

1999

Anticipatory Humanitarian Intervention in Kosovo

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Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 32 *Vanderbilt Law Review* 1231 (2021)

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VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 32

NOVEMBER 1999

NUMBER 5

COMMENTARY

Anticipatory Humanitarian Intervention in Kosovo

*Jonathan I. Charney**

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I. INTRODUCTION

The intervention by the North Atlantic Treaty Organization (NATO) in Kosovo during the spring of 1999 aroused controversy at the time and still provokes questions about the legality of the action, its precedential effect, and procedures for developing new international law. The participants faced a legal and moral dilemma between international law prohibitions on the use of force and the goal of preventing or stopping widespread grave violations of

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international human rights. This commentary seeks to chart a course for the future in light of the current legal and moral environment.

Many individuals on all sides of the Kosovo crisis maintained the highest standards of law and morality. Regrettably, others, particularly political leaders, fell short of their moral or legal obligations or both. Of the latter, the leadership of the Federal Republic of Yugoslavia (FRY) headed by Slobodan Milošević stands out. The FRY committed grave international crimes against the ethnic Albanians in Kosovo. However, both the ethnic Albanians and the Serbs in Kosovo engaged in aggressive and brutal actions against each other and both were at fault, legally and morally.¹ The Kosovo Liberation Army (KLA) has also committed terrorist and other brutal acts against the Yugoslav Serbs and the FRY forces. As for the United Nations, though perhaps not morally at fault, it did not address the Kosovo problem in a timely and effective manner, as is its responsibility.

Indisputably, the NATO intervention through its bombing campaign violated the U.N. Charter and international law. As a result, the intervention risked destabilizing the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorization by the U.N. Security Council or a situation of self-defense. The NATO actions, regardless of how well-intentioned, constitute an unfortunate precedent for states to use force to suppress the commission of international crimes in other states—grounds that easily can be and have been abused to justify intervention for less laudable objectives. As now conceived, the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord, and disorder and diminish protections of human rights worldwide. If current international law and organizations are inadequate to solve problems like the Kosovo situation, better rules of law and improved organizations might be developed to avoid these terrible risks and properly protect human rights.

II. U.N. CHARTER LAW AND GENERAL INTERNATIONAL LAW

Contemporary international law prohibits violations of human rights and humanitarian law committed by a state against its own citizens. These duties are owed *erga omnes*, to all the world. Every state is obliged to respond to those violations, individually and collectively, by the use of nonforcible actions and countermeasures.

1. See generally William W. Hagen, *The Balkans' Lethal Nationalisms*, 78 FOREIGN AFF. 52 (July-Aug. 1999).

A variety of intergovernmental and nongovernmental organizations may also take part in combating such violations. The NATO actions in Kosovo, however, raise the question whether international law permits the use of force by foreign states, individually or collectively, to stop violations of international human rights and humanitarian law committed within a single state. The answer turns on U.N. Charter law and contemporary international law derived from it.

The Security Council was involved in the Kosovo matter for some time. It adopted three resolutions under Chapter VII of the Charter prior to the NATO bombing campaign.² These resolutions laid out a plan of action that authorized the Organization for Security and Co-operation in Europe (OSCE) to place an observer force, the Kosovo Verification Mission (KVM), in Kosovo to monitor the situation.³ The resolutions also called upon the FRY, the KLA, and all other states and organizations to stop using force and called for a halt to violations of human rights.⁴ The resolutions did not authorize the use of force by any outside entity.⁵ Rather, they reaffirmed the sovereignty and territorial integrity of the FRY.⁶ In this situation, outside entities had no authority to take forcible actions. To avoid a veto, the Council resolution adopted subsequent to the bombing did not retroactively legalize NATO's actions but only prospectively authorized foreign states to intervene in the FRY to maintain the peace.⁷

Neither of the permissible uses of force in international relations under the U.N. Charter—enforcement actions by the Security Council under Chapter VII and self-defense—provides a legal justification for the NATO action.⁸ The International Court of

2. See generally S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

3. See, e.g., S.C. Res. 1160, *supra* note 2, para. 7 (expressing support for OSCE's efforts towards peaceful resolution of conflict).

4. See, e.g., S.C. Res. 1199, *supra* note 2, preamble.

5. See generally S.C. Res. 1160, *supra* note 2; S.C. Res. 1199, *supra* note 2.

6. See, e.g., S.C. Res. 1199, *supra* note 2, preamble ("Reaffirming also the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia").

7. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999), para. 7.

8. See U.N. CHARTER, arts. 2.4, 42, 51; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 32-35 & *dispositif* (April 9); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 93, 94, 98-100 (June 27); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624-26, 1629-33 (1984); see also *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess, Supp. No. 31, at 142, U.N. Doc. A/RES/3314 (1974); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 26th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1971).

