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THESIS

OPERATION ALLIED FORCE: SETTING A NEW PRECEDENT FOR HUMANITARIAN INTERVENTION?

by

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December 2000

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OPERATION ALLIED FORCE: SETTING A NEW PRECEDENT FOR HUMANITARIAN INTERVENTION?

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ABSTRACT

On 24 March 1999, NATO initiated military action against the Federal Republic of Yugoslavia in response to the crisis in Kosovo. Operation Allied Force was conducted without the explicit authorization of the United Nations Security Council, but was justified by NATO allies as a means to bring peace and stability to Kosovo, and to prevent a greater humanitarian emergency from developing. In the absence of specific U.N.S.C. authorization, was NATO's violation of Yugoslavia's sovereignty through the use of force illegitimate? Or were the potential humanitarian consequences of inaction by NATO so disastrous as to make intervention a moral imperative, despite the stipulations of the U.N. Charter? These questions—still under debate—highlight the dilemma facing the NATO allies on the eve of Operation Allied Force. This thesis examines Operation Allied Force and how the most influential NATO allies (Britain, France, Germany, and the United States) justified the use of force in the Kosovo crisis without relying on an explicit U.N. Security Council mandate for such action. In addition, it considers whether NATO's intervention in the Kosovo conflict established a new precedent whereby U.N. Security Council authorization of the use of force is no longer a prerequisite for forceful humanitarian intervention.

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EXECUTIVE SUMMARY

On 24 March 1999, NATO initiated military action against the Federal Republic of Yugoslavia in response to the crisis in Kosovo. Operation Allied Force was conducted without the explicit authorization of the United Nations Security Council, but was justified by NATO allies as a means to bring peace and stability to Kosovo, and to prevent a greater humanitarian emergency from developing.

In the absence of specific U.N.S.C. authorization, was NATO's violation of Yugoslavia's sovereignty through the use of force illegitimate? Or were the potential humanitarian consequences of inaction by NATO so disastrous as to make intervention a moral imperative, despite the stipulations of the U.N. Charter? These questions—still under debate—highlight the dilemma facing the NATO allies on the eve of Operation Allied Force.

Prior to the Kosovo crisis, some NATO allies held the position that explicit U.N. Security Council authorization was required for the Alliance to threaten or use force for purposes other than collective defense. By the middle of 1998, as it became evident that the violence in Kosovo had the potential to escalate into a major conflagration, and with initial diplomatic efforts proving to be inadequate, NATO leaders contemplated the use of force. Although the allies agreed in October 1998 that they had a sufficient legal basis to use force, their interpretations of the specific content of this legal basis varied widely. Lacking consensus on the legal basis to use force, but recognizing the need to move forward to resolve the crisis in Kosovo, leaders of the NATO Alliance left it to each member state to define its own legal justification for the use of force.

Operation Allied Force successfully concluded with the withdrawal of Yugoslav forces from Kosovo and the eventual return of most refugees to Kosovo. Even though the NATO allies achieved the objectives announced at their Washington Summit in April 1999, the Kosovo conflict raised broad questions about future undertakings by the Alliance and its ability to deal with humanitarian crises beyond the immediate borders of the European allies. While NATO leaders maintain that it was appropriate to intervene in the Kosovo conflict in defense of human rights, the conduct of NATO's air campaign and NATO's decision not to use ground forces to end the violence in Kosovo drew sharp criticism from many corners. Such criticism muted any expectation by Western governments that Operation Allied Force had somehow ushered in a new global moral order.

An analysis of NATO's decision to threaten air strikes in October 1998 and its subsequent military intervention in the Federal Republic of Yugoslavia in March 1999 confirms that actions taken by the Atlantic Alliance were inconsistent with some current interpretations of the U.N. Charter and international law; nevertheless, there is support for a counter-argument that NATO's actions were legitimate because they upheld human rights norms, which may be viewed as the parameters for evolving international law.

Aside from the fundamental international legal questions raised by NATO's intervention in the Kosovo crisis, some observers have expressed concern over any possible precedent set by NATO's intervention in the Kosovo conflict and its impact on prospects for the U.N. Security Council to function properly in the future.

While NATO's intervention in the Kosovo conflict did not set a generally approved legal precedent, it demonstrated that the Alliance is capable of undertaking

non-Article 5 military interventions without explicit authorization from the U.N. Security Council to threaten or use force. For better or worse, NATO's Kosovo "exception" now exists as a contested precedent that most assuredly will be used in the future as a benchmark for a wide range of international undertakings. Nevertheless, while the decision by the allies to intervene in the Kosovo conflict set a *de facto* precedent, the manner in which the intervention was conducted only serves to highlight the shortcomings of such a precedent for future humanitarian interventions.

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I. INTRODUCTION

For the prosperous and comfortable Western powers military issues in the post-Cold War world significantly differ from those of the Cold War. In the post-Cold War era, with the shift in focus from inter-bloc rivalries to intra-state conflicts, humanitarian concerns have attained a new and higher profile in which military intervention is driven to a greater degree by normative concerns in addition to *Realpolitik.*

Over the past decade there have been over a dozen instances of forcible humanitarian action where previous superpower rivalry would have negated such endeavors (*e.g.*, Iraq, Somalia, Haiti, or Yugoslavia). Most of these interventions were conducted within the framework of Chapter VII mandates issued by the U.N. Security Council, but in two instances military force was used without a resolution clearly authorizing such action. The first instance pertains to the actions taken against Iraq in 1991 by a "coalition of the willing," and the second, NATO's intervention in the Kosovo conflict through Operation Allied Force in 1999.

With regard to Iraq, Security Council Resolution 688 of 5 April 1991, adopted just after the August 1990-February 1991 Gulf War, authorized a humanitarian relief operation by invoking "a threat to international peace and security" under Chapter VII; but it did not specify the use of coercive measures. Coalition partners used this resolution as a justification to declare humanitarian enclaves within the borders of Iraq off limits to Baghdad authorities, and to launch the humanitarian relief effort Operation Provide Comfort. Because this humanitarian intervention followed one of the most successful U.N. peace-enforcement missions ever, it received a significant amount of international

support. Nevertheless, some of the coalition partners were uneasy in regard to the legal questions it raised.

NATO's intervention in the Kosovo conflict was similar in that it lacked a specific mandate from the Security Council authorizing the use of force, but that is where the similarity ends. The crisis in Kosovo was obviously different in many ways, including cultural and political perspectives. Moreover, unlike Iraq, the Federal Republic of Yugoslavia had not been subjected to a direct military defeat and still retained a measure of international support. Therefore, NATO's Operation Allied Force remains a contentious issue, highlighting the tension between enforcement of human rights policy on the one hand and respect for state sovereignty on the other.

This thesis examines Operation Allied Force and how the most influential NATO allies (*i.e.*, the "Quad"—Britain, France, Germany, and the United States) justified the use of force in the Kosovo crisis without relying on an explicit U.N. Security Council mandate for such action. In addition, it considers whether NATO's intervention in the Kosovo conflict established a new precedent whereby U.N. Security Council authorization of the use of force is no longer a prerequisite for forceful humanitarian intervention.

A. KOSOVO AND THE QUESTION OF HUMANITARIAN INTERVENTION

On 24 March 1999, NATO initiated military action against the Federal Republic of Yugoslavia (FRY) in response to the crisis in Kosovo. Operation Allied Force was conducted without the explicit authorization of the United Nations Security Council, but

was justified by NATO allies as a means to bring peace and stability to Kosovo, and prevent a greater humanitarian emergency from developing. Although policy statements by NATO leaders supported such justifications, behind the scenes the allies disagreed about the specific legal basis for the use of force.

Although the tragedy and guilt associated with events in Bosnia in 1992-1995 were still on the minds of many Western leaders, the humanitarian emergency in Kosovo alone did not trigger this unprecedented action by the Atlantic Alliance. The concern of the leaders of many NATO countries projected beyond the immediate crisis unfolding in Kosovo, and focused on the broader implications for regional instability and the potential impact NATO inaction would have on the Alliance's credibility and future. The United States and other allies tacitly endorsed a "domino theory," whereby a domestic war in Kosovo between Serbs and ethnic Albanians could draw in Macedonia and Albania, followed by Greece and Turkey (both NATO allies), thus challenging the cohesion and future of the Alliance.[1] Consequently, national security interests, combined with concern about Belgrade's violations of international humanitarian law, and recognition of previous miscalculations in Bosnia by Western governments compelled members of NATO to respond to the situation in Kosovo.

Throughout 1998, the Security Council of the United Nations approved a number of resolutions under Chapter VII of the United Nations Charter in response to the nascent crisis in Kosovo; however, none of these resolutions specifically authorized the use of

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[1] Marshall Freeman Harris, "Macedonia: The Next Domino?" *The National Interest* (Spring 1999): 42.

military force. These resolutions, in conjunction with diplomatic negotiations conducted at Rambouillet, France, just prior to NATO intervention, failed to produce a peaceful solution in Kosovo.

Under the Charter of the United Nations, states are prohibited from threatening or using force against the territorial integrity or political independence of any state[2] unless it is initiated for reasons of self-defense[3] or specifically authorized by the Security Council.[4] However, with diplomatic efforts exhausted, the NATO allies took military action against Belgrade; this unleashed an outburst of criticism from Moscow and Beijing, neither of which subscribed to claims by some Western governments that the previously approved U.N. Security Council resolutions involving Kosovo provided implicit permission to use military force.[5] Moreover, the military action conducted by NATO in Operation Allied Force stirred a debate throughout Western societies on the legality of the use of force by states or regional organizations without the explicit authorization of the U.N. Security Council as stipulated in the Charter of the United Nations.

In the absence of specific U.N.S.C. authorization, was NATO's violation of Yugoslavia's sovereignty through the use of force illegitimate? Or were the potential

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[2] Article 2(4) of "The Charter of the United Nations," in Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 512.

[3] Article 51 of "The Charter of the United Nations," 523.

[4] Article 42 of "The Charter of the United Nations," 521.

[5] As Permanent Members of the U.N. Security Council, both Russia and China have the power to veto resolutions.

humanitarian consequences of inaction by NATO so disastrous as to make intervention a moral imperative, despite the stipulations of the U.N. Charter? Answers to these questions are still being debated. However, these questions clearly highlight the dilemma facing the NATO allies on the eve of Operation Allied Force.

B. THE RELEVANCE OF OPERATION ALLIED FORCE

U.N. Secretary-General Kofi Annan accurately captured the fundamental significance of Operation Allied Force:

> [NATO's intervention] has cast in stark relief the dilemma of so-called "humanitarian intervention." On the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.[6]

Arguments for and against NATO's intervention in the Kosovo conflict converge on the interpretation of Article 2, paragraph 4, of the Charter of the United Nations: "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." On the one hand, it is possible to infer from this that states are prohibited from using force, even for humanitarian purposes.[7] On the other hand, the counter-argument to this claim is that

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[6] Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist* (18 September 1999): 49.

[7] Under the U.N. Charter, the legal exceptions are (as noted above) state rights to self-defense (art. 51), and the explicit approval of the Security Council to use force (art. 53).

NATO's intervention in the Kosovo crisis did not in fact violate the territorial integrity of the Federal Republic of Yugoslavia (*i.e.*, NATO was not attempting to gain territory or change the existing border). Nor did it violate the political independence of the Federal Republic of Yugoslavia (though it did hamper Belgrade's ability to pursue its policies in Kosovo). From this perspective, it could be argued that humanitarian intervention in this case was in keeping with the principles of the Charter of the United Nations.[8]

Such arguments have led some legal scholars to propose that NATO's military intervention in the Kosovo conflict set a precedent for an emerging legal norm.[9] Such a legal norm would confer upon governments or regional arrangements[10] the authority to use military force against a state that commits gross violations of international humanitarian law in situations where the Security Council chooses not to respond or is powerless to respond due to a political impasse.[11]

The establishment of such a legal norm raises serious political questions and concerns about the sovereign rights of states. For instance, would such a legal norm

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[8] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" Forthcoming in *United States Air Force Academy Journal of Legal Studies*, vol. 10 (Winter 2000-2001).

[9] Ibid.

[10] Articles 52, 53, and 54 of the U.N. Charter refer to "regional arrangements or agencies," not alliances. While the OSCE has declared itself a regional arrangement in the sense of Chapter VIII of the U.N Charter, the allies have made it clear since 1949 that these articles do not apply to the Atlantic Alliance.

[11] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" Forthcoming in *United States Air Force Academy Journal of Legal Studies*, vol. 10 (Winter 2000-2001).

justify multilateral military action against countries like Turkey (with respect to the Kurdish question), China (Tibet), or Russia (Chechnya)? At what point in a crisis would a state or regional organization assume the "moral authority" to take action? Under the auspices of such a legal norm, could unilateral action by one state be justified? An opposing dilemma exists when there is an absence of national security interests to provide a motive for action in conjunction with an absence of explicit Security Council authorization. In this situation there are no mechanisms available to compel governments or regional organizations to take action against states that commit large-scale but intra-state violations of humanitarian law (*e.g.*, genocide in Cambodia and Rwanda). In the case of Kosovo, members of the Atlantic Alliance determined that their national security interests were at stake, and hence NATO intervened. It is unclear whether the Alliance would have intervened solely on humanitarian grounds.

While an argument can be made that NATO's intervention in the Kosovo conflict was justified based on the regional instability that might have ensued (*i.e.*, an appeal to Article 51 of the U.N. Charter), such justifications arguably were undercut by the manner in which NATO executed the intervention. Critics point to the air campaign, in which NATO aircraft conducted over 37,465 combat sorties, 14,006 of which were strike sorties.[12] In their view, the magnitude of destruction and collateral damage, combined with over 500 civilian deaths, confirmed that NATO's strategy constituted a

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[12] Wesley Clark, "When Force is Necessary: NATO's Military Response to the Kosovo Crisis," *NATO Review* (Summer 1999): 16.

disproportionate use of force as well. Was the use of ground forces a viable alternative? Initially, such an option was ruled out by Western governments (notably Germany and the United States) as politically unacceptable (due to the potential for numerous casualties), but as the conflict moved into its third month this alternative appeared to be an uncomfortable possibility.

