NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?

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Introduction

Operation Allied Force, the recent North Atlantic Treaty Organization (NATO) intervention in the Federal Republic of Yugoslavia (FRY), relied solely on air power to force Slobodan Milosevic's troops out of Kosovo. No NATO ground forces were used. There were, however, ground troops deployed in Kosovo that were fighting the FRY forces; the Kosovo Liberation Army (KLA) was fighting for an independent Kosovo.

This article examines the KLA and its relationship with NATO during the two months of fighting. On several occasions during the war, NATO forces apparently supported, either directly or indirectly, the KLA in its battles with FRY forces. If NATO forces provided assistance to the KLA, a rebel force within the sovereign state of Yugoslavia, it may have violated traditional understandings of the United Nations (UN) Charter and committed unlawful aggression against Yugoslavia.

Customary international law permitted unilateral humanitarian intervention to protect nationals and even non-nationals, under some circumstances. The majority view is that the UN Charter replaced this customary law and now prohibits such intervention. Some believe that humanitarian intervention is still permitted and will not run afoul of Article 2(4), so long as the intervention does not affect the "territorial integrity" or "political independence" of the state against which the humanitarian intervention is directed.[1] The intervention in Kosovo is unique in that it was not a unilateral action, but action initiated by a regional organization, after the UN had addressed the matter and failed to authorize the use of force. Further, while NATO's primary purpose was humanitarian, it *de facto* supported the KLA's fight for independence from the FRY.

This article begins by examining the history of the KLA and why it sought to secede from Yugoslavia. It next discusses NATO's legal basis for intervening in Kosovo and the conduct of the war, focusing on NATO's relationship with the KLA. The article then provides a legal analysis of intervention in civil wars, starting with an examination of the traditional rule of non-intervention, to include a look at the International Court of Justice's decision in the *Nicaragua* case. It discusses self-determination and Article 2(4) of the UN Charter and, after demonstrating that a right of self-determination exists under the UN Charter, the article explores the following issues: when the right to secede arises; whether the situation in Kosovo justified the KLA's demand for secession; whether it was lawful for NATO to assist the KLA in its fight for independence; the role that the humanitarian crisis in Kosovo played in NATO's intervention; and, finally, the enduring impact of NATO's intervention in Kosovo.

This article posits that NATO—acting without UN authorization—did not violate the UN Charter by using force against Yugoslavia. NATO's tenous military support to the KLA, which was fighting for an independent Kosovo, was perfectly legitimate. However, NATO's refusal to characterize honestly its actions actually undermined the rule of law, exacerbated the suffering of the very people it was trying to help, and set a damaging precedent for intervention in future civil wars. From the beginning, NATO should have stated that the government of Yugoslavia illegally and systematically denied the Albanian Kosovars their right of self-determination. As a result of NATO's failure to make such a statement early on, the Albanian Kosovars, through the KLA, rebelled, fought for independence, successfully captured substantial territory in Kosovo and freely elected their own government. It was not until this point that NATO intervened and came to the Albanian Kosovars' assistance in their pursuit of the UN Charter's bedrock principle of self-determination. NATO's biggest mistake was its failure to provide the KLA with more support, more quickly. Doing so could have greatly reduced the suffering of the Albanian Kosovars.

The Kosovo Liberation Army: Background and Beliefs[2]

For 800 years, since the beginning of the Ottoman Empire, control of Kosovo has shifted back and forth between the Albanians and the Serbs.[3] This continued until 1913 when the Serbs

1. JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 152-53 (1990).

2. In January 1999, weeks before NATO's intervention in Kosovo, Professor Julie A. Mertus of Ohio Northern University Law School completed a timely and scholarly history of Kosovo. Her book successfully dispels many myths about the roots of conflict in Kosovo and clarifies some misco nceptions. The central myth is that: "Although tensions between Serbs and Albanians have long existed, the war in Kosovo was not preordained by ancient hatreds. Rather, the war was ignited by more recent storytelling." JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR xxi (1999). "[T]he conflict was propelled through media propaganda and political hate speech. These orchestrated efforts were successful at instilling a sense of fear and victimization." *Id*. at 262.

proclaimed Kosovo their fatherland.[4] The Serbs initially lost their foothold in Kosovo in 1689 when they failed to free themselves from Ottoman rule:

> Fearing murderous reprisals, the Serbian archbishop of Pec led some 30,000 Serbian families into exile in Hapsburg-ruled southern Hungary, where their descendents live to this day. Henceforth the Albanians in Kosova (as the region is known in their language), favored by the Ottomans as loyal Muslims, rose to demographic predominance.[5]

It was not until the Balkan War of 1912 that the Serbs successfully conquered and annexed Kosovo.[6] The Serbs wreaked terrible violence on the Muslim Albanians.[7] The Albanians got their revenge during World War II, however, when the Nazi's raised a Waffen SS division of Kosovar Muslims whereby "[m]urderous attacks on Serbs were carried out . . . ."[8]

Having lost their fight to remain independent from Yugoslavia after World War II, some 250,000 Albanians fled Kosovo to escape the discriminatory, colonial Serb rule.[9] Finally, in 1968, after violent Albanian demonstrations, Tito granted Kosovo wide-ranging autonomy.[10] The stage was then set for the rise of Serb nationalists in the 1980s and the arrival of Slobodan Milosevic.[11]

Until 1989, Kosovo was one of two autonomous provinces in the Federal Republic of Yugoslavia.[12] This autonomy ended in 1989 when the newly-elected Serbian leader Slobodan Milosevic[13] established virtual martial law in Kosovo, changed the constitution, and took away Kosovo's autonomy.[14] In 1991, with the break up of Yugoslavia, the Kosovar assembly saw an opening and voted for independence.[15]

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3. *See* Michael P. Scharf & Tamara A. Shaw, *International Institutions*, 33 INT'L LAW. 567, 573-75 (1999) (citations omitted); *see also* William W. Hagen, *The Balkans' Lethal Nationalisms*, FOREIGN AFFAIRS, July/Aug. 1999, at 53. "[T]he Balkan states were all born in the nineteenth and early twentieth centuries as irredentist nations—that is, as nations committed to the recovery of their 'unredeemed' national territories. Their legitimacy rested entirely on their ability to embody the national 'imagined community.'" *Id.*

4. *See* Scharf & Shaw, *supra* note 3, at 573-75; *see also* Hagen, *supra* note 3, at 56 (describing Kosovo as the "cradle of the medieval Serbian monarchy").

5. Hagen, *supra* note 3, at 57.

6. *Id*. at 57-58.

7. *Id*. at 58.

8. *Id*.

9. *Id*.

10. *Id.*

11. *See* MERTUS, *supra* note 2, at 29-46 (discussing the 1981 student demonstrations). What started as a small demonstration for better cafeteria food spread across Kosovo and turned into demands for better conditions for Albanians in Kosovo. As the unrest grew larger, allegations of outside influences and conspiracies abounded and the confrontations grew violent. "According to both Kosovo Serbs and Albanians, 1981 was the year in which many previously harmonious relationships between members of different groups grew sour or broke off completely." *Id*. at 41. Professor Mertus concluded: "[O]ver the next eight years, 584,373 Kosovo Albanians—half the adult population—would be arrested, interrogated, interned or remanded. Albanians would not only lose their demand for a Kosovo republic—they would lose their status under the 1974 Constitution. And Yugoslavia would be lost altogether." *Id.* at 46.

12. *See* Kathleen Sarah Galbraith, *Moving People: Forced Migration and International Law*, 13 GEO. IMMIGR. L. J. 597, 599-600 (1999) (noting that "[u]ntil 1991, six republics (Serbia, Slovenia, Croatia, Bosnia-Herzegovina, Macedonia and Montenegro) and two autonomous provinces (Kosovo and Vojvodina) made up the Socialist Federal Republic of Yugoslavia.").

13. Slobodan Milosevic was elected President of Serbia on 9 December 1990. MERTUS, *supra* note 2, at 299.

14. Galbraith, *supra* note 12, at 601.

15. *See* Hagen, *supra* note 3, at 59; *see also* MERTUS, *supra* note 2, at xviii ("The break-up of Yugoslavia, [the Kosovo Albanians] contend, threw open all questions of sovereignty within Yugoslavia, and Albanians living in Kosovo have voted for autonomy and established their own government."). Professor Mertus ties these critical events together:

> After the Serbian Constitution of 1990 revoked the autonomous status of Kosovo, Albanians protested the changes as illegal acts, arguing further that since the old Yugoslavia no longer existed, Kosovars could choose their fate. In 1991, in a popular referendum not recognized by Serbia, Kosovars voted to separate from Serbia. Ibrahim Rugova was elected president of an independent Kosova, but the elections were branded illegal by the Serbian regime and went unrecognized by any government other than Albania's.

Id. at 269.

Around this time, Ibrahim Rugova, the popular leader of the Albanian Kosovars, promoted a pacifist, non-violent response to Serbian repression.[16] This approach was not shared by all in Kosovo because, beginning in 1996, the KLA emerged and claimed responsibility for a series of bomb attacks against Serbs.[17]

The political views of the KLA have been described as having "hints of fascism on one side and whiffs of communism on the other."[18] Beginning in January 1997, the KLA stepped up its bombing campaign[19] and, during the summer of 1998, it grew stronger.[20] Originally, the group's numbers were small, "but by July 1998, the KLA enjoyed wide popular support across Kosovo and controlled roughly one third of the territory."[21]

In May 1998, U.S. envoy Richard Holbrook brought Milosevic and Rugova together for peace talks, but the fighting continued.[22] The presence of the KLA and their violent attacks on Serbian police gave Milosovic the justification he needed for the ensuing vicious attacks on Albanian Kosovars. In the summer of 1998, Milosovic repeated history and used the Yugoslav Army and the Interior Ministry to force over 800,000 ethnic Albanians from Kosovo into Albania, The Former Yugoslav Republic of Macedonia (FYROM), and Montenegro.[23] In June 1998, however, UN Secretary General Kofi Annan warned NATO that it must obtain a Security Council mandate prior to any military intervention in Kosovo.[24]

NATO Enters the War

Legal Basis

On 24 March 1999, NATO began its bombing campaign and Operation Allied Force was underway. The following discussion outlines the legal theory upon which NATO relied to justify its use of force against Yugoslavia.

Article 1 of the North Atlantic Treaty mirrors Article 2(4) of the UN Charter in that it obligates member states "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[25] The heart of the Treaty is contained in Article 5, which mirrors Article 51 of the UN Charter.[26] Although Article 5 provides for the collective self-defense of all member states, the only NATO member state even close to Kosovo is Greece,[27] and it is separated from Kosovo by FYROM. Therefore, NATO did not rely on collective self-defense to justify its use of force.

At the same time NATO warplanes were bombing Yugoslavia, the 50th Anniversary NATO Summit was taking place in Washington, DC. On 24 April 1999, NATO released the "Alliance's Strategic Concept,"[28] Paragraph 6 of which states: "Based on common values of democracy, human rights and the rule of law, the Alliance has striven since its inception to secure a just and lasting peaceful order in Europe."[29] However, Paragraph 11 states: "the Alliance will continue to respect the legitimate security interests of others . . . ."[30] While Paragraph 6 seems to provide a rationale for NATO's action in Kosovo, such action also appears to violate Paragraph 11.

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16. On 24 May 1992, Ibrahim Rugova was elected President of the Republic of Kosova with ninety-five percent of the vote. *See* Joseph S. Nye, Jr., *Redefining the National Interest*, FOREIGN AFFAIRS, July/Aug. 1999, at 33; *see also* MERTUS, *supra* note 2, at 301.