Justice (ICJ) acknowledged this problem (without purporting to decide the merits) in its decision refusing to grant the FRY's request for interim measures of protection.⁹

Various scholars and diplomats have searched for exceptions to the U.N. Charter prohibition on the use of force, principally through liberal interpretations of the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" contained in Article 2(4).¹⁰ Those arguments are unfounded. The use of force by bombing the territory of another state violates its territorial integrity regardless of the motivation.¹¹ Furthermore, the first purpose of the Charter is "to save succeeding generations from the scourge of war"¹² by "maintain[ing] international peace and security."¹³ The protection of human rights is also among the primary purposes of the Charter, although subsidiary to the objective of limiting war and the use of force in international relations, as found in the express Charter prohibitions on the use of force.¹⁴ This interpretation is supported by the *travaux préparatoires* of the Charter. They establish that the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" were added to Article 2(4) to close all potential loopholes in its prohibition on the use of force, rather than to open new ones.¹⁵ Neither the use of force by regional organizations against nonconsenting states nor intervention to

9. Although the Court denied the request for indication of interim measures, it indicated that it was "profoundly concerned with the use of force in Yugoslavia" and that "under the present circumstances such use raises very serious issues of international law." *Legality of Use of Force (Yugo. v. Belg.) Order*, para. 17 (June 2, 1999) <<http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe/htm>>. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1-6 (1999); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. g (1987).

10. Article 2(4) 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." U.N. CHARTER art. 2(4). For examples of the search for exceptions to the Prohibition, see Oscar Schachter, *International Law in Theory and Practice, General Course in Public International Law*, 178 RECUEIL DES COURS 9, 138-49 (1982); Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 339-40 (1988). *But see id.* at 368.

11. See *Corfu Channel*, 1949 I.C.J. at 32-33; *Definition of Aggression*, *supra* note 8, arts. 1, 3, 5; Schachter, *supra* note 10, at 140-41.

12. U.N. CHARTER preamble, para. 1.

13. *Id.* art. 1.1.

14. See *id.* preamble, para. 2, arts. 1.2-1.3; see also *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, preamble; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, UN. Doc. A/6220 (1965).

15. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265-68 (1991).

support domestic insurrections is permitted absent authorization by the Security Council or resort to self-defense.¹⁶ Any other uses of force that may have been legal under pre-Charter law ended when the Charter entered into force.

III. HUMANITARIAN INTERVENTION

Despite the limitations in the text of the U.N. Charter, humanitarian intervention arguably provides a lawful foundation for the NATO actions. Unfortunately, humanitarian intervention is not an exception to the Charter prohibitions on the use of force.¹⁷ No reference to such a right is found in the Charter. The doctrine of "humanitarian intervention" is not well defined, and the evidence does not establish a rule of law permitting the use of force against a state in situations like that of Kosovo.

Most situations in which this theory is arguably applied actually involve actions by states to protect their citizens abroad from alleged mortal danger. Such intervention probably falls under the doctrine of self-defense.¹⁸ Examples include actions in the Congo, the Dominican Republic, Entebbe, Grenada, and Panama.¹⁹ With the

16. See *Military and Paramilitary Activities*, 1986 I.C.J. 14, 100-03, 109, 110, 124, 126 (June 27). This decision was taken despite prior U.N. General Assembly resolutions that arguably allowed intervention to support self determination. See, e.g., *Definition of Aggression*, *supra* note 8, at 144, art. 7; *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, at 121; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, *supra* note 14, at 11. The KLA is an example of a revolutionary group that is difficult to support on humanitarian and self determination grounds due to its fascist and Stalinist affinities. See Chris Hedges, *Kosovo's Next Masters?*, 78 FOREIGN AFF. 24, 26-28 (May-June 1999).

17. See generally *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, at 121; *Definition of Aggression*, *supra* note 8, at 143, art. 5; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 14, at 11. See also Schachter, *supra* note 8, at 1628-33; Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 218-19 (John Norton Moore ed., 1974). But see Wolf, *supra* note 10, at 344-54; Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, *supra*, at 229; Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* app. A (Richard B. Lillich ed., 1973).

18. See Schachter, *supra* note 10, at 143-49.

19. The 1976 Israeli raid on Entebbe was justified on the ground of self-defense and protection of Israeli nationals. See U.N. SCOR, 31st Sess., U.N. Doc. S/PV.1939, at 51-59 (July 9, 1976), reprinted in 15 I.L.M. 1228, 1228-31 (1976). See also the two failed UNSC resolutions submitted in regard to the incident, U.N. Doc.

apparent sole exception of the Entebbe raid, however, many consider that the justifications given for those interventions were actually ruses to conceal that they were conducted for other political objectives.²⁰ This risk of abuse points to the need to adhere closely to the core Charter prohibitions on the use of force, even though it may be lawful to intervene to protect a state's own nationals. Other situations invoked as solidly supporting the theory of humanitarian intervention also fall short.²¹ For example, India intervened in East