Once NATO's prosecution of the air campaign was underway, atrocities committed by the Serbs against the Kosovar Albanians escalated dramatically. It is estimated that Serbs killed 10,000 ethnic Albanian civilians during the air war, while some 800,000 more were forcefully expelled from Kosovo.[13] Critics suggested that NATO intervention was the direct causal link. In addition, concern developed over NATO's responsibility for the ever-rising number of civilian casualties of the bombing campaign (*e.g.*, the accidental bombings of a civilian passenger train and a convoy of ethnic Albanian refugees, and the deliberate bombing of a Serbian state television/radio station in Belgrade). The bombing of the Chinese Embassy in Belgrade was another serious political and strategic accident that drew sharp criticism from many quarters. Collectively, critics asserted, these incidents pointed to the possibility that NATO's use of force was disproportionate.[14]

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[13] Ivo H. Daalder and Michael E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (Washington, D.C.: Brookings Institution Press, 2000), 3.

[14] The *Caroline* incident of 1837 (involving an attack by British troops against an American vessel accused of providing assistance to rebels in Canada) is often cited in international law as a classic demonstration that self-defense does not permit an excessive use of force in response. This case set a precedent whereby in self-defense a nation may use military force, but that force must be 1) proportional to the magnitude of the attack and 2) necessary (*i.e.*, an alternative to the use of force does not exist). For background, see Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 467-468.

Some human rights activists have even attempted to indict leaders of NATO countries for war crimes (*i.e.*, the killing of innocent civilians), via charges of violating the Protocol I addition to the Geneva Conventions of 1949.[15] However, Carla Del Ponte, the chief prosecutor for the International Criminal Tribunal for Yugoslavia, has concluded that NATO's actions did not violate the Protocol I addition to the Geneva Conventions. Her report, released on 13 June 1999, stated that, "although some mistakes were made by NATO, the Prosecutor is satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign."[16]

After 78 days of intense NATO bombing, Belgrade capitulated and agreed to a peace plan that led to a cease-fire under U.N. Security Council Resolution 1244. Although NATO's forceful intervention established a fragile peace and quasi-stable environment in Kosovo, questions remain as to whether NATO's actions in the Kosovo conflict were an anomaly or an imperfect benchmark for future humanitarian interventions.

C. METHODOLOGY

This thesis is based on an analytical survey of primary and secondary sources concerning the intervention in the Kosovo conflict. It analyzes justifications offered by

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[15] "Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force," Amnesty International Report. Available [Online]:<http://www.amnesty.org/ailib/aipub/2000/EUR/47001800.htm >[3 August 2000].

[16] Steve Woehrel and Julie Kim, "Kosovo and U.S. Policy," *CRS Issue Brief for Congress*, 21 July 2000, 11.

the key NATO allies to intervene and evaluates these justifications in terms of humanitarian necessity, national security interests, and international law.

D. THESIS ORGANIZATION

The second chapter of the thesis examines NATO's use of force against the Federal Republic of Yugoslavia (FRY) and the justifications offered by key NATO governments on the use of force prior to initiating action. Chapter III considers the outcome of Operation Allied Force, and analyzes the justifications for the use of force offered in hindsight by the Quad countries of the NATO Alliance. A key issue in this regard is whether NATO's action is considered a useful precedent or an isolated anomaly. Chapter IV critically analyzes the key issues surrounding the intervention in the Kosovo crisis in the context of the justifications offered by the four most influential NATO allies. Chapter V offers conclusions about the significance of Operation Allied Force for future humanitarian interventions.

II. NATO INTERVENTION AND INITIAL JUSTIFICATIONS BY KEY ALLIES

Prior to the Kosovo crisis, some NATO allies held the position that explicit U.N. Security Council authorization was required for NATO-led operations. By the middle of 1998, as it became evident that the violence in Kosovo had the potential to escalate into a major conflagration, and with initial diplomatic efforts proving to be inadequate, NATO leaders contemplated the use of force. The debate over the use of force by the NATO allies took place between the Security Council's vote on Resolution 1199 on 23 September 1998 and NATO's approval of an Activation Order (ACTORD) authorizing air strikes on 12 October 1998.[17] Although the allies agreed that they had a sufficient legal basis to use force, their interpretations of this legal basis varied widely. As Ivo Daalder explains, the key NATO allies were divided into three camps over the issue:

> There was, first, a "Catholic" camp (France and Italy) which insisted on the need for an explicit UN mandate while recognizing that, like sinning, this sacrosanct rule could be violated in exceptional circumstances such as these. In contrast, a "Lutheran" camp (including Britain and, later, Germany) sought to devise an alternative dogma to justify actions necessitated by the humanitarian crisis, notably the fact that the crisis was both overwhelming in nature and required an emergency response. A third camp (the United States) was "agnostic" in arguing that the rule requiring a UN mandate was neither sacrosanct nor absolute.[18]

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[17] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 25.

[18] Ivo H. Daalder, *Winning Ugly: NATO's War to Save Kosovo* (Washington D.C.: Brookings Institution Press, 2000), 45.

Lacking consensus on the legal basis to use force, but recognizing the need to move forward to resolve the crisis in Kosovo, leaders of the NATO Alliance left it to each individual member state to give a separate, legal justification of its own for the use of force.[19] Effectively this meant "the *de facto* withdrawal of its [NATO's], until then, unqualified acceptance of the political primacy of the Security Council."[20]

A. RESPONDING TO THE VIOLENCE: THE EVOLUTION OF NATO'S THREATS AND USE OF FORCE

From February 1998 to March 1999, thousands of ethnic Albanian civilians in the Serbian province of Kosovo were displaced, their homes destroyed; and over 2,500 were killed due to fighting between Yugoslav troops and guerrilla fighters of the separatist Kosovo Liberation Army (KLA).[21] In March and September 1998, the United Nations Security Council approved Resolutions 1160[22] and 1199, respectively, in attempts to peacefully resolve the on-going conflict. Resolution 1199 called for, among other things, a cease fire, the withdrawal of FRY security forces used for civilian repression, access for NGO's and humanitarian organizations, and the return home of refugees and the

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[19] Dick A. Leurdijk, "NATO as a Subcontractor to the United Nations: The Cases of Bosnia and Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 131.

[20] Ibid.

[21] Steven Woehrel and Julie Kim, "Kosovo and U.S. Policy," *CRS Issue Brief for Congress*, 21 July 2000, 1.

[22] Resolution 1160 called for, *inter alia,* a peaceful resolution of the Kosovo crisis, which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration.

internally displaced. Nevertheless, as reported by U.N. Secretary-General Kofi Annan in October 1998, "fighting in Kosovo continued unabated."[23] In view of recent atrocities committed in Bosnia and Herzegovina, the reports of mass killings of ethnic Albanian civilians in Kosovo led the U.N. Secretary-General to conclude "that civilians increasingly have become the main target in the conflict."[24] While U.N.S.C.R. 1199 described what steps needed to be taken to end the conflict, it quickly became evident that no enforcement mechanism existed to ensure that these demands would be met.[25]

With the onset of winter only weeks away, the concern over refugees and displaced persons in Kosovo pressed Western leaders to take action to avert a humanitarian catastrophe. President Clinton told reporters, "We need to stop the violence, get a negotiated settlement, and work our way through this. We don't want thousands upon thousands of people to be caught up in a war or to starve or freeze this winter because they have been displaced."[26]

As the situation in Kosovo steadily declined, diplomatic efforts intensified in October 1998. U.S. special envoy Richard Holbrooke, with the support of the Contact

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[23] Kofi Annan, "Kosovo: Report of the U.N. Secretary-General," 3 October 1998. Available [Online]:<http://www.kosovo.mod.uk/annan_report.htm>[29 August 2000].

[24] Ibid.

[25] Ivo H. Daalder, *Winning Ugly: NATO's War to Save Kosovo* (Washington D.C.: Brookings Institution Press, 2000), 42.

[26] Clinton quoted in "Clinton Says Allies Must Be Firm on Kosovo," *Bulletin Broadfaxing Network, Inc.*, 2 October 1998. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

Group,[27] traveled to Belgrade in a final attempt to persuade President Slobodan Milosevic to end the violence and reach a negotiated settlement regarding Kosovo. Western leaders made it clear that failure on the part of President Slobodan Milosevic to meet their demands would result in military action by NATO against Serb forces in Kosovo. Britain's Secretary of State for Defense, George Robertson, confirmed such warnings in an interview, asserting "that if Dick Holbrooke's mission does not produce results, there will be military action."[28] In a radio interview, French Foreign Minister Hubert Védrine stated that:

> If there is no breakthrough, if Mr. Holbrooke does not achieve any results...and neither do Russian actions...if pulling out [troops] remains problematic and impossible to check...and thus, not very credible...we shall shoulder our responsibilities. Force will be resorted to, one way or another, and this will be proof of the determination of the international community to find a solution.[29]

On 12 October 1998, the North Atlantic Council issued an Activation Order (ACTORD) authorizing both a phased air campaign and limited air operations against Serb forces in Kosovo. The NATO allies insisted they were "sensitive to the legal basis for their action."[30] In addition to Belgrade's failure to comply with the numerous

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[27] The Contact Group consists of diplomatic representatives from Britain, France, Germany, Italy, Russia, and the United States. It was initially established in April 1994 to deal with Bosnia and the implementation of the Dayton Accords.

[28] Robertson quoted in "UK's Cook, Robertson Warn NATO Force To Be Used," *FBIS*, document ID: FTS19981011000162, transcribed from the *London Press Association*, 11 October 1998.

[29] Védrine quoted in "Védrine Says Force to Be Used in Kosovo If No Breakthrough," *FBIS*, document ID: FTS19981009000701, translated from *Paris France-Info Radio*, 9 October 1998.

[30] George Robertson, "Kosovo One Year On: Achievement and Challenge," 21 March 2000. Available [Online]:< http://www.nato.int/kosovo/repo2000/report-en.pdf>[2 December 2000].

demands of the U.N. Security Council, the North Atlantic Council took the following factors into consideration when approving the ACTORD:

- The Yugoslav government's non-compliance with earlier U.N. Security Council resolutions,
- The warnings from the U.N. Secretary General about the dangers of a humanitarian disaster in Kosovo,
- The risk of such a catastrophe in the light of Yugoslavia's failure to seek a peaceful resolution of the crisis,
- The unlikelihood that a further U.N. Security Council resolution would be passed in the near future,
- And the threat to peace and security in the region.[31]

Based on these factors, there was consensus in the North Atlantic Council "that a sufficient legal basis existed for the Alliance to threaten and, if necessary, use force against the Federal Republic of Yugoslavia."[32] However, NATO delayed the execution of air strikes for four days to allow Belgrade time to reach an agreement with Ambassador Holbrooke on compliance with Security Council Resolution 1199. The following day, at a press conference in Belgrade, Ambassador Holbrooke announced an accord reached with President Milosevic to verify compliance with the demands of the U.N Resolution:

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[31] George Robertson, "Kosovo One Year On: Achievement and Challenge," 21 March 2000, 24. Available [Online]:<http://www.nato.int/kosovo/repo2000/report-en.pdf>[2 December 2000].

[32] Ibid.

> We have agreed with President Milosevic on a ground verification program augmented by an important aerial verification program. On the ground the OSCE, the Organization of Security and Cooperation in Europe, will have in Kosovo a two-thousand person Verification Mission....aerial verification by non-combat [NATO] aircraft flying over Kosovo...[has also] been agreed upon.[33]

In addition to the Kosovo Verification Mission (KVM), the Holbrooke agreement essentially mirrored Resolution 1199 in that it called for a cease-fire, a reduction in the number of FRY forces operating in Kosovo, the safe return of refugees, and negotiations on the political future of the province.[34] However, Ambassador Holbrooke failed to persuade President Milosevic to allow the international war crimes tribunal in The Hague to have jurisdiction in Kosovo. Nevertheless, United Nations Security Council Resolution 1203, approved on 24 October 1998, endorsed the agreement reached with Belgrade, but did not offer explicit authorization for NATO to use force in the event that Belgrade failed to comply with U.N. demands.[35]

The situation in Kosovo remained volatile, culminating in an end to the brief cease-fire by December 1998 and the massacre of forty-five ethnic Albanian civilians at Racak in January 1999. The assessment of Belgrade's pledges expressed in President Clinton's statement months before that "commitments are not compliance...Balkan

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[33] "Press Conference by Ambassador Richard Holbrooke and Ambassador Christopher Hill," Hyatt Hotel, Belgrade, 13 October 1998. Available [Online]:<http://www.nato.int/usa/state/s981013b.htm>[28 August 2000].

[34]Tim Youngs, *et al.*, "Kosovo: NATO and Military Action," *House of Commons Research Paper 99/34*, 24 March 1999, p. 9. Available [Online]:<http://www-parliament.uk/commons/lib/research/rp99/rp99-034.pdf>[28 August 2000].

[35] Ibid.

graveyards are filled with President Milosevic's broken promises" was prescient.[36] With the situation continuing to deteriorate, the Contact Group drafted a peace plan on 29 January 1999, and asked Serb and Kosovar Albanian representatives to attend meetings in Rambouillet, France, to negotiate a peace settlement.

In order to persuade the Yugoslav government to participate in the negotiations, NATO threatened air strikes against Serb targets in Kosovo. A spokesman for the Alliance warned that "NATO stands ready to act and rules out no option to insure full respect by both sides of the demands of the international community."[37] NATO's decision to threaten air strikes followed U.N. Secretary-General Kofi Annan's assessment that the threat of force was crucial to diplomatic efforts to conclude a negotiated peace settlement.[38] Annan further stated that:

> The bloody wars of the last decade have left us with no illusions about the difficulty of halting internal conflicts, by reason or by force, particularly against the wishes of the government of a sovereign state. Nor have they left us with any illusions about the need to use force, when all other means have failed. We may be reaching that limit, once again, in the former Yugoslavia.[39]

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[36] "Text of Clinton's Statement on Kosovo," *Agence France Presse*, 13 October 1998. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[37] Craig Whitney, "NATO Says It's Ready to Act to Stop Violence," *New York Times*, 29 January 1999. Available [Online]:<http://www.nytimes.com/library/world/europe/012999kosovo-nato.html>[17 August 2000].

