intervention was illegal it was still legitimate. This main argument can be best summed up in the following conclusions:

The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.¹¹¹

Elsewhere in the report, the Commission also states:

Such a conclusion is related to the controversial idea that a "right" of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may, depending on the context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse.¹¹²

In other words, there were certain rights guaranteed to Kosovar Albanians by the UN Charter which had to be protected. Since a sufficient amount of prior attempts at reaching a peaceful settlement had all failed and since President Milosevic had proven unreliable to honor such agreements, the only way left to prevent further human rights abuses was by way of a military intervention carried out by NATO.

¹¹⁰ The Kosovo Report 2000, 163

¹¹¹ The Kosovo Report 2000, 4. Michael W. Reisman reached the same conclusion by arguing that the legal requirement in instances when the UNSC cannot act remains to save lives. Reisman 1999, 860.

¹¹² The Kosovo Report 2000, 186

It should be noted that this is a powerful argument, one that is advanced by a number of other authors as well.¹¹³ It clearly captures the power of the consequentialist argument and the difficulty of arguing to the contrary – Kosovo is certainly better off in 2002 under UN rule than it was in 1998 under Milosevic’s rule. Moreover, the general consensus is that things would have most likely only gotten worse if something had not been done. So why argue that the NATO intervention was illegitimate?

My disagreement with the Kosovo Commission’s report lies in a fundamental difference of opinion about the role and definition of the international community’s consent when it comes to forcible military interventions. Simply put, I do not believe that the report placed enough value on the viewpoint that NATO’s Kosovo air war was deeply injurious to both the international order of states as well as the developing norms of humanitarian intervention. There were specific alternatives to seeking action within the UN Security Council, alternatives that would have made NATO’s mandate much clearer and legitimated the intervention.

Thus in this subsection I will analyze the claim made by the International Commission on Kosovo that despite its illegality NATO’s intervention was legitimate. To do so, I will, in order, examine three separate arguments. First, I will discuss the possible role of the “Uniting for Peace” resolution in judging NATO’s legitimacy to intervene. Second, I will present an argument that NATO needed just such a show of support in light of its narrow representation of the international community. Third, I will offer an examination of NATO’s war aims and use it to explain precisely why interventions like the one in Kosovo cannot be deemed legitimate without the express approval of the international community.

¹¹³ See Falk 1999(a); Mertus 2000(a).

“Uniting for Peace” Resolution

The process of examining NATO’s legitimacy as an international actor to intervene separately from the UN Security Council undoubtedly takes the discussion toward the question of a proper international response to human rights abuses. To what extent does the protection of innocent lives through a military intervention preserve the overall order and observation of international law? Also, if indeed military interventions without the consent of the UN Security Council are downright illegal, how does one strike a balance between the need and desire to uphold and strengthen international law and the duty and ability to save lives from death and oppression if these two concepts come into conflict?

The key problem in the Kosovo case was that the UN Security Council was not able to transcend its internal divisions and act on the Kosovo matter resolutely. Russia and China held firm in their opposition of any sanction for the use of force.¹¹⁴ As the Kosovo crisis worsened, the obvious question became whether the international community should allow a pair of vetoes by permanent members of the Security Council to prevent and halt a military solution that many believed could put an end to the suffering.¹¹⁵ NATO leaders did not think so and they resorted to the use of force despite a clear lack of UNSC approval.

But the question here should not be whether the UNSC dealt with the Kosovo matter appropriately – there is no doubt that it had not. Instead, the question should be shifted to NATO leaders and a broader sense of responsibility should be advocated. That is, if NATO was willing

¹¹⁴ China, a permanent member, is for example still skeptical of the entire idea of humanitarian interventions, even in cases where there are clear instances of human rights violations. Jonah 1993, 70.

¹¹⁵ Kofi Annan echoed such sentiments in the address to the 54th session of the General Assembly. He wondered what the international community would have done had a coalition of states been willing to intervene in Rwanda in 1994 without the authorization of the Security Council. “Should such a coalition have stood aside and allowed the horror to unfold?”

to take upon itself the duty to right the wrongs in Kosovo it should have made a greater attempt to legitimize its authority to act.

There is a currently available way of simulating the support of the United Nations without obtaining the Security Council's support and it does not involve making any changes to the UN Charter. It involves using the 1950 "Uniting for Peace" resolution which:

Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.¹¹⁶

The resolution further resolves that if the General Assembly is not in session at the time, it may be convened in emergency special session within twenty-four hours of the request. Either a majority of the General Assembly or any nine members of the Security Council may call for such a special session.¹¹⁷

The obvious conclusion here is that NATO had the opportunity to see whether it was truly acting with the support of the international community by putting the matter in front of the UN Security Council and then fighting the expected Russian and Chinese vetoes within the General Assembly. In fact, Nicholas Wheeler and Nigel White have both argued that NATO did not even need to go so far as provoking a veto; it could have simply tabled a draft resolution presented to the UNSC and then introduced a separate procedural resolution suggesting that the matter be transferred to the General Assembly. As procedural resolutions are not subject to a veto, this UNSC vote could have passed safely. The endgame of this legal maneuver would have been a vote in the General Assembly on the Kosovo situation – a vote that, although lacking in

¹¹⁶ <http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>

¹¹⁷ Baehr 2000.

prescriptive power afforded to UNSC resolutions, could have served as a powerful affirmation of NATO's authority to act to preserve basic human rights and maintain peace and security in Kosovo.¹¹⁸ Moreover, this vote would not have been a matter for an emergency session; the UN Security Council had been wrestling with the Kosovo problem for the entire 1998 calendar year – at any point in time this matter could have been put before the General Assembly.¹¹⁹

Although the International Commission on Intervention and State Sovereignty does not support this view directly in its report The Responsibility to Protect it does suggest this type of an action for future interventions:

One possible alternative, for which we have found significant support in a number of our consultations would be to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established “Uniting for Peace” procedures. These were developed in 1950 specifically to address the situation where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security.¹²⁰

The report further states that although the General Assembly does not have the power to direct that an action be taken, strong support from the Assembly could cause one of the holders of the veto to budge. The value and the danger of such a showing are further explained in the report:

The practical difficulty in all of this is to contemplate the unlikelihood, in any but very exceptional case, of a two-thirds majority, as required under the Uniting for Peace procedure, being able to be put together in a political environment in which there has been either no majority on the Security Council or a veto imposed or threatened by one or more of the permanent members – although Kosovo and Rwanda might just conceivably have been such cases.¹²¹

¹¹⁸ Wheeler 2000, 562; White 2000, 40.