17. *See* Nye, *supra* note 16, at 33; *see also* MERTUS, *supra* note 2, at 307.

18. *See* Nye, *supra* note 16, at 34 (quoting journalist Chris Hedges).

19. *See* MERTUS, *supra* note 2, at 307-08 (providing a chronology of key KLA attacks and Serbian responses).

20. *See* Ted Baggett, *Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457, 462 (1999).

21. *Id.* at 462 (citation omitted); *see also* MERTUS, *supra* note 2, at 308.

22. MERTUS, *supra* note 2, at 308.

23. *See* Galbraith, *supra* note 12, at 598 (postulating additional motivating factors) ("The prospect of removing ethnic Albanian civilians from areas containing mineral wealth and Orthodox Christian religious sites at least partially motivated the assault.").

24. *Id.*

25. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

26. *Id.*

27. The other NATO members are: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom, and the United States. North Atlantic Treaty Organization, *NATO Member Countries, at* http://www.nato.int/structur/countries.htm (last modified Dec. 19, 2000).

28. NATO Press Release, *The Alliance's Strategic Concept*, Apr. 24, 1999, *available at* http://www.nato.int/docu/pr/1999/p99-065e.htm.

Former Secretary-General of the North Atlantic Treaty Organization, Javier Solana, characterized the NATO operation in Kosovo as follows:

> For the first time, a defensive alliance launched a military campaign to avoid a humanitarian tragedy outside its own borders. For the first time, an alliance of sovereign nations fought not to conquer or preserve territory but to protect the values on which the alliance was founded.[31]

Arguably, NATO bombed Yugoslavia to enforce its values against a non-member of NATO.

Russia and China made it clear that they would oppose any military action in Kosovo.[32] On 26 March 1999, Russia drafted a resolution that was supported by India and Belarus (only Russia, China and Namibia subsequently voted for the resolution) urging NATO to stop its use of force.[33] At least one state opposing the resolution felt NATO had the authority to use force.

> The representative of Slovenia, which was among the states opposing the resolution, made the key point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has "the primary, but not exclusive, responsibility for maintaining international peace and security."[34]

A few days before NATO started its bombing campaign in Kosovo, Mr. Douglas Dworkin, Principal Deputy Department of Defense (DOD) General Counsel, speaking at a Pacific Command (PACOM) Conference, outlined the U.S. justification for NATO's use of force in Kosovo.[35] While acknowledging that no U.N. resolution expressly authorized the use of force, and no traditional legal justification appeared to support the use of force, Mr. Dworkin instead provided a list of factors supporting the use of force:

> (1) The United Nations Security Council (UNSC) might not be able to act effectively;
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> (2) There were some similar precedents for use of force by regional defense-type organizations (the Organization of American States during the Cuban Missile Crisis by concurring in the quarantine, and the Organization of Eastern Caribbean States approval of U.S. action in Grenada);
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> (3) There was, in fact, a threat to regional peace and security;
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> (4) The UN Security Council recognized this threat in UN Security Council Resolution 1199;
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> (5) NATO had a unique role to play in the Balkans, given its current involvement in Bosnia and general interest in peace and security in that region of the world;
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> (6) The decision to use force would be a multilateral one (by NATO), not unilateral;
>
> (7) There was a tremendous threat for human catastrophe in Kosovo, which calls out for humanitarian intervention; and
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> (8) All of these factors coalesced in the Balkans, a very unique area representing a tinderbox which could explode and spread instability, insecurity, and conflict throughout the adjoining areas.[36]

On 23 March 1999, the day before the bombing campaign began, Samuel R. Berger, Assistant to the President for National Security Affairs, sent a letter to Senator Trent Lott, the Senate Majority Leader, outlining the President's legal authority for using force:

> The United States' national interests are clear and significant. As the President stated in his October 6 letter to you, "Kosovo is a tinderbox that could ignite a wider European war

29. *Id.*

30. *Id.*

31. Javier Solana, *NATO's Success in Kosovo*, FOREIGN AFFAIRS 114 (Nov./Dec. 1999).

32. Adam Roberts, *NATO's "Humanitarian War" over Kosovo*, SURVIVAL, Autumn 1999, at 104.

33. *Id.* at 105.

34. *Id.* (citation omitted).

35. E-mail from Colonel Michael W. Schlabs, Chief, International and Operations Law (Air Force), to Major General William Moorman, The Judge Advocate General of the Air Force, summarizing Mr. Dworkin's comments at the PACOM Conference (Mar. 18, 1999) (on file with author).

36. *Id.*

> with dangerous consequences to the United States." *This concern lies at the core of our analysis*. As the President stated as recently as Friday, March 19, "this is a conflict with no natural boundaries. If it continues it will push refugees across borders, and draw in neighboring countries." The special historical significance of the Balkans provides additional urgency for our concerns. The House reached this same conclusion on March 12, 1999, when it passed H. Con. Res. 42 finding that "[t]he conflict in Kosovo has caused great human suffering and, if permitted to continue, could threaten the peace of Europe." The threat is particularly acute for neighboring NATO Allies, and NATO has also concluded that the use of force in this case would be justified. Not acting will undermine the credibility and effectiveness of NATO, on which the stability of Europe depends . . . .
>
> . . . .
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> . . . NATO would be acting to deter unlawful violence in Kosovo that endangers the fragile stability of the Balkans and threatens a wider conflict in Europe, to uphold the will of the international community as expressed in various U.N. Security Council resolutions, as well as to prevent another humanitarian crisis, which itself could undermine stability and threaten neighboring countries . . . .[37]

This justification appears to be a combination of self-defense and the fact-based factors provided by Mr. Dworkin. While Mr. Berger mentioned humanitarian intervention in passing, he still tied it directly to the resulting instability it would cause in the region, rather than arguing that it provided an independent moral basis for using force.

In June 1999, the Honorable Judith A. Miller, General Counsel of the Department of Defense, provided this justification for NATO's use of force in Kosovo: "It was designed to terminate unlawful attacks on the civilian population, to defeat FRY's threats to regional peace and stability, and to restart diplomatic and political efforts to resolve the crisis."[38] It is interesting to note that, unlike Mr. Berger, she listed humanitarian intervention first.

The British apparently believed that humanitarian intervention alone provided a sufficient justification for using force in Kosovo. In a June 2000 report to Parliament, *Kosovo: Lessons from the Crisis*, the Ministry of Defence wrote:

> The nineteen NATO democracies had made every effort to find a diplomatic solution to the crisis, but NATO now had no choice but to act if a humanitarian catastrophe was to be prevented.[39]

The report went on to state:

> The UK was clear that the military action taken was justified in international law as an exceptional measure and was the minimum necessary to prevent a humanitarian catastrophe. All NATO Allies agreed that there was a legal base for action.[40]

And finally, the British made it clear that they believedNATO could have acted with or without the UN approval:

> We would have welcomed the express authorisation of the UN Security Council through a resolution before the NATO air campaign. This would have represented the strongest possible expression of international support. But discussions at the United Nations in New York had shown that such a resolution could not be achieved. Nevertheless, the UK and our NATO Allies, and many others in the international community, were clear that as a last resort, all other means of resolving the crisis having failed, armed intervention was justifiable in international law as an exceptional measure to prevent an overwhelming humanitarian catastrophe in Kosovo.[41]

German Foreign Minister, Klaus Kinkel, relied on a "cluster of conditions," which taken together, supported the use of force.[42] Mr. Kinkel's argument was similar to that of Secretary General Solana, who relied on the following relevant factors as justification:

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37. Letter from Samuel R. Berger, Assistant to the President for National Security Affairs, to Trent Lott, Senate Majority Leader 2-3 (Mar. 23, 1999) (on file with author).

38. JUDITH A. MILLER, 21 A.B.A. NAT'L SEC. L. REP. 4 (1999).

39. U.K. MINISTRY OF DEFENSE, KOSOVO: LESSONS FROM THE CRISIS ch. 2 (2000), *available at* http://www.kosovo.mod.uk/lessons/.

40. *Id.* ch. 3.

41. *Id.* ch. 5.

> (1) The failure of Yugoslavia to fulfill the requirements set out by [Security Council] Resolutions 1160 and 1199, based on Chapter VII of the UN Charter;
>
> (2) The imminent risk of a humanitarian catastrophe, as documented by the report of the UN Secretary-General Kofi Annan on 4 September 1998;
>
> (3) The impossibility to obtain, in short order, a Security Council resolution mandating the use of force; and
>
> (4) The fact that Resolution 1199 stated that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region.[43]

French President Chirac somewhat relied on Resolution 1199 and its reference to Chapter VII action, but declined to emphatically state a position.[44] The Italian's at first seemed to argue that collective self-defense warranted the use of force, then later appeared to insist that Security Council approval was required.[45]

Clearly, the mere mention of Chapter VII in a UN resolution does not imply that force is authorized. This holds especially true when two permanent members of the Security Council—Russia and China—"accompanied their votes by legally valid declaratory statements spelling out that the resolutions should not be interpreted as authorising the use of force."[46] At least two authors, however, support NATO's position that Resolution 1199 opened the door for the use of force, simply because it was based on Chapter VII:

> Technically, the resolution can be interpreted to open the door for the use of military force because, while its text does not specifically address the threatening of force or set a deadline for compliance, it was adopted under Chapter VII of the U.N. Charter which permits military action to enforce compliance.[47]

Responding to an author critical of NATO's intervention, James B. Steinberg, Deputy Assistant to the President for National Security Affairs, apparently relied on humanitarian intervention, rather than Resolution 1199 and its Chapter VII implications:

> Since NATO fought on behalf of the [Albanian Kosovars] while embracing the Serb-backed view that Kosovo should remain part of Serbia, [Michael Mandelbaum] claims that NATO's effort was an incoherent failure.
>
> But NATO did not go to war in Kosovo over any principle of sovereignty. NATO fought to end Serb repression in Kosovo and to protect southeastern Europe from its consequences.[48]

One author further argued that Kosovo, which combined civil war and genocide, illustrates the intersection of international human rights law and humanitarian law.[49] She asserted that "increasingly, they [humanitarian interventions] give primacy to human rights over the sovereignty of states when the two principles conflict."[50]

42. *See* Catherine Guicherd, *International Law and the War in Kosovo*, 41 INT'L INST. FOR STRATEGIC STUD. 20, 27 (1999). Mr. Kinkel's conditions were:

> [T]he inability of the Security Council to act in what was an emergency situation; the fact that a military threat was in the "sense and logic" of Resolutions 1160 and 1199 [although, he conceded, the latter did not provide direct legal ground]; and the particular high standards for the protection of human rights reached by European states in the [Organization for Security and Cooperation in Europe] context, in particular regarding the protection of minorities.

Id. (citation omitted).

43. *Id.* at 27-28.

44. *Id.* at 28.

45. *Id.* Eventually, the Italians simply stopped raising any objections and essentially acquiesced.

46. *See id.* at 26.

47. Michael P. Scharf & Tamara A. Shaw, *International Institutions*, 33 INT'L LAW. 567, 575 (1999) (citation omitted).

48. James B. Steinberg, *A Perfect Plemic: Blind to Reality on Kosovo* , FOREIGN AFFAIRS, Nov./Dec. 1999, at 132, *responding to* Michael Mandelbaum's, *A Perfect Failure*, FOREIGN AFFAIRS, Sept./Oct. 1999, at 2.

