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Reconsidering the Legality of
Humanitarian Intervention:
Lessons from Kosovo

By

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RECONSIDERING THE LEGALITY OF HUMANITARIAN INTERVENTION: LESSONS FROM KOSOVO

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For nearly ten years, human rights advocates tried to focus public attention on Kosovo. They issued report after report of gross and systemic human rights abuses in the troubled region. Nearly all of the reports detailed crimes committed by Serb civilians and Serb police against Albanian civilians.¹ They warned of escalating violence and impending forced deportations, and implored intergovernmental organizations and individual countries to take preventative action.² International policymakers had overwhelming evidence that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near.³ Yet they treated the warnings as those of the boy who cried "wolf." Without the "wolf" of all-out war, inter-

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1. See, e.g., HUMAN RIGHTS WATCH HELSINKI, *OPEN WOUNDS: HUMAN RIGHTS ABUSES IN KOSOVO* (1994); Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (last modified Oct. 1998) <<http://www.hrw.org/reports98/kosovo/>>; *Systematic Rights Abuses Reported in Kosovo*, NEW EUROPE ON-LINE, Aug. 28, 1999, available in 1998 WL 24015766.

2. See Amnesty International, *Federal Republic of Yugoslavia: Time the Authorities Listened and Acted!* (last modified Apr. 29, 1998) <http://www.amnesty.org.uk/news/press/releases/29_april_1998-5.shtml>; Amnesty International, *Violence Sweeps Through Kosovo Province: International Effort Needed to Prevent Further Killings and Beatings* (last modified Mar. 5, 1998) <http://www.amnesty.org.uk/news/press/releases/5_march_1998-1.shtml>; International Helsinki Federation for Human Rights, *Kosovo: Time Is Running Out* (last modified Sept. 1, 1998) <<http://www.ihf-hr.org/appeals/hr.org/appeals/hr.org/appeals/980830.htm>>.

3. See Peter Humphrey, *Albanians Victims of Serbian Police*, NEWSDAY, June 1, 1993, available in 1993 WL 11375416; Neil King Jr., *Hague Panel May Indict Milosevic: Kosovo Killings Could Prompt Charges*, WALL ST. J. EUR., Mar. 16, 1998,

national leaders failed to treat Kosovo seriously. Indeed, international leaders failed to treat the Kosovo situation seriously even after many Albanians grew impatient with their campaign of "passive resistance" to Serb aggression and instead supported a new tactic of armed resistance. This situation became even more drastic at the end of 1997 when the Kosovo Liberation Army (KLA) was at the vanguard of armed resistance.⁴ Still, international leaders failed to take preventative action. Even after the hot spring of 1998, when Serb forces killed fifty-one members of an Albanian family in retaliation for KLA provocation,⁵ and after the summer of 1998, when Serb forces began a scorched-earth policy of destroying whole villages,⁶ international leaders obstinately refused to take effective action. Indeed, even after the Milosevic regime reneged on its October 1998 agreement to decrease its forces in Kosovo⁷ and instead continued attacks on civilians,⁸ murdering forty-one civilians in the village of Racak in January 1999,⁹ the international community still pre-

available in 1998 WL-WSJE 3512577; U.S. Dep't of State, *Serbia-Montenegro Country Report on Human Rights Practices for 1996* (last modified Jan. 30, 1997) <<http://www.usis.usemb.se/human/human96/serbiemo.html>>; U.S. Dep't of State, *Serbia-Montenegro Human Rights Practices, 1995* (last modified Mar. 1996) <<http://www.usis.usemb.se/human/human95/serbiemo.htm>>.

4. See FRIENDS OF BOSNIA, KOSOVO: WAR AND PEACE IN THE BALKANS 3 (undated factsheet).

5. See *id.*

6. See Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (last modified Oct. 1998) <<http://www.hrw.org/reports98/kosovo/>>; see also Physicians for Human Rights, *Action Alert: Kosovo Crisis; Aid in the Balkans* (last modified Aug. 1998) <<http://www.phrusa.org/campaigns/kosovo.html>> (reporting extensively about the "intensive systematic destruction and ethnic cleansing of villages by Serb police"); Physicians for Human Rights, *Medical Group Recounts Individual Testimonies of Human Rights Abuses in Kosovo* (last modified June 24, 1998) <<http://www.phrusa.org/research/kosovo2.html>> (reporting "serious human rights violations, including detentions, arbitrary arrests, violent beatings and rape, throughout Kosovo during the past six months").