¹¹⁹ As Nigel White has stated “It is somewhat ironic that a procedure advocated by the Western states in 1950 was conveniently forgotten in the case of the Kosovo crisis. The cumbersome nature of convening a special session or emergency special session of the Assembly is no real excuse given that NATO first threatened to use force without express authority in October 1998.” White 2000, 41.

¹²⁰ ICISS report 2001, 53. For more on this report see Evans, Gareth and Mohamed Sahnoun. 2001. Intervention and State Sovereignty: Breaking New Ground. *Global Governance* (April-June): 119-124.

¹²¹ ICISS report 2001, 53.

A two-thirds approval in the General Assembly could serve as a powerful sign that significantly boosts the overall legitimacy of a non-UNSC intervention. Thus, conducting a military intervention that has the stamp of approval of two-thirds of the General Assembly may still be an illegal act, but its flavor is at least a palatable one. This way, if the coalition that plans to conduct the intervention succeeds in garnering more than two-thirds of the votes in the General Assembly, that amounts to expressed support from more than 120 nations. Going through the General Assembly and getting the necessary votes not only provides the intervener with a new coat of legitimacy but it also pays proper homage to both the responsibility to protect the human rights of all citizens as well as the responsibility to preserve order within the international community.

However, there are serious concerns with utilizing this approach. Shashi Tharoor and Sam Daws explain that:

The potential difficulty with this approach is that it substitutes for the primary and mandated authority of the Security Council, where an attempt has been made under the charter to marry power with representation, the “one state-one vote” democracy of the General Assembly, where countries such as Nauru and Tuvalu with a population of 12,000 each have the same vote as countries such as China and India, with over a billion citizens each. Certainly the General Assembly can claim to be more representative of world opinion than the Security Council, but a General Assembly majority itself is no guarantee of a majority of world opinion. If the General Assembly were to take upon itself to pronounce on such matters, it would be the composition of votes – that is, which countries voted in favor, which against, and which abstained – that would add to or detract from legitimacy in a particular case.¹²²

These are valid points and I will admit that the “Uniting for Peace” resolution approach is not a perfect one. Strange vote combinations that pit a great minority of the world population against the majority are possible under this formula. However, it should be noted that this approach allows for two things that a simple bypassing of the General Assembly does not. First, it allows

¹²² Tharoor and Daws 2001, 21.

for an informed debate between the states of the UN to take place on the Assembly floor; second, it clearly shows that regardless of their size or relative power the intervening actor still has more than 100 nations supporting this action, a fact that cannot be ignored in any argument.

In the end, it is important to realize that had NATO secured a two-thirds majority vote to intervene from the General Assembly, its legitimacy to do so would have been greatly boosted by such a show of international support. However, without it NATO lacked an effective proof of worldwide backing and put in question the motivations behind its actions in Kosovo, thus making it very difficult to classify its intervention as legitimate.

Support of the International Community

One particular problem with NATO's intervention is that the military alliance does not serve as an effective representative of the world community.¹²³ This problem is more than just one of membership – NATO's 19 member states are predominantly European and include the United States. The dilemma here is one of overall perception that cannot be denied – that judging by who conducted most of the interventions in the closing decade of the 20th century the Western world is setting the trend when it comes to humanitarian interventions.¹²⁴ Although sensitivity over such uncomfortable reminders of imperialism should never be a reason for preventing international involvement, the fact that NATO's actions directly challenged the authority of the UNSC and the United Nations in general should be explored. When it comes to the use of force in Kosovo Christine Chinkin argues that:

This disregard at the behest of a regional defense organization dominated by the sole remaining superpower reveals the “new world order” as a Western hegemon. The Security Council is resorted to, or not, according to the likelihood of

¹²³ It became obvious that this is a controversial point when Russia sponsored its draft resolution to stop the bombing.

¹²⁴ Chinkin, 1999, 844.

conformity within it and the “reinvention” of NATO in the post-Cold War era is at the expense of the agreed normative order.¹²⁵

Moreover, that states like India had clearly objected to NATO’s “acting as if it is above the law” does not bode well for overall peace and security.¹²⁶ Additionally, Russia’s contention that NATO’s action went beyond Kosovo and directly challenged the council’s authority runs counter to the expectation that states should place greater faith into the UN and its ability to handle crises.¹²⁷ This idea was not limited to just the Russian delegation. Ralph Zacklin argues that NATO’s bombing campaign overtly opposed the principle that the UN served as the only universal political organization and, as such, represented the international community of states.¹²⁸

As an example, the Kosovo Commission pointed out that NATO’s citing of the UN’s inability to protect civilians in Bosnia was a somewhat self-serving act in terms of explaining why NATO was better suited to act in Kosovo; a great factor in the UN’s failure in Bosnia was a lack of effective support by NATO countries.¹²⁹ Similarly, it is difficult for the NATO countries to push for greater involvement in the UN by other nations when the alliance has made it clear that it was quite willing to bypass the UNSC and ignore the General Assembly’s secondary role in peace maintenance.

Additionally, Zacklin offers an analysis of a debate between member states that took part after Kofi Annan’s address to the General Assembly on September 20, 1999, where the Secretary-General referred to humanitarian intervention as an “emerging norm.”¹³⁰ Zacklin

¹²⁵ Chinkin 1999, 843.

¹²⁶ Shinoda 2000(b), 516.

¹²⁷ Shinoda 2000(b).

¹²⁸ Zacklin 2001, 926. Secretary-General Kofi Annan was also disappointed with the marginalization of the Security Council in the Kosovo matter.

¹²⁹ The Kosovo Report 2000, 170.

¹³⁰ United Nations, “Secretary General Presents His Annual Report to the UN General Assembly” UN Press Release, SG/SM/7136.

concludes that out of 51 states who participated in the debate, only Germany and Sweden strongly advocated military interventions in instances of humanitarian crises. On the other side of the spectrum, a larger group of about two fifths of participating states, composed mostly of states from Africa, Asia and Latin America strongly opposed such humanitarian intervention and defended the principle of national sovereignty as “unchallengeable.” The final group situated itself somewhere in the middle, not opposing humanitarian intervention outright but also calling for caution and a development of clear criteria that will assure application on an equitable basis. Zacklin also points out that a cause for concern is the fact that the division between supporters and opponents of intervention was on a strictly North-South geographic basis and that two of the states who opposed intervention were Russia and China, both permanent members.¹³¹

The point here is not to argue that other states’ fears of neo-imperialism should serve as a check on NATO’s actions; instead, the argument is that along with a responsibility to protect human rights comes a responsibility to exhibit respect for and preserve the general principles of international relations which make peace and security possible. The most accurate way to do so is to consult the General Assembly and conduct the intervention with as much international support as possible. Thus, after consideration of the above matters it is important to proceed to defend the underlying assertion present for most of this section – that intervention by NATO should enjoy broad support from the community of states. In the next subsection I will present an argument for why this is so. In short, mandating that international actors secure either a UNSC mandate or support from two thirds of states in the General Assembly is the only objective way of judging the validity of underlying reasons that motivate the intervention.