49. Guicherd, *supra* note 42, at 21. Catherine Guicherd is Deputy for Policy Coordination to the Secretary General at the NATO Parliamentary Assembly (formerly North Atlantic Assembly), Brussels.

50. *Id.* at 21-22.

As the previous discussion reveals, there was no single justification for NATO's use of force in Yugoslavia upon which everyone could agree. Of particular note, not one NATO member ever argued that intervention was justified to help the Albanian Kosovars regain their right of self-determination from Yugoslavia.

Support to the KLA

In an interview with Azen Syla, a founding member of the KLA who sits on its central council, journalist Peter Finn of *The Washington Post* wrote less than a week after the start of the bombing campaign that the KLA "is facing imminent military defeat unless NATO airdrops heavy weaponry to help the guerrillas survive . . . ."[51] NATO apparently ignored the rebel pleas for arms, reflecting U.S. skepticism of the KLA: "U.S. officials have said repeatedly that they do not want NATO warplanes to become 'the KLA's air force,' even as they support the rebel group's resistance to government repression."[52]

NATO was in a very delicate position. Its premise for starting the war was to stop the humanitarian crisis in Kosovo. The bombing campaign, however, had served to aggravate the suffering of ethnic Albanians in Kosovo. The only forces capable of stopping the Serbian attacks were the KLA.[53] Once the Albanian government saw that the KLA was winning widespread support among Albanian Kosovars, it began to put pressure on the U.S. and NATO to supply arms to the KLA.[54]

NATO's hesitancy to embrace the KLA was based on several legitimate concerns. The KLA started as a terrorist organization, at times receiving support from Islamic fundamentalists in the Middle East.[55] The U.S. Drug Enforcement Administration believed that "Turkish [drug] trafficking groups are using Albanians, Yugoslavs and elements of criminal groups from Kosovo to sell and distribute their heroin . . . . These groups are believed to be a part of the financial arm of the [KLA's] war against Serbia."[56] The KLA's radical political views and desire to unify "Albanians in Kosovo, Albania and Macedonia in a greater Albanian state"[57] also concerned NATO leaders. Further, if Western countries started supplying the KLA with arms, they might start a conventional arms race with the Russians supplying weapons to the Serbs. There was also evidence that the KLA was forcibly conscripting Albanian refugees into its Army.[58]

As NATO contemplated the introduction of ground forces, it was being drawn into a closer relationship with the KLA, while publicly continuing to keep the KLA at arms length.

> KLA officials have denied receiving any significant assistance from NATO countries or from undercover Western special forces teams believed to be operating in Kosovo. But an indirect relationship between the two forces is emerging. Rebel officials conduct regular satellite telephone discussions with designated contacts about tactical and strategic military matters, and these contacts in turn relay helpful information to NATO's target planning staff.[59]

NATO's reluctance to openly cooperate with the KLA and fully integrate them into its battle planning process frustrated the KLA leadership, apparently resulted in many lost targeting opportunities, and possibly prolonged the campaign.

> The principal impediment to closer military cooperation at this stage, sources report, is that NATO continues to use a cumbersome process for selecting its targets, involving advance planning and complicated logistical support. That fact, more than anything else,

51. Peter Finn, *Guerrilla Force Near Collapse: Kosovo Rebels Appeal to NATO for Airborne Supplies*, WASH. POST, Apr. 1, 1999, at A1, A18.

52. *Id. But see* Roberts, *supra* note 32, at 118 (revealing the results of *de facto* coordination between NATO air strikes and KLA ground offensive) ("KLA forces push Yugoslav soldiers out into the open [and] 7 June NATO attack achieved largest, single kill.").

53. *See* Peter Finn, *Albania Asks West to Arm Rebels: Government Shifts Position to Support Kosovo Guerrillas*, WASH. POST, Apr. 20, 1999, at A20 ("In Kosovo, the only force that protects civilians is the KLA, but they do not have enough arms.").

54. *See id*. ("[A]lbanian President Rexhep Mejdani is prepared to raise the subject when he meets with President Clinton during the NATO su mmit in Washington this week, a senior adviser to the Albanian leader said today.").

55. *See* Peter Finn & R. Jeffrey Smith, *Rebels with a Crippled Cause: Kosovo Guerrillas, NATO Share a Common Enemy-and Little Else*, WASH. POST, Apr. 23, 1999, at A01, A32.

56. *Id.* at A32.

57. *Id.*

58. *See* James Rupert, *Kosovo Rebel Army Not All-Volunteer: Some Refugees Conscripted by Force, Say Aid Workers, Evacuees*, WASH. POST, Apr. 26, 1999, at A14 ("An official of the rebel movement's political wing said Saturday that force has been used only in isolated cases and that an o rder had been issued to halt the practice.").

59. Finn & Smith, *supra* note 55, at A32.

> is preventing KLA members from acting as spotters for Western warplanes. "Sometimes," [Sokol] Bashota [a top official of the KLA's political directorate] said, "they are doing the right thing and going to the right place, and sometimes not."[60]

On 25 April 1999, the normally secretive KLA took the unusual step of holding a press conference to "plead anew for a battlefield alliance with NATO."[61]

As the campaign moved into late May, the KLA appeared to be gaining ground against FRY forces. More recruits, weapons and ammunition were reaching KLA troops. One KLA official speculated that NATO countries were "closing one eye" to the rebels' black market weapons purchases.[62] Lieutenant General John W. Hendrix, commander of U.S. forces in Albania, stated: "They seem to have an endless supply of weapons and ammunition."[63] Officially, NATO continued to deny they were cooperating with the KLA.[64]

> The subject of NATO's cooperation with the rebels is sensitive, and details are not volunteered. But sources say that NATO war planners have been relying on scouting reports by KLA rebels inside Kosovo to direct airstrikes, and that members of the alliance have ignored some recent arms shipments to the KLA.[65]

NATO commanders knew from their experiences in a previous Balkan bombing campaign that, to be successful, they must rely on ground observers for critical intelligence and infantry-to-infantry engagements.

> The real lesson of those 1995 events [Operation Deliberate Force, the NATO bombing campaign against Serb targets in Bosnia] might be a very different one: that if NATO wants to have some effect, including through air-power, it needs to have allies among the local belligerents, and a credible land-force component to its strategy.[66]

Additionally, NATO erred in ruling out the use of ground troops at the beginning of the campaign.

> The initial exclusion of the option of a land invasion was the most extraordinary aspect of NATO's resort to force . . . . [T]he initial exclusion of even the threat of a land option had adverse effects: in Kosovo, the FRY forces could concentrate on killing and concealment rather than defence, while in Belgrade the Yugoslav government could hope simply to sit out the bombing. Within the Alliance, creating at least a credible threat of

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60. *Id.*

61. James Rupert, *Guerrillas Go Public with Pleas: Kosovo Rebels Seek Arms, NATO Troops*, WASH. POST, Apr. 26, 1999, at A14.

62. R. Jeffrey Smith, *Training, Arms, Allies Bolster KLA Prospects*, WASH. POST, May 26, 1999, at A25. Mr. Smith also notes that "here in Kukes there is ample evidence that the KLA's recruitment activities, training and field operations are receiving at least tacit allied military assistance." *Id.*

63. *Id.*

64. *See generally* General Wesley K. Clark, Supreme Allied Commander, Europe, Press Conference on the Kosovo Strike Assessment (Sept. 16, 1999),*available at* http://www.fas.org/ man/dod-101/ops/docs99/p990916a.htm. Hartwig Nathe asked, "how can you explain the role of the KLA during the air campaign?" General Clark replied:

> In conducting the air campaign against the forces in the field in Kosovo, we used every conceivable bit of information we could find. But we never had direct information from, cooperation or coordination with the KLA. We just kept our eyes and ears open, and what information was made available, what targets appeared, those we struck.

Id.

65. Smith, *supra* note 62, at A25; *see also* INTERNATIONAL CRISIS GROUP, WAR IN THE BALKANS: CONSEQUENCES OF THE KOSOVO CONFLICT AND FUTURE OPTIONS FOR KOSOVO AND THE REGION (1999) (revealing NATO cooperation with the KLA), *available at* http://www.crisisweb.org/ projects/sbalkans/ reports/kos20main.htm.

> Although NATO troops are already stationed in Macedonia, and KLA spotters near the border are already providing NATO with intelligence critical to a safe deployment [of NATO ground troops] . . . NATO is in close consultation with KLA commanders, who are providing NATO with some of the only on-the-ground information on the situation in Kosovo that the alliance receives . . . . The combination of increased NATO air strikes and the possibility of the KLA marking individual Serbian units on the ground—either to help guide NATO's strikes, or to fight against them with anti-tank weapons and ammunition it has procured on its own—may serve to reduce the number of Serb military units still in Kosovo . . . .

Id.

66. Roberts, *supra* note 32, at 110-11.

> a land option proved to be one of the most important and difficult tasks.[67]

The drastic increase in violence against ethnic Albanians in Kosovo after the bombing started put even more pressure on NATO commanders to do something to stop the killing. Without eyes and ears in Kosovo, it was obvious they could not stop the FRY forces with aerial bombing alone.

During a 27 May 1999 Pentagon briefing, Rear Admiral Thomas Wilson, the top intelligence officer for the Joint Chiefs of Staff, stated: "NATO warplanes are targeting Yugoslav mechanized armor and heavy weapons on the ground in part to 'level the playing field' between the secessionist militia and its adversaries."[68] Admiral Wilson reiterated that the "KLA is not a partner in the war . . . ."[69] Pentagon spokesman Kenneth Bacon clarified that Admiral Wilson was not implying a new relationship with the KLA:

> He just stated the obvious, which is that after 64 days of pounding, the [Serb forces] have been diminished in their capability . . . . [O]ur goal has never been to empower the KLA to create more fighting. Our goal has been to end fighting in Kosovo.[70]

Mr. Bacon's statement seems to contradict the statement by the Chairman of the Joint Chiefs of Staff concerning the mission of the Kosovo campaign:

> Diplomacy and deterrence having failed, we knew that the use of military force could not stop Milosevic's attack on Kosovar civilians, which had been planned in advance and already was in the process of being carried out. The specific military objectives we set were to attack his ability to wage combat operations in the future against either Kosovo or Serbia's neighbors. *By weakening his ability to wage combat operations, we were creating the possibility that the military efforts of the [Albanian Kosovars], which were likely to grow in intensity as a result of Milosevic's atrocities in Kosovo, might be a more credible challenge to Serb armed forces.*[71]

A plain reading of the Chairman's comments reveals a specific intent to assist the KLA in their war against the Yugoslav Army. There was no mention of humanitarian intervention. It appears that the intent was indeed "to empower the KLA to create more fighting."

On 2 June 1999, in a front page story, *The Washington Post* revealed that, contrary to Admiral Wilson's assertion above, the KLA and NATO were in fact partners in the war. Dropping all previous pretexts, NATO warplanes provided coordinated air support to a massive KLA offensive called Operation Arrow.[72]

> NATO and the Clinton administration have denied helping the KLA directly . . . . But U.S. intelligence officials said NATO responded last week to "urgent" KLA pleas for air support to rebuff a Serb counterattack on Mount Pastrik just inside Kosovo. The bombings marked the first known air support by NATO aircraft for the Kosovo rebels."[73]

The Pentagon continued to deny a direct link between NATO's air strikes and the KLA, but KLA official Visa Reka, when asked whether NATO and the KLA were coordinating strategies replied: "I wouldn't say coordination. I would say that NATO is following with much more care and interest [in] what is happening."[74] The story noted that NATO and KLA forces routinely talked to each other on the telephone, NATO regularly monitored KLA communications, and the KLA kept NATO informed of its positions.[75]

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67. *Id.* at 112.