[38] Ibid.

[39] Annan quoted in Craig Whitney, "NATO Says It's Ready to Act to Stop Violence," *New York Times*, 29 January 1999. Available [Online]:<http://www.nytimes.com/library/world/europe/012999kosovo-nato.html>[17 August 2000].

With the Contact Group's ultimatum backed by threats from NATO, both sides agreed to attend the talks. The negotiating teams met with mediators from the Contact Group beginning on 6 February 1999. However, after two extensions, talks were adjourned on 23 February without a negotiated settlement. Failure to reach an agreement was primarily due to Belgrade's strong opposition to the proposed deployment of a NATO peacekeeping force to implement an agreement. Belgrade asserted that such a force would infringe on the sovereignty of the FRY.[40] Although talks resumed in Paris, on 15 March 1999, negotiations quickly ended four days later with only the ethnic Albanian delegation signing an interim peace agreement.

Following the adjournment of negotiations the OSCE withdrew its members from the Kosovo Verification Mission, and U.S. Secretary of State Madeleine Albright announced that Richard Holbrooke would return to Belgrade to deliver the following message to President Milosevic:

> Ambassador Holbrooke will emphasize to President Milosevic that NATO air strikes against the FRY are being prepared. He will make clear that Milosevic faces a stark choice: to halt aggression against the Kosovar Albanians and accept an interim settlement with a NATO-led implementation force or bear the full responsibility for the consequences of NATO military action.[41]

Subsequent efforts by Ambassador Holbrooke were unsuccessful, and on 23 March NATO Secretary-General Javier Solana authorized the Supreme Allied

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[40] Tim Youngs, *et al.*, "Kosovo: NATO and Military Action," *House of Commons Research Paper 99/34*, 24 March 1999, p. 15. Available [Online]:<http://www-parliament.uk/commons/lib/research/rp99/rp99-034.pdf>[28 August 2000].

[41] Madeleine K. Albright, "Statement on Ambassador Holbrooke's Travel to Belgrade" Washington, D.C., 21 March 1999. Available [Online]:<http://secretary.state.gov/www/statements/1999/990321.html> [17 August 2000].

Commander, Europe (SACEUR), General Wesley Clark, to execute air strikes against the Federal Republic of Yugoslavia.[42] The following day, phase one of NATO's military action began against an estimated 40,000 Serbian Interior Ministry police (MUP) and Yugoslav Army (VJ) forces.[43]

According to the U.S. Department of Defense, NATO had three specific strategic objectives for the use of force in the Kosovo conflict:

- Demonstrate the seriousness of NATO's opposition to Belgrade's aggression in the Balkans
- Deter Milosevic from continuing and escalating his attacks on helpless civilians and create conditions to reverse his ethnic cleansing
- Damage Serbia's capacity to wage war against Kosovo in the future or spread the war to neighbors by diminishing or degrading its ability to conduct military operations.[44]

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[42] The decision to authorize the use of force was made by members of the North Atlantic Council. This decision was merely conveyed to General Wesley Clark by Secretary-General Solana.

[43] NATO's operational plan (OPLAN) for Operation Allied Force consisted of five phases: "Phase 0 was the deployment of air assets into the European theater. Phase 1 would establish air superiority over Kosovo...and degrade command and control...over the whole of the Federal Republic of Yugoslavia. Phase 2 would attack military targets in Kosovo and those Yugoslav forces south of 44 degrees latitude, which were providing reinforcement to Serbian forces into Kosovo.... Phase 3 would expand air operations against a wide range of high-value military and security force targets throughout the Federal Republic of Yugoslavia. Phase 4 would redeploy forces as required. A Limited Air Response, relying predominantly on cruise missiles to strike selected targets throughout the Federal Republic of Yugoslavia was developed as a stand-alone option...[and] was eventually integrated into Phase 1." *Report to Congress: Kosovo/Operation Allied Force After Action Report*, United States Department of Defense, 31 January 2000, 7-8.

[44] *Report to Congress: Kosovo/Operation Allied Force After Action Report*, United States Department of Defense, 31 January 2000, 7.

However, as Ivo Daalder points out, " NATO clearly failed to achieve the last two of these objectives, and it made only limited progress toward the first in the early weeks of the war."[45] Expectations that Operation Allied Force would be short in duration by persuading President Milosevic to return to the negotiating table quickly faded as the initial phase of NATO bombing failed to gain Belgrade's compliance. By the time Allied leaders met in Washington, D.C., on 23 April 1999, for a NATO Summit, it had already become clear that maintaining Alliance unity was the overarching strategic objective of Operation Allied Force. In addition, having failed to meet their initial objectives, the NATO leaders concluded their Summit with a statement on Kosovo outlining five new goals to be achieved by Operation Allied Force:

- Ensure a verifiable stop to all [Serb] military action and the immediate end of violence and repression in Kosovo
- Withdraw from Kosovo his [Milosevic's] military, police, and paramilitary forces
- Agree to the stationing in Kosovo of an international military presence
- Agree to the unconditional and safe return of all refugees and displaced persons, and unhindered access to them by humanitarian aid organizations

[45] Ivo H. Daalder, *Winning Ugly: NATO's War to Save Kosovo* (Washington D.C.: Brookings Institution Press, 2000), 101.

- Provide credible assurance of his [Milosevic's] willingness to work for the establishment of a political framework [in Kosovo] based on the Rambouillet accords.[46]

During much of the conflict it was unclear how successful NATO would be in achieving its goals, but eventually the Alliance prevailed. After eleven weeks of intense air strikes, NATO achieved its goals when President Milosevic agreed on 3 June 1999, to a peace plan proposed by European Union (EU) representative and Finnish President Martti Ahtisaari and Russian Balkans envoy Viktor Chernomyrdin. The proposal was based primarily on NATO demands as well as proposals from the Group of Eight countries (Britain, Canada, France, Germany, Italy, Japan, Russia, and the United States). It called for the withdrawal of all Yugoslav forces from Kosovo; the deployment of an international peacekeeping force with NATO at its center; and international administration of Kosovo until an elected interim government was established.

Following an agreement reached between NATO and Yugoslav military officers, NATO Secretary General Javier Solana announced on 10 June 1999, that NATO had formally suspended its air strikes against Yugoslavia. Ten days later, after completion of the Serbian troop withdrawal from Kosovo, NATO formally terminated the air campaign.[47]

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[46] *Report to Congress: Kosovo/Operation Allied Force After Action Report*, United States Department of Defense, 31 January 2000, 8-9.

[47] *Kosovo Backgrounder: The Military Campaign Against Yugoslavia*, House Armed Service Committee Report, 30 June 1999, 7. Available [Online]<http://www.house.gov/hasc/Publications/106thCongress/kosovobackgrounder.pdf>[15 August 2000].

B. U.S. JUSTIFICATIONS FOR THREATENING THE USE OF FORCE

From the beginning of the Serb crackdown in Kosovo in March 1998, the Contact Group recognized that a unified response to the violence would be necessary if a repeat of the horrors witnessed in Bosnia in 1992-1995 was to be avoided. Secretary of State Madeleine Albright emphasized this point at a meeting with her European colleagues in London on 9 March 1998: "History is watching us. In this very room our predecessors delayed as Bosnia burned, and history will not be kind to us if we do the same."[48] In his initial remarks on Kosovo, President Clinton made a similar comment: "We do not want the Balkans to have more pictures like we've seen in the last few days so reminiscent of what Bosnia endured."[49] Foreign Ministers from the other five countries of the Contact Group also condemned the hostilities in Kosovo. Nevertheless, by applying the lessons of Bosnia to Kosovo, it became clear that a solution to the crisis required more than just unity of effort by members of the Contact Group; above all, it required American leadership.

It is difficult to overestimate the significance of American leadership with regard to NATO's intervention in the Kosovo conflict. From the beginning, the United States took the lead in devising a response to the violence. Stressing the need for "unity and resolve," Madeleine Albright encouraged her colleagues to take decisive action:

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[48] Albright quoted in Walter Isaacson, "Madeleine's War," *Time*, 17 May 1999, 29.

[49] "Remarks by the President and U.N. Secretary-General Kofi Annan in Photo Opportunity," (The White House, Office of the Press Secretary, 11 March 1998). Available [Online]:< http://www.whitehouse.gov/WH/New/html/19980311-14335.html>[29 September 2000].

> When the war in the former Yugoslavia began in 1991, the international community did not react with sufficient vigor and force. Each small act of aggression that we did not oppose led to larger acts of aggression that we could not oppose without great risk to ourselves. Only when those responsible paid for their actions with isolation and hardship did the war end. It took us seven years to bring Bosnia to this moment of hope. It must not take us that long to resolve the crisis that is growing in Kosovo; and it does not have to if we apply the lessons of 1991. This time, we must act with unity and resolve. This time, we must respond before it is too late.[50]

In his remarks just prior to the issuance of NATO's Activation Order, President Clinton further demonstrated the resolve of the U.S. leadership: "We have been working for months...to get NATO and ... the UN to send a message to Mr. Milosevic to stop the violence. I believe our allies in Europe are with us."[51] However, it was not until a week later, after the ACTORD was signed, that President Clinton explained what precisely the allies were "with us" on[52]:

> All along, our objectives have been clear, to end the violence in Kosovo which threatens to spill over into neighboring countries, and to spark instability in the heart of Europe, to reverse a humanitarian catastrophe in the making, as tens of thousands of homeless refugees...risk freezing or starving to death in the winter and to seek a negotiated peace.[53]

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[50] Madeleine K. Albright, "Statement at the Contact Group Ministerial on Kosovo" London, United Kingdom, 9 March 1998. Available [Online]:<http://secretary.state.gov/www/statements/1998/980309.html>[17 August 2000].

[51] Clinton quoted in "Clinton Says Allies Must be Firm on Kosovo," *Bulletin Broadfaxing Network*, 2 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

[52] Rouven J. Steeves, "Legitimizing Intra-State Military Intervention on Behalf of Human Rights," *Thesis*, Naval Postgraduate School, December 1999, 31.

[53] "Text of Clinton's Statement on Kosovo," *Agence France Presse*, 13 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

With this statement, President Clinton established the official U.S. framework to justify the use of force—humanitarian necessity and the imperative of preventing a wider conflict in Europe. The United States wished to set aside legal arguments over the sovereign rights of the Federal Republic of Yugoslavia, a point underscored by Madeleine Albright when asked whether President Milosevic had forfeited sovereignty over his country: "I think that that is an international legal question that I think I don't want to answer in a specific form.... But I do think that there is very much a sense that Milosevic is not behaving in a way that is commensurate with how a leader of a sovereign nation should...I think that it's very important that he [Milosevic] understand that as the leader—an elected leader—of a sovereign nation, he has responsibilities not only to his own people but to the international community for trying to pursue civilized behavior"[54]

Nevertheless, when pressed on the issue of legality, Washington officials based their justifications on existing U.N. resolutions (*i.e.*, Resolution's 1160, 1199, and 1203), and Belgrade's failure to comply with them.[55] Washington argued that since the resolutions were based on Chapter VII of the U.N. Charter, Belgrade's failure to comply provided sufficient legal grounds for NATO to undertake military action.[56] Responding

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[54] Madeleine K. Albright, "Statement at the Contact Group Ministerial on Kosovo," London, United Kingdom, 9 March 1998. Available [Online]:<http://secretary.state.gov/www/statements/1998/980309.html>[17 August 2000].

[55] Madeleine K. Albright, "Albright and German Foreign Minister Joschka Fisher Remarks to the Press," Washington, D.C., 3 November 1998. Available [Online]:<http://secretary.state.gov/www/statements/1998/981103.html>[17 August 2000].

[56] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 26.

to questions by the press in November 1998, Secretary of State Albright claimed that "the United States believes that we have all [the] authority we need to use military force if we have to, because the international community has spoken on this any number of times and the resolutions have talked about severest consequences. So we believe that we have the authorization."[57]

President Clinton promoted this view by claiming that any "action by NATO forces would be within the framework of U.N. decisions."[58] Indeed, when Secretary of State Madeleine Albright was asked whether taking action without a new U.N. resolution would be a problem for other NATO allies, she replied that "those governments will understand the need for action and understand that the resolution that the Security Council has already taken is sufficient."[59] However, such a legitimizing rationale for the use of force was clearly not explicitly expressed in the resolutions, a point that would be made by the outgoing German Foreign Minister, Klaus Kinkel. In fact, U.N.S.C.R. 1199 stated that, "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, [the Security Council is] to consider further action and additional measures to maintain or restore stability in the region."[60] Nevertheless, rather

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[57] Madeleine K. Albright, "Albright and German Foreign Minister Joschka Fisher Remarks to the Press," Washington, D.C., 3 November 1998. Available [Online]:<http://secretary.state.gov/www/statements/1998/981103.html>[17 August 2000].

[58] Joseph Fitchett, "U.S. Tells NATO It's Time to Use Force on Kosovo," *International Herald Tribune*, 9 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

[59] Madeleine K. Albright, "Press Conference on Kosovo," Brussels, Belgium, 8 October 1998. Available [Online]:<http://secretary.state.gov/www/statements/1998/981008.html>[17 August 2000].

[60] *U.N. Security Council Resolution 1199 (1998)*, 23 September 1998. Available [Online]:<http://www.un.org/Docs/scres/1998/sres1199.htm>[17 August 2000].

than directly rejecting U.S. interpretations, America's European allies articulated their own justifications.

