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The politics of legitimacy in international relations

The case of NATO's intervention in Kosovo

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There was an interesting, although militarily insignificant, discrepancy among the leaders of NATO, while the alliance conducted an air campaign against Serbia in the spring of 1999. The matter was how to describe their action. In the press conference following the attack upon Yugoslavia over the issue of Kosovo, NATO's spokesmen repeatedly emphasized that they were not waging war, which was the official view of NATO headquarters. A majority of journalists, thus, at first, seemed to hesitate to call the military operation a war despite growing suspicion. Preferred expressions to designate it were like "air campaign" and "air strikes." However, the most hawkish figure in *Operation Allied Force*, British Prime Minister Tony Blair, did not refrain from using the word, war, while he believed that it was not a normal war, but a just war. This "doctrine of the international community" sharply contradicted even with his Defence Secretary, George Robertson's remark in a House of Commons Select Committee debate on Defence on 24 March 1999 that 'It is not a war'.¹

This discrepancy reflects the difference between moderate figures who did not dare to elaborate on a just war theory and the politician who insisted upon sending in ground troops. However, in more theoretical terms, it represents a complex situation of the normative structure of international society. The question about war and peace in the context of the use of force is always concerned with the issue of legitimacy, on which the characterization of actions like military intervention depends. There are certainly many views, even conflicting views, on the conceptual map of war, peace, and legitimacy in international society. In international society where no written constitutional law exists, the issue of legitimacy as an object of political struggles determines the conceptual nature of war and peace. It is because legitimacy is the issue that concerns the very normative pillars of international society.

This paper is intended to explore the issue of legitimacy in international relations in conceptualizing war and peace. It focuses on the case of NATO's intervention in Kosovo as a signpost of intervention in the post-Cold War world. The first section attempts a typology of ways to justify the military intervention by looking at the discourses of NATO leaders. The next considers the implications of the NATO action in the normative framework of international society. Finally, I shall draw attention to the theoretical problem regarding legitimacy, war, and peace exemplified by *Operation Allied Force*.

Typology of Justifications for NATO's Intervention

The Official View of NATO Headquarters

First of all, the official view of NATO denies the existence of war in Kosovo. How was it possible to say that despite the exchange of heavily weaponry attacks, NATO was not engaged in a war? According to Javier Solana, the then Secretary-General of NATO, in a press conference on 25 March 1999, the next day NATO launched the air strikes, the operation was legitimate and therefore not a war. He stated that:

the NATO countries think that this action is perfectly legitimate and it is within the logic of the UN Security Council and therefore that is why we are engaged in this operation in order not to wage war against anybody but to try to stop the war and to guarantee that peace is a reality for a country that has been suffering from war for many, many years.²

It seems that in his view the operation accorded with the Security Council's resolution and was thus legitimate. This means that it was intended to stop the ongoing war, an internal war in Kosovo, and therefore not a war. Asked about further human catastrophe that NATO air strikes may cause, he answered: "With all due respect, I would like to say once again that the only person who is responsible for creating the humanitarian catastrophe has a name and his name is President Milosevic, not NATO." What does this mean for Yugoslav people? The seemingly irritated Secretary

¹ George Robertson, House of Commons Select Committee on Defence, Hearings, 24 March 1999, Q.390, quoted in Adam Roberts, "NATO's 'Humanitarian War' over Kosovo," *Survival: The IISS Quarterly*, Autumn 1999, vol. 41, no. 3, p. 112.

² Press Conference by Secretary General, Dr. Javier Solana and SACEUR, Gen. Wesley Clark on 25 March 1999.

General continued: "I said from the very beginning that NATO is not waging a war against the Yugoslav people, to the contrary."³ Solana's perception of war is something between peoples, and an attack aimed at a certain individual and his regime like *Operation Allied Force* is, although it may physically harm other people, not a war.⁴