68. William Claiborne, *KLA Improving Its Status, Pentagon Says: Training, Leadership, Equipment, Number of Kosovo Guerrillas on the Upswing*, WASH. POST, May 28, 1999, at A31.

69. *Id.*

70. *Id.*

71. *See* Press Release, Prepared Joint Statement on the Kosovo After Action Review Presented by Secretary of Defense William S. Cohen and General Henry H. Shelton, Chairman of the Joint Chiefs of Staff, Before the Senate Armed Services Committee (Oct. 14, 1999) at 1 (emphasis added), *available at* http://www.defenselink.mil/news/Oct1999/b10141999_bt478-99.html.

72. Dana Priest & Peter Finn, *NATO Gives Air Support to Kosovo Guerrillas: But Yugoslavs Repel Attack From Albania*, WASH. POST, June 2, 1999, at A1, A17.

73. *Id.*

74. *Id.*

75. *Id.*

The decisive battle of the war occurred on 7 June 1999 on Mount Pastrik. Two days after this devastating NATO air strike, Yugoslav generals signed an agreement that eventually ended the campaign.[76] The KLA had been fighting its way down Mount Pastrik for several days, attempting to establish a new supply line.[77] Serbian forces were massed on the Kosovo side of the mountain, successfully stalling the KLA assault. The KLA called in the Serbian positions to NATO, and U.S. B-52 and B-1 bombers delivered the decisive blow.[78]

It seems fairly clear that NATO provided indirect and direct military support to the KLA in its war for independence from Yugoslavia. Whether the KLA used NATO or NATO used the KLA, the result was a victory for the KLA and another messy, long-term Balkan entanglement for NATO and the United States.

Intervention in Civil Wars

Traditional Rule v. Intervention: The Nicaragua Case and Other Civil War Examples

> *[T]he combined right of victims to assistance and the right of the Security Council to authorise humanitarian intervention with military means do not amount to a right of humanitarian intervention by states, individually or collectively. Indeed, the overwhelming majority of international lawyers consider that such a right cannot be recognised because it would violate the [UN] Charter's prohibition of the use of force. This prohibition would hold even in the case in which international law recognises most clearly the absolute character of the rights protected, that is humanitarian law.*[79]

This quote succinctly states the traditional rule regarding the use of force to intervene in a civil war setting like Kosovo. It is prohibited. The Charter prohibition referred to in the quote is contained in Article 2(4), which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes[80] of the United Nations.[81]

In Kosovo, NATO used force to intervene in the internal affairs of a sovereign nation .Whether intended or not,NATO's intervention assisted ethnic minority fighting for independence.[82] It appears to have violated the traditional rule.

Javier Solana, the Secretary-General of NATO at the time, recognized this was a violation of Article 2(4), but felt that an exception was in order:

> The ACTORD[83] of October 1998 had already raised the difficult issue of whether NATO could threaten the use of force without an explicit Security Council mandate to do so. The allies agreed that NATO could—for it had become abundantly clear that such a step was the only likely solution. It was equally clear, though, that such a step would constitute the exception from the rule, not an attempt to create new international law.[84]

It would appear that no further analysis is required. The UN Charter clearly prohibits the unauthorized use of aggression to intervene in the affairs of a sovereign state. There exists in the Charter, however, another equally important purpose: respect for human rights and the self-determination of peoples.[85]

The UN expanded on these principles in the form of two important resolutions. In 1970, the UN General Assembly released the Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance

76. John Ward Anderson, *NATO's Most Lethal Airstrike Ended a Battle, Perhaps a War: In Mid-Struggle with Rebels, Serbs Took Decisive Hit*, WASH. POST, June 26, 1999, at A01, A18.

77. *Id.*

78. *Id.*

79. Guicherd, *supra* note 42, at 23.

80. "Purposes" is capitalized because it refers to the four "Purposes" contained in Chapter I, Article 1 of the Charter. In summary, they are: (1) To maintain international peace and security; (2) To develop friendly relations among nations; (3) To achieve international cooperation in solving problems; and, (4) To be a center for harmonizing the actions of nations in the attainment of these common ends. *Id.* For purposes of this article, Purpose 1 contains the important phrase "suppression of acts of aggression." The illusive definition of aggression will be discussed later.

81. U.N. Charter, *reprinted in* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW DOCUMENTS 90 (1995).

82. *See* John T. Correll, *The Doctrine of Intervention*, A.F. MAG. (Feb. 2000).

83. ACTORD refers to the North Atlantic Council's Activation Order for air operations againstYugoslav military assets. *See* Solana, *supra* note 31, at 116.

84. *Id.* at 118.

with the Charter of the United Nations (Resolution 2625).[86] Considered to be the authoritative statement of the right to self-determination, Resolution 2625 states that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development . . . ."[87] Resolution 2625 imposes a duty on every state to "promote, through joint and separate action, realization"[88] of self-determination and authorizes the subjugated peoples to "seek and to receive support in accordance with the purposes and principles of the Charter."[89] As one author notes:

> The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter.[90]

It would appear that Resolution 2625 supports NATO's intervention in Kosovo. What once was a general principle contained in the UN Charter, has now been elevated to the level of a fundamental human right, that is, "self-determination and the correlative prohibition of States using force to deprive peoples of that right."[91] The problematic prohibition of unlawful aggression, however, remains.

In 1974, the UN General Assembly issued its "Definition of Aggression," Resolution 3314.[92] Resolution 3314, Article 3, prohibits "[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[93] This language seemingly prohibited Operation Allied Force. Article 7 of Resolution 3314, however, states that nothing in Article 3 "could in any way prejudice the right of self-determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support . . . ."[94] One author sums up the conflict this way:

> An apparent inconsistency therefore exists under Resolutions 3314 and 2625. Certain peoples have the right to overthrow repressive regimes and to receive some degree of external assistance in achieving self-determination, as viewed from the perspective of those peoples. Yet such external "support" provided by a state must conform to the general prohibition on interfering with the territorial integrity and political independence of another state. The apparent inconsistency really can only be resolved by returning to the basic Charter purposes that originally contemplated self-determination and state sovereignty as being mutually reinforcing principles. Any other formulation would effectively embrace one of the principles to the exclusion of the other. Therefore, if the right to receive support in seeking self-determination is to retain any meaning under Resolutions 3314 and 2625, certain forms of external assistance that are otherwise defined as direct or indirect aggression may be permissible if they are provided in support of a people struggling for self-determination.[95]

85. *See* U.N. CHARTER art. 1, para. 2; *see also* Captain Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*, 122 MIL. L. REV. 149, 151 (1988) (noting that: "In light of the Charter's stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of controversy within the international legal community.").

86. G.A. Res. 2625, GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/2625 (1970), *reprinted in* MOORE, *supra* note 81, at 144-52.

87. *Id.*

88. *Id.*

89. *Id.*

90. Dean, *supra* note 85, at 153-54 (footnotes omitted).

91. MICHAEL A. MEYER & HILAIRE MCCOUBREY, REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 185 (1998).

92. G.A. Res. 3314, GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3314 (1974). The resolution was adopted without a vote on December 14, 1974. *Id.*

93. *Id.*

94. *Id.*

95. Dean, *supra* note 85, at 166 (footnotes omitted).

In light of these two resolutions, one might ask if there is in fact a traditional rule of non-intervention. As this article will demonstrate, intervention in civil wars on the side of rebel insurgents has a long history of acceptance in international law.[96]

Civil War

> *Americans should be very wary about intervention in civil wars over self-determination. The principle is dangerously ambiguous; atrocities are often committed by activists on both sides and the precedents can have disastrous consequences.*[97]

This warning concerning our involvement in Kosovo went unheeded for many reasons. The primary reason was the natural affinity of Americans for helping people fight off the yoke of oppression and win independence.[98] American history promotes this belief.[99] There is a valid concern, however, that anarchy will reign if every ethnic minority within every sovereign state fights for independence.[100] How does one determine which civil wars are legal and which are not? When, if ever, can a third state use force to intervene on behalf of a rebel insurgent group? There is no clear-cut test.

Some authors have developed criteria for determining when a third-party state can use force to support a rebel insurgency.[101] Others have proposed standards for the initiation of hostilities in support of governments facing rebel insurgents.[102] One author identifies the central problem as follows:

> This issue of who is a proper subject for protection as a "people" paradoxically has become an obstacle to constructive efforts at ensuring self-determination and humane treatment of peoples. As the law struggles to distinguish between popular democratic movements and radical opposition groups, the labels "freedom fighter" and "terrorist" have become interchanged carelessly. The same 1985 General Assembly resolution that reaffirmed the right of self-determination also purported to condemn all acts of terrorism as criminal conduct. The Resolution is widely viewed, however, as permitting an exception for terrorist violence in national

96. *See* MOORE, *supra* note 1, at 122 (noting that the Organization of African Unity and the Arab League openly support national liberation movements, believing that regional assistance to insurgent groups for the purpose of restoring self-determination is not "enforcement action" requiring Security Council authorization. Professor Moore, however, states that "the prevailing view seems to be that, absent United Nations authorization, assistance to insurgent groups is unlawful.").

97. Nye, *supra* note 16, at 33.

98. *See* Baggett, *supra* note 20, at 457.

99. *See* TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. 104 (1997) (writing about FDR's discussions with Stalin regarding a Baltic states plebiscite) ("He [FDR] wanted Stalin to understand the great importance the American people attached to the idea of self-determination.").

100. *See* Nye, *supra* note 16, at 30-31.

> It is true that old-fashioned state sovereignty is eroding—both *de facto*, through the penetration of national borders by transnational forces, and *de jure*, as seen in the imposition of sanctions against South Africa for apartheid, the development of an International Criminal Court, and the bombing of Yugoslavia over its policies in Kosovo. But the erosion of sovereignty is a long-term trend of decades and centuries, and it is a mixed blessing rather than a clear good. Although the erosion may help advance human rights in repressive regimes by exposing them to international attention, it also portends considerable disorder. Recall that the seventeenth-century Peace of Westphalia created a system of sovereign states to curtail vicious civil wars over religion. Although it is true that sovereignty stands in the way of national self-determination, such self-determination is not the unequivocal moral good it first appears. In a world where there are some two hundred states but many t housands of often overlapping entities that might eventually make a claim to nationhood, blind promotion of self-determination would have highly problematic consequences.

Id.

101. *See* Dean, *supra* note 85, at 162.

> As to the status of entities other than states that might be able to assert rights under international law, a group in armed opposition to an established government traditionally could rise to the status of belligerent only if it met certain defined criteria. Thus, classified, it could then assert an international status that imposed a legal requirement of neutrality on third states in their relations with the two combatants. These prerequisites for belligerent status included: (1) a well-organized opposition group; (2) conventional military operations conducted in compliance with the law of war; and, (3) de jure or de facto control over an identifiable portion of the territory or population.

Id. (citations omitted).

102. *See* MOORE, *supra* note 1, at 140-44. Professor Moore provides standards for various factual scenarios. For example: military assistance to a widely recognized government—both prior to insurgency and after insurgency is reached; intervention for the protection of human rights; impermissble assistance to a faction challenging the authority structure of a state; and assistance to offset impermissible assistance to insurgents.

> liberation struggles against colonial domination, alien occupation, and racist regimes.[103]

The question remains: Could NATO have intervened with force in Kosovo solely to assist the KLA in its fight for an independent Kosovo?