C. BRITISH JUSTIFICATIONS FOR THREATENING THE USE OF FORCE

With the United States leading the diplomatic effort regarding Kosovo, the British Government staunchly supported Washington's impetus to threaten NATO air strikes in response to Belgrade's non-compliance with U.N.S.C. resolutions. Additionally, British leaders predictably admonished some of their European allies for being equivocal in their support of a policy advocated by London and Washington. Nevertheless, London officials took an approach differing from that of their American counterparts to justify the legality of threatening NATO air strikes. Rather than relying explicitly on U.N.S.C.R. 1199, London based its legitimizing rationale for threatening the use of force against Belgrade on the overwhelming humanitarian necessity posed by the displaced Kosovars. The Foreign and Commonwealth Office (FCO) disseminated a note to other NATO allies outlining Britain's justification for such an approach:

> Security Council authorization to use force for humanitarian purposes is now widely accepted (Bosnia and Somalia provided firm legal precedents). A UNSCR would give a clear legal base for NATO action, as well as being politically desirable.
>
> But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied:
>
> (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;

(c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim—i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.

There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and the UNSG's and UNHCR's reports). We judge on the evidence of FRY handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milosevic is dissuaded from further repressive acts, and that only the proposed threat of force will achieve this objective. The UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.[61]

In an attempt to base their argument on precedent, the British referred to the Gulf War, and more specifically to the establishment of no-fly zones in Iraq which in the northern part protected Kurdish populations (*i.e.*, Operation Provide Comfort). In August 1991, in reference to these no-fly zones, Foreign Secretary Douglas Hurd had remarked:

> We operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognizes extreme humanitarian need...We are on strong legal as well as humanitarian ground in setting up the 'no-fly' zone.[62]

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[61] "FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force," Foreign and Commonwealth Office, 7 October 1998. Quoted in Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *Survival*, vol. 41, no. 3 (Autumn 1999), 106.

[62] Interview on *BBC Radio 4 Today Programme*, 19 August 1991, Hurd quoted in Tim Youngs, *et al.*, "Kosovo: NATO and Military Action," *House of Commons Research Paper 99/34*, 24 March 1999, 35. Available [Online]:<http://www-parliament.uk/commons/lib/research/rp99/rp99-034.pdf>[28 August 2000].

Some in the British government echoed this theme of exceptional humanitarian necessity leading to a "right of intervention" under international law and related it to the prospect of NATO action in the Kosovo crisis. The Parliamentary Under-Secretary of State, Baroness Symons of Vernham Dean, addressed the issue in a Written Answer to the House of Lords:

> Cases have also arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of the purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. These cases are exceptional.... The important point is that all NATO operations must have a proper basis in international law....this need not always be a United Nations Security Council resolution. The legal basis in any particular case is bound to depend on the circumstances. We have to judge each case on its merits and act accordingly.[63]

Supporting this position, Foreign Secretary Robin Cook stated that "we are clear that we have legal authority for action to prevent humanitarian catastrophe and we are all deeply worried that we shall be looking at just such a catastrophe unless we are able to get a political settlement under way."[64] In addition, Cook indicated that NATO threats were a means to encourage Belgrade to accept a peace settlement: "the objective of [military] action, and of the threat of such action, is to try to secure the compliance of Belgrade" with the Contact Group's demands. However, the assumption that threats

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[63] Baroness Symons of Vernham Dean, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, in House of Lords, Hansard, 14 December 1998, columns 1220-21. Quoted in Rouven J. Steeves, "Legitimizing Intra-State Military Intervention on Behalf of Human Rights," *Thesis*, Naval Postgraduate School, December 1999, 36.

[64] Great Britain, Parliament, House of Commons, 1 February 1999, column 605. Quoted in Tim Youngs, *et al.*, "Kosovo: NATO and Military Action," *House of Commons Research Paper 99/34*, 24 March 1999, 34. Available [Online]:<http://www-parliament.uk/commons/lib/research/rp99/rp99-034.pdf>[28 August 2000].

would be enough to compel Belgrade to accept a peace settlement ultimately proved false.

Finally it must be noted that London's rationale for threatening force was not restricted to humanitarian necessity alone. Some government officials implied that the right of collective self-defense was also a basis for military action in the Federal Republic of Yugoslavia. In his statement on 23 March 1999 Tony Blair argued:

> If Kosovo was left to the mercy of Serbian repression, there is not merely a risk, but the probability of re-igniting unrest in Albania, of a destabilized Macedonia, of almost certain knock-on effects in Bosnia, and of further tension between Greece and Turkey. Strategic interests for the whole of Europe are at stake. We cannot contemplate, on the doorstep of the EU, a disintegration into chaos and disorder.[65]

Such a statement highlights the fact that British motives for NATO military action extended beyond purely humanitarian concerns over Kosovo. Indeed, strategic interests played a role in London's analysis despite its emphasis on human rights as the principal basis for threatening intervention.

D. GERMAN JUSTIFICATIONS FOR THREATENING THE USE OF FORCE

During the period that the NATO allies were seeking consensus to approve the ACTORD, Germany was undergoing a change of government. Although this change in leadership progressed smoothly between outgoing Chancellor Helmut Kohl and incoming

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[65] Statement of Prime Minister Tony Blair in the House of Commons, 23 March 1999. Quoted in Tim Youngs, *et al.*, "Kosovo: NATO and Military Action," *House of Commons Research Paper 99/34*, 24 March 1999, 33. Available [Online]:<http://www-parliament.uk/commons/lib/research/rp99/rp99-034.pdf>[28 August 2000].

Chancellor Gerhard Schröder, both agreeing to back NATO's Kosovo policy, Schröder's new coalition government faced its first political challenge over the issue.[66]

While most Germans agreed, regardless of their party affiliation, that action had to be taken to prevent the humanitarian catastrophe in prospect in Kosovo, finding common ground on the precise nature of that action presented a difficult challenge for the German government. Outgoing German Foreign Minister Klaus Kinkel was opposed to relying on U.N.S.C. Resolution 1199 as the sole basis for NATO intervention. Unconvinced by the arguments put forward by his American and British colleagues, Kinkel attempted (albeit unsuccessfully) to find alternative legal grounds for threatening military action in Kosovo.[67]

Kinkel started by acknowledging what all members of the Alliance knew but chose to ignore—i.e., that "the reference to Chapter VII in Resolution 1160 and 1199 was insufficient in that Russia and China both had accompanied their votes by legally valid declaratory statements spelling out that the resolutions should not be interpreted as authorizing the use of force."[68] Next, he formulated a "cluster of conditions" that collectively made a military threat legitimate in his analysis. According to Kinkel, such

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[66] The coalition government consisted of the Social Democratic Party (SPD) and the Union 90/Green Party. The Green Party was sharply divided between fundamentalist "fundi" left-wingers, who opposed the use of military force for any reason, and more moderate "realos" who backed peacekeeping missions.

[67] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 26.

[68] Kinkel quoted in indirect discourse in Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 26. With regard to Resolution 1199, China abstained from voting on the grounds that the wording of the resolution encroached on Yugoslavia's sovereignty. Russia went along with Resolutions 1160 and 1199 on the grounds that if they were not complied with, the Council would have to consider further action.

conditions included: 1) the political impasse of the Security Council over what had become an emergency situation in Kosovo; 2) the fact that a military threat was in the "sense and logic" of Resolutions 1160 and 1199; and 3) the significance of protecting human rights, particularly the rights of minorities.[69] Given these circumstances, he argued that "this is a case in which international law exceptionally authorizes a military strike to avert an imminent humanitarian catastrophe after all civilian means have failed."[70]

While a Social Democratic Party (SPD) official asserted that the new majority supported the position of the outgoing government, he did not specify whether this applied to the legal grounding or the political decision itself.[71] Therefore, a degree of uncertainty remained over how the incoming SPD-Green German government would justify the legality of threatening military intervention in Kosovo.

After meeting with President Clinton and thereby also discussing the ACTORD, Chancellor-elect Schröder assured the allies that his new government would back NATO air strikes, without a new United Nations Security Council resolution: "Our threats are not only pretense. If U.N. Resolution 1199 is not fulfilled, things will get serious."[72]

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[69] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 26.

[70] Kinkel quoted in Michael Adler, "Germany Approves NATO Operation Against Serbs," *Agence France Presse*, 12 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

[71] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 27.

[72] Schröder quoted in Michael Alder, "Germany Approves NATO Operations Against Serbs," *Agence France Presse*, 12 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

However, such a statement lacked clarity and underscored the reluctance of the German coalition government to take decisive action to help avert the impending crisis in Kosovo. Such reluctance was further demonstrated by Schröder when he claimed that Germany "does not have a vested interest in going into war in Kosovo," but said somewhat oxymoronically that, "I find it very important to reveal a certain degree of decisiveness here."[73] Yet, just a short time later he remarked at a news conference, "I don't even want to think about what happens if the U.N. resolution is not fulfilled."[74]

It was clear that the new government was walking a fine line so as to neither alienate constituents in Germany on the one hand, nor its NATO allies on the other. This balancing act was readily apparent as Schröder argued that NATO (in reference to U.N.S.C. Resolution 1199) was not giving "itself a mandate," but was "acting within the reference framework of the United Nations." At the same time, in what appeared to be a contradiction (or appeasement to his coalition Greens), he reemphasized the "U.N. monopoly on the use of force and the responsibility of the Security Council for the preservation of world peace and international security."[75]

Surprisingly, Germany's newly appointed Foreign Minister, Joschka Fisher (a Green Party leader), appeared more assertive in arguing for the use of force: "I am not a friend of using force, but sometimes it is a necessary means of last resort. So I am ready

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[73] Schröder quoted in Steven Erlanger, "Schroder Tells Clinton He Backs Action by NATO in Kosovo," *New York Times*, 10 October 1998. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

[74] Ibid.

[75] Schröder quoted in "Schröder Addresses Bundestag on Kosovo," *FBIS*, document ID: FTS19981011000162, translated from *Mainz ZDF Television Network*, 16 October 1998.

to use it if there is no other way. If people are being massacred, you cannot mutter about having no mandate. You must act."[76] Additionally, incoming Defense Minister Rudolf Scharping propounded the necessity for international law to be further developed so that massive human-rights violations could be considered legitimate grounds for military intervention.[77] Nevertheless, Germany's lack of resolve persisted throughout the period leading up to NATO's intervention in the Kosovo conflict.

E. FRENCH JUSTIFICATIONS FOR THREATENING THE USE OF FORCE

Unlike their British and German counterparts, the French were very pragmatic in their justifications of the threat of military action in Kosovo. Indeed, noticeably missing from statements by French officials in regard to Kosovo were any references to the atrocities being committed or to the potential instability that might have resulted for the rest of Europe.[78] French pragmatism took the form of a more legalistic approach to justify intervention. This was evident in a statement by the French Minister of Defense, Alain Richard, in February 1999:

> We remain firmly attached to the legitimacy for any non-Article 5 operation implying recourse to force provided by the authority of the United Nations Security Council, the sole legitimate and indisputable organ for a resort to force and for effecting a delegation [of authority to use force] to a regional organization. This formula, which is

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[76] Fisher quoted in Roger Cohen, "Germany's Pramatic Ex-Radical Thinks Globally," *New York Times*, 28 January 1999. Available [Lexis/Nexis]: NEWS/ALLNWS [17 August 2000].

[77] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 27.

[78] Rouven J. Steeves, "Legitimizing Intra-State Military Intervention on Behalf of Human Rights," *Thesis*, Naval Postgraduate School, December 1999, 47.

> consistent with international law, has demonstrated its flexibility, because it was possible to place our action in Kosovo in 1998 within its scope, a proof that it does not in the least imply passivity, once we know how to use it with effectiveness. But we have in this case reached the extreme limits of this flexibility, and on an exceptional basis, because it concerned a case of humanitarian necessity.[79]

Richard's statement reflects the position of French officials that humanitarian necessity provided an exceptional circumstance legitimizing military intervention in the Kosovo conflict. However, besides demonstrating France's rationale on the use of force, such a statement serves to illustrate the government's vigilance over U.S. attempts to locate further decision-making away from the Security Council and under the aegis of an American-dominated NATO.[80] Nevertheless, even though the French traditionally had been disinclined to support NATO-led missions without an explicit U.N. Security Council mandate, it became readily apparent that in the case of Kosovo such a position was "a prescription for paralysis."[81] Further articulating this point, French President Jacques Chirac explained in October 1998 that:

> Any military action must be requested and decided by the Security Council. In this particular case, we have a resolution which does open the way to the possibility of military action. I would add, and repeat, that the humanitarian situation constitutes a ground that can justify an exception to a rule, however strong and firm it is. And if it appeared

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[79] Alain Richard, Minister of Defense, on the future of the Atlantic Alliance, on the occasion of the thirty-fifth conference on the politics of security, Munich, 6 February 1999. Quoted in David S. Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, and Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 31-32.

[80] Marc Weller, "The Rambouillet Conference on Kosovo," *International Affairs*, vol. 75, no. 2 (April 1999), 212.

[81] David S. Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, and Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 33.

> that the situation required it, then France would not hesitate to join those who would like to intervene in order to assist those that are in danger.[82]

Although French officials strongly desired a U.N.S.C resolution that clearly authorized military intervention, they reluctantly agreed to the ACTORD based upon existing Resolution 1199. No attempt was made by Paris to "bridge the legal gap" between the "resolution which opens the way to the possibility of military action" and the military intervention itself.[83] Finally, as Operation Allied Force commenced in March 1999, French Prime Minister Lionel Jospin again emphasized the exceptional nature of the crisis: "Military intervention was imperative, because the irrationality of the Yugoslav regime left no other choice, [and] because we could not resign ourselves to impotence....once the [U.N. Security] Council was not in a position to act..., [and] once there was an emergency, it was up to us to assume all our responsibilities, notably within the Atlantic Alliance."[84]

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[82] Chirac quoted in Ivo H. Daalder, *Winning Ugly: NATO's War to Save Kosovo* (Washington D.C.: Brookings Institution Press, 2000), 44.

[83] Catherine Guicherd, "International Law and the War in Kosovo," *Survival*, vol. 41, no. 2 (Summer 1999), 28.