This standpoint derives from the orthodox view of war as a military conflict between sovereign states, and thus represents a conventional orientation of justifying an intervention. There is a UN resolution and there exists an internationally recognized threat to the peace, which makes a military attempt to restore peace legitimate. But was it not the case that the Security Council did not authorize a military operation explicitly, and NATO allies were all aware that China and Russia would become furious? As far as NATO leaders felt it necessary to pretend their action accorded with the conventional way of justification, they had a means to point to Resolution 1199 of 23 September 1998 and Resolution 1203 of 24 October 1998. The former demanded that Yugoslavia "cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression," and had referred to possible "further action and additional measures to maintain or restore peace and stability in the region", if the concrete measures demanded in the resolution were not taken.⁵ The latter demanded Serb compliance with a number of key provisions of accords concluded between NATO and the Federal Republic of Yugoslavia, and the OSCE and FRY in Belgrade on 15-16 October, in addition to Resolutions 1160 and 1199.⁶ These do not allow the Alliance to launch an air campaign explicitly, but created a room for justifying a military intervention. The resolutions symbolize a framework of NATO's official policy in line with the conventional doctrine, by stating the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia," while "Affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region."⁷ In addition, it was reaffirmed that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council."⁸

The expectation to adhere to the conventional line of justification substantially cracked when Russia proposed to the Security Council a draft resolution calling for "an immediate cessation of the use of force against the Federal Republic of Yugoslavia." However, despite the Council's inability to authorize the operation, it still failed to condemn it as well. It was on 26 March 1999 that the Security Council enlarged a gray area in international society by rejecting the draft resolution

³ *Ibid.*

⁴ Dieter Kastrup of Germany, speaking on behalf of the Council of Europe in an urgent Security Council meeting on 24 March 1999, stressed that "The policy of the Council of Europe was neither directed against the Yugoslav or Serb population nor against the Federal Republic of Yugoslavia or the Republic of Serbia, he said. It was directed against the irresponsible policy of the Yugoslav leadership. President Milosevic must stop Serb aggression in Kosovo and sign the Rambouillet Accords." Press Release SC/6657 "NATO Action against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo." A theoretically opposite view to Solana's idea of war was expressed by Agim Nesho of Albania, who strongly supported NATO's action and proclaimed that "The international community had not declared war on Serbia -- that war had already existed." *Ibid.* Nesho's understanding seems that a war had already taken place within FRY, and NATO just intervened in it.

⁵ UN Security Council Resolution 1199 on 23 September 1998
[<http://www.un.org/Docs/scres/1998/sres1199.htm>].

⁶ UN Security Council Resolution 1203 on 24 October 1998
[<http://www.un.org/Docs/scres/1998/sres1203.htm>].

⁷ UNSC Resolutions 1199 and 1203. See also Resolution 1160 on 31 March 1998
[<http://www.un.org/Docs/scres/1998/sres1160.htm>]. Marc Weller points out that the constitution of the Socialist Federal Republic of Yugoslavia provided for secession of its constitutional units, one of which Kosovo constitutes, but the international organizations involved did not respect it. See Marc Weller, "The Rambouillet Conference on Kosovo," *International Affairs*, vol. 75, no. 2, April 1999, pp. 214-5.

⁸ UNSC Resolution 1203.

sponsored by Russia. Only three states, Russia, China, and Namibia voted in favor, and 12 against. The rejected draft said that NATO's operation was a violation of Articles 2(4), 24, and 53 of the UN Charter. Surprisingly, or inevitably, the countries that rejected the draft did not contend about the credibility of the draft's interpretation of the Charter. Instead, they emphasized that the Belgrade regime had violated the Council resolutions and "had chosen to defy repeatedly the will of the international community." In the words of the US representative, Peter Burleigh, "The Charter did not sanction armed assaults on ethnic groups, or implied that the international community should turn a blind eye to a growing humanitarian disaster. NATO's actions were completely justified."⁹ Burleigh's belief was that "By rejecting the resolution before it today, the Council would reaffirm the requirements it had put to the Government in Belgrade." So the grounds for NATO's justification were the past Council resolutions, human rights norms, and international humanitarian law. Stewart Eldon of the United Kingdom underlined that "In the current circumstances, military intervention was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe."

There are Council members like Malaysia who expressed their reservation about the air strikes but still voted against the draft resolution. But as the representative of Bosnia-Herzegovina explained that "Like many other United Nations Members, his country was concerned about the implications of the NATO military action being undertaken without sanction of the United Nations or Security Council, but he would be even more dismayed if the Council was blocked and if there was no response to the humanitarian crisis and legal obligation to confront ethnic cleansing and war crime abuses." Such non-NATO members' views suggest that the Council's decision to reject the draft resolution overwhelmingly was made after political deliberations, rather than legal judgements of an act of NATO countries.