7. See Linda D. Kozaryn, *NATO Orders Air Strikes to End "Humanitarian Catastrophe"* (last modified Mar. 24, 1999) <http://www.defenselink.mil/news/Mar1999/n03241999_9903244.html>.

8. See Human Rights Watch, *Detentions and Abuse in Kosovo* (last modified Dec. 1998) <<http://www.hrw.org/reports98/kosovo2/>>.

9. See Human Rights Watch, *Human Rights Watch Investigation Finds: Yugoslav Forces Guilty of War Crimes in Racak, Kosovo* (last modified Jan. 29, 1999) <<http://www.hrw.org/hrw/press/1999/jan/yugo-prs.htm>>; see also Human Rights Watch, *A Week of Terror in Drenica* (visited Apr. 1, 2000) <<http://www.hrw.org/hrw/reports/>

tended that Kosovo was a small matter that would go away quietly.¹⁰

In March 1999, the "Contact group"—United States, Britain, France, Germany, Italy, and Russia—brought Kosovar and Serbian negotiators together in Rambouillet, France. The agreement on the table required autonomy to be restored to Kosovo, a NATO peacekeeping force to be installed, the KLA to disarm, and Milosevic to reduce his troops in Kosovo. Neither side liked the arrangement.

The agreement was unacceptable to Kosovars because it failed to require the complete withdrawal of Serbian troops and the guarantee of independence. At the same time, it was unacceptable to Serbs who refused to give up Kosovo and to permit the presence of an armed international military force. NATO threatened both sides: Kosovars would be cut off from any international support if they failed to sign and Serbia would be bombed if they failed to sign. Kosovars eventually signed the agreement, but Serbia refused. Then, on March 23, 1999, NATO war planes commenced military air operations and missile strikes in Yugoslavia. Suddenly, Kosovo was a lead story in every media outlet.¹¹ Kosovo finally came into focus, but the optic was blurred. In a rush to "do the right thing" or just "do anything" many human rights advocates, like the diplomats and pundits they criticized, started to get sloppy. They accepted a false slate of diametrically opposed choices—intervention or no intervention; protection of Serbian sovereignty or denial of Serbian sovereignty—without questioning what each choice actually meant under international law and without listening to the reasons proffered by the intervenors themselves.

1999/kosovo/> (documenting violations of international humanitarian law during the last week of September 1998).

10. See Fred Abrahams, *The West Winks at Serbian Atrocities in Kosovo*, INT'L HERALD TRIB., Aug. 5, 1998, at 6, available in 1998 WL 4793339.

11. See, e.g., Stephen Castle, *European Elections: Swing to Apathy in Every Part of Europe*, INDEPENDENT (LONDON), June 14, 1999, at 9, available in 1999 WL 15752459; Norman Harper, *Live a Moment of History*, ABERDEEN PRESS & J., May 6, 1999, at 16, available in LEXIS, News Library, Abdnpj File; R.C. Longworth, *Bridge to Brighter Future Must Span Ancient Hate*, CHI. TRIB., May 30, 1999, at 1, available in 1999 WL 2878571; *US Newspapers Roll Victory Drums in Kosovo Crisis*, AGENCE FR. PRESSE, June 4, 1999, available in 1999 WL 2615928.