S/12138 (July 12, 1976), *reprinted in* 15 I.L.M. 1226 (1976); U.N. Doc. S/12139 (July 12, 1976), *reprinted in* 15 I.L.M. at 1226-27 (1976). The RESTATEMENT reports:

It is generally accepted that Article 2(4) does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976. That interpretation of the Charter, however, would not justify the use of force by one state on its own authority to conquer another state or overthrow its government even if that government had been guilty of persecution of minorities or other gross violations of human rights.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 905 cmt. G (1987). *See also* Roderick D. Margo, *The Legality of the Entebbe Raid In International Law*, 94 S. AFR. L.J. 306, 309-10 (1977); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 227-30 (2d ed. 1994); Louis Henkin, *Use of Force: Law and U.S. Policy*, in LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41-42 (2d. ed. 1991) (limited exception to the prohibition on the use of force in order to save hostages only such as Entebbe). Allegedly the United States intervened in Grenada to save nationals, and the action was legitimized by invitation of the government and authorization of a regional organization. In reality, it was a unilateral move to prevent Grenada from falling under Communist rule. *See* The Situation in Granada, G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. 47, at 19, U.N. Doc. A/38/L.8 and add.1, A/38/L.9 (Nov. 2, 1983) (condemning the U.S. action). In 1965, the United States intervened in the Dominican Republic, with the support of the OAS, to protect the lives of U.S. and other foreign nationals and to stop a communist revolution. *See* 52 DEP'T ST. BULL. 744, 745-46 (1965) (statement by President Johnson of May 2, 1965, justifying United States unilateral intervention); Resolution Establishing Inter-American Force, May 6, 1965, 4 I.L.M. 594 (1965) (after United States intervention); Leonard C. Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T ST. BULL. 60 (1965); Wolfgang Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, 866-68 (1965); A. J. THOMAS JR. & ANN VAN WYNEN THOMAS, THE DOMINICAN REPUBLIC CRISIS 1965 (John Carey ed., 1967). In 1964, the United States and Belgium intervened in the Congo to save foreign nationals at a time that civil order in the country had broken down. *See* S.C. Res. 199, U.N. SCOR, 19th Sess., 1189th mtg. at 328-29, U.N.Doc. S/6129 (1964) ("Reaffirming the sovereignty and territorial integrity of the Democratic Republic of the Congo" and requesting "all states to refrain or desist from intervening in the domestic affairs of the Congo," but not indicating any support for that intervention). In 1989, the United States intervened in Panama to save the lives of Americans, but also to protect U.S. interests in the Panama Canal, replace the ruling powers pursuant to an election, and bring the President of Panama to the United States for prosecution. *See* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 536, 545-49 (1990).

20. *See supra* note 19.

21. *See* Schachter, *supra* note 10, at 146-48; 1 OPPENHEIM'S INTERNATIONAL LAW 442-43 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

Pakistan allegedly to protect the ethnic Bengalis during the 1971 civil war in Pakistan. A large majority in the U.N. General Assembly condemned this action, and India clearly had objectives other than merely humanitarian ones.²² The resolution adopted by the General Assembly in response to this incident makes clear that the international community opposed the doctrine. Intervention executed apparently for humanitarian reasons has often been justified as a matter of law on the basis of an alleged request to intervene by the government of the state concerned, for example, in Czechoslovakia, the Dominican Republic, Grenada, and Hungary.²³ Not only were the requests of dubious legitimacy, but the humanitarian grounds put forward were designed to mask other political objectives. Some situations have involved the collapse of a state's effective government, and intervention was allegedly undertaken to restore order, as in Cambodia, the Congo, Liberia,

22. See G.A. Res. 2793, U.N. GAOR, 26th Sess., Supp. No. 29, at 3, U.N. Doc. A/L.647/Rev.1 (1971) (calling for a cease-fire and withdrawal of troops to their own state's territory); Schachter, *supra* note 10, at 144.