[84] Lionel Jospin, statement to the National Assembly, 26 March 1999, *Journal Officiel de la République Française, Débats Parlementaires, Assemblée Nationale*, pp. 2969-2972. Quoted in David S. Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, and Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 33.

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III. POST-INTERVENTION POSITIONS OF KEY NATO GOVERNMENTS

Operation Allied Force successfully concluded with the withdrawal of Yugoslav forces from Kosovo and the eventual return of most refugees to Kosovo. Even though the NATO allies achieved the Alliance objectives announced at their Washington Summit in April 1999, the Kosovo conflict raised broad questions about future undertakings by the Alliance and its ability to deal with humanitarian crises beyond the immediate borders of the European allies. While NATO leaders held that they had done the "right thing" to intervene in the Kosovo conflict in defense of human rights, such pronouncements were not also forthcoming in regard to the execution of NATO's strategy. The conduct of NATO's air campaign and NATO's decision not to use ground forces to end the violence in Kosovo drew sharp criticism from many corners. Such criticism muted any expectation by Western governments that Operation Allied Force had somehow "ushered in a new global moral order":[85]

> Had the West been willing to unleash a ground war to secure its military, humanitarian and human-rights objectives, there would be more room for optimism. But NATO's unwillingness to attack on land means that the moral claims it is now making for itself need to be treated with skepticism....It is all very well to talk about the defense of human rights. But such talk rings hollow when the commitment is not permitted to go much below 15,000 feet....When you go to war, you have to be willing to wage war. You may be fighting in defense of human rights, but you are fighting a war. And wars are never cost-

[85] David Rieff, "A Just War is Still a War," *Newsweek*, 14 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

> free. Nor, it might be added, are moral ambitions, unaccompanied by a willingness to sacrifice, likely to be realized very often.[86]

NATO leaders have been careful to avoid making statements that could be interpreted as propounding Operation Allied Force as the new model for future humanitarian interventions. Rather than defining NATO's intervention in the Kosovo conflict as a precedent-setting event, most allied leaders have portrayed the conflict as an "unfortunate, but necessary and reasonable exception," which they are thankful to have behind them.[87] As one observer noted, "the feeling provoked within the alliance...by the war's end was less an exultant cheer of victory than a collective sigh of relief. The overriding sentiment: Let's not do this again anytime soon."[88]

Both President Clinton and Prime Minister Blair articulated the need to establish a new doctrine for future humanitarian interventions, but their "pronouncements were so couched in caveats that they hardly amounted to a set of governing principles for the use of force."[89] Nevertheless, as an independent international commission reviewing NATO's intervention into Kosovo has noted: "The Kosovo 'exception' now exists, for

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[86] David Rieff, "A Just War is Still a War," *Newsweek*, 14 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[87] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000. Available [Online]:<http://www.kosovocommission.org>[17 August 2000]. The Independent International Commission on Kosovo was initiated by the Prime Minister of Sweden, Mr Göran Persson, who wanted an independent analysis of the conflict in Kosovo. The Secretary-General of the United Nations, Kofi Annan, endorsed the project. The report focuses on the origins of the Kosovo crisis, the diplomatic efforts to end the conflict, the role of the United Nations and NATO's decision to intervene militarily. The commission was headed by Justice Richard Goldstone of South Africa, together with Mr. Carl Tham, Secretary General of the Olof Palme International Centre in Sweden.

[88] James Kitfield, "A War of Limits," *The National Journal*, 24 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[89] Ibid.

better and worse, as a contested precedent that must be assessed in relation to a wide range of international effects and undertakings....[E]ventual assessment of the 'Kosovo principle' will also be strongly influenced by the ultimate outcome in Kosovo—whether the international action is seen as producing stable and humane governance, or the opposite."[90]

A. THE UNITED STATES

Following the issuance of the ACTORD by the allies in October 1998, Richard Holbrooke had asserted that NATO's decision to threaten the use of force was "precedent-setting."[91] Even so, Holbrooke conceded that "the fact that it [NATO's decision] sets a precedent doesn't mean it sets an iron-clad rule for intervention."[92] Nonetheless, he concluded that while some U.N. member states might be dissatisfied by the possibility that future internal disputes could be subjected to scrutiny and military intervention, the decision by Western governments to take action in conflicts similar to Kosovo would be made on a "case-by-case" basis.[93]

In May 1999, President Clinton wrote in a *New York Times* article: "People will look back on Kosovo and say that this time, because we acted soon and forcefully

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[90] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

[91] Holbrooke quoted in Farhan Haq, "Politics-Kosovo: Debate Over Use of NATO Military Threats," *World News*, 1 November 1998. Available [Online]:<http://www.oneworld.org/ips2/nov98/14.01_041.html>[17 August 2000].

[92] Ibid.

[93] Ibid.

enough, more lives were saved and the refugees all came home....We cannot respond to such tragedies everywhere, but when ethnic conflict turns into ethnic cleansing where we can make a difference, we must try, and that is clearly the case in Kosovo."[94]

Following the conclusion of NATO's intervention in the Kosovo conflict, President Clinton was asked whether America's decision to intervene with its allies was based on principle. In response, he asserted: "If somebody comes after innocent civilians and tries to kill them en masse because of their ethnic background or their religion, and it is within our power to stop it, we will stop it."[95] Later, when asked by a CNN reporter if there was an emerging "Clinton Doctrine," President Clinton responded that "whenever there is ethnic or religious conflict, if the world community has the power to stop it, we ought to stop genocide and ethnic cleansing."[96] However, because these statements failed to limit future humanitarian interventions to situations in which vital American interests were at stake, Administration officials were quick to add "conditions."

The United States, Washington officials indicated, must not only have a clear moral justification for future interventions, but its strategic interests must be involved. Moreover, it must determine on realistic grounds that such an undertaking would not

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[94] William Jefferson Clinton, "A Just and Necessary War," *The New York Times*, 23 May 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[95] Clinton quoted in James Kitfield, "A War of Limits," *The National Journal*, 24 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[96] Jeffrey Bartholet, "A Superpower's Dilemma," *Newsweek*, 20 September 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

demand too heavy a price.[97] In an attempt to block efforts to universalize Operation Allied Force into a precedent for action elsewhere, an unnamed "top White House official" added: "Any comprehensive view is just destined to be wrong."[98] Some experts agree that it would be a mistake to interpret Kosovo as the beginning of a "Clinton Doctrine" on humanitarian intervention. For example, Anthony Cordesman has written: "any broad, grand strategic doctrine for defining the 'whys' of American military involvement will collapse under the pressure of events, the uncertainties involved, and the unique character of a given contingency."[99]

Secretary of State Madeleine Albright reiterated such a viewpoint in an interview on the *PBS Newshour with Jim Lehrer*. When asked by Jim Lehrer whether the action taken by NATO had set a precedent for the future, Madeleine Albright replied:

> I think that, obviously, each condition, each case has to be judged on its own merit....I think that every situation is different. I think we have to look – you know, there are horrible situations in other parts of the world, and we have to look at what we are capable of doing, with whom, and how to best attack the problem...a lot of people have said, why haven't you been in X country or Y country? Just because you can't be everywhere doesn't mean that you don't go anywhere. I think that we had the ability, through the existence of NATO – the most powerful alliance – in an area that is strategically important, against an action that was a crime against humanity. It doesn't always come in that particular package, but I think we have to look at each case

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[97] James Kitfield, "A War of Limits," *The National Journal*, 24 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[98] Barton Gellman and Steven Mufson, "Humanitarian War; Conflict Tests a Paradigm of Values-Based International Action," *Washington Post*, 6 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[99] Cordesman quoted in James Kitfield, "A War of Limits," *The National Journal*, 24 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

> individually, and decide what the appropriate method for dealing with it is. So I don't want to say that this is a precedent.[100]

Addressing the Council on Foreign Relations in June 1999, Madeleine Albright indicated that NATO's intervention in the Kosovo conflict should not be interpreted to mean that the Alliance will intervene in other conflicts. "Some hope, and others fear, that Kosovo will be a precedent for similar interventions around the globe," she said.[101] "I would caution against any such sweeping conclusions....Every circumstance is unique...[and] NATO is a European and Atlantic – not a global – institution."[102] Claiming that U.S. foreign policy is "more art than science," Madeleine Albright wrote in *The Wall Street Journal* that "the crisis in Kosovo should cause a re-examination of the paradigms of the past."[103] Furthermore, she stressed,

> [a]s for the use of force, Kosovo tells us only what we should have already known. Yes, in confronting evil and otherwise protecting our interests, force is sometimes required. No, as before Kosovo, it is not wise to formulate assumptions based on any single experience about exactly when and how force should be applied. In coping with future crisis, the accumulated wisdom of the past will have to be weighed against factors unique to that place and time. This is why foreign policy is more art than science, and how chief executives earn their pay.[104]

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[100] "Interview on the PBS Newshour With Jim Lehrer," Washington, D.C., 10 June 1999. Available [Online]:<http://secretary.state.gov/www/statements/1999/990610c.html>[17 August 2000].

[101] Albright quoted in Nicole Winfield, "Albright: NATO bombing not a precedent for future intervention," *Canoe News*, 29 June 1999. Available [Online]:<http://search.canoe.ca/CNEWSKosovo9906/29_albright.html>[17 August 2000].

[102] Ibid.

[103] Madeleine K. Albright, "To Win the Peace," *The Wall Street Journal*, 14 June 1999. Available [Online]:< http://secretary.state.gov/www/statements/1999/990614a.html>[17 August 2000].

[104] Ibid.

When President Clinton addressed the 54th Session of the United Nations General Assembly in September 1999, he made it clear that "national interests" would need to be incorporated into the formulation of any future doctrine on humanitarian intervention:

> The way the international community responds will depend upon the capacity of countries to act, and on their perception of their national interests. NATO acted in Kosovo, for example, to stop a vicious campaign of ethnic cleansing in a place where we had important interests at stake, and the ability to act collectively....I know that some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world. We cannot do everything everywhere. But simply because we have different interests in different parts of the world does not mean we can be indifferent to the destruction of innocents in any part of the world.[105]

B. BRITAIN

From the very beginning of the Kosovo crisis, London officials maintained that the situation in the Federal Republic of Yugoslavia was "exceptional," and that the decision to intervene in future humanitarian crises would depend on the circumstances and merits of each case.[106] Even so, British Defense Secretary George Robertson implied, days after the conflict had ended, that NATO's intervention in the Kosovo conflict might have set a precedent: "Maybe the international community will have to look a bit more carefully at this general principle about national sovereignty – that you can get away with anything against anyone and any people simply if you confine it inside

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[105] William Jefferson Clinton, "Remarks by the President to the 54th Session of the United Nations General Assembly," New York, 21 September 1999. Available [Online]:<http://www.state.gov/www/issues/990921_clinton_unga.html>[17 August 2000].

[106] Baroness Symons of Vernham Dean, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, in House of Lords, Hansard, 14 December 1998, col. 1220-21.

national boundaries. Maybe that's one of the Rubicons that we've crossed in the Kosovo conflict...[but] that's a debate for tomorrow."[107] However, when asked whether by implication such logic could be extended to allow Russia to invade other former Soviet states or China to invade Taiwan, Robertson quickly qualified his earlier remarks, stating that the key criterion would always be humanitarian:

> I'm not suggesting that people act outside of international law or outside the general principles of the Charter of the United Nations...But there has to be a recognition that genocide is something that we fought against in the Second World War. This creates a precedent that works against dictators, works against those who would use swift military, disproportionate action against people but at the same time focuses us back again on the rule of international law, which I believe has been enormously strengthened by what we've done.[108]

Regardless of such a viewpoint, most British officials continued to justify NATO intervention based upon the exceptional nature of the Kosovo conflict. In a speech given to the American Bar Association in London, a year after the Kosovo conflict had ended, Foreign Secretary Robin Cook repeated this sentiment and called for "guidelines" to respond to future humanitarian interventions:

> Exceptional circumstances demand an exceptional response. Just such circumstances arose in Kosovo. Regrettably, the threat of veto by two of the Permanent Members made Security Council action impossible despite majority support for our cause. But under these exceptional circumstances, we were still justified, in every respect, in intervening as we did through NATO....We should set down guidelines for intervention in response to massive violations of humanitarian law and crimes against humanity. In doing so, I want to reinforce the Security

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[107] Robertson quoted in Dominic Hayes, "Robertson Hints At U.N. Charter Changes," *Press Association Limited*, 13 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[108] Ibid.

> Council's ability to do what is right and to fulfill its duties. If we cannot do this, and the Security Council cannot respond to the most serious aspects of modern conflict, it risks becoming irrelevant.[109]

However, such a proposal by a London official was nothing new. British Prime Minister Tony Blair had previously proposed establishing new international policies and reforming international institutions to respond to gross violations of human rights. Blair said that a "new framework" was necessary because, unlike the Cold War period in which inter-state threats existed, the actions of Western governments "are guided by a more subtle blend of mutual self-interest and moral purpose in defending the values we cherish."[110]

Asserting the imperative of defending human rights in Kosovo, Prime Minister Blair wrote during the early weeks of NATO's air campaign: "We need to enter a new millennium where dictators know that they cannot get away with ethnic cleansing or repress their peoples with impunity. In this conflict we are fighting not for territory but for values. For a new internationalism where the brutal repression of whole ethnic groups will no longer be tolerated."[111] However, as Michael Elliott points out, "values is

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[109] Robin Cook, "Guiding Humanitarian Intervention," Speech to the American Bar Association, London, United Kingdom, 19 July 2000. Available [Online]:<http://www.fco.gov.uk/news/speechtext.asp?3989>[17 August 2000].

[110] Tony Blair, "Doctrine of the International Community," Speech to the Economic Club of Chicago, 22 April 1999. Available [Online]:<http://www.fco.gov.uk/text_only/news/speechtext.asp ?2316&printVersion=yes>[17 August 2000].