The Montevideo Convention on Rights and Duties of States, written in 1933 and adopted by the Seventh International Conference of American States, lists four requirements that are considered the customary characteristics of statehood in modern international law: "a permanent population, a defined territory, [a] government, and a capacity to enter into relations with other States."[104] Ted Bagget argued that the Albanian Kosovars met all four of the requirements and that the UN or NATO should have intervened to help them win independence.[105]

Mr. Bagget relied on two distinguished international legal scholars, Bryan Schwartz and Susan Waywood, to support his argument. Schwartz and Waywood posed fourteen criteria for determining whether repressed minorities can assert their right to self-determination.[106] Mr. Baggett concluded that Kosovo satisfied most of the requirements under the Schwartz-Waywood analysis.[107] The Schwartz-Waywood concept of self-determination is based on a belief that "individuals do not exist to serve the state, but governmental structures exist to serve individuals."[108] They proposed the following standard:

> In general, the population of part of an existing state only has a unilateral right to self-determination in the form of sovereign statehood when it is clear that the existing state has engaged in the serious denial of these basic rights, and there is no realistic possibility that these rights can be honored within a reasonable time frame by less drastic means such as limited self-government within the existing state.[109]

Kosovo satisfied the standard articulated by Schwartz and Waywood. In March 1989, Serbia rewrote its constitution, stripping Kosovo of its autonomy.[110] In December of the following year, Milosevic was elected president of Yugoslavia.[111] Thus began years of oppression, violence and subjugation. The Albanian Kosovars had tried "less drastic means" of regaining their self-determination for over eight years. Finally fed up with the situation, the KLA began to implement more drastic means. They gained support, got stronger, and eventually forced Milosevic to resort to all out war in Kosovo. Applying the Schwartz-Waywood standard, the Albanian Kosovars were fully justified in exercising their right to fight for an independent Kosovo under these circumstances. This conclusion is further supported, noted Mr. Baggett, by the way Kosovo was treated following the Yugoslavia breakup:

> The question that needs to be asked is why Kosovo was treated differently from other provinces in the former Yugoslavia. The other provinces, now states, asserted similar claims to the right of self-determination. Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, FYROM, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?[112]

While the Albanian Kosovars may have been justified in exercising their right to fight for an independent Kosovo, popular support for the KLA quickly eroded after the war.[113] If an election was held in the fall of 1999, Ibrahim Rugova, the moderate Albanian leader who led the passive resistance campaign against the Serbs, would have won with ninety-two percent of

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103. Dean, *supra* note 85, at 161. The resolution referred to is Resolution 2625.

104. Baggett, *supra* note 20, at 471 (citing P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW 32 (1994)).

105. *Id.* at 471-72.

106. *Id.* at 472-73 (citing Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Succession*, 11 N.Y. INT'L L. REV. 1 (1998)).

107. *Id.* at 474.

108. *Id.* at 472-73.

109. *Id.* at 473 (citation omitted).

110. *See* MERTUS, *supra* note 2, at 295-96.

111. *Id.* at 297.

112. Baggett, *supra* note 20, at 474 (citations omitted). Mr. Baggett notes that the most common argument against an independent Kosovo is the fear of a "Greater Albania." The KLA announced at one point that they were "fighting for the liberation of all occupied Albanian territories . . . and their unification with Albania." *Id.* at 475. He makes the valid point that there is no evidence that all ethnic Albanians in the surrounding Baltic countries support this idea.

113. *See* Peter Finn, *Support Dwindles for Kosovo Rebels: Ethnic Albanians Dismayed by KLA's Violence, Arrogance*, WASH. POST, Oct. 17, 1999, at A1.

the vote against Hashim Thaqi, the political leader of the KLA.[114] The KLA's arrogant power grabs after the war, to include installing their people in local leadership positions, angered and alienated many Albanians.[115]

If the KLA did not have widespread support among Albanian Kosovars, then arguably they were just a terrorist organization, and NATO's de facto military support for the KLA, therefore, would have been illegal. However, before and during the bombing campaign the KLA did have widespread support. Its forces held up to one third of the Kosovo territory, and Kosovo Albanians had declared their independence and even held their own elections.[116] Clearly, the KLA had risen to the level of a legitimate rebel force and they met the standards to be considered an insurgent group, rather than a mere terrorist organization.

The Nicaragua *Case*

> *The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. . . . "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."*[117]

This is the International Court of Justice's (ICJ) statement of the traditional view of non-intervention in *Nicaragua v. United States*. The ICJ went on to find that:

> [T]he support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.[118]

By a twelve to three vote, the ICJ rejected the U.S. collective self-defense justification for its intervention.[119] In his dissent, Judge Schwebel disagreed with the majority holding that the U.S. unlawfully intervened in Nicaragua.[120] Nevertheless, applying Judge Schwebel's rationale to the Kosovo scenario, customary international law would prohibit NATO's intervention in Kosovo. Judge Schwebel wrote:

> In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized. [T]he right of peoples to struggle to achieve these ends is universally accepted; but what is not universally recognized and what is not universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion. This is true whether the struggle is or is proclaimed to be in pursuance of the process of decolonization or against colonial domination.[121]

At least one author, Anthony D'Amato, has caustically criticized the ICJ's *Nicaragua* opinion for its analysis of customary international law:

> [T]he Nicaragua case was not forged out of the heat of adversarial confrontation. Instead, it reveals the judges of the World Court deciding the content of customary international law on a *tabula rasa*. Sadly, the Judgment reveals that the judges have little idea about what they are doing.[122]

Instead of starting with state practice and the resulting customary international law, Mr. D'Amato notes that the ICJ begins

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114. *Id.* at A26.

115. *Id.*

116. MERTUS, *supra* note 2, at 295-97.

117. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27) (Merits) (citation omitted).

118. *Id.* at 124 (Merits) (citation omitted).

119. *See id*. at 146. The United States, however, never argued on the merits because it declined to submit to the jurisdiction of the court.

120. *See id.* at 381-85 (dissenting opinion of Judge Schwebel).

121. *Id*. at 351. One must remember that Judge Schwebel is referring to Nicaragua's actions with respect to El Salvador, not United States actions with respect to the Contras.

with a disembodied rule, that is, non-intervention, and finds that state acceptance of this rule in various treaties is *opinio juris*:

> The Court thus completely misunderstands customary law. First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do with "acceptance" of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice.[123]

If one follows the logic of the ICJ, Mr. D'Amato contends, then state practice carries no authority if it conflicts with a treaty rule.[124]

After listing several examples of state interventions directly contrary to the ICJ's non-intervention theory of customary international law—for example, humanitarian intervention, antiterrorist reprisals, individual as well as collective enforcement measures, and new uses of transboundary force such as the Israeli raid on the Iraqi nuclear reactor[125]—Mr. D'Amato states:

> The process of change and modification over time introduces a complex element that is missing from the Court's handling of Article 2(4). It is true that when 2(4) was adopted as part of the UN Charter in 1945, it had a major impact upon customary law. But Article 2(4) did not "freeze" international law for all time subsequent to 1945 (no more than an equivalent customary-law incident would have done). Rather, the rule of Article 2(4) underwent change and modification almost from the beginning. Subsequent customary practice in all the categories mentioned above has profoundly altered the meaning and content of the non-intervention principle articulated in Article 2(4) in 1945.[126]

The facts of the *Nicaragua* case are sufficiently distinguishable from the Kosovo conflict to render it of little use in analyzing whether NATO properly used force against Yugoslavia. Further, because the ICJ's analysis of the customary international law concerning non-intervention virtually ignored state practice, it seriously undermined the decision's precedential value. A more useful exercise would be to examine actual situations in which third states intervened in civil wars and the reaction of the international community to these interventions.

Other Civil War Intervention Examples

> *It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.*[127]

An examination of civil wars resulting in intervention by foreign states reveals a consistent theme. When states intervene on one side or the other in a civil war, a legal justification is rarely offered by the intervening state or demanded by the international community. One author, A. Mark Weisburd, concludes that: "Almost none of the intervening states encountered sanctions from third states."[128] After examining nineteen examples of civil wars with international involvement, from the Greek Civil War (1946-1949) to the Liberian Civil War (1989-1997), Mr. Weisburd states:

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122. Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 101-02 (1987). *But see* Tom J. Farer, *Drawing the Right Line*, 81 AM. J. INT'L L. 112 (1987). Mr. Farer praises one aspect of the ICJ opinion in the Nicaragua case: "While this is not an inevitable interpretation of contemporary international law, in my judgment it is the one that most effectively reconciles the international system's preeminent interests: conflict containment and national sovereignty (expressed in terms of territorial integrity and political independence)." *Id.* at 113. Mr. Farer's support for the opinion, however, does not conflict with the faults noted by Mr. D'Amato. For purposes of this article and the argument that NATO's use of force to support the KLA was lawful, Mr. Farer notes that:

> In the colonial context and in the name of national self-determination, the United Nations has gone behind the political institutions established by metropolitan governments to locate sovereignty in the people of the territory. There is, therefore, some precedent at the global level for regarding people, not governments, as the ultimate locus of sovereignty.

Id. at 115. This recognizes the trend, discussed above, that international law supports the rights of individuals and minorities at the expense of state sovereignty. *See* Guicherd, *supra* note 42, at n.40.

123. D'Amato, *supra* note 122, at 102.

124. *Id*.

125. *Id*. at 103 (citations omitted).

126. *Id*. at 104.

127. Military and Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14, 97 (June 27) (Merits) (citation omitted).

> Taking all these events together, then, it appears that interventions in civil strife are frequent and that there seems to be a high degree of international acceptance of such interventions. Applying the obey-or-be-sanctioned standard, it would appear that interventions of this type should not be considered unlawful.[129]

All of these conflicts occurred after the creation of the United Nations—and after adoption of Article 2(4). This article briefly examines three of these conflicts and compares them to NATO's intervention in Kosovo.

In the Laotian May 1958 elections, the Communist Lao Patriotic Front (LPF) handily defeated the opposition, rightist military officers backed by the United States, giving rise to the Laotian Civil War (1959-1975). During this civil war, Weisburd asserts, the United States provided military equipment and civilian-clothed advisors, organized various "irregular" units, and even began bombing targets in Laos at the same time it was bombing targets in Vietnam.[130] The Democratic Republic of Vietnam (DRV) was also providing assistance to the LPF.[131] The United States initially tried to conceal its activities, but after it admitted bombing communist targets in Laos, it justified its use of force by pointing to communist activities in Laos.[132] In summary, Mr. Weisburd concludes:

> This case, then, involved support of internal factions by outside states, which included active participation in combat. To the extent that they justified their actions, the outside states did so by reference to one another's activities. Their motives were ideological . . . . Third states reacted very little to the situation, apparently seeing it, understandably, as inseparable from the larger problem of the Second Indochina War.[133]

In the Chadian Civil Wars (1969-1972, 1975-1993), as in Kosovo, a Muslim minority rebelled against the oppression of non-Muslim President Tombalbaye. France supported President Tombalbaye. Libya supported the Muslim rebels. Mr. Weisburd notes that: "The conflict attracted little third-state interest and no sanctions."[134] Further, the "United Nations played almost no role in this crisis."[135] Even after Libya became a combatant in the conflict and occupied substantial areas of Chad, "no UN organ made any serious effort to address the conflict, preferring to leave it to the [Organization of African Unity] with its traditionally mediational approach."[136]

Finally, in the Liberian Civil War (1989-1997), the National Patriotic Front of Liberia revolted against the government of President Samuel Doe. The fighting between ethnic groups was extremely brutal and many civilians were caught in the middle.[137] Eight months into the civil war, the Economic Community of West African States (ECOWAS) deployed a peacekeeping force in Liberia "citing the danger to nationals of member states then in Liberia and the refugee problem the war was creating for the region."[138] The fighting continued for several years and President Doe was eventually assassinated. Most third-party states supported the ECOWAS intervention, and the UN Security Council adopted a resolution commending the work of ECOWAS.[139]

The Liberian Civil War most resembles the Kosovo intervention, "a civil war in which a regional organization intervened."[140] The UN failed to condemn ECOWAS's non-UN-authorized use of force; in November 1992, more than two years after ECOWAS deployed its forces, the UN actually

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128. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 207 (1997).