23. See *supra* note 19 (discussing U.S. intervention in Grenada and the Dominican Republic). The USSR justified its 1968 intervention into Hungary on the grounds that the government requested that it protect the population from a revolution by reactionary groups. See G.A. Res. 1004, U.N. GAOR, 2d Emergency Sess., Annex, Agenda Item 5, (1956) (calling on the USSR to withdraw its forces from Hungary); G.A. Res. 1131, U.N. GAOR, 11th Sess., Supp. No. 17, at 64, U.N. Doc. A/3572 (1956) (calling for the USSR to withdraw its forces from Hungary); Statement of the USSR, U.N. GAOR, 11th Sess., 582nd plen. mtg., at 108, 111-12 (Nov. 19, 1956) (fascist actions threatening the Hungarian population, collective self-defense and government request); United Nations, *The Report on Hungary*, 2 U.N. REV. 4 (No. 2, Aug. 1957). The USSR intervened in Czechoslovakia in 1968 allegedly pursuant to a request of the government and collective self-defense under mutual treaty obligations. *Letter Dated 21 August 1968 from the Permanent Representative of the Union of Soviet Socialist Republics Addressed to the President of the Security Council*, U.N. Doc. S/8759 (1968), reprinted in 7 I.L.M. 1288 (1968) (justifying the intervention); U.N. Doc. S/PV.1441, at 41-52 (Mr. Malik, USSR, justifying the USSR intervention); *id.* at 66-77 (Mr. Muzik, Czechoslovakia, denying that the USSR was requested to intervene and denying that international law justified the USSR intervention) (Aug. 21, 1968); *Tass Statement on Military Intervention*, 7 I.L.M. 1283 (1968) (justifying the intervention); *Declaration of the Presidium of the Central Committee of the Czechoslovakian Communist Party*, 7 I.L.M. 1285 (1968) (denying that the USSR intervention was requested or justified), *Proclamation of the Presidium of the Czechoslovakian National Assembly*, 7 I.L.M. 1286 (1968) (protesting the USSR intervention). See a draft resolution affirming the "sovereignty, political independence and territorial integrity" of Czechoslovakia that failed despite a 10-2 vote with three abstentions due to the USSR veto (accompanied by Hungary), U.N. Doc. S/PV.1443, at 163-65 (Aug. 22, 1968)). See also various post-intervention statements and reports at 7 I.L.M. 1300-39 (1968); Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 65, 88 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

and Uganda. Again, other political interests have often animated the intervening states.²⁴

Finally, few, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.

IV. NEW LAW

Perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights. After all, general international law may change through breach of the current law and the development of new state practice and *opinio juris* supporting the change. The Kosovo intervention, however, presents problems in this regard. In the *Nicaragua* case, the International Court of Justice found that, to challenge a rule of international law, the state practice relied upon must be clearly predicated on that different rule of law;²⁵ however, NATO has not justified its actions on the basis of a specific rule of law—even humanitarian intervention—new or old. Throughout the campaign,

24. See, e.g., *supra* note 19 (discussing the 1964 United States and Belgian intervention in the Congo). Tanzania intervened in Uganda in 1979 to support a Ugandan insurrection against President Idi Amin. Vietnam's 1978 intervention in Cambodia was closely related to a long term conflict between the countries but was allegedly based on the atrocities of the Khmer Rouge. See G.A. Res. 34/22, U.N. GAOR, 34th Sess., 67th plen. mtg. (Nov. 14, 1979) (calling for all foreign forces to cease all hostilities, withdraw from Cambodia and to refrain from interference in its internal affairs). See also Schachter, *supra* note 23, at 88 (discussing a similar situation in Liberia).

25. The Court wrote:

The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy.

But these were statements of international policy, and not an assertion of rules of existing international law.

NATO offered no legal justification for its action.²⁶ Only in the recent suits against the intervening NATO states before the ICJ did the respondents begin to articulate legal justifications.²⁷ Nevertheless, only Belgium even mentioned humanitarian intervention, and then merely as a possible legal justification.²⁸

Another obstacle to changing the existing international law is that the rule prohibiting the use of force is derived from the U.N. Charter. Charter law may very well not be subject to change by new general international law. By its terms, the U.N. Charter overrides all inconsistent treaties, regardless of the date of their entry into force.²⁹ One would expect the same rule to apply to developments in general international law, especially since treaties supersede all

26. See *Press Statement by Dr. Javier Solana, Secretary General of NATO* (NATO Press Release No. (1999)040, Mar. 23, 1999) <<http://www.nato.int/docu/pr/1999/p99-040E.htm>> (“Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. We must also act to prevent instability spreading in the region”).

27. See *infra* note 28.

28. *Legality of Use of Force (Yugo. v. Belg.)*, Translation of Oral Pleadings of Belgium (May 10, 1999) <<http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>> (“This is a case of a lawful armed humanitarian intervention for which there is a compelling necessity”). Portugal presented a somewhat less direct legal justification that is mirrored in the arguments of others: “NATO’s operation was an exceptional intervention with the aim to put an end and minimize a gross violation of human rights—caused by the Federal Republic of Yugoslavia.” *Legality of Use of Force (Yugo. v. Port.)*, Oral Pleadings of Portugal. Para. 3.1.4 (May 11, 1999) <<http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm>>. Germany made similar arguments. See *Legality of Use of Force (Yugo. v. F.R.G.)*, Oral Pleadings of Germany, para. 1.3.1 (May 11, 1999) <<http://www.icj-cij.org/icjwww/idocket/iyge/iygeframe.htm>>. Other respondents made reference to the violations of human rights and humanitarian law in Kosovo by the FRY, the need to avoid a catastrophe and the discretion the ICJ may exercise in granting or denying the request for interim measures, but they did not expressly link their arguments to a rule of international law that would justify the NATO intervention. See *generally* Oral Pleadings of Canada, France, Italy, Netherlands, Spain, United Kingdom, and United States <<http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm>>. Of course, these were proceedings on the FRY’s request for interim measures of protection and the merits of the dispute were not under direct consideration. All the respondents relied most heavily on the argument that ICJ jurisdiction was lacking. Thus, Professor Brownlie argued for the FRY in rebuttal:

The respondent States in the course of the ten hours placed at their disposal made no effort to offer a developed legal justification for the air offensive. It is true that, quite exceptionally, the representative of Belgium contended that it was an armed humanitarian intervention which was compatible with Article 2, paragraph 4, and he admitted that the alleged principle was emerging slowly.