[111] Blair quoted in Barton Gellman and Steven Mufson, "Humanitarian War; Conflict Tests a Paradigm of Values-Based International Action," *Washington Post*, 6 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

slippery concept on which to base the expenditure of blood and treasure. Reasonable, civilized men and women can disagree about which values are worth dying for."[112]

Speaking to the Economic Club of Chicago in April 1999, the Prime Minister outlined his concept of a "new internationalism" to cope with humanitarian crises. He said that such a doctrine was necessary for deciding in the future when and whether to intervene in intra-state conflicts. [113] In addition, Blair stressed the difficulty that foreign policy-makers are confronted with in deciding whether to intervene in internal conflicts:

> One state should not feel it has the right to change the political system of another or foment subversion or seize pieces of territory to which it feels it should have some claim. But the principle of non-interference must be qualified in important respects. Acts of genocide can never be a purely internal matter. When oppression produces massive flows of refugees which unsettle neighbouring countries, then they can properly be described as 'threats to international peace and security'.[114]

At the 54th Session of the United Nations General Assembly in September 1999, Foreign Secretary Cook restated the need to build international consensus on the conditions and circumstances allowing humanitarian intervention.[115] However, even though a report by the British House of Commons Foreign Affairs Committee on Kosovo came out in support of these aims, the committee concluded that "at the very least, the

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[112] Michael Elliott, "Not Much To Celebrate," *Newsweek*, 26 April 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[113] Colin Brown and Mary Dejevsky, "We Bomb Now, We Invade Later," *The Independent*, 23 April 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[114] Tony Blair, "Doctrine of the International Community," Speech to the Economic Club of Chicago, 22 April 1999. Available [Online]:<http://www.fco.gov.uk/text_only/news/speechtext.asp ?2316&printVersion=yes>[17 August 2000].

[115] "Cook Calls for More U.N. Action On Conflicts," *FBIS*, document ID: FTS19990921001611, transcribed from *FCO On-Line WWW Service*, 21 September 1999.

doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action [in the Kosovo conflict] legally questionable."[116]

C. GERMANY

NATO's intervention in the Kosovo conflict signified the first time since 1945 that armed forces from the Federal Republic of Germany took part in combat operations, marking a "decisive point" for Germany. [117] At a news conference shortly after Operation Allied Force had ended, Chancellor Schröder stated, "we had the task of redefining Germany's foreign and security policy in the Kosovo crisis, and we did it."[118]

According to German Foreign Minister Joschka Fischer, after Kosovo "there can be no more talk of any special role for us [Germans]. Like other democracies, Germany has an obligation to play its part in developing the international security architecture, strengthening international law and promoting respect for human rights."[119] Furthermore, Fischer stated: "a key lesson from the Kosovo conflict is that the United Nations system

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[116] "Kosovo," *Fourth Report from the Foreign Affairs Committee*, August 2000. Available [Online]: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm#a37 >[17 August 2000].

[117] Joschka Fischer, "Kosovo – Challenges on the Balkan's Route to Europe," *German Government Policy Statement*, Federal Minister for Foreign Affairs, 5 April 2000. Available [Online]:<http://www. auswaertiges-amt.de/6_archiv/2/r/r000405b.htm>[17 August 2000].

[118] Schröder quoted in Tony Czuczka, "Headed for Berlin, Schröder Sees Stronger Germany," *Associated Press*, 15 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[119] Joschka Fischer, "The Fundamentals of German Foreign Policy," Speech at the General Meeting of the German Society for Foreign Affairs, Berlin, 24 November 1999. Available [Online]:<http://www.german-embassy.org.uk/the_fundamentals_of_german_for.html>[17 August 2000].

and the conflict prevention mechanisms have to be strengthened and paid much more attention in the future....The [German] Federal Government is determined to continue to play an active role in this debate with a view to strengthening the U.N. and anchoring human rights."[120]

Nevertheless, in the aftermath of Kosovo German officials continue to maintain that the bombing campaign against the Federal Republic of Yugoslavia was justified, and insist that NATO's intervention without U.N. Security Council authorization should remain an exception.[121] This point has been made repeatedly by Fischer, who has argued that NATO's intervention in the Kosovo conflict did not establish a precedent for future humanitarian interventions:

> Murder and rape are happening all over the world and they are to be condemned everywhere, not just in Kosovo. But we intervened militarily there because crimes against humanity were being committed in our immediate neighborhood and were endangering the security of Europe. One cannot derive from that, however, a general duty to intervene on the part of Germany or the European states.[122]

In his speech to the U.N. General Assembly in September 1999, Fischer reiterated that the intervention in the Kosovo conflict was justified because of the emergency nature

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[120] Joschka Fischer, "Kosovo – Challenges on the Balkan's Route to Europe," *German Government Policy Statement*, Federal Minister for Foreign Affairs, 5 April 2000. Available [Online]:<http://www.auswaertiges-amt.de/6_archiv/2/r/r000405b.htm>[17 August 2000].

[121] Peter James Spielmann, "Italy Questions Legality of NATO's Air War Over Kosovo," *Associated Press*, 22 September 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[122] Fischer quoted in Denis Staunton, "NATO Campaign in Kosovo Not Precedent for Conflicts – Fischer," *Irish Times*, 20 July 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

of the crisis and because the Security Council had "tied its own hands."[123] Nevertheless, he said, "this step...must not set a precedent for weakening the U.N. Security Council's monopoly on authorizing the use of legal international force."[124]

In the months following the conflict, the German Foreign Minister has continued to be outspoken on the exceptional character of NATO's Kosovo intervention. When asked in an interview to describe circumstances that would determine whether the West would intervene militarily in the future, Fischer replied: "It is not a matter of noble principles that we set up and whose violations leads to our intervention...we intervened militarily there [in the Kosovo conflict] because crimes against humanity occurred in our immediate vicinity and thereby endangered security in Europe."[125] When pressed by his interviewer to be more specific on precisely what it would take for Germany to participate in future military interventions, Fischer said, "I will make it specific when the specific question arises. I have just done that with respect to Kosovo. But the developments there do not serve for a principle that can be generalized."[126] Finally, when the Foreign Minister was challenged by his interviewer with the judgment that NATO's intervention in the Kosovo conflict may have been justified morally, but not legally under international law, Fischer responded: "I say as emphatically as I can: No! It was an

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[123] Fischer quoted in Peter James Spielmann, "Italy Questions Legality of NATO's Air War Over Kosovo," *Associated Press*, 22 September 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[124] Ibid.

[125] Fischer quoted in "I Don't Feel Like the Winner of the War," *FBIS*, document ID: FTS19990719000560, translated from *Berlin Die Tageszeitung*, 19 July 1999.

[126] Ibid.

emergency situation that led to an emergency solution; I deliberately stress: emergency solution."[127]

D. FRANCE

With the termination of NATO's air campaign over the Federal Republic of Yugoslavia in early June 1999, French President Jacques Chirac described Operation Allied Force as "a great victory for human rights, a grand idea that has developed step by step in this century with setbacks and tragedies along the way."[128] While Chirac agreed with other European allies that NATO's intervention in the Kosovo conflict constituted a "just war," he continued to point out that there remain "strong differences of views between the United States and France" over the primacy of the Security Council.[129] Nevertheless, French officials continue to view NATO's intervention in the Kosovo crisis as a necessary but exceptional occurrence.

Following the Kosovo conflict, French Foreign Minister Hubert Védrine qualified the decision by France to support NATO's threats and use of military force as a "special case," not something that set a new precedent:

> Between July and October [1998], France faced a difficult choice: whether to agree to give credibility to the threat of force by taking the

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[127] Fischer quoted in "I Don't Feel Like the Winner of the War," *FBIS*, document ID: FTS19990719000560, translated from *Berlin Die Tageszeitung*, 19 July 1999.

[128] Chirac quoted in Barton Gellman and Steven Mufson, "Humanitarian War; Conflict Tests a Paradigm of Values-Based International Action," *Washington Post*, 6 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[129] Barton Gellman, "Can Alliance Muster Will to Win?," *Washington Post*, 25 April 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

> necessary decisions in NATO or whether to take the view that only the Security Council and it alone could do so. President Chirac and the Prime Minister took their decision in October: given what was at stake politically, morally and historically, given the fact that the Security Council, because of the attitude of the Russians and Chinese, couldn't go any further than the two Chapter VII resolutions we had already obtained, France would vote for the "activation orders" in NATO, while refusing to accept that this special case created a precedent as regards NATO's role.[130]

According to Védrine, the allies were able to deal with the Kosovo crisis because the circumstances in the Balkans were unlike those surrounding any other crisis in the world. Therefore, the exceptional nature of the conditions in the Balkans "precludes any possibility of asserting that the management of the Kosovo crisis constitutes a precedent. Kosovo is an exception, even though it represented a step forward in terms of the will to act."[131]

In his address to the 54th Session of the United Nations General Assembly in September 1999, French Prime Minister Lionel Jospin reiterated the exceptional nature of the Kosovo conflict, while underscoring the primary responsibility of the Security Council to resolve crisis situations:

> To be sure, there have been circumstances when an urgent humanitarian situation dictated we should act immediately. But such an approach must remain an exception. We must take care, as in the case of Kosovo, to replace this action in the context of the Charter. Our fundamental rule is that it is for the Security Council to resolve crisis situations. For that reason, NATO's new strategic concept recalls that the Washington Treaty recognizes the primary

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[130] Védrine quoted in "Interview given by Minister of Foreign Affairs Hubert Védrine to *Le Nouvel Obserateur*," Paris, France, 17 June 1999. Available [Online]:<http://info-france-usa.org/news/statmnts/peace1.htm>[17 August 2000].

[131] Védrine quoted in "Interview given by M. Hubert Védrine, Minister of Foreign Affairs, to the Newspaper '*Le Monde*,'" Paris, France, 24 March 2000. Available [Online]:<http://www.diplomatie.fr/actual/dossiers/kossovo/kossovo175.gb.html>[17 August 2000].

responsibility bestowed upon the Security Council in the field of peacekeeping.[132]

Although French officials lament that the necessity for NATO to take action against Belgrade without an explicit U.N. Security Council mandate arose, they maintain that the overall policy of France was to support the authority of the Security Council in regard to the Kosovo crisis. Hence, Foreign Minister Védrine asserts that future interventions elsewhere in the world must be undertaken cautiously, and based on resolutions approved by the Security Council.[133]

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[132] "Address by Prime Minister Lionel Jospin to the 54th Session of the United General Assembly," New York, 20 September 1999. Available [Online]:<http://info-france-usa.org/news/statmnts/onujosp.htm>[17 August 2000].

[133] "Védrine on Mideast, Lebanon, Kosovo," *FBIS*, document ID: FTS1999071600062514, translated from *London Al-Hayah,* 14 July 1999.

IV. ANALYSIS OF KEY ISSUES

From a strictly ethical point of view, the justifications offered by the NATO allies for intervening in the Kosovo conflict are compelling. However, as one scholar has noted, "moral choices are not simply made, they are also judged and so there must be criteria for judgment."[134] Therefore, while it may appear that Belgrade's record of persistent and systematic human rights violations presented the NATO allies with a moral imperative to intervene in Kosovo, action on such moral justifications was influenced by the competing factors of national interests and international law. As German Foreign Minster Joschka Fischer asserted at the end of the conflict, the war in Yugoslavia was not only a "moral question" or a "question of human rights," but also involved "a question of the security and stability of Europe."[135]

The following analysis of NATO's decision to threaten air strikes in October 1998 and its subsequent military intervention in the Federal Republic of Yugoslavia in March-June 1999 confirms that actions taken by the Atlantic Alliance were inconsistent with some current interpretations of the U.N. Charter and international law; nevertheless, there is support for a counter-argument that NATO's actions were legitimate because they upheld human rights norms, which may be viewed as the parameters for evolving international law.[136] Even under such an argument, practical considerations also require

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[134] Michael Walzer, *Just and Unjust Wars*, 106

[135] Fischer quoted in Steven Mufson, "Once a Pacifist, German Official Defends War," *Washington Post*, 11 June 1999. Available [Lexis/Nexis]: NEWS/ALLNEWS [17 August 2000].

[136] Robert Tomes, "Operation Allied Force and the Legal Basis For Humanitarian Interventions," *Parameters*, vol. 30, no. 1 (Spring 2000), 42.

contemplation when determining whether NATO's actions in the Kosovo crisis set a precedent for future humanitarian interventions. These practical considerations include the political and economic aspects of humanitarian intervention, and are significant because moral justifications may not be decisive when other relevant factors are taken into account.

A. HUMANITARIAN NECESSITY

As outlined in previous chapters, arguments put forward by NATO leaders for threatening the use of force and the subsequent military intervention in the Federal Republic of Yugoslavia were based primarily on humanitarian necessity. Moreover, U.N.S.C. Resolutions 1199 and 1203 alluded to the "impending humanitarian catastrophe" in Kosovo, and, on the basis of Chapter VII of the U.N. Charter, emphasized that the crisis was "a threat to international peace and security" due to the destabilizing effect that massive flows of refugees into neighboring countries could potentially have on the region. Because NATO's intervention was justified principally to stop the killing and expulsion of Kosovar Albanians, NATO's action in the Kosovo conflict is viewed as a humanitarian war. This circumstance has highlighted the debate over human rights and humanitarian issues on the one hand, and state sovereignty on the other.[137]

Although Operation Allied Force was conducted without the explicit authorization of the U.N. Security Council, the moral priority of preventing human rights

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[137] Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *Survival*, vol. 41, no. 3 (Autumn 1999), 102.

violations and "ethnic cleansing" justified action by the allies and was in keeping with the intent of the United Nations Charter. Indeed, the preamble of the U.N. Charter stipulates that one of the purposes of the United Nations is "to reaffirm faith in fundamental human rights."[138]

Additionally, articles 55 and 56 of the U.N. Charter require U.N. members "to take joint and separate action" to ensure "universal respect for, and observance of, human rights and fundamental freedoms."[139] Since the application of military force by the allies did not seek to change the territorial integrity or political independence of the Federal Republic of Yugoslavia, Operation Allied Force did not meet the threshold of the U.N. Charter's limitation on the use of force. Therefore, given Belgrade's propensity toward massive human rights violations and its rejection of diplomatic efforts to resolve the crisis, NATO's intervention was legitimate because it was the only practical means available to protect the Kosovar Albanians from further human rights violations, including the killings and mass deportations known as "ethnic cleansing."[140]

Critics of Operation Allied Force argue that NATO's "intervention in the internal affairs of a sovereign state...violates the United Nations Charter," rendering action by the

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[138] Preamble of "The Charter of the United Nations," in Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 511.