¹³¹ Zacklin 2001, 935-6.

Judging NATO's Motives for Intervention

The charge of neo-imperialism levied against NATO is a simple one – many states believe that the true reasons for NATO's intervention in Kosovo had little to do with stopping the impending humanitarian disaster but were instead more concerned with assuring the alliance's credibility as an effective security agent in Europe. As a result, many states remain skeptical of not just the possible precedent-setting character of such intervention but also of the entire idea of humanitarian intervention. To assuage these fears and protect states from future interventions that only pay lip service to humanitarian problems but, instead, have other motives behind the action, securing international approval becomes a key point. Analyzing NATO's methods and communicated motives for intervening in Kosovo illustrates why broad international recognition for such action should be obtained.

The first point of departure for this exploration should be the stated goals of NATO at the beginning of the bombing campaign. As it turns out, there were many. Dr. Javier Solana, then Secretary-General of NATO emphasized: the protection of the basic rights of the people of Kosovo; the prevention of instability spreading throughout the region; the support of international efforts to extract a temporary political settlement from the Yugoslav government.¹³² Although the first two are certainly noble goals, the final one is extra-legal as the 1969 Vienna Convention on the Law of Treaties clearly states that “a treaty is void if its conclusion has been procured by threat or use of force.”¹³³ Now, if forcing Milosevic to sign an agreement is a way to protect the Kosovars, then NATO's goals are not problematic. However, the difficulty of judging

¹³² Dr. Javier Solana, Press Statement, <http://www.nato.int/docu/pr/1999/p99-040e.htm>

¹³³ Mertus took issue with this stated goal of NATO as well – she feels that uses of force cannot be justified if its intent is to force a leader to sign a political agreement. See Mertus 2000(a), 1744; Mertus 2000(b), 528. See also Shinoda 2000(b), 515.

whether NATO's overall approach was indeed an adequate response to Kosovo's problem will become apparent in the paragraphs below.

It should be noted that there are multiple attacks upon the legitimacy of NATO's intervention that dispute the factual basis of certain claims inherent in the Kosovo Commission's assessment of the situation. The first of these factual disputes takes issue with the classification of Kosovo as a humanitarian crisis. Despite a proven track record of oppression, for Mandelbaum the 45 confirmed deaths in Racak hardly compare with the hundreds of thousands victims of ethnic cleansing in Rwanda. He writes that: "The Serb treatment of Albanians in Kosovo before the NATO bombing was hardly exemplary, but measured by the worst of all human rights violations – murder – neither was it exceptionally bad."^{134,135} Jonathan Charney also argues that "the extent of the human rights violations prior to the withdrawal of the OSCE's observer force was not massive and widespread."¹³⁶ Charney supports his argument by citing the International Criminal Tribunal for the former Yugoslavia's indictment of President Milosevic on May 22, 1999, which had a number of general accusations and only one specific one – the Racak massacre, which took place two months prior to NATO's intervention.¹³⁷

This is a point that should be clarified. First, this objection is not a matter of the "perfect being the enemy of the good," although Mandelbaum does question the lack of NATO's concern over worse human rights abuses in Sudan and Rwanda. Mohammed Ayoob takes issue with selective interventions for a different reason. While discussing the notion of NATO's bombing

¹³⁴ Mandelbaum 1999, 4.

¹³⁵ It should be noted that the mass exodus of Kosovars did not really start until after March 24, 1999. Moreover, the evidence proving that an alleged "Operation Horseshoe" to rid Kosovo of its ethnic Albanian population ever existed remains uncovered. Thus, it is difficult to tell whether the Kosovar Albanians were in fact escaping from Serb persecution or simply NATO's bombing missions. Also, as Milosevic stands on trial in Hague, the underlying evidence of a Serb plan to rid Kosovo of its ethnic Albanian population, Operation Horseshoe, is being called into question. For a more thorough discussion see Mertus 2001; The Kosovo Report 2000; Judah 2000; Daalder and O'Hanlon, 2000; <http://www.un.org/icty/transe54/020214IT.htm>

¹³⁶ Charney 1999, 839.

¹³⁷ Ibid.

campaign as an example of the military alliance acting on the behalf of the international community Ayoob writes:

The problem becomes more acute when these “representatives” of the “international community” choose targets for intervention selectively while ignoring human rights violations of equal or greater magnitude elsewhere. Much of this selectivity stems from the strategic interests of the dominant North Atlantic Concert. The decision in 1991 to create a safe haven for the Kurds in Iraq but not in Turkey, where the human rights of Kurds were being violated with equal severity, cast grave doubts on the sincerity of the intervening powers.¹³⁸

As Ayoob points out, the concern is not so much that realist concerns and power relationships in the international order prevent universal intervention. The issue gets problematic if a significant portion of the world feels that a certain intervention – regardless of its impact on human rights – also conforms closely with the realist concerns of one or more major powers. At that point in time, discerning whether hidden agendas are at work becomes difficult and the entire process becomes tarnished.

Second, the proposed action here is not for NATO to abstain from intervening in Kosovo because nothing was done in Rwanda.¹³⁹ Instead, the argument here is that the international community’s lack of a prompt response in Rwanda should not be a great part of the justification for intervention in Kosovo because to place the two into the same category is to exaggerate the humanitarian crisis in Kosovo. While estimates of killing in Rwanda are in the hundreds of thousands, figures on Kosovo are still murky – however, the commonly agreed to estimates are around ten thousand dead throughout Kosovo, including deaths suffered during the 1999 air campaign.¹⁴⁰ While human deaths cannot be compared in such numbers but that the

¹³⁸ Ayoob 2001, 225.

¹³⁹ The moral bankruptcy of such a view should be apparent. A single slow response on the international scale or the inability to intervene everywhere equally would end up tying the international actors’ hands and in the end result in no one intervening anywhere.