129. *Id*.

130. *Id*. at 180-81.

131. *Id*.

132. *Id*. at 181.

133. *Id*. at 181-82.

134. *Id*. at 190.

135. *Id*. at 195.

136. *Id*. at 196.

137. *Id*. at 204.

138. *Id*. at 204-05.

139. *Id*. at 205.

140. *Id*. at 206.

blessed the ECOWAS operation with a resolution.[141] Owing to this example, Mr. Weisburd concludes "it would appear that such multilateral interventions may be considered affirmatively lawful."[142]

Self-Determination and the Need for a New Interpretation of Article 2(4)

> *Invocations of state sovereignty to justify gross human rights abuses is unequivocally contrary to international law. Moreover, in 1989 Serbian politicians illegally stripped Kosovo of its autonomous status in old Yugoslavia, shortly before that country was torn apart. This calls the legal status of Kosovo within Serbia into question and exposes the fallacy of claims that it is an internal Serbian problem*.[143]

At least three authors argue for a new interpretation of UN Charter Article 2(4).[144] The argument is that humanitarian intervention "is not directed against the territorial integrity or political independence of the state in which it takes place . . . ."[145] Further, while the Charter does not specifically authorize unilateral or collective humanitarian intervention, "neither does it specifically abolish the traditional doctrine."[146] What happens when humanitarian intervention is combined with a civil war in which the victims are fighting for self-determination? In other words, could NATO intervene both to prevent human rights abuses and to assist the KLA regain self-determination for Albanian Kosovars? If self-determination is a recognized "right" under international law, then assisting the KLA in its fight for self-determination is still humanitarian intervention. The problem is that self-determination can lead to independence, which is in fact "directed against the territorial integrity or political independence of the state in which it takes place . . . ."[147]

Most scholars would agree that the legal concept of self-determination did not qualify as a rule of international law at the creation of the UN Charter.[148] Self-determination is not mentioned in the 1948 Universal Declaration of Human Rights.[149] Self-determination gradually moved from a general "principle" to a "right" that was formalized in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[150] The question remained, however, whether the right existed outside of the decolonization context:[151]

> A continuing debate among international lawyers is whether or not there exists a *right* to self-determination in customary international law, and, if so, whether or not it is limited to colonial situations. Professors Brownlie and Gros Espiell submit that the right to self-determination constitutes *jus cogens*, a peremptory norm of international law, while Professor Verzijil represents the other extreme in holding that self-determination is "unworthy of the appellation of a rule of law."[152]

It is clear that the right of self-determination "exists for peoples under colonial and alien domination, that is to say, who are not

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141. *Id*. at 205.

142. *Id*. at 208; *see also* Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 258 (1997) (citation omitted):

> ECOWAS has never requested [UN Security] Council approval of the operation, nor has the Council ever passed judgment on its legality. This suggests either that in "commending" ECOWAS the Council was authorizing future ECOMOG [ECOWAS Monitoring Group] activities in Liberia, or that the Council decided ECOWAS needed no formal authorization.

Id.

143. MERTUS, *supra* note 2, at 279.

144. *See* Guicherd, *supra* note 42, at 24; *see also* MOORE, *supra* note 1, at 149.

145. Guicherd, *supra* note 42, at 24.

146. MOORE, *supra* note 1, at 152.

147. Guicherd, *supra* note 42, at 24.

148. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 33 (1996).

149. *See id.*

150. *See id.* (citing G.A. Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960)).

151. *See* HANNUM, *supra* note 148, at 34, 44.

152. *Id.* at 44-45 (citations omitted) (emphasis in original).

living under the legal form of a State."[153] But for the exception of Bangladesh, however, "no secessionist claim has been accepted by the international community since 1945."[154]

Secession: When Does the Right to Secede Arise?

Why did Yugoslavia rewrite its constitution and take away Kosovo's autonomy? Among other reasons, it probably feared that autonomy would lead to outright secession. Recent examples, however, do not support this fear. One author found that negotiated autonomy does not lead to secession.[155] In fact, ethnic states that won some form of independence in the 1990s "did so in the absence of negotiations, not because of them."[156] Further, "[i]n most recent wars of self-determination, fighting usually began with demands for complete independence and ended with negotiated or *de facto* autonomy within the state."[157]

The restrictive view of secession under the UN Charter is that the right of self-determination is consistent with the Charter "only insofar as it implied the right of self-government of peoples and not the right of secession."[158] The expansive view of secession holds "the right of peoples everywhere to establish any regime they chose . . . ."[159] To date, no author asserts that international law currently recognizes a right of secession.[160] There is a common string running through the debate, however, which may justify the right to secede: the violation of fundamental rights by the state.[161] One author contends that the "only reliable test for determining the reasonableness of self-determination has to be the nature and extent of the deprivation of human rights of the subgroup claiming the right."[162] Arguably, the Albanian Kosovars had more than sufficient grounds to support a legitimate demand for secession.

Prior to initiating its bombing campaign in Kosovo, NATO should have followed the example of the Organization of American States (OAS) in 1979. In a bold and principled move the OAS withdrew recognition of the Somoza government in Nicaragua on human rights grounds, declaring *inter alia* "[t]he inhuman conduct of the dictatorial regime governing the country . . . . [i]s the fundamental cause of the dramatic situation faced by the Nicaraguan people."[163] Was the situation in Kosovo any less "dramatic" than that in Nicaragua?

In the fall of 1999, just months after the campaign in Kosovo ended, it became clear that U.S. officials privately considered Kosovo independence a foregone conclusion. On 24 September 1999, *The Washington Post* reported that: "Senior U.S. officials have privately dropped their opposition to Kosovo's independence from Yugoslavia and say the Clinton administration increasingly sees the province's secession as inevitable."[164] While continuing to publicly declare it had not changed its policy, one official stated off the record: "Our attitude before the war was, it's better if it doesn't happen. Now, we know it's clearly on the way . . . . [I]t's the mostly unspoken assumption [of all U.S. policy-makers.]"[165] Had Yugoslavia not taken away Kosovo's autonomy in 1989, the KLA probably never would have surfaced, the civil war could have been avoided, and perhaps the province's secession would not have been inevitable.

The Humanitarian Intervention Factor

Did the presence of human rights abuses by Yugoslavia against the Albanian Kosovars tip the scales in favor of using force to intervene on behalf of the KLA? Prior to the creation of the UN, the notion of humanitarian intervention was recog-

153. *Id.* at 46 (citation omitted).

154. *Id*.

155. *See* Ted Robert Gurr, *Ethnic Warfare on the Wane,* FOREIGN AFFAIRS, May/June 2000.

156. *Id*. at 56.

157. *Id*. at 57.

158. Jane E. Stromseth, *Self-Determination, Secession and Humanitarian Intervention by the United Nations*, *in* PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 370 (1992).

159. *Id*.

160. *See* HANNUM, *supra* note 148, at 471; *see also* Stromseth, *supra* note 158, at 374. The international community may not be willing to recognize a right to secede, but it may be willing to shine the spotlight of world scrutiny on struggles for self-determination, and—at least today—the principle of domestic jurisdiction is unlikely to stand in the way.

161. *See* HANNUM, *supra* note 148, at 471.

162. *Id.* at 472 (citation omitted).

163. *Id.* at 470.

164. R. Jeffrey Smith, *U.S. Officials Expect Kosovo Independence: Secession Increasingly Is Seen as Inevitable,* WASH. POST, Sept. 24, 1999, at A01, A24.

165. *Id*.

nized where the "the treatment of a state to its nationals shocks the conscience of mankind."[166] Most authors agree that the Charter replaced these self-help measures and now precludes unilateral humanitarian intervention.[167]

Post-UN Charter, humanitarian intervention without UN approval is still recognized but strictly limited.[168] Generally, it should be used as a last resort, have a limited duration, and should not be aimed at a permanent transformation of pre-existing legal arrangements—for example, the secession of a province.[169] To these "classical conditions," one author adds two additional criteria:

> (1) [A]ny humanitarian military intervention should be carried out by a group of states—whether they act in the context of an alliance, a regional organisation, or a "coalition of the willing"—so as to dispel the suspicion that intervention is undertaken for the sake of narrow national interest.
>
> (2) [T]he participating states should act in close coordination with the UN, demonstrate a clear readiness to obtain *post facto* legitimisation by the Security Council and, when possible, to hand the matter back to the UN.[170]

It is well established in international law that state sovereignty may be subordinate to the self-determination goals of an oppressed group.[171] The rationale being that the inviolability of a state from external interference is based on the assumption that the state is meeting its international human rights obligations to its citizens. Kosovo was not simply a civil war. It was a unique situation in which well-established autonomy had been stripped away and brute force used to oppress and brutalize an ethnic minority.

The clear trend is that the protection of human rights, minority rights, and self-determination are no longer considered internal, domestic problems, off limits to outside interference.[172] This is especially so when the conflict spills over into neighboring states.

Intervention's Ramifications

NATO would have taken criticism and suffered repercussions no matter what justification it formulated for intervening in Kosovo. That does not mean it should not have acted. Taking a leadership role in a volatile situation is never easy. The problem for NATO is that it relied on a politically correct, questionable, and at times, non-existent legal bases for using force against Yugoslavia. If it had taken an aggressive but sound legal position, it still would have angered some states, but in the end the criticism would be about its aggressiveness and not its lack of clarity and legal indecisiveness. Smoothing over the

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166. MOORE, *supra* note 1, at 147 (citing R. Lillich, *Forcible Self Help Under International Law, in* 62 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 134-37 (R. Lillich & J. Moore eds. 1980)) (for example, the treatment of the Jews in Russia and various Christians in Turkey during the last century).

167. *See id.* at 148. *But see* Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 333-34 (1998) (citations omitted).

> Although a role for regional organizations in humanitarian intervention has been established, until the advent of the Economic Community of West African States (ECOWAS) missions in Liberia and Sierra Leone, states' practices suggested that prior approval by the Security Council was a prerequisite to any humanitarian intervention. However, for the first time the ECOWAS Cease-fire Monitoring Group (ECOMOG) missions in Liberia and Sierra Leone provide two clear examples of unilateral humanitarian intervention by a regional actor that enjoyed support from the whole of the international community.

Id.

168. *See generally* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185-201 (Damrosch & Scheffer, eds., 1991); Guicherd, *supra* note 42; Levitt, *supra* note 167; Roberts, *supra* note 32, at 102.

169. *See* Guicherd, *supra* note 42, at 24 (citation omitted).

170. *Id.* (emphasis in original).

171. *See* Dean, *supra* note 85, at 153-54.

> The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter (quoting Western Sahara (Spain v. Mauritania v. Morocco), 1975 I.C.J. 12, 31 (Advisory Opinion) (citing the Namibia decision, held that self-determination as expressed in Resolution 2625 is an established principle under international law with respect to peoples in non-self-governing territories)).