[139] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" Forthcoming in *United States Air Force Academy Journal of Legal Studies*, vol. 10 (Winter 2000-2001).

[140] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, 167-168. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

allies in the Federal Republic of Yugoslavia illegal.[141] Article 2(7) of the U.N. Charter sets forth the position of the United Nations on unwelcome interference in the domestic affairs of a state:

> 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 Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[142]

Furthermore, opponents of NATO's intervention maintain that the extent of human rights violations in Kosovo prior to the withdrawal of the OSCE's observer force was not massive and widespread, and that the verification mission had effectively prevented the commission of widespread atrocities.[143] It was only *after* the OSCE observers were withdrawn and the NATO bombing commenced, these critics assert, that atrocities committed by Belgrade substantially escalated and became widespread. However, it would be incorrect to claim that NATO provoked the attacks on the civilian Kosovar population, since responsibility for that campaign rests entirely on the Belgrade government.[144] Documents published by the German Ministry of Defense in April 1999

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[141] "NATO Air Strikes Will Not Resolve Kosovo Crisis, China Says," *Nando Times*, 12 October 1998. Available [Online]:< http://www.techserver.com/newsroom/ntn/top/101298/topstory_22530_S7.html>[17 August 2000].

[142] Article 2(7) of "The Charter of the United Nations," in Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 512.

[143] Jonathan I. Charney, "U.N. Charter Law and General International Law," *American Journal of International Law*, vol. 93, no. 4 (October 1999). Available [Online]:<http://www.asil.org/kosovo.htm>[17 August 2000].

[144] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, 88. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

described a Serbian plan, known as "Operation Horseshoe," which outlined the details of an alleged plan to expel Kosovo's ethnic Albanian population.[145] Regardless of whether or not such a plan by Belgrade actually existed, an OSCE report asserts that "the arrival of such large numbers [of refugees into neighboring countries] so soon after the departure of the OSCE-KVM [from the FRY] would appear to indicate pre-planning of the operation [to expel Kosovar Albanians by Serbs]."[146] Nevertheless, critics of NATO's intervention contend that an impending *intra-state* humanitarian crisis cannot serve as a legal justification for the initiation of the use of force under international law.[147]

Under contemporary international law, violations of human rights and humanitarian law by a state against its own citizens are prohibited. Every state is obliged to respond to those violations, individually and collectively, by resort to *non-forcible* actions and countermeasures.[148] While there are a variety of ways to oppose such violations through non-forcible means, NATO's military intervention against the Federal Republic of Yugoslavia raises the question whether forcible action to stop violations of human rights and humanitarian law is permissible under international law.

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[145] "Kosovo," *Fourth Report from the Foreign Affairs Committee*, August 2000. Available [Online]: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm#a37 >[17 August 2000].

[146] "Kosovo: As Seen, As Told," Report by the OSCE, part 1, par. 7, 1999. Available [Online]:<http://www.osce.org/kosovo/reports/hr/index.htm>[17 August 2000]. The report notes that in the first eight days of the campaign, 307,500 refugees left Kosovo.

[147] Jonathan I. Charney, "U.N. Charter Law and General International Law," *American Journal of International Law*, vol. 93, no. 4 (October 1999). Available [Online]:<http://www.asil.org/kosovo.htm>[17 August 2000].

[148] Ibid.

The prohibition on the threat or use of force in international relations is addressed in article 2(4) of the U.N. Charter, 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.[149]

The U.N. Charter provides two exceptions to this prohibition on the threat or use of force. In the first instance, Article 51 of the U.N. Charter stipulates that states retain "the inherent right of individual or collective self-defense if an armed attack occurs...until the Security Council has taken measures necessary to maintain international peace and security."[150] In the second instance, Article 39 of the U.N. Charter delegates responsibility to the Security Council to determine if there exists "any threat to the peace, breach of the peace, or act of aggression."[151] If the Security Council determines that such circumstances exist, it can decide "what measures not involving the use of armed force are to be employed" to restore peace and security.[152] However, if non-forcible measures are deemed inadequate, the Security Council may authorize forcible measures "as necessary to maintain and restore international peace and security."[153]

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[149] Article 2(4) of "The Charter of the United Nations," in Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 512.

[150] Article 51 of "The Charter of the United Nations," 523.

[151] Article 39 of "The Charter of the United Nations," 520.

[152] Article 41 of "The Charter of the United Nations," 521

[153] Article 42 of "The Charter of the United Nations," 521.

It is clear that NATO's air campaign against the Federal Republic of Yugoslavia violated a strict interpretation of the U.N. Charter. Even though U.N. Security Council Resolutions 1199 and 1203 were adopted on the basis of Chapter VII, and indicated that the Kosovo crisis constituted a "threat to peace and security in the region," no explicit authorization was given to the NATO allies to use force because of the political impasse caused by threatened Russian and Chinese vetoes on any such resolution. Nevertheless, some scholars contend that "failure [of NATO] to act because of tangentially related political dynamics involving NATO-Russia and U.S.-China relations should not be the final factor in weighing the 'justness' of NATO's actions... it is specious to argue that the political act of securing Security Council consensus is the pivot on which humanitarian intervention should hinge."[154]

With greater political emphasis placed on honoring human rights throughout the world over the past several decades, evidence suggests that as a consequence international law is evolving as well. Some legal scholars suggest that NATO's intervention in the Kosovo crisis, combined with numerous other interventions over the past decade, may in the aggregate serve as a basis for the development of an emerging legal norm to protect human rights (*i.e.*, a doctrine of humanitarian intervention).[155] Several factors support this claim, including the increasing emphasis placed on human

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[154] Robert Tomes, "Operation Allied Force and the Legal Basis For Humanitarian Interventions," *Parameters*, vol. 30, no. 1 (Spring 2000), 48-49.

[155] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" Forthcoming in *United States Air Force Academy Journal of Legal Studies*, vol. 10 (Winter 2000-2001).

rights law in recent decades; the numerous instances of humanitarian intervention that have taken place during the post-Cold War period; and the tendency of the United Nations Security Council to recognize these crises as threats to international peace and security.[156] Combined with the Kosovo conflict, in which NATO's intervention received criticism from Russia, China, Belarus, and "non-aligned" governments but not outright condemnation from the United Nations as a whole, these recent developments point to a growing acceptance of such a concept.[157] However, it remains to be seen whether many states, much less the United Nations, will endorse such a doctrine.

Even with growing political support to modify existing international law, NATO failed in the Kosovo crisis to offer a precise legal rationale for its actions. As Jonathan Charney points out, even though "general international law may change through breach of current law and the development of new state practice and *opinio juris* supporting the change," NATO's intervention in the Kosovo conflict presents a problem in this regard since the allies never offered a specific legal justification for their actions.[158] According to Charney, this lack of legal justification by NATO is significant in light of the

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[156] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" Forthcoming in *United States Air Force Academy Journal of Legal Studies*, vol. 10 (Winter 2000-2001).

[157] Ibid.

[158] Jonathan I. Charney, "U.N. Charter Law and General International Law," *American Journal of International Law*, vol. 93, no. 4 (October 1999). Available [Online]:<http://www.asil.org/kosovo.htm>[17 August 2000].

Nicaragua case[159] in which the International Court of Justice (ICJ) determined that in order to challenge a standing rule of international law, the practice relied upon by the challenger must be clearly predicated on an alternative rule of law.[160] In addition, he asserts:

> Another obstacle to changing the existing international law is that the rule prohibiting the use of force is derived from the UN Charter. Charter law may very well not be subject to change by new general international law. By its terms, the UN Charter overrides all inconsistent treaties, regardless of the date of their entry into force. One would expect the same rule to apply to developments in general international law, especially since treaties supersede all 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 United Nations Charter on the basis of a norm of equal status.[161]

While an amendment to the U.N. Charter legalizing humanitarian intervention is unlikely, there is concern that NATO's intervention in the Kosovo conflict set an undesirable precedent—the threat and use of force without the explicit authorization of the U.N. Security Council. This precedent could jeopardize the stabilizing function of the

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[159] In the case of Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Nicaragua filed a memorial to the International Court of Justice (ICJ) in 1984 against the United States seeking reparation for damages and to stop alleged military activities of the United States in the form of mining its harbors and organizing and equipping the *contra* insurgents based in Honduras. The United States filed a counter-memorial to the ICJ arguing that Nicaragua was engaged in an armed attack against its neighbors (*i.e.*, El Salvador, Costa Rica, Honduras, and Guatemala), and that military activity by the United States was within its inherent right of self-defense. The ICJ issued its judgment against the United States in 1986, deciding, *inter alia*, that the United States was in breach of its obligation under customary international law not to use force against another state (*i.e.*, Nicaragua).

[160] Jonathan I. Charney, "U.N. Charter Law and General International Law," *American Journal of International Law*, vol. 93, no. 4 (October 1999). Available [Online]:<http://www.asil.org/kosovo.htm>[17 August 2000].

[161] Ibid.

U.N. Security Council and obscure the conditions under which recourse to force by states is permissible.[162]

In light of the foregoing discussion, it is clear that the NATO allies faced a difficult legal dilemma with regard to the Kosovo crisis. Because diplomacy had failed, and given Belgrade's past record of atrocities, NATO leaders were left with the options of doing nothing, or launching Operation Allied Force. While it is impossible to know what would have happened had the allies not acted, NATO's decision to intervene was probably appropriate. Although not legal according to a strict interpretation of the U.N. Charter, NATO's decision was legitimate based on the circumstances.

While the decision made by the NATO allies to intervene in the Kosovo crisis is justifiable, the manner in which Operation Allied Force was conducted is less so. The military strategy used by the allies (*i.e.*, the decision not to use ground forces and to rely instead on air strikes from high altitudes) did not prevent Belgrade from committing human rights violations or "ethnic cleansing." As Ivo Daalder argues:

> A strategy relying solely on airpower could not prevent a determined adversary from inflicting massive harm on a civilian population in Kosovo. Although the Yugoslav army and its heavy weapons participated in the expulsion campaign, much of the damage was inflicted by paramilitary forces operating in small groups using machine guns and other small-caliber weapons. There was very little that airpower could do to prevent this form of terror, particularly airplanes that flew above the clouds at 15,000 feet above sea level.[163]

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[162] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, p. 174. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

[163] Ivo H. Daalder, *Winning Ugly: NATO's War to Save Kosovo* (Washington D.C.: Brookings Institution Press, 2000), 210.

The fact that Operation Allied Force "failed in the intended manner to avert a humanitarian disaster in the short term, even though it did eventually stop it, makes it a questionable model of humanitarian intervention."[164]

B. U.N. SECURITY COUNCIL AUTHORIZATION

Throughout NATO's existence, the primary purpose of the Alliance has rested on the mission of collective defense, the mutual-defense pledge in Article 5 of the Washington Treaty.[165] Following the demise of the Soviet Union in 1991, the focus of the NATO Alliance shifted towards "non-Article 5 missions." While maintaining its core mission of collective defense, the Alliance has demonstrated over the past decade a willingness to support peacekeeping and crisis management operations, on a case-by-case basis, to defend the common interests of Alliance members. With the shift in focus from defending common territory to that of defending common interests of Alliance members,

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[164] Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *Survival*, vol. 41, no. 3 (Autumn 1999), 108.

[165] Article 5 of the Washington Treaty includes the following stipulations: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

a debate has emerged among the allies over when NATO has the authority to threaten or use force for purposes other than collective defense.[166]

Prior to the Kosovo conflict, many allies held that NATO required an explicit mandate or authorization from either the U.N. Security Council or the OSCE to threaten or use force in non-Article 5 missions. This view was supported at NATO's 1994 Brussels Summit, when the allies declared: "We reaffirm our offer to support, on a case-by-case basis in accordance with our own procedures, peacekeeping and other operations under the authority of the U.N. Security Council or the responsibility of the CSCE, including by making available Alliance resources."[167] In May 1995 the North Atlantic Council issued a communiqué expressing a desire by the Alliance to make its aims and objectives better understood "with regard to its new missions of peacekeeping under the authority of the U.N. or the responsibility of the OSCE."[168]

On the one hand, the French and some other allies have argued that these declarations established a principle that non-Article 5 interventions by the Atlantic Alliance require authorization by the U.N Security Council or OSCE.[169] On the other

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[166] Ivo Daalder, *NATO, the U.N., and the Use of Force* (Brookings Institution, March 1999). Available [Online]:<http://www.unausa.org/issues/sc/daalder.htm>[17 August 2000].

[167] Declaration of the Heads of State and Government Participating in the Meeting of the North Atlantic Council Held at NATO Headquarters, Brussels, Belguim, 10-11 January 1994, par. 7. Available [Online]:<http://www.nato.int/docu/pr/1994/p94-003.htm>[17 August 2000].

[168] North Atlantic Council Communiqué, Noordwijk, The Netherlands, 30 May 1995, par. 11. Available [Online]:<http://www.nato.int/doc/comm/49-95/c950530b.htm>[17 August 2000].