¹⁴⁰ http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/b_right_1.shtml I used BBC’s reporting for as a trusted news source. Some allege that the number is higher while others that it is even lower.

documentations of widespread acts of genocide are certainly clearer in the case of Rwanda. The intervention in Kosovo came for a different reason – to prevent an impending disaster. As such, it is more open to criticisms that other reasonable means of reaching a peaceful agreement were not fully used.

Still, even though such discussions deal with a largely subjective search for a threshold of a humanitarian crisis, they nevertheless point to an important development in the Kosovo case – there were serious concerns whether the humanitarian situation on the ground was grave enough to warrant such a sudden and thorough use of force. Whether one agrees with the urgency of the Kosovo situation is not the issue; rather, the Russian delegation's expressed view that the application of force was premature should serve as further proof that in some instances, humanitarian catastrophes are a matter of interpretation. Simply put, states like China and Russia – whose permanent seats on the UN Security Council charge them with the responsibility of upholding international peace and security – did not feel that the potential level of suffering in Kosovo met the threshold for an armed intervention. Moreover, that states like Namibia, China and India supported the resolution to halt the bombing points to an ideological rift in the international community when it comes to NATO's diagnosis of the Kosovo problem and the alliance's prescribed solution.

There are also those who do not believe that all reasonably available negotiation attempts were utilized and that the bombing campaign was in essence a premature use of force. Michael Mandelbaum is one of them. Comparing the initial terms of the Rambouillet agreement with the final Military-Technical Agreement that brought the war to an end he sees important departures and disagrees with Albright's claim that prior to resorting to the use of force NATO went the

extra mile to find a peaceful solution.¹⁴¹ According to the Agreement, the United Nations, and not NATO, received ultimate authority to oversee Kosovo. As Russia, a permanent member on the UNSC with a veto, was known to be sympathetic to Yugoslavia's situation, this was a victory for Milosevic. Additionally, the Rambouillet agreement called for a referendum on Kosovo's status and future within three years of signing it – after the Kosovo war this provision disappeared and there was no mention of it in the Military-Technical Agreement. Finally, perhaps the most serious sticking point in the Rambouillet document, that of NATO troops' freedom of movement throughout the entire FRY was in the final June 9 agreement limited to just Kosovo. While it is impossible to know whether Milosevic would have accepted something like the Military-Technical Agreement before the war, these differences between the two documents put into question the extent of NATO's commitment to a search for a peaceful solution.¹⁴²

Some mention should be made of the fact that NATO's goals were certainly pluralistic to some extent – in addition to saving lives, NATO was concerned with restoring its credibility as a viable military alliance on Europe's soil in the 21st century.¹⁴³ Writing in *Foreign Affairs*, Peter Rodman agreed that success in this mission provided valuable gains for NATO – “a success in Kosovo would guarantee the primacy of NATO in Europe's future.”¹⁴⁴ As one particularly harsh critic put it:

According to the official version, Kosovo had a problem, and NATO provided the solution. In reality, NATO had a problem and Kosovo provided a solution.

¹⁴¹ Mandelbaum 199, 3.

¹⁴² Mandelbaum suggests that a part of the reason for this discrepancy may have been the fact that NATO leaders never intended for the bombing campaign to be so thorough – they figured that Milosevic would fold after a few days of heavy attacks. Ibid 3. Richard Falk subscribes to the same theory, further pointing out that once this assessment had proven false NATO had no recourse but to continue bombing until an agreement had been reached – otherwise its credibility would have been destroyed. Falk 1999(a), 850. Also see Shank 1999.

¹⁴³ See Mertus 2000(a), 136; Mertus 2001, 141; Judah 2000, 241; Wedgewood 829.

¹⁴⁴ Rodman 1999, 46.

NATO's problem was to find a new *raison d'être* in the absence of the "Soviet threat."¹⁴⁵

These writers all allege that even though Kosovo was a problem prior to March 24, 1999, and that there were humanitarian reasons to get involved, the actual operation's purposes were more self-centered on NATO's survival as a viable military organization than they were humanitarian. The idea here is not to side with any specific view of the motivations behind NATO's air war over Kosovo. Instead, the discussion in this sub-section is meant to illustrate that judging whether the political situation in one country warrants unauthorized intervention is not only controversial but also downright subjective and difficult to defend without demonstrated international support.¹⁴⁶

Some authors have identified this problem already and proposed solutions. Dino Kritsiotis wonders why complaints about selective interventions that comply closely with national interests of the intervening states are not a subject of greater discussions. In response, Kritsiotis develops a method of incorporating states' motives into the overall question of legitimacy. His stated view is that:

Even where a state's reasons for action are open to question or placed in grave doubt, if the international community is willing to summon and approve the transnational use of force to achieve a designated humanitarian objective, the use of force should be permitted insofar as – and only insofar as – the use of force is targeted towards attaining the permitted humanitarian reason for action.¹⁴⁷

But the first problem with this approach is that the act of judging motives behind the intervention now becomes a matter of examining the individual strategic decisions made during and after the use of force – very much a matter of testing the limits of the just war doctrine. There is also the

¹⁴⁵ Johnstone 2000, 7-8.

¹⁴⁶ Dino Kritsiotis has argued that discovering states' purity of motive is an impossible task. Kritsiotis 1998.

¹⁴⁷ Kritsiotis 1998, 1039.

matter of properly defining the term international community – does it refer to the UN Security Council, the General Assembly or a coalition of democratic states.

More importantly, this proposal still depends on obtaining the international community's permission to intervene, especially in cases where the initial goals of the action are defined and limited by very broad terms such as “all necessary means.” As such, the original dilemma is hardly resolved – in the case of Kosovo, Kritsiotis' proposal fails to resolve the central question of whether NATO's air war to overthrow Milosevic is an acceptable use of force to protect the human rights of Kosovars. One is simply left to assume that if such permission could have been secured the air war would have been justified.¹⁴⁸

Such shortcomings further illustrate precisely why obtaining clear international support is so important when conducting an UNSC-authorized intervention – not only does it provide an important mandate for intervention, but it powerfully dispels notions of imperialism and pushes aside objections over ulterior motives that may be driving the process. Finally, and perhaps most importantly, it assures that a truly horrible violation of human rights has occurred, one that has shocked the world wide.