Legality of Use of Force (Yugo. v. Belg. et al.), Oral Rebuttal of Yugoslavia (May 12, 1999) <<http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm>>. Other respondents made no reference to humanitarian intervention but used the unusual phrase “humanitarian catastrophe.” See, e.g., *Legality of Use of Force (Yugo. v. F.R.G.)*, Oral Pleadings of Germany (May 11, 1999), para 3.1.4.

29. See U.N. CHARTER art. 103.

but *jus cogens* norms. Furthermore, because the Charter restrictions on the use of force are themselves *jus cogens* norms, it would take a new norm of that quality to override them. The only clearly effective solution would be to amend the U.N. Charter on the basis of a norm of equal status.³⁰

One might argue, of course, that the doctrine of humanitarian intervention is merely a new and improved interpretation of the human rights provisions already in the Charter. This view might be supported by reference to the Vienna Convention on the Law of Treaties, which gives an agreement of treaty parties persuasive value in regard to its interpretation.³¹ But no such agreement of U.N. members can be shown.

Alternatively, one might argue that the international legal system has radically changed since the founding of the United Nations, resulting in the development of a right of humanitarian intervention. At the time the Charter entered into force, international law centered on state sovereignty. The independence of states, especially with respect to matters of domestic concern, was of foremost importance.³² New developments in international human rights law, particularly with regard to international crimes, authorize, if not require, all states to take action in the face of widespread grave violations of human rights amounting to such crimes.³³ Thus, one might argue that contemporary public

30. See U.N. CHARTER arts. 108-09 (providing amendment procedure).

31. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340 § 3.

32. See U.N. CHARTER art. 2(7); *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 14, at 11.

33. See *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) (discussing the prospect of "Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia" since 1991); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 3, U.N. Doc. S/RES/955 (1994) reprinted in 33 I.L.M. 1598, 1602 (1994) (establishing an international criminal tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between January 1, 1994 and December 31, 1994); *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9* (1998), reprinted in 37 I.L.M. 999 [hereinafter ICC Statute]. As of November 2, 1999, there were four ratifications of the Statute of the sixty necessary to bring it into force. Eighty-nine states had signed the Statute. See also S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992) (UNSC authorization of intervention in Somalia); S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) (UNSC authorization of intervention in Haiti); S.C. Res. 929, U.N. SCOR, 49th Sess., 3392nd mtg. at 2, U.N. Doc. S/RES/929 (1994) (UNSC authorization of intervention in Rwanda). One might also perhaps include the actions by the United States, the United Kingdom, and

international law and a proper contemporary interpretation of the U.N. Charter permit pure humanitarian intervention without Chapter VII authorization by the Security Council or a situation of self-defense.

But has the law changed so radically? Does the international community wish to authorize individual states or groups of states, by themselves, to use force against a nonconsenting state in such situations? It is hard to find an international consensus to support this proposition, even among the NATO states. Certainly, neither widespread state practice nor *opinio juris* exist to support this view. Past resolutions by the General Assembly that condemn specific interventions and other resolutions and declarations addressing broad subjects like intervention, the use of force, self-determination, and human rights foreclose such actions, demonstrating international opposition to such a rule.³⁴ Furthermore, the statutes of none of the existing or proposed international criminal tribunals—the Tribunals for Yugoslavia and Rwanda and the international criminal court—authorize such interventions.³⁵ Accordingly, a doctrine of humanitarian intervention that would legitimate NATO's Kosovo actions cannot be found.

One might further ask whether, as a policy matter, international law should make humanitarian intervention legal. One could argue that this step is morally and ethically required. Public international law, as all law, should conform to the highest ideals. Humanitarian intervention would also protect human rights already encompassed by international law and the law of the Charter. This aspect is particularly important since the situations concerned may pose risks to international peace and security that might be stopped only by forcible intervention.

On the other hand, humanitarian intervention presents grave risks of abuse, as illustrated by virtually all of the past actions put forward in its support.³⁶ Once established, such a right would be

France in northern Iraq to protect the Kurds from the Iraqi government. See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L LAW 124, 132-33 (1999).