Id.

172. *See* Stromseth, *supra* note 158, at 372.

fall-out from Operation Allied Force would have been much easier for NATO and the individual countries involved had NATO taken the aggressive but legitimate position advocated by the authorities discussed herein.

No one will dispute that NATO's intervention alienated both China and Russia.[173] By entering the campaign without stating a coherent legal position, however, NATO's critics, like predators, sensed the weakness of NATO's conviction and pounced accordingly. China and Russia made the most of NATO's mistakes and missteps and won concessions to strengthen their bargaining position on future, unrelated disputes. This inevitable posturing could have been reduced had NATO entered the campaign from a position of strength, rather than of weakness.

One of the most damaging criticisms is that the bombing made things worse for those NATO sought to protect—the Albanian Kosovars.[174]

> Before NATO intervened on March 24, approximately 2,500 people had died in Kosovo's civil war between Serb authorities and the ethnic Albanian insurgents of the Kosovo Liberation Army (KLA). During the 11 weeks of bombardment, an estimated 10,000 people died violently in the province, most of them Albanian civilians murdered by Serbs.
>
> An equally important NATO goal was to prevent the forced displacement of the [Albanian Kosovars]. At the outset of the bombing, 230,000 were estimated to have left their homes. By its end, 1.4 million were displaced.[175]

This, too, could have been avoided. Had NATO stated from the outset that its goal was to restore Kosovo's autonomy, and or gain its independence, then it could have outwardly and aggressively supported the KLA with arms, troops, and air support. The KLA was in the best position to stop the reign of terror in Kosovo. Granted, the KLA did not have clean hands, but it had earned the right under international law to speak for the Albanian Kosovars in their fight for independence.

State actors, especially developed democratic states,[176] are responsible for promoting the rule of law. If a group of states, like the members of NATO, are perceived to have violated international law, why should less-developed, emerging democracies follow the law?[177] As one author notes, legal advisors bear a substantial burden for promoting the rule of law:

> [W]e as lawyers need to be concerned about the integrity of international law, particularly as practiced in the diplomacy and military arenas. It has been said that the "real lesson in Kosovo is that 'international law' in political and military matters is increasingly exposed as an academic sham . . . [and this crisis gives] us a more realistic sense of the limits and inadequacies of the chimera of international legal theorizing. We can and should do better."[178]

Another common criticism leveled at NATO questions why it intervened in Kosovo, but not in Africa or Chechnya.[179] Arguably, Africa is not within NATO's area of concern, and Africa has ECOWAS, a regional organization with a proven track record on humanitarian intervention.[180] As for Chechnya, no mass of refugees was spilling over into neighboring coun-

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173. *See* Correll, *supra* note 82; *see also* Peter Rodman, *The Fallout from Kosovo*, FOREIGN AFFAIRS, July/Aug. 1999, at 49-50. Rodman warned that if the outcome of the war is viewed as a failure:

> Sino-American relations will suffer thanks to the nasty Chinese overreaction after the accidental U.S. bombing of the Chinese embassy in Belgrade. America's relationship with Russia may pay a price for Moscow's coddling of Milosevic . . . . The American people and m ilitary are likely to be gun-shy about any future interventions. And leaders around the world, from Baghdad to Beijing, will draw their conclusions about America's credibility, staying power, and competence.

Id.

174. Roberts, *supra* note 32, at 113.

175. Mandelbaum, *supra* note 48, at 3.

176. *See* Roberts, *supra* note 32, at 107 (arguing that the massive multilateral support among the nineteen member states in NATO represented "an international-community interest, and not just the interests of one single state," and that a "further element was sometimes woven into the argument, namely the claim that democratic states have a greater right to engage in military interventions than do autocracies; or at least have a greater claim to international support when they do so.").

177. *See* John F. Murphy, *Introduction: International Legal Developments in Review: 1998*, 33 INT'L LAW. 229, 230 (1999). "The United States has also been sharply criticized for actions that allegedly violate international legal standards, most recently for the NATO bombing in Kosovo and Serbia. At a minimum these allegations raise serious issues regarding the U.S. commitment to the rule of law in international affairs." *Id.*

178. Byard Q. Clemmons, *Might Makes Right?*, 46 FED. LAW. 40, 41 (1999) (citation omitted).

179. *See* Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 219-20 (1999).

180. *See* WEISBURD, *supra* note 128.

tries. Without some direct impact on neighboring countries, it would be difficult to stretch the aggressive theory of humanitarian intervention all the way to Chechnya. The background and circumstances of the Muslim minority in Chechnya is also substantially different than that of the Albanian Kosovars. NATO could lead by example and pressure Russia to do the right thing in Chechnya, but the circumstances would not allow the same intervention in Chechnya that was legally defensible in Kosovo.[181]

The Albanian Kosovars accounted for ninety percent of the population of Kosovo. For over nine years they lived under substantial autonomy. It was not until this autonomy was stripped away and they were subjected to extreme and consistent brutality by the Milosevic government that the KLA surfaced and began to fight back. When taken together, the revocation of autonomy, the accompanying human rights abuses, and the direct impact of refugees on neighboring countries, provided the legal justification for the Albanian Kosovars to take up arms in the pursuit of self-determination. These factors also allowed them to seek assistance in their fight for self-determination. NATO cannot address all of the world's ills, but it had the power and authority to help the Albanian Kosovars.

"Kosovo is not ready for independence. Pernicious influences from northern Albania—organized crime, political intimidation, and lawlessness—are threatening to take root."[182] This quotation, while true, takes a myopic view of the future of Kosovo. Do the problems now facing Kosovo mean NATO should not have intervened? The problems in Kosovo are difficult ones,[183] but they are now Kosovar Albanian problems.[184] Animosity between the Serbs and the Albanians run deep.[185] It will take years to undo what rabid nationalism and state-sponsored hatred has created.

Conclusion

NATO's justification for intervention in Kosovo was tortured and disingenuous. Instead of dancing on the head of a pin about whether Resolution 1199 authorized the use of force, the Alliance should have argued from the beginning that intervention was justified because: Yugoslavia illegally withdrew Kosovo's autonomy, it denied the Albanian majority in Kosovo its fundamental right to self-determination; and it continued to trample on numerous other basic human rights guaranteed under the UN Charter. In so doing, Yugoslavia forfeited its right to Kosovo. These egregious Yugoslav violations of international law gave NATO sufficient legal grounds for using force to assist the KLA in its fight for an independent Kosovo.

Kosovo was the only autonomous province with the former Yugoslavia that did not win independence at the break up in 1991.[186] Whether due to racism, oversight, or pressure from Russia, the Albanian Kosovars were left under the boot of a repressive regime. Some commentators persuasively argue that the only winner in Operation Allied Force was the KLA.[187] It

181. Although some might argue that the only real difference between the two situations is that might makes right. NATO could stand up to Serbia but not Russia.

182. David Rohde, *Kosovo Seething*, FOREIGN AFFAIRS, May/June 2000, at 76.

183. *See id.* at 66. "One year on, NATO's largest-ever military intervention appears to be creating a 'new Kosovo' that is the polar opposite of the alliance's stated goals. The province remains widely corrupt, lawless, intolerant of both ethnic and political minorities, and a source of instability." *Id.*

184. *Id.* at 72. On the political level, the cause that once unified Albanians—their struggle against Belgrade—has largely disappeared. The Democratic League of Kosovo, the group headed by Ibrahim Rugova that ran the shadow government during the Serb crackdown, remains popular but disorganized. The KLA itself has splintered into various groups—some criminal, others not. *Id.*

185. *Id.* at 71, "An unreleased public-opinion survey of [Albanian Kosovars] conducted last October by the U.S. State Department illustrated the depth of the animosity. Of those surveyed, 91 percent said there had been too much damage in Kosovo for ethnic Albanians and Serbs to live together peacefully." *Id.*

186. *See* Baggett, *supra* note 20, at 474 (citation omitted). "Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?"

187. Richard Cohen, *And the Winner Is . . . the KLA*, WASH. POST, June 17, 1999, at A35.

> Say what you will about the KLA, it has been the one player in the current Balkan drama that has known from the start precisely what it wanted and how to get it. . . . The KLA had a simple, but effective, plan. It would kill Serb policemen. The Serbs would retaliate, Balkan style, with widespread reprisals and the occasional massacre. The West would get more and more appalled, until finally it would—as it did in Bosnia—take action. In effect, the United States and much of Europe would go to war on the side of the KLA.

Id. Other commentators share this view, believing that NATO and the United States were duped by the KLA into entering the war with Yugoslavia.

> The KLA's guerrilla campaign was a deliberate attempt to provoke Belgrade into reprisals that would attract the West's attention. Knowing it could not defeat Yugoslavia without NATO's military support, the KLA waged a nasty insurgency that included assassinations of Serbian political and military officials. The KLA calculated—accurately—that a violent Yugoslav retaliation would pressure Washington and its allies to intervene. Although U.S. intelligence warned the Clinton administration of the KLA's intentions, Clinton and his advisers took the bait: Washington placed the blame for events in Kosovo on Belgrade and absolved the KLA.

Christopher Layne & Benjamin Schwarz, *We Were Suckers for the KLA*, WASH. POST, Mar. 26, 2000, at B1, B5.

is hard to argue with these commentators who dramatically illustrate the risks associated with intervening in a nasty civil war on the side of rebel forces. The risks, however, were warranted in the case of Kosovo. NATO should have exercised intellectual integrity and relied on the Albanian Kosovars' fight for self-determination to justify intervention, rather than on the amorphous argument that Resolution 1199 authorized its use of force. If it had, the criticism outlined in this article would have been avoided and the respect for the rule of law promoted.

Gulf War Syndrome Sub Judice

After ten years, 192 studies, and hundreds of millions of public and private research dollars, the jury is still out as to whether there is a Gulf War Syndrome or merely a collection of unrelated illnesses, let alone definitive answers as to a cause or a cure.[32] Nevertheless, the lack of definitive answers has not stopped a variety of litigation and legislative efforts to compensate Persian Gulf War veterans and their families. This article examines the more prominent of these efforts designed to aid those suffering from Gulf War Syndrome, why litigation will most likely fail, and why relief, if any, will probably have to come from the United States government.

One of the first targets for litigation by ill veterans and their families was the federal government. In *Minns et al. v. United States of America*,[33] three families sued the United States for negligence under the Federal Tort Claims Act (FTCA),[34] alleging that their respective children's birth defects were the result of experimental and defective vaccinations given to the servicemen fathers.[35] The district court dismissed their claims for lack of subject matter jurisdiction.[36] Almost any claim filed by a service member or their family member would meet with a similar fate due to the *Feres* Doctrine.[37] In *Feres v. United States*, the Supreme Court held that the United States has not waived its sovereign immunity for service members "where the injuries arise out of or are in the course of activity incident to [military] service."[38] The Court stated that civilian courts should not second-guess military decisions. Not only does the *Feres* Doctrine prevent suits by service members, but also derivative suits by their family members arising out of a service member's injuries.[39]

Applying the *Feres* Doctrine bar in Gulf War Syndrome cases follows a long list of precedents. Claims by family members for injuries were likewise barred in the Vietnam era Agent Orange defoliant cases and the atomic bomb test radiation exposure cases; cases in which the government's culpability was clearer than with the potential Gulf War Syndrome.[40] Any result other than dismissing these plaintiffs' claims would result in judicial review of the military's determination to inoculate, how, and with what.