Renowned human rights advocates, such as Czech President Vaclav Havel, offered human rights rationales for NATO's actions. Havel claimed that the alliance "acted out of respect for human rights" and that the war was "probably the first war that has not been waged in the name of 'national interests,' but rather the name of principle and values."¹² If only this were true, the legitimacy of actions in Kosovo would be much clearer. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian grounds. Instead, the Clinton Administration, like other international leaders who have intervened in nation-states in the past,¹³ offered an array of justifications. Although humanitarian concerns were included "because we care about saving innocent lives,"¹⁴ they were rolled together with other factors, most prominently: (1) the need for regional stabilization, or in Clinton's words, "because our children need and deserve a peaceful, stable, free Europe";¹⁵ (2) national security concerns relating to a long war and a large refugee flow, "because we have an interest in avoiding an even crueler and costlier war";¹⁶ and (3) the need to protect NATO's reputation, because looking the other way "would discredit NATO, the cornerstone on which our security has rested for 50 years."¹⁷ As Clinton explained these factors to the nation in his first public address on NATO intervention in Kosovo, he emphasized America's economic and security concerns, not humanitarianism:

[I]f America is going to be prosperous and secure, we need a Europe that is prosperous, secure undivided and free That is why I have supported the political and economic unification of Europe. That is why we brought Poland, Hungary

12. Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. OF BOOKS, June 10, 1999, at 6, available in 1999 WL 9802362.

13. Sean Murphy's review of incidents of intervention demonstrates that "government officials of the intervening state (rightly or wrongly) based the legality of that state's action on one or more other reasons." See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 85 (1996).

14. Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 518 (Mar. 24, 1999).

15. *Id.*

16. *Id.*

17. *Id.*

and the Czech Republic into NATO, and redefined its missions. . . .¹⁸

In the Administration's announcements, White House spokesmen also stressed that "NATO had to address the problem [in Kosovo] now because a failure to act would have destroyed its credibility."¹⁹

Dr. Javier Solana, Secretary-General of NATO, similarly offered an array of extralegal justifications for NATO intervention in Kosovo. In his first address after the onset of NATO bombing, Solana emphasized more clearly than had President Clinton that NATO's "objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo."²⁰ At the same time, Solana stated that the military action was necessary to "prevent instability spreading in the region"²¹ and to "support the political aims of the international community."²² Specifically, he characterized NATO's efforts as "support[ing] international efforts to secure Yugoslav agreement to an interim political settlement."²³ This latter justification—the use of force to coerce a political leader to sign an agreement—clearly was extralegal. Indeed, under the 1969 Vienna Convention on the Law of Treaties, "[a] treaty is void if its conclusion has been procured by the threat or use of force. . . ."²⁴ Thus, under the 1969 Vienna Convention, legal justifications for the use of force in Kosovo should have been offered apart from the mere desire to force a political leader to sign a "take it or leave it" agreement.²⁵

18. *Id.*

19. Jim Garamone & Linda D. Kozaryn, *NATO Attacks Serbs to Stop Kosovo Killings* (last modified Mar. 24, 1999) <http://www.defenselink.mil/news/Mar1999/n03241999_9903245.html> (quoting White House spokesman Joe Lockhart).

20. Dr. Javier Solana, *Press Statement* (last modified Mar. 23, 1999) <<http://www.nato.int/docu/pr/1999/p99-040e.htm>>.

21. *Id.*

22. *Id.*

23. *Id.*

24. Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 698.

25. Serbia did make a counteroffer. Although the proposal would have rejected the presence of NATO troops in Kosovo, it would have permitted the presence of other unarmed internationals. For the text of the proposal, see *Rambouillet* (visited Apr. 1, 2000) <<http://www.jurist.law.pitt.edu/kosovo.htm#Rambouillet>>.

By failing to specify clearly the legal parameters of their actions, the NATO allies exposed themselves to criticism suggesting that NATO was not operating under any legal grounds at all.²⁶ Critics who argue that a humanitarian and human rights disaster did not exist in Kosovo before NATO attacks are wrong on the facts, however.²⁷ By the time NATO began bombing, Kosovo Albanians had faced more than ten years of intense human rights violations under the boot of Serb forces.²⁸ In the summer of 1998 alone, attacking Yugoslav and Serb paramilitary forces shelled an estimated three hundred thousand Kosovo Albanians out of their homes.²⁹ Thus, contrary to the critics' *factual* contentions, the wealth of information on gross and systemic human rights abuses in Kosovo prior to the NATO bombing provided sufficient evidence of a human rights basis for intervention. Nonetheless, many of the same critics point to

26. See, e.g., Raju G.C. Thomas, *NATO and International Law* (visited Apr. 1, 2000) <<http://www.jurist.law.pitt.edu/thomas.htm>>.