Conclusions

Returning to the Kosovo Commission's earlier argument on why NATO's action in Kosovo was legitimate, the primacy of securing broad international support in the absence of an explicit UNSC mandate becomes clear. The reason why the Kosovo air war should not be accepted as legitimate is that the perceived urgency of intervention is not always a clear-cut

¹⁴⁸ To be fair, Kritsiotis' article was published before the Kosovo intervention took place. However, the limitations of his proposal still stand – judging legitimacy is no easier under this idea because the key sticking points are circumvented by arguing that if the international community approves it, then they should be allowed. But what happens when such international recognition and support are not forthcoming is the essential question that needs to be answered.

matter. But with broad international support – either a UNSC resolution or a two-thirds vote in the General Assembly – the effect of differences in interpretations of the overall level of urgency does not have to be deleterious. If NATO had secured a two thirds majority within the General Assembly as per “Uniting for Peace” resolution, arguments about NATO’s need for credibility, its true motive for intervention, the reality of the humanitarian emergency in Kosovo, and the efficacy and thoroughness of the negotiations process would have all largely been rendered moot as the majority of the world community had deemed the situation grave enough for an intervention.

As it stands, NATO chose to ignore the General Assembly. Thus, it did not effectively represent the world community and, whether it intended to do this or not, set up a very shaky precedent for intervention. To legitimate NATO’s action is to legitimate a precedent that in essence boils down to the following: An international actor can violate the territorial boundary of a nation-state if that actor determines that the humanitarian conditions in said state constitute a threat to international security and peace. Additionally, this action is legitimated if consequent attempts to stop such action in the UN Security Council or the General Assembly fail.

Such a precedent would not bode well for the future of the international community. Moreover, it is missing a clear definition of authority – one that could be fixed by mandating that prior to initiating the intervention the international actor secures the General Assembly’s support by way of the Uniting for Peace resolution. Had the NATO alliance done this, its intervention in Kosovo in 1999 would have still been illegal, but it would have been legitimate.

CHAPTER FOUR

CONCLUSIONS

The stated central question of this thesis was to answer the “who” question of humanitarian intervention – who should conduct it. Unfortunately, the answer to this question does not exist in a vacuum and it is intimately related to the question of when to intervene and why to intervene. Moreover, the answer cannot be given as a simple list of international actors, even if they are ranked according to some determined and patterned order. Instead, I have sought to answer the “who” question by generalizing it as a broader discussion of authority to exercise power and act on emerging norms in international affairs. I believe that the answer to this question does not lie in delineating which actors have the most authority in which circumstance, but in specifying an appropriate and more general definition of legitimated authority to intervene. The highly qualified statement from Chapter Two stems from this approach: that *armed humanitarian interventions* which are not *sanctioned by the UN Charter* or *explicitly authorized* by the United Nations Security Council should only be legitimated when *adequate proof of support* by the *international community of states* has been obtained. Obviously, rooted deeply within this argument is the belief that the international community of states’ communicated support should be the only acceptable legitimatization of humanitarian intervention. The final subsection of Chapter Three proceeded to defend this last assertion by pointing out that the only truly effective way to counter the objections that come with the intervener(s)’ pluralistic goals for intervention is to have it authorized by the international community of states.

Aside from justifications that meet the requirements of Article 51 or a certain UN Security Council resolution, the authorization process proposed in this thesis was outlined in the

“Uniting for Peace” subsection of Chapter Three. The idea presented was that a failure to obtain a favorable outcome in the Security Council is not the end of the line for international actors concerned with protecting human rights. If the UN Security Council is unwilling or unable to act the General Assembly can be persuaded to sanction a military intervention for humanitarian purposes. If the final vote tally in the General Assembly reaches two-thirds in favor, I argued that this would be a sufficient demonstration of international support to deem the action legitimate.

When this analysis was applied to NATO’s intervention in Kosovo, the result was that such action was neither legal nor legitimate. NATO did not qualify for exemption from the restraints of Article 2(4) specified in Article 51, it violated the provisions of Article 2(4), and it did not have sufficient authority to intervene on the basis of resolutions the UN Security Council previously passed on the Kosovo matter. Moreover, because NATO did not bring up the matter for a vote in the Security Council nor did it attempt to obtain the General Assembly’s support through the procedures established under the Uniting for Peace resolution, its actions cannot be said to have received the backing and approval of the international community of states. Lacking such approval, NATO’s pluralistic goals for intervening in Kosovo created a dangerous precedent of self-justified intervention and demonstrated why international support is key in determining legitimacy.

The remainder of this chapter seeks to address objections to the argument advanced above. Specifically, it offers a discussion of alternate methods of legitimizing intervention and the drawbacks of defining a two-thirds vote in the General Assembly as international support.

The Consequentialist Argument for Intervention

Throughout this thesis international support was used as the benchmark test for judging the legitimacy of humanitarian intervention – the question that stems from this reliance on international backing is whether there are other ways of legitimating NATO's actions in Kosovo specifically and such military interventions generally? In analyzing opposing arguments throughout this paper I have identified two types of alternate approaches to legitimacy, loosely termed as re-defined sovereignty and consequentialism. I do not believe that either of these can serve as a sufficient basis for establishing legitimacy.

A good summation of the re-defined sovereignty argument can be found in Julie Mertus' position that the mistreatment of ethnic Albanians under Slobodan Milosevic's regime rid Yugoslavia of the right to claim protection under existing norms of sovereignty. As such, NATO did not bomb a sovereign state but an illegitimate government with an unsatisfactory human rights record. This argument and its shortcomings were addressed in Chapter One under the heading of "Sovereignty as Responsibility." Thus, the rest of this section will examine the consequentialist claims.

The consequentialist argument was perhaps best captured by the International Commission on Kosovo and the analysis that, after exhausting all reasonably available non-forceful avenues, the intervention had an overall positive effect on Kosovo and its population. That is, Kosovo is obviously better off today than it would have been under Milosevic. As Reisman has stated plainly "Kosovars are back in their homes."¹⁴⁹

In many ways, it is impossible to address this argument adequately for the simple fact that we will never know for sure what Kosovo would have looked like in 2002 if NATO had not intervened. While a peaceful solution could have put matters on the right track as early as 1998,

¹⁴⁹ Reisman 1999, 860.

it is difficult to predict how long such a negotiated settlement would have lasted. Similarly, even though Milosevic lost power in 2000, it is difficult to ascertain whether he was on his way out or whether the horrors of the Kosovo air war sealed his political fate. The only thing that is known for sure is that Kosovo is in better hands in 2002 than it was in 1998. The question then is whether this fact is enough to legitimize actions like NATO's intervention in Kosovo.