In dismissing the plaintiff's claims, the *Minns* court found that the government's decision to vaccinate service members, and to not warn them or their family members of any potential side effects of these vaccinations, were "discretionary" functions.[41] Discretionary functions of the government are specifically excluded from the FTCA waiver of federal sovereign immunity.[42] Just as the *Feres* Doctrine is in part designed to prevent judicial second-guessing of military decisions, the discretionary function exception to the FTCA is also designed to prevent judicial review of the policy decisions of the executive and legislative branches of government. The district court's opinion was upheld on appeal, and the Supreme Court refused to hear the case on certiorari.[43]

The lawsuits on behalf of veterans and their families, however, have not been aimed solely at the federal government. *Marshall Coleman et al. v. Alcolac et al.*[44] involves a current class action of potentially 100,000 veterans claimed to have been injured by exposure to chemical and biological weapons allegedly used during the Persian Gulf War.[45] Filed in a Texas state court against twenty-seven companies, the plaintiffs allege that the defendant corporations were negligent in con-

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32. *Hearing on Gulf War Illness Before the Senate Comm. on Appropriations, Subcomms. on Labor, Health and Human Services, Education and related Agencies*, 106th Cong. (2000).

33. 974 F. Supp. 500 (D. Md. 1997).

34. 28 U.S.C. §§ 2671-2680 (2000).

35. *Minns*, 974 F. Supp. at 502.

36. *Id.* at 508.

37. Feres v. United States, 340 U.S. 135 (1950). For an overview of the *Feres* Doctrine and its application to the Gulf War Syndrome, see Kevin J. Dalton, *Comment: Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179 (1996); Claire Alida Milner, *Comment: Gulf War Guinea Pigs: Is Informed Consent Optional During War?*, 13 J. CONTEMP. H.L. & POL'Y 199 (1996); and William Brook Lafferty, *Comment: The Persian Gulf War Syndrome: Rethinking Government Tort Liability*, 25 STETSON L. REV. 137 (1995).

38. *Feres*, 340 U.S. at 146.

39. *Minns*, 974 F. Supp. at 503.

40. *Id.*

41. *Id.* at 506.

42. *Id.* at 505.

43. 155 F.3d 445 (4th Cir. 1998), *cert. denied*, 525 U.S. 1106 (1999).

44. 888 F. Supp. 1388 (S.D. Tx. 1995).

structing, manufacturing, and selling to Iraq chemical components or equipment used to make Iraqi chemical and biological weapons.[46] Begun in 1995, the litigation continues today.

In all likelihood, however, this attempt will fail just as the attempts against the federal government have failed. In the litigation dealing with Agent Orange, Vietnam veterans and their families claimed that the military's use of the defoliant caused injuries and sued the companies that produced it for, among other things, their failure to warn of the dangers of exposure to the chemical.[47] Those plaintiffs that did not accept a settlement offer lost in federal district court, in part because they were unable to prove successfully that their injuries were caused by exposure to Agent Orange.[48] In the case of Gulf War Syndrome, it is also likely, with the research to date, that the plaintiffs would be unable to prove, by a preponderance of the evidence, that the chemicals or equipment sold by the defendant corporations are responsible for the various illnesses they or their family members experience. It is more likely that the plaintiffs anticipate a settlement similar to that in the Agent Orange litigation, in which the defendant corporations created a 180 million-dollar fund for the sick veterans and their families.[49] The nexus between the hazards of Agent Orange and the manufacturer's failure to warn of its dangers is stronger, however, than that of the chemicals and equipment produced and sold by the defendant corporations and the existence, or foreseeability, of a Gulf War Syndrome.

Both avenues of litigation against the government and private corporations are therefore likely to fail. As stated in the appellate court decision of *Minns et al. v. United States*, while the court recognized that the parents of the disabled children were without a judicial remedy, it felt that it was up to Congress to provide the relief to these and other veterans and families suffering from the effects of the Gulf War Syndrome.[50] Congress has taken some steps in this direction. In 1992, Congress passed the Persian Gulf War Veterans' Health Status Act, creating a database of Gulf War veterans' health information to facilitate later research.[51] In 1994, Congress gave the Veteran's Administration the authority to pay disability payments to Persian Gulf War veterans suffering from chronic illness manifesting itself in any of thirteen symptoms, including fatigue, muscle pain, and sleep disturbances.[52] Reportedly, however, over ninety-three percent of the claims have been denied.[53] Congress also passed The Persian Gulf War Veterans Act[54] of 1998, establishing a presumption of a service-connection, and therefore a means of compensation and treatment, for illnesses associated with exposure to one or more of over thirty toxic agents present in the Persian Gulf War, much like the Agent Orange Act of 1991.[55] The Act will apply, however, only after a link is established between one of the toxins and the Gulf War Syndrome, a connection that has not yet been made.

Other legislative initiatives have been proposed. The Persian Gulf War Syndrome Compensation Act of 1999[56] would recognize Gulf War Syndrome as a war-related injury, and would make it easier for veterans and their families to receive disability and death benefits, even if the veteran's symptoms did not arise during their military service.[57] The bill has remained in committee since its introduction in August of 1999.[58] The Gulf War Veterans' Iraqi Claims Protection Act of 1999 is another legislative initiative to aid veterans.[59] It pro-

45. *Id.* at 1394.

46. *Id.*

47. *In re* "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984).

48. *In re* "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985) (appellate court affirmed motion to dismiss on basis of Government Contractor Defense).

49. Hercules, Inc. v. United States, 516 U.S. 417, 420 (1996).

50. Minns v. United States, 155 F.3d 445, 453 (4th Cir. 1998).

51. Pub. L. No. 102-585, 106 Stat. 4975 (1992).

52. Compensation for Certain Disabilities due to Undiagnosed Illnesses, 38 C.F.R. § 3.317 (2000).

53. Don Manzullo, *Manzullo Unveils Legislation to Help Veterans with Gulf War Syndrome* (1999), *at* http://www.house.gov/manzullo/pr092799.htm.

54. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

55. Pub. L. No. 102-4, 105 Stat. 11 (1991).

56. H.R. 2697, 106th Cong. (1999).

57. *Id.*

58. H.R. 2697, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 2697.

59. H.R. 618, 106th Cong. (1999).

poses to authorize the Foreign Claims Settlement Commission of the United States to process claims of Gulf War veterans against the billions of dollars of Iraqi assets frozen in United States banks. Veterans would have priority of awards and would be eligible to receive up to $100,000 each. The Act was passed by the House and is now before a Senate committee.[60]

While no legislation can cure ill veterans or their families, Congress has at least taken initial steps towards helping them. As stated in *Minns et al. v. United States*, there is unlikely to be any judicial remedy for these plaintiffs. If there is to be any relief for the victims of Gulf War Syndrome, it will have to be provided by Congres s .Captain (Retired) Swank.

Reserve Component Note

New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke

A fifty-year-old sergeant first class in the United States Army Reserve reports for inactive duty "drill" weekend on Saturday at 0700. He feels fine. In fact, he has always enjoyed excellent health. At 1500, he departs on a formation run with his unit. At 1510, he remarks to the soldier next to him that his left arm feels "funny." At 1513, he collapses. The emergency room diagnosis is quick and certain: the soldier suffered a serious, permanently disabling heart attack. Until recently, this sergeant first class would not have been eligible for veterans' benefits.

Congress recently amended Title 38 of the United States Code to correct this problem by expanding eligibility for veterans' benefits. Legal advisors involved in line of duty investigations need to understand the scope—and limitations—of this change.

Section 301 of the Veterans Benefits and Health Care Improvement Act of 2000[61] now defines any period of service in which an individual was disabled or died from an acute myocardial infarction (heart attack), a cardiac arrest, or cerebrovascular accident (stroke) as "active military, naval, or air service" for purposes of veterans' benefits laws.[62] The reason for the change appears clear from the legislative history. The provision was enacted to render heart attacks or strokes suffered during any type of military duty as "service-connected."[63]

The Department of Veterans Affairs (VA) is implementing the law in accord with that intent. The director of the VA recently disseminated written guidance establishing entitlement to service connection for heart attacks and strokes incurred while performing (or in transit to or from) inactive duty for training.[64]

Neither the statutory change nor the VA guidance address the question of whether a heart attack or stroke which is the natural progression of long-term disease, as opposed to an acute injurious event, is now covered. Line of duty (LOD) officers often struggle with this question. The September 1986 version of *Army Regulation 600-8-1*[65] states that medical evidence of natural progression overcomes the normal presumption that military service aggravates a medical condition.[66] Courts have drawn the same conclusion, determining that heart attacks during periods of short duty were the manifestations of disease existing prior to the duty—that is, existing prior to service (EPTS)—rather than injuries or aggravation of injuries suffered during duty.[67]

The new law authorizes no change to this process in military line of duty investigations. If an EPTS condition is not aggravated by military service, *Army Regulation 600-8-1* directs a finding of "not in line of duty—not due to own misconduct."[68]

Line of duty officers may still have to make a "not in line of duty" finding for heart attacks or strokes incurred during short

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60. H.R. 618, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 618.

61. Pub. L. 106-419, 114 Stat. 1822 (2000).

62. *Id.* § 301, 114 Stat. 1822, 1852 (amending 38 U.S.C. § 101(24) (2000).

63. *See* 146 CONG. REC. H 9944 (2000) (statement Rep. Stupak). "My bill closes an exceptionally problematic loophole . . . . My bill would consider heart attacks and strokes suffered by Guard and Reserve personnel while on 'inactive duty for training,' to be service-connected for the purpose of VA benefits." *Id.*

64. Fast Letter 00-90 from Director, Department of Veterans Affairs to All VBA Regional Offices and Centers (Dec. 4, 2000) [hereinafter Fast Letter] (directing VA examiners to obtain LOD determination or other supporting documentation to verify that disease or injury occurred while on duty)(copy on file with the author).

65. U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1 (1986)], *superseded by* U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONAL AFFAIRS: ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994). Practitioners should note that although AR 600-8-1 (1986) was replaced with the 1994 version, the later does not address Line of Duty (LOD) investigations. At present, there is no current regulation addressing LOD investigations, and practice has been to rely on the 1986 regulation as non-binding guidance.

66. AR 600-8-1 (1986), *supra* note 65, para. 41-9(e), (f).

67. *See* Stephens v. United States, 358 F. 2d 951 (Ct. Cl. 1966); Gwin v. United States, 137 F. Supp. 737 (Ct. Cl. 1956).

68. AR 600-8-1 (1986), *supra* note 65, para. 41-9 (e).

periods of military duty. However, they should remember that the VA uses the LOD factual record to help make its own determination of eligibility for veteran's benefits.[69] This makes an accurate and complete LOD investigative record critically important.

Line of duty investigating officers might be inclined to articulate a simple finding that a heart attack or stroke occurring during a short period of military duty is an EPTS condition, and leave it at that. However, the LOD record must accurately reflect the timing and progression of symptoms in these cases, in relation to both the period of duty and the period of travel to and from the duty. This will allow the fairest possible determination of the facts and entitlement by theVA.

The new liberalized law may also provide recourse for veterans previously ineligible for VA benefits as the result of heart attack or stroke suffered during short periods of military duty.[70] Affected veterans may want to consider reapplying for benefits. Major Culver.

69. Fast Letter, *supra* note 64.

70. *See* 38 C.F.R. § 3.114 (2000). If a "liberalizing" law is passed, this regulation lays out rules for calculating retroactive entitlement.