[169] David Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 28.

hand, the United States contends that while such authorization from the U.N. Security Council or the OSCE would be welcome, it is not a prerequisite for NATO to take action.[170] Furthermore, U.S. leaders have argued that NATO has the right to threaten or use force, if necessary, when the security interests of its members are at risk. Kenneth Bacon, a spokesman for the U.S. Department of Defense, has claimed an even broader right to autonomous action for NATO: "The U.S. view has always been that NATO has the right to act on its own – the right and the obligation to act on its own in matters of European security."[171]

The implication of the French position is that NATO's use of force in non-Article 5 contingencies would be subject to a veto by Russia and China. As one observer has noted:

> The widespread assumption that the power to authorize a legitimate intervention by the Alliance resides solely with the UN Security Council amounts to ceding a *droit de regard* to Russia and/or China – and possibly to other governments if the number of permanent members with veto rights in the Security Council increases – over NATO's future ability to contribute to international security. Russian and Chinese interests may conflict with those of the Alliance. Depending on Moscow and Beijing to endorse NATO-led crisis

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[170] Since the OSCE has declared itself a regional arrangement in the sense of Chapter VIII of the U.N. Charter, any military enforcement action under its responsibility would require authorization by the U.N. Security Council. Thus, it is less circuitous for NATO to work directly with the Security Council on issues involving crisis-management interventions than to initiate deliberations in the OSCE and then turn to the U.N. Security Council.

[171] Kenneth Bacon, "Transcript: Pentagon Spokesman's Regular Briefing," Washington D.C., 1 October 1998. Available [Online]:<http://www.usembassy-israel.org.il/publish/press/defence/archive/1998/october/dd1102.htm>[17 August 2000].

management and peace operations in support of collective security may therefore be imprudent.[172]

With the emerging crisis in Kosovo in 1998, the Alliance was confronted with the practical implications of what had been until then a theoretical debate. As it became apparent that the U.N. Security Council was incapable of authorizing the use of force to prevent a humanitarian catastrophe in Kosovo, the NATO allies that most strongly supported the principle of a Security Council mandate realized that such a requirement would render the Alliance powerless to deal with the crisis. This realization solidified consensus among the allies that NATO had legitimate grounds for threatening and using force to resolve the crisis in Kosovo based on the "exceptional" circumstances of the nascent humanitarian crisis. Through repeated statements, allied leaders have maintained that NATO's intervention in the Kosovo conflict did not set a precedent for future humanitarian interventions. Instead, NATO Secretary-General George Robertson said recently, the emphasis will be on crisis-prevention, not intervention: "Kosovo should not be seen as a model for the future. Ideally, the future should be characterized by more prevention and less intervention."[173] However, questions regarding the necessity of U.N. Security Council authorization for future NATO interventions were debated when allied leaders met in Washington for NATO's 50th Anniversary.

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[172] David Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 30.

[173] George Robertson, "Peacekeeping and Conflict Prevention: What Risks and Threats in Geopolitics in the Future?" Trans-Atlantic Century Conference, Rome, Italy, 13 January 2000. Available [Online]:< http://www.nato.int/docu/speech/2000/s000113a.htm>[2 December 2000].

At NATO's Washington Summit in April 1999, the allies approved a new Strategic Concept. Addressing the "mandate" issue, the new Strategic Concept reaffirmed NATO's commitment, made in Brussels in 1994, "to support on a case-by-case basis in accordance with its own procedures, peacekeeping and other operations under the authority of the UN Security Council or the responsibility of the OSCE, including by making available Alliance resources and expertise. In this context NATO recalls its subsequent decisions with respect to crisis response operations in the Balkans."[174]

This reaffirmation is significant because it satisfied the French and other allies who favored upholding the primacy of the UN Security Council – when it is capable of functioning effectively.[175] At the same time, it supported the position stated by the NATO allies that Operation Allied Force was not intended to be, nor did it set, a precedent for future humanitarian interventions. However, the reference to "subsequent decisions with respect to crisis response operations in the Balkans" alludes to the North Atlantic Council's choices to threaten and use force in the Kosovo conflict without explicit U.N. Security Council authorization.[176]

While NATO's intervention in the Kosovo conflict might not have set a legal precedent, it certainly demonstrated that the Alliance is capable of making exceptions in

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[174] North Atlantic Council, Strategic Concept, 24 April 1999, par. 31. Available [Online]:< http://www. nato.int/docu/pr/1999/p99-065e.htm>[17 August 2000].

[175] David Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 33-34.

[176] Ibid.

order to undertake non-Article 5 military interventions *without* explicit authorization from the U.N. Security Council to threaten or use force. For better or worse, NATO's Kosovo "exception" now exists as a contested precedent that most assuredly will be used in the future as a benchmark for a wide range of international undertakings.[177] Nevertheless, while the decision by the allies to intervene in the Kosovo conflict was precedent-setting in a *de facto* sense, despite the professed intentions of most allies, the manner in which the intervention was conducted only serves to highlight the shortcomings of such a precedent. Thus, Operation Allied Force established a precedent for future humanitarian interventions, albeit an imperfect one.

C. AN APPEAL TO ARTICLE 51 OF THE U.N. CHARTER

The right of individual or collective self-defense by states is established in customary international law, and is embodied textually in Article 51 of the U.N. Charter as an exception to the Charter's prohibition on the use of force:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.[178]

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[177] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, p. 176. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

[178] Article 51 of "The Charter of the United Nations," in Thomas R. Van Dervort, *International Law and Organization: An Introduction* (Thousand Oaks, California: SAGE Publications, 1998), 523.

To exercise its right of self-defense under the U.N. Charter, a state must be subjected to an "armed attack" by another state, and that fact must be made known immediately to the U.N. Security Council. There is no provision under customary international law allowing another state (*i.e*, a third party) to exercise the right of collective self-defense (based on its own assessment of the situation) without being invited to do so by the attacked state.[179]

During the Kosovo conflict, leaders in Macedonia and Albania invited NATO forces into their countries to deter Belgrade from possibly expanding the conflict in the region, and to limit the destabilizing impact of the huge flow of refugees. As one observer has noted, although Serb forces never committed an "armed attack" against either country during the Kosovo crisis, the fact that NATO was invited into Macedonia and Albania "allows one to make a 'collective right to self-defense' argument for the NATO buildup [of military forces] in those countries. But the argument cannot be extended to NATO intervention in Kosovo or the bombing of Belgrade."[180]

Even though the allies never specifically justified their actions in the Kosovo conflict as collective self-defense, statements by NATO leaders alluded to the necessity of NATO intervention to prevent the conflict from spreading throughout the Balkan region. The United States and other allies tacitly endorsed a "domino theory," whereby

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[179] This is supported by the judgment (merits) of the International Court of Justice in the case of Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 27 June 1986, paras. 187-201. Available [Online]:< http://www.icj-cij.org/icjwww/idecisions/ isummaries/inussummary860627.htm>[2 December 2000].

[180] Robert Tomes, "Operation Allied Force and the Legal Basis For Humanitarian Interventions," *Parameters*, vol. 30, no. 1 (Spring 2000), 46.

the domestic conflict in the Federal Republic of Yugoslavia could spill over into other Balkan countries, to include Greece and Turkey, thus posing a threat to the Alliance.

While Article 51 of the U.N. Charter provides an exception to the prohibition on the use of force, national or collective self-defense can only be initiated in response to a prior "armed attack" by an aggressor under current international law. Some observers maintain that there is no factual basis upon which the Alliance could claim that the use of force qualified as collective self-defense under the exception granted within the U.N. Charter and customary international law, because Serb forces did not attack Macedonia or Albania during the Kosovo conflict.[181]

D. PRACTICAL CONSIDERATIONS

Aside from the fundamental international legal questions raised by NATO's intervention in the Kosovo crisis, some observers have expressed concern over any possible precedent set by NATO's intervention in the Kosovo conflict and its impact on the prospects for the U.N. Security Council to function properly in the future. While there have been arguments suggesting that the NATO campaign had an "aura of legality on the basis of 'implicit' authorization to use force" by the U.N. Security Council (*e.g.*,

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[181] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *European Journal of International Law*, vol. 10, no. 1, 1999. Available [Online]:<http://www.ejil.org/journal/Vol10/No1/com.html>[17 August 2000].

approval of Resolutions 1199, 1203, and 1244 by the U.N.S.C.), some observers hold that such an interpretation could set an undesirable precedent. [182]

An "implied authorization" doctrine would likely encourage an even greater reliance on the veto right by those Permanent Members of the U.N. Security Council (i.e., Russia and China) that fear expansive subsequent interpretations involving future humanitarian crises. As the Independent International Commission on Kosovo concluded:

> Such states may be concerned that their concurring vote on what seems like a preliminary resolution on a threat to peace might later be relied upon by some states to justify force and what they would regard as unwarranted intrusions on sovereign rights. There is little doubt that any move toward an implicit authorization for force tends to undermine 'the bright red line' that the Charter has attempted to draw around permissible force.[183]

First, any interpretations of U.N. Security Council resolutions that identify and/or condemn a humanitarian crisis as an implied authorization to threaten or use force against the offending party run the risk of alienating some of its Permanent Members. Second, such interpretations could further undermine the prospects for obtaining the cooperation of Russia and China in other matters affecting international peace and security. [184] Third, if NATO's intervention is seen as a precedent for the Alliance to issue its own mandate

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[182] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, p. 173. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

[183] Ibid.

[184] David Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 29.

for threatening or using force, it could solidify opposition throughout the world to future interventions by the NATO allies.[185]

As previously mentioned, there is also concern that establishing Operation Allied Force as a precedent could set the wrong example for other countries (*e.g.*, China, India, Nigeria, Russia and others). Doing so might encourage states to devise their own arguments for conducting "peacekeeping" interventions abroad without an explicit mandate from the U.N. Security Council.[186] Such an argument is not unfounded given that Russia has already advanced such a rationale for intervention in other former Soviet republics. The fact that Russia has been employing this rationale since 1993 implies, however, that Moscow did not need the "precedent' of Operation Allied Force to do so.

Finally, Operation Allied Force and the subsequent peacekeeping missions under U.N. auspices in Kosovo—the United Nations Mission in Kosovo (UNMIK) and the NATO-led Kosovo Force (KFOR)—underscore the economic and political cost of humanitarian intervention. It is estimated that the post-war reconstruction costs in the Balkans could range anywhere from $10 billion to $30 billion.[187] Additionally, the NATO mission in Kosovo may be of a more permanent nature than the allies would like. However, as one observer has suggested, "it will be much cheaper to make a substantial

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[185] David Yost, "Collective Defense and Collective Security After Kosovo," in Rob de Wijk, Bram Boxhoorn, Niklaas Hoekstra, eds., *NATO After Kosovo* (Netherlands: Royal Netherlands Military Academy, 2000), 29.

[186] Ibid.

[187] "Kosovo—The Cost of War and Peace," *Transition Newsletter*, The World Bank Group, June 1999. Available [Online]:< http://www.worldbank.org/html/prddr/trans/mayjun99/pgs11-12.htm>[17 August 2000].

investment now rather than simply allowing Kosovo to slide, which will cost the West a lot more in the long run."[188] Nevertheless, given the cost of rebuilding in the Balkans and the likelihood that NATO forces will be required to stay in Kosovo for some time to come, it is understandable that Alliance leaders are determined to make Operation Allied Force the "exception," not the rule.

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[188] Tony Karon, "Kosovo Is Starting To Look A Lot Like Korea," *CNN.com*, 7 March 2000. Available [Online]:< http://www.cnn.com/2000/WORLD/europe/03/07/kosovo3_7.b.tm/>[17 August 2000].

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V. CONCLUSION

Throughout the 1990s, numerous humanitarian crises have underscored the growing dilemma between the inviolability of state sovereignty on the one hand, and human rights issues on the other. Bosnia, East Timor, Haiti, and Somalia are some of the more prominent examples in which forcible measures have been used in an attempt to alleviate potential humanitarian disasters. However, NATO's involvement in the Kosovo conflict through Operation Allied Force is viewed as a defining moment in the debate over humanitarian intervention.

While the NATO allies propounded the need to take decisive action in order to avert the nascent humanitarian catastrophe in the Kosovo province, their rationale for military intervention in the Kosovo conflict was not entirely humanitarian, but rather relied on weaving together past experiences and future concerns.[189] The decision by the NATO allies to take action in the Kosovo crisis was not easily made. The crisis in Kosovo confronted NATO leaders with the practical implications of what had been, up until that time, a theoretical debate over the "mandate" question. This explains the lack of consensus among the NATO allies over the legal basis to threaten and use force against Belgrade. In turn, this lack of consensus required each member of the Alliance to come up with its own legal justification to support NATO action outside the auspices of an explicit U.N. Security Council mandate.

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[189] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, p. 160. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

The decision by NATO leaders to threaten and use force to resolve the crisis in Kosovo was significant because it challenged the notion of the U.N. Security Council's political primacy in decision-making about international security, and effectively demonstrated that through consensus the allies could take action on their own. Although this decision was contrary to strict interpretations of the U.N. Charter, actions by the NATO allies were legitimate. Even so, the utility of the *de facto* precedent may be limited due to the manner in which Operation Allied Force was conducted. NATO's insistence on making the protection of its own forces the top priority (rather than the safety of the Kosovar Albanian refugees) makes it an imperfect benchmark for legitimate humanitarian intervention in the future.

Operation Allied Force and other humanitarian interventions over the past decade appear to support an emerging legal doctrine of humanitarian intervention, but legal hurdles and political considerations make it unlikely that such a doctrine will gain general approval any time soon. Two specific problems are:

> First, that most states in the international community are nervous about justifying in advance a type of operation which might further increase the power of major powers, and might be used against them, and second, NATO members and other states are uneasy about creating a doctrine which might oblige them to intervene in a situation where they were not keen to do so.[190]

The reluctance on the part of the NATO allies to view Operation Allied Force as a precedent is understandable. However, as an Independent International Commission on Kosovo asserts: "NATO could in theory formally commit itself not to repeat such an

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[190] Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *Survival*, vol. 41, no. 3 (Autumn 1999), 108.

unauthorized intervention in the event of similar circumstances arising in the future, but such a step would be seen as amounting to the repudiation of its campaign on behalf of Kosovo, and is extremely unlikely." [191] Furthermore, such a repudiation could mean the loss of any deterrent credibility the Alliance has gained by demonstrating its capacity for collective action.

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[191] "The Kosovo Report," *Independent International Commission on Kosovo*, 2 November 2000, p. 176. Available [Online]:<http://www.kosovocommission.org>[17 August 2000].

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