The answer to such ex post facto legitimatization is one that can be levied against consequentialist thought in general. That is, the international community simply should not allow the nation-states to operate in ways that seek to "act first and explain as they act" because it makes determining the authority to intervene and deriving prescriptive rules very difficult and rather relativist. Moreover, rules and steadfast procedures of international behavior and order, be they laws or customs, have come about for a reason – they successfully prevent or at least seriously deter states from committing unwanted actions that are deemed injurious to the overall international community. These rules are not mere suggestions to be ignored and broken in hope that a positive outcome will legitimize and vindicate the infraction – the rules' ability to function depends on their mutual and uniform respect. The fact that 189 nations are signatories to the UN Charter is a powerful message about the trust that the majority of the world has placed into the Security Council and its primary right to address issues of international peace and security. In other words, by signing the UN Charter each state effectively communicates to the international community its preference for reaching conflict solutions collectively instead of individually. Ignoring that trust and purposefully acting outside of the system established to foster international cooperation on such security matters, even if the outcome is positive, erodes away the Council's and the UN's power to deter such future actions which may or may not bring about positive results. Therefore, even though Kosovo is in better hands with a steady deployment of

NATO troops and the OSCE overseeing its public institutions, this hardly justifies the ensuing bombing campaign which established an uncomfortable precedent of intervention not sanctioned by the international community and carried out in the name of, among other things, human rights.

Drawbacks of Appealing to the General Assembly

Throughout this paper I argued that a two-thirds majority vote in the UN General Assembly represents adequate authorization when the UN Security Council is unwilling to act. However, Nicholas Wheeler brings up three powerful arguments against counting on the General Assembly to serve as a source of alternative international support for humanitarian interventions.¹⁵⁰ First, he wonders whether the presence of so many states with a questionable human rights record makes the UN General Assembly fit to authorize humanitarian interventions. Second, he holds that using the General Assembly to effectively overturn a veto is more damaging to international order than ad-hoc interventions not sanctioned by the UNSC. Third, he believes that any recourse to the General Assembly avoids the central question of justifying non-intervention because the new dilemma then becomes not whether to intervene without UNSC support, but whether to intervene without the General Assembly's support.

I will address all three of these arguments in the paragraphs below.

The other side of the “Uniting for Peace” resolution

Wheeler's first objection goes to the roots of the original intent of the “Uniting for Peace” resolution. The resolution was adopted at the height of the Cold War in 1950 as a way for the West to bypass the Soviet veto. At that time, the West still had a clear majority in the General

¹⁵⁰ Wheeler 2001(b), 559.

Assembly, and it could shift the power to act on matters of international peace and security away from the UNSC and to the Assembly floor where it could hope for a better outcome.¹⁵¹ Since the resolution's inception, however, UN membership has changed drastically and the Western democratic states no longer hold a numerical majority, much less one necessary for a two-thirds majority. Wheeler does not think that this fact bodes well for any vote on intervention in the General Assembly as many governments are fearful of such future actions due to their own human rights records. Thus, they would vote down any such resolution for fear of setting a precedent that could be used against them in the future.¹⁵² He questions whether countries with questionable human rights records should be allowed to render humanitarian intervention decisions.

However, even though Wheeler's point is valid, it is difficult to see its possible applications or where such an observation could lead. First, it is difficult to make the act of judging a country's human rights record an unbiased task, especially if the implied impact of such judgments is a loss of credibility and influence on the international scale.¹⁵³ This also brings to light a larger question of whether any organization, state or group of states has the necessary moral and political objectivity to render judgments of whether certain states should be allowed to participate in the rendering of decisions to intervene. Second, something should be said for the fact that the international community is what it is – composed of states whose levels of economic development, internal cohesion, and respect for human rights differ. While working with such a conglomeration of varied interests may not allow certain matters to be dealt with in the most desired fashion it would hardly be a step forward to exclude states with questionable human rights records from participating in the process of setting trends for the development of emerging

¹⁵¹ Fassbender 1998.

¹⁵² Wheeler 2001(b), 559.

¹⁵³ This is not to say that there are not any clear-cut cases – however, the process is rife with subjective judgments.

humanitarian norms, especially if the likelihood is high that they could find themselves on the receiving end of just such an intervention. Thus, while these states' tendencies toward self-protection would certainly slow or hinder any attempts to advance the notion that human rights abuses should be a matter of greater international concern and involvement, this fact alone should not prevent them from participation. After all, while Russia and China's human rights records are anything but spotless no one would seriously advocate excluding these countries from discussions over humanitarian intervention because their projected military power is so great. Similarly, while insecurities about imperialistic intervention under the guise of humanitarianism may hinder international aid efforts, these are the unfortunate part of the international equation.

Preserving the permanent member veto

Wheeler's second point offers an interesting look at the politics behind NATO's bypassing of the General Assembly and serves as a partial response to such concerns. Wheeler proposes that one reason why the United States may not have wanted to engage the General Assembly in the Kosovo debate deals with its unease over the possibility that such a move could shift power away from the Security Council and seriously undermine the influence of the veto.

Wheeler continues:

The UK and the US felt it necessary to bypass the veto in this particular case, but did not want to issue a direct challenge to the legitimacy of the veto. Moreover, this position is supported by Russia and China who are eager to maintain the primacy of the UN [Security Council], since it is the only body in which they continue to have major influence in the global arena. A further reason why proposals to develop the General Assembly's role under "Uniting for Peace" will not receive support from Western states is that this might embolden the Arab states at the UN to try to circumvent the US veto by adopting a resolution in the General Assembly that recommends coercive measures against Israel.¹⁵⁴

¹⁵⁴ Wheeler 2001(b), 567.

Wheeler's analysis of the reasons for US' decision not to utilize the "Uniting for Peace" resolution thus asks us to consider whether, once the Council is deadlocked, greater injury is done to the international order and the stability created by the existence of a permanent five veto by seeking approval from the General Assembly or by ignoring the General Assembly as well as the UNSC and proceeding with the intervention without sanction from either body.

This is a very difficult question to answer. Still, the advantage of the General Assembly approach becomes clearer after considering that a step away from the United Nations is a step toward pure power politics. In a world where the United States holds the clichéd title of the world's last remaining superpower an intervention approach that seeks to bypass the UNSC and the General assembly in order to avoid a direct challenge to the permanent member veto may very well be a valued outcome. However, should the relative projections of power and strength between the permanent members change, the international community is left with unpleasant precedents of illegal acts of intervention whose underlying motivations for action are no doubt pluralistic. In addition, such an approach has a negative impact on developments of human rights norms, which then become more and more closely associated with the growing power of the Western states.