27. See Robert Hayden, *Humanitarian Hypocrisy* (visited Apr. 1, 2000) <<http://www.jurist.law.pitt.edu/hayden.htm>>. Hayden claims that "the wide Serbian offensive against Kosovo Albanians began *after* NATO's attacks began." *Id.* Though the Serbian all-out war against the Albanians commenced after NATO bombing, the nine years of intense Serbian harassment of Albanians provided the crux of NATO's humanitarian argument, not the postbombing deportations and murders. Hayden contends further that "Yugoslav forces, until NATO attacks on them commenced, were fighting a guerrilla force, in much the same way that American forces had fought in Vietnam." *Id.* Setting aside disputes regarding America's actions in Vietnam and the validity of these actions, Hayden's statements ignore the wealth of documentation that Yugoslav forces, Serbian police, and paramilitary troops were directly targeting civilians in Kosovo. For example, Physicians for Human Rights concluded, after extensive study, that:

Serb forces have engaged in a systematic and brutal campaign to forcibly expel the ethnic Albanian[] population of Kosovo throughout the province. In the course of these mass deportations, and over the past year in Kosovo, Serb forces have committed widespread violations of human rights against ethnic Albanians including: killings, beatings, torture, sexual assault, separation and disappearances, shootings, looting and destruction of property, and violations of medical neutrality.

See Physicians for Human Rights, *War Crimes in Kosovo* (last modified June 15, 1999) <<http://www.phrusa.org/new/kexec.html>>.

28. See Julie Mertus, *The Obvious Next Step-NATO Complicit in Genocide: Send Ground Troops Now*, CHI. TRIB., Apr. 1, 1999, available in 1999 WL 2859071.

29. See Julie Mertus, *International Displacement in Kosovo: The Impact on Women and Children* (last modified Apr. 21, 1999) <<http://www.law.onu.edu/organizations/international/displaced.htm>>.

valid *legal* concerns about the extensive list of various justifications for intervention that contained many questionable items, most notably, the desire to use force to coerce the signing of an agreement or the use of force to protect one's own reputation or the reputation of friends.³⁰

Some champions of intervention openly acknowledged the illegality of the air strikes, but claimed moral legitimacy for such actions.³¹ Straying from legal justifications, however, the risks delegitimized international law and dismantled the gains of human rights advocates over the past decade. International law generally, and human rights law specifically, are most influential when communities perceive their terms as legitimate and fair.³² Legitimacy is central to the enforcement of human rights.³³ Accordingly, only human rights processes and bodies perceived as legitimate will be taken seriously, and only states perceived as legitimate can enforce human rights norms successfully.³⁴ As Thomas Franck explains:

In a community organized around rules, compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed . . . [P]erception of legitimacy . . . becomes a crucial

30. See generally Hayden, *supra* note 27 (examining the hypocrisy of NATO humanitarian intervention); Thomas, *supra* note 26 (outlining the key violations of international law NATO committed).

31. Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23 (1999) (last modified May 11, 1999) <<http://www.ejil.org/journal/Vol10/No1/com.html>>; Hayden, *supra* note 27; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999) (last modified Apr. 26, 1999) <<http://www.ejil.org/journal/Vol10/No1/ab1-1.html>>.

32. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter FRANCK, *FAIRNESS*]; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *POWER*]; see also Jose Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations* by Thomas M. Franck, 24 N.Y.U. J. INT'L L. & POL. 199 (1991) (reviewing FRANCK, *POWER*, *supra*).

33. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 81-84 (1992) (asserting the notion that human rights protections are elementary to the legitimacy of states).

34. See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) (explaining the concept of popular sovereignty).