34. See G.A. Res. 2793, *supra* note 22, at 3 (India intervention in Pakistan, calling for a cease-fire and withdrawal of troops to their own state's territory); S.C. Res. 199, *supra* note 19 (1964 United States and Belgian intervention in the Congo); G.A. Res. 38/7, *supra* note 19 (U.S. intervention in Grenada); G.A. Res. 34/22, *supra* note 24, at 19 (Vietnam's intervention in Cambodia); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, at 121; *Definition of Aggression*, *supra* note 8, at 142; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 14, at 11.

35. See *supra* note 33.

36. See *supra* note 19.

difficult to check, thwarting containment of those unacceptable risks. It is clear, therefore, that humanitarian intervention raises serious difficulties despite its noble objectives. That was the judgment of states participating in the San Francisco Conference when they negotiated the U.N. Charter after World War II, and it remains unchanged.

V. DEVELOPING THE LAW

Despite these limitations and risks, support for a doctrine of humanitarian intervention may be growing. Whether many states would endorse such a rule remains to be seen. Weak states may fear such interventions. The strongest states may wish to retain the option of using their veto in the Security Council, as well as their power to take actions for political reasons notwithstanding the law. Thus, keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit abuse, although it remains an imperfect solution.

If the international community does wish to establish new law permitting humanitarian intervention, it should apply only to situations of widespread and gross violations of human rights and the necessary remedial actions. Sufficient support for such new law was lacking in the past. Arguably, the Kosovo events and other similar developments have changed the situation.

Let us consider how one might develop international law to attain the objectives that humanitarian intervention is supposed to serve, while also avoiding risks of abuse and excessive damage. The existing law of the U.N. Charter gives the Security Council the right to authorize such interventions.³⁷ Such authority, however, requires an affirmative vote by a three-fifths majority of the fifteen Council members and no veto by any of the five permanent members.³⁸ With the exception of the early years of the United Nations and the early 1990s, this procedure has not proved efficacious. One could imagine other procedures that the United Nations or other global organizations could adopt that might provide a legitimate basis for humanitarian intervention.³⁹ In my opinion,

37. See U.N. CHARTER arts. 39-42.

38. See *id.* art. 27(3).

39. *E.g.*, a UNSC vote by a three-fifths majority but without the right to a veto by the permanent members; a restructured UNSC with more states added with or without veto rights; a UNGA vote by a two-thirds majority (the Uniting for Peace Resolution); a rapid ICJ advisory opinion requested by the UNGA or a special organ of the UNGA or UNSC that would find that the specific situation makes a humanitarian intervention lawful; an International Criminal Court (ICC) indictment and order of enforcement to arrest violators and to stop the violations that would be carried out under the authority of the ICC prosecutor with the assistance of

however, the development of such mechanisms will not be politically feasible in the foreseeable future. Nor is it likely that any such changes would adequately balance the need to restrict the use of force with the ability to engage in humanitarian intervention in justifiable circumstances.

If humanitarian intervention outside the traditional interpretation of the U.N. Charter is to be sought, it should be based on principles that build upon arguments in its favor.⁴⁰ That new law should be clear and should limit the potential for abuse. The necessary international consensus might be established either by superseding general international law at the level of a *jus cogens* norm or by reinterpreting the U.N. Charter on the basis of agreement of the U.N. member states. One should not underestimate the difficulty of accomplishing this objective. Nevertheless, several approaches might balance the interests well. Perhaps the following procedural and factual requirements could form the basis for an appropriately balanced regime.

Proof. Publicly available evidence must establish that widespread and grave international crimes as defined in the Rome Statute of the International Criminal Court⁴¹ are being committed in a state and that this state supports these criminal activities, acquiesces in them, or cannot control them.

Notice. A regional intergovernmental organization in the same area as the state in which the crimes are being committed must call upon that state to take action itself or with the help of others to stop those crimes.

Exhaustion of remedies. The regional group must exhaust all reasonably available means to stop the criminal behavior, including negotiations, political initiatives, nonforcible countermeasures (such as economic sanctions), among others.

U.N. role. If those countermeasures fail to produce the necessary results, the regional organization, acting through its U.N. member states, must formally bring the matter to the attention of the General Assembly and the Security Council on an emergency

cooperating states; a standing international force under a new international authority.

40. Others have made similar proposals. See generally, e.g., Simma, *supra* note 9; Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 21 (1999); see also Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order-Part I*, 43 DENV. L.J. 439, 473-74 (1966); Richard B. Lillich, *Forcible Self-Help by States To Protect Human Rights*, 53 IOWA L. REV. 325, 347-51 (1967).

41. See ICC Statute, *supra* note 33. The crimes within the jurisdiction of the Court include: genocide (arts. 5.1(a) & 6), crimes against humanity (arts. 5.1(b) & 7), war crimes (arts. 5.1(c) & 8), and, once an agreement is reached in the future, aggression (arts. 5.1(d) & 5.2).

basis. It should seek Chapter VII authorization from the Security Council to take appropriate action to stop the crimes. If the Council authorizes such action, the matter must remain under its control. If, however, the Council fails to approve such action, and neither it nor the General Assembly adopts a resolution expressly forbidding further action by the regional organization, recourse to a U.N.-based remedy will be deemed exhausted.