Nevertheless, when it comes to preserving the role and power of the veto, I am not completely convinced that Russia and China would rather see their vetoes flatly ignored by another permanent member instead of being voted down by more than a hundred other nation-states of the General Assembly.¹⁵⁵ After all, the challenge is nevertheless there – in the case of ignoring the UNSC and the GA the challenge takes the form of a direct power approach, where a

¹⁵⁵ As Wheeler does not provide any specific evidence of his own, I believe that this would be an important incentive to thoroughly document Russia and China's views on the Kosovo intervention and the overall role of humanitarian interventions in international peace promotion.

state powerful enough to intervene simply ignores the opposition present in the Council and the Assembly; on the other hand, in the case of a passed Uniting for Peace resolution the challenge takes the form of a unified front of states who happen to feel strongly about a certain issue.

Finally, I believe that a disagreement over the need for an intervention is an instance where effective bargaining and issue linkage between the permanent members should come before acting outside of the UN because of an unsatisfactory outcome within it. Providing a large majority of the states really does favor such action, permanent members could be induced to switch their votes from vetoes to mere abstentions with as little as economic concessions and as much as threats of taking the debate to the General Assembly. The possibilities are truly varied – all that is required is a commitment by the state(s) pushing for intervention to work within the UN system. Thus, if a certain state is blocking a key resolution that could save thousands of lives, the weight of worldwide public opinion could be brought to bear and perhaps force the said state to budge. Similarly, for states that are concerned about possible future expansions of the authority to intervene based on previously passed resolutions, specific provisions can be inserted that prevent just such interpretations.¹⁵⁶ Such an approach shows a greater commitment to international order and the overall idea of protecting human rights. It also provides the intervening state with a thicker coat of legitimacy.

With or without the General Assembly?

Wheeler's third point is that acting through the General Assembly does not bring us closer to the central question of humanitarian intervention. Echoing Kofi Annan's earlier address to the General Assembly, Wheeler modifies the question and asks, "Should a group of states

¹⁵⁶ An example would be the Security Council delineating temporal limits on the use of force or expirations of granted authority on the basis of ground developments.

stand aside if they cannot secure the necessary votes in the GA in cases where massive and systematic abuses of human rights are taking place?”¹⁵⁷ The answer to such a hypothetical question depends on the circumstances but it can be summarized as a conditional “yes.” If the collection of states intent on intervening has not secured the *support of the international community*, they should be expected to respect the territorial boundaries of the state in question. Obviously, the phrase “support of the international community” is the key factor in this argument; but the overall answer to the question goes back to the inability to trust nations’ own reasons for intervention or judge their true motives.

However, it should first be pointed out that such a hypothetical proposition conflates the issue in an uneven and unfair manner by making sweeping assumptions and taking shortcuts towards explanations of events. On one level, such a simplistic formulation illustrates the shortcomings of not evaluating the right or duty to intervene within the context of the international actors’ authority.

Second, military intervention is a serious matter. It may be a particularly effective solution to the immediate problem of brewing conflict and potential genocide, but it is a rather harsh and complicated solution. As it is likely to require significant sustained support from international institutions in the post-intervention rebuilding process – especially in instances of failed states – and is likely to involve a sizable loss of life, it should serve by definition as one of the last resorts. As a result, if there are legitimate concerns and doubts over the extent of the previous commitment to negotiations and non-forceful coercive measures, the use of military force is difficult to justify.

This is an important point. Humanitarian crises do not exist in a vacuum, nor do permanent member states exercise their veto powers while turning a blind eye to the situations in

¹⁵⁷ Wheeler 2001(b), 559-60.

the troubled state or region. More likely than not, the group of states that is standing ready to intervene as well as the states that voted down the intervention proposal have a serious stake in the situation. As was evidenced in the discussion of NATO's stated goals and reasons for the intervention, there are numerous reasons to be reluctant of allowing states to act without UNSC's approval as their motivations are difficult to gauge. This difficulty of judgment is indeed a serious and crucial problem when it comes to deciding the legitimacy of a certain action. Since there is often a difference between publicly stated goals of politicians and their governments' overall foreign policy, the first part of the problem is that it is truly difficult to ascertain the real motivations behind an international actors' intention to intervene.

Additionally, the lack of a required majority in the Security Council or in the General Assembly can mean a number of things – among them a very rational and solid conclusion that there is no impending humanitarian crisis and that non-forceful measures and approaches have not yet run their course. In the Kosovo case, Russia's insistence that Milosevic could be bargained with thus becomes key; unfortunately, the problem here is that NATO's intervention took place to prevent another Rwanda or Bosnia. Once the air strikes started the verification mission observers were pulled out of the country and reliable information about human rights abuses became scarce. The resort to force thus slammed the door shut on the possibility of a peaceful negotiated agreement and placed a question mark on whether Milosevic would have agreed to the terms of the Military-Technical Agreement without such a show of force.

This is not a matter of denying groups of states the right to intervene on the basis that a more peaceful approach to the problem could have yielded better results. Instead, the point here is that to intervene when the available mechanisms of conflict resolution have not yet been given proper room to run their full course is to doom prematurely such efforts to failure. And since

judging the effectiveness and commitment to current efforts towards a peaceful settlement is often a matter of relative and subjective interpretations of the available facts, the support of the international community becomes key. Without it, the debate over the authority to intervene becomes hopelessly lost in analyses of different conceptions of human rights, proposed limits upon sovereignty and interveners' ulterior motivations to act.

Finally, mobilizing national opinion and devoting the country's resources to fighting for humanitarian causes is not an easy task. The fact of the matter is that support for troop deployments in far-away places is easier to maintain when there is some form of national interest present. Public opinion and legislative support is much more likely to be forthcoming in cases where genuine acts of "saving strangers" and protecting human rights are coupled with realist foreign policy issues like reacting to an earlier terrorist attack (current US presence in Afghanistan), acting due to geographic proximity (US' actions in Haiti), protecting strategically valuable land or supporting allies (US' involvement in Iraq), extending and expanding the role of a previous involvement in the region (NATO's response in Kosovo) or even attempting to redraw territorial boundaries (Vietnam's overthrow of the Khmer-Rouge in Cambodia). Extricating the most significant underlying reasons for intervening and deciding whether the international actors' motivations are mostly humanitarian or not is thus not only a difficult but just about an impossible task. Also, deciding which self-interested motives should be condoned and which should be condemned is equally tricky especially when one considers that many interventions are often on shaky legal ground to begin with. The issue of changing objectives is present as well – NATO's intervention in Kosovo may have started as a purely humanitarian effort but there are allegations that as Milosevic refused to back down and air strikes appeared ineffective the entire mission became a face-saving matter for the NATO alliance. The bottom line here is that it is

incredibly difficult to make a satisfactory evaluation of the motivations behind intervention. The only way to truly counter such objections is not by appealing to norms that have yet to be universalized and accepted but by obtaining a clear mandate to intervene from a great majority of states in the international community. Thus, to allow states to intervene without clear international support translates into condoning violations of international law based on biased and subjective interpretations.