Regional action. The regional organization could then lawfully take forcible action to stop the continuing, widespread grave violations of international criminal law in the target state subject to the following limitations:

Warning. The target state must be notified in advance of the impending use of force.

Court jurisdiction. Before intervening, the states that are to participate must consent both to suit in the ICJ by any directly injured state for violations of international law committed in the course of the humanitarian intervention, and to the jurisdiction of the international criminal court (once established)⁴² over their nationals for crimes within that court's reach that might be committed in the course of the intervention.

Purpose and means. Force must be used only to stop the widespread and massive violations of international criminal law. To this end, the targets must be limited, collateral damage minimized, unrelated effects on the state's legitimate functions avoided, and other requirements of international humanitarian law strictly observed.

Withdrawal. Once the use of force has accomplished the appropriate objectives and the future is secured, the foreign forces must withdraw, absent the target state's consent to their remaining or the adoption of Security Council authorization under Chapter VII.

The purpose of these requirements is to limit the use of humanitarian intervention to the gravest of cases in which no alternative is available and to limit the effects on the target state and the risks of abuse. Such actions could be taken only by a regional organization, which necessitates multiple-state support as opposed to unilateral action. The stated goals would be accomplished by requiring specific conditions and giving the target state and the United Nations opportunities to prevent intervention. The inclusion of a judicial role may further remove such actions from international politics by strengthening the salience of international law.

This approach might appropriately balance the desire to protect human rights with the need to minimize the use of force in

42. Assuming that the ICC Statute, *supra* note 33, enters into force.

international relations. If recent developments in international relations do reflect a watershed change in attitude by the international community, a rule of law permitting some form of humanitarian intervention, such as the above proposal, might be feasible. The most appropriate, but also the most difficult, way to accomplish this objective would be to amend the U.N. Charter. Other solutions are troublesome for the reasons discussed above. One might credibly argue, however, that this plan would conform to the Charter by (1) clearly promoting human rights, (2) minimizing the potential and degree of intervention (some argue that it is not intervention), including prejudice to the territorial integrity of the target state, (3) implicitly earning U.N. authorization, and (4) building on ambiguities some find in the Charter with regard to the authority of regional organizations.

VI. Kosovo

Unfortunately, it is difficult to justify the NATO intervention in Kosovo even on these suggested grounds, if one focuses on the situation at the time the intervention began, as should be the case.⁴³ A review of some of the above requirements proves this conclusion.

Proof. The extent of the human rights violations in Kosovo prior to the withdrawal of the OSCE's observer force was not massive and widespread.⁴⁴ In fact, the Security Council had authorized the deployment of the verification mission, which had effectively prevented the commission of widespread atrocities.⁴⁵ The FRY's behavior changed only after NATO forced the withdrawal of the

43. See generally Simma, *supra* note 9; Cassese, *supra* note 40 (reaching the same ultimate conclusion).

44. Even the U.S. Department of State's press releases recognize that while the risks were present, during the time that the KVM was in place the FRY violence was limited and focused on the suppression of the insurrectionist KLA. See US Department of State, *Kosovo Update* (March 2, 1999) <http://www.state.gov/www/regions/eur/rpt_990302_kdom.html>; US Department of State, *Kosovo Update*, March 12, 1999 <http://www.state.gov/www/regions/eur/rpt_790312_kdom.html>; US Department of State, *Kosovo Humanitarian Situation Report*, March 31, 1999. In the March 31 report, the section entitled "Background" identifies minimal FRY violence against ethnic Albanians and those actions are related to the conflict with the KLA. But the document goes on to report a massive upsurge of widespread abuses of the ethnic Albanian's human rights after the withdrawal of the KVM and the commencement of NATO bombing. See also US Department of State, *Erasing History: Ethnic Cleansing in Kosovo* (May 1999) <http://www.state.gov/www/regions/eur/rpt9905_ethnic_ksvo_toc.html>. All of these U.S. State Department documents may be found at the following web site: (visited May 19, 1999) <http://www.state.gov/www/regions/eur/kosovo_hp.html>.

45. See *supra* note 3 and accompanying text.

OSCE observers. These facts are apparent in the indictment of President Milošević on May 22, 1999 by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.⁴⁶ Other than general accusations, the specific charges document only one situation involving a significant number of deaths caused by FRY forces in the months prior to the start of the NATO bombing campaign on March 24, 1999. That incident, during which forty-five persons were killed, took place in Racak more than two months before the NATO action on January 15, 1999.⁴⁷ There were also reports of displacements of Albanian Kosovars within the FRY.⁴⁸ This is not a circumstance involving ongoing widespread grave violations of international criminal law. All the remaining counts concern events that occurred after the bombing commenced.⁴⁹ Those events do involve substantially larger numbers of persons,⁵⁰ but they cannot serve as a legal justification for the earlier beginning of the NATO campaign.