The key to setting such strict limits on states' right to intervene without demonstrated UN approval then lies in adopting a flexible but meaningful definition of international support. Seeking approval from the United Nations Security Council or the General Assembly are options that immediately suggest themselves because they currently do the best job of roughly representing the states of the world. The UN General Assembly's universal membership allows it to sidestep charges of bias and its overall one-state, one-vote formula effectively polls the international community of states when it comes voting on intervention. But even if the UN may be the best available option, it is by no means the only possible option – other combinations of states could constitute international support as well. Following a failure to obtain a two-thirds vote in the General Assembly, states bent on intervening could obtain international support in other ways.¹⁵⁸ For example, support from a multilateral organization composed of 25 of the most economically strong and militarily powerful countries in the world would constitute international approval just as effective as that of a two-thirds vote in the General Assembly. Unanimous consent to intervene by a coalition of states with exemplary human rights records and dedicated to the protection of human rights could also represent international support.¹⁵⁹ Absent the UN's

¹⁵⁸ States wishing to intervene would have even more of a right to form alternate alliances if the vote were narrowly defeated in the General Assembly by states whose human rights records are poor.

¹⁵⁹ I am indebted for this idea to Allen Buchanan, who has a forthcoming article on this topic. He suggested a coalition of liberal democracies as a possible source of international support.

approval and in light of the UN's shortcomings, I believe that researchers and policymakers should look for novel ways to propose inclusive and unbiased combinations of international actors designed to genuinely simulate the international community's support.¹⁶⁰

Lessons Learned

Much of the literature on NATO's intervention in Kosovo focuses on lessons that can be learned from this event. I believe that this is an expression of a clear goal of any political science research project – to be able to adequately answer even the most flippant “why bother” questions about the necessity of conducting the study. Drawing conclusions from one's research that are either applicable to real world policy initiatives or successful in adding to the overall body of knowledge on the topic is a most effective way of justifying the importance of such projects.

One of the first lessons to be learned from this thesis is that, on balance, the concept of humanitarian intervention is a positive development in international relations. The current dilemmas that arise from clashes between traditional notions of sovereignty and newly emerging norms concerning human rights and the proper treatment of a country's citizens point to a greater worldwide concern with the human condition. To look at the aspirational role that human rights were assigned in the UN Charter is to see how much the world has changed and continues to change since then. Human rights are now a key part of the lexicon of international relations.

However, this development should not be overstated. Although progress has been made in coming closer to realizing the goals set in Articles 55 and 56, respect for human rights has yet to reach a level that warrants basing state sovereignty on it. Old and entrenched norms die hard

¹⁶⁰ For example, Richard Haass believes that the UNSC is a permanent alliance which does not work well in the fluid post-Cold-War world of international relations. He advocates forging alliances designed to respond to specific security threats. In a similar vein, a multilateral alliance of states dedicated to preventing the next Rwanda may very well be a better answer to this dilemma than the UNSC, which was created with the primary purpose of preventing inter-state wars.

– for scholars to be able to say that egregious human rights violations are tantamount to waivers of sovereignty requires a much clearer repudiation of old notions of sovereignty by the international community of states. To claim that such rejection has already taken place is to flatly ignore the vehement opposition to humanitarian intervention currently found in Russia, China, India and much of the non-aligned world. Until the concept of human rights crystallizes on the international level, basing sovereignty on it will give single states too much of a free hand in deciding which claims to sovereignty should be honored and which should not.

One possible solution to circumventing the problems caused by the nebulous, controversial and contested definitions of human rights lies in viewing humanitarian crises as threats to international peace and security first and affronts to common notions of human dignity second. The reason for this preference is that there is greater consensus among nation-states on definitions of international peace and the set-up of institutions designed to deal with matters of international security. Not only would such a view re-assert the UN Security Council's role in conflict management, but it would also help quell some of the fears of precedent setting voiced by many states whenever an intervention for humanitarian reasons is proposed. Additionally, approaching the problem of humanitarian crises from a security standpoint could make it easier for governments to justify internally their involvement on both practical and moral grounds. From refugee flows that disrupt economies of neighboring nations to overall destabilizing effects on the surrounding nations, most humanitarian crises could fall into the category of threats to international peace and security.

However, this solution resolves the problem only partially – it does nothing for cases where the UN Security Council, the primary available means of international conflict management, proves unable to muster an intervening force to stop documented cases of serious

human right abuses. The dilemma also holds for the broader question of what happens when secondary attempts at legitimization and authorization via the UN General Assembly fail as well.

The obvious answer is that “something” should be done. Allowing human rights abuses to go unpunished damages the international order in that it highlights its deficiencies in a most gruesome and irreversible manner. But the key question here is whether that “something” necessitates an unauthorized intervention and all the dangers that it can bring to bear on the international system. As judging egregious human violations and determining the full complement and influence of reasons for one actors’ intervention is difficult, the line between illegal interventions driven by humanitarian desires and those motivated by realist interests is thin indeed. In the end, the main problem with humanitarian interventions not authorized by the UN is one of developing effective checks against abuse, be it by single states or sizable collections of states.

The central answer that this thesis provides is that support by the international community of states is the only legitimate check upon such abuses. As such, authority comes to matter greatly in deciding the legitimacy of a certain intervention as its pluralistic motivations, regardless of their internal mix between realist and humanitarian concerns, are powerfully vindicated by shows of recognized international support. Currently, this form of international support can take form in either clear-cut compliance with the UN Charter, explicit mandates by UNSC resolutions or a two-thirds vote of the UN General Assembly. Additionally, even in cases where neither of these legitimizing acts could be obtained, there could be a way of justifying intervention by working through other as-of-yet unformed international actors. Otherwise, without clear international support, humanitarian interventions are illegitimate.

The remaining point to note then is that to uphold this view of mandating international support for legitimate interventions is not the equivalent of dooming thousands of victims of oppressive regimes to their death by turning a blind eye to their suffering. Instead, it is a matter of respecting existing international norms, laws and institutions and holding international order in high regard. Most importantly, it is an act of preserving the serious nature of humanitarian intervention – as a last-resort measure meant to be protected from abuse and used only in the most dire circumstances when a significant majority of the international community of states has agreed that the internal conditions within one state have come to warrant an injection of military force and a de-facto nullification of sovereignty.

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