Exhaustion of remedies. It is difficult to find exhaustion of nonforcible remedies. Some questionable efforts were made to negotiate with the FRY, but only after the bombing started was an oil embargo considered.

U.N. role. Although neither the Security Council nor the General Assembly forbade the intervention, the Council did retain jurisdiction over the matter and was involved in efforts to prevent human rights abuses (particularly through the use of the verification mission), albeit without complete success. One might argue that the rejection of the Security Council resolution introduced by Russia and the failure of Secretary-General Kofi Annan to condemn the NATO actions in an informal statement, both of which took place shortly after the NATO campaign began, proved the acquiescence of the United Nations in the intervention.⁵¹ On the other hand, prior

46. See International Criminal Tribunal for the Former Yugoslavia, *Indictment of the Prosecutor of the Tribunal Against Slobodan Milosevic et al.* (May 24, 1999) <<http://www.un.org/icty/indictment/english/24-05-99milo.htm>> [hereinafter *Indictment*].

47. See *id.* paras. 28, 98(a), sched. A.

48. See generally *id.*

49. See *id.* paras. 97-100.

50. See *id.* paras. 37-39, 97(a)-(j) (deportation of approximately 740,000 Kosovo Albanian civilians between April 2, 1999 and May 22, 1999); *id.* para. 98(b)-(e) & sched. B-G (killings between March 25, 1999 and May 22, 1999: Bela Crkva (Orahovac/Rahovec municipality) killing 67 persons; Velika Krusa and Mali Krusa/Krushe e Mahde and Krushe e Vogel (Orahovac/Rahovec municipality) killing 105 persons; Dakovica/Gjakovë killing 6 persons; Crkolez/Padalishte (Istok/Istog municipality) killing 20 persons; Izbica (Srbica/Skenderaj municipality) killing 130 persons; Qerim district of Dakovica/Gjakovë killing 20 persons. The same is true of subsequently discovered crimes to date.

51. See UN Press Release, *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, U.N. SCOR, 3989th Mtg., U.N. Doc.

Security Council resolutions on Kosovo support the view that the Council was addressing the problem, though not to everyone's satisfaction.

Purpose and means. The NATO action did not stop the commission of widespread grave violations of international criminal law (even if one assumes that they were taking place just prior to the bombing). The intervention clearly did not protect the ethnic Albanians in Kosovo. Instead, by removing the OSCE observers, NATO allowed the FRY to commence a campaign of widespread grave violations of international criminal law. We will never know if those violations would have taken place in the absence of the removal of the observer mission and the initiation of the NATO campaign. The military campaign itself was not tailored to protect the ethnic Albanians in Kosovo;⁵² rather, it had the broader objective of undermining the FRY Government to force its capitulation, together with the collateral objective of freeing some or all of Kosovo from FRY control by partition or independence. As of today, the success one can speak of is the cessation of the massive Serbian violations commenced after the bombing began and the de facto partition of the FRY.

Court jurisdiction. Finally, consent to the jurisdiction of the ICJ and the international criminal court was not given by all the participating states, but since this part of the proposal is particularly novel and the latter court has not yet been established, such consent could not have been expected.

VII. CONCLUSION

The international community has moved toward the creation of stronger international human rights law, including greater enforcement and protection measures. It has not, however, authorized some states to intervene by the use of force in third states to protect those rights, absent Chapter VII authorization by the Security Council or a situation of self-defense—moral and ethical arguments in favor of humanitarian intervention notwithstanding. Because the Council neither authorized NATO's actions before they commenced nor approved them subsequently in its resolution of June 10, 1999, their legality remains questionable at best. In fact, the Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was

SC/6659 (Mar. 26, 1999) <<http://www.un.org/News/Press>>; Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13.

52. Edward N. Luttwak, *Give War a Chance*, FOREIGN AFF. 36, 41 (July-Aug. 1999).

actually an "anticipatory humanitarian intervention" based on past actions of the FRY regime and future risks of conflict. Such intervention, like "anticipatory self-defense," is a particularly dangerous permutation of an already problematic concept.⁵³ Although many will share the view that the intervention was morally just in light of subsequent developments, it presents an unfortunate precedent. If this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law.

Perhaps the example of Kosovo may stimulate the development of a new rule of law that permits intervention by regional organizations to stop these crimes without the Security Council's authorization, while limiting the risks of abuse and escalation. That is the task for the future.

53. The international community debated for years whether a right of self-defense includes actions prior to an attack. Most consider such actions as impermissible. "Anticipatory humanitarian intervention," while laudable, seems even less justifiable. Similarly, there has been some suggestion that the intervention was taken to avoid destabilizing the region and, thus, leading to an international conflict. This pushes the right of self defense beyond even anticipatory self defense and is hardly legally justifiable.