The Security Council showed a vast vacuum in the legal and normative framework of international society. No one argues against the need for implementing human rights norms and international humanitarian law, and the Council's recognition of the threat to international peace in Kosovo. No one argues against general illegality of intervention and the use of force without the authorization of the Council. The body of international law cannot indicate a clear map; the Security Council neither sanctions nor condemns the intervention. Kofi A. Annan expressed that neither unauthorized interventions nor late interventions were desirable.¹⁰ But such a statement simply reveals a vast gray area where legitimacy of the use of force was neither justified nor denied. What I call a modified second justification for the NATO action then comes out.

The Modified Version of the Official View

The modified version can be found in an article which Solana triumphantly wrote several months after the end of the operation. As regards the legitimacy issue he admitted that there had been a doubt before the operation about the legitimacy of the use of force without an explicit mandate of the Security Council. This is a slight but important change in his tone after the operation. According to Solana, now the European Union's High Representative for Foreign and Security Affairs, NATO did not seek the Security Council mandate because

It was the unique allied cohesion of 19 democracies, including NATO's three new members, that was crucial in establishing consensus on the legal basis and legitimacy of NATO's actions. The ACTORD [Activation Order] 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.¹¹

⁹ Press Release SC/6659 "Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia.

¹⁰ See Kofi A. Annan, "Two concepts of sovereignty", *The Economist* (18 September 1999) [<http://www.un.org/Overview/SG/kaecon.htm>].

¹¹ Javier Solana, "NATO's Success in Kosovo," *Foreign Affairs*, vol.78, no.6, November/December 1999, p. 118.

Solana seems to keep the basic line of the conventional way. However, the elements of self-justification of the legitimacy of NATO's action, "the unique allied cohesion of 19 democracies," was not evident in his initial explanation of the operation in March. His new conclusion is still quite unsatisfactory. It remains to be answered why NATO could made an exception by its own mandate. Furthermore, why NATO could describe its action as an exception by deterring others from conducting similar operations. But it is a candid view, given that the first conventional way of justification faced an unsettled predicament in the Council.

The question is, as the Russian representative warned in the Security Council, whether the vote on NATO's action "was not just on the problem of Kosovo, but went directly to the Council's authority, in the eyes of the world community." Was the Indian representative right to say that "NATO believed itself to be above the law"? The official view was that NATO did not defy the Council, but reinforced it by the enforcement action, and its air campaign remained an exception. The representative of Slovenia, supporting the operation, pointed to its implications in general terms and suggested a way for modification. "According to the United Nations Charter, the Security Council had the primary, but not exclusive responsibility for maintaining international peace and security."¹² This is indeed the wording of Article 24 and seems to point to room for justifying the NATO action, although Article 53 proclaims that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council".¹³

What appears to be a violation of the UN Charter could be compensated for a possible application of general international law, which illuminates a second method of NATO's self-justification. A UK Foreign and Commonwealth Office note of October 1998, circulated to NATO allies, argued that

force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR [UN Security Council Resolution]. The following criteria would need to be applied. (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved; (c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim - i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion....The UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.¹⁴

The doctrine of necessity in international law is here given a cultivating implication. The UK note insists that humanitarian rules can be the source of appealing to the doctrine of necessity that virtually override normal legal procedures. It goes without saying that humanitarian norms derived from "crimes against humanity," the 1948 Genocide Convention, and of the 1949 Geneva Conventions, are binding in international society, and may justify interventions. But should these criteria be applied regardless of the lack of an explicit authorization of the Security Council; in other words, should the criteria derived from general international law override the provisions of the UN Charter? Does the UN Charter stand at the highest point of international legal norms? Or is it true that general international law that one might claim as *jus cogens* or peremptory norms could be superior to the Charter, at least its procedural rules? Is it correct to perceive of the UN as the primary international organization, but categorically equal to other international organizations like NATO?

No practitioner has unequivocally answered these questions in legal terms. But the

¹² Press Release SC/6659.

¹³ There is an argument that NATO as an alliance is not formally a regional agency, although it does not seem to me convincing.

¹⁴ One-page FCO note of 7 October 1998, "FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force," quoted in Roberts, "NATO's 'Humanitarian War' over Kosovo", p. 106.

emphasis upon the legitimacy of the NATO action on the humanitarian grounds and the concurrent avoidance of discussing the validity of procedural rules of the UN Charter resulted in what I call the second way of justifying the operation. Namely, there exists the peremptory body of general international law, that justifies the use of force, regardless of procedural matters of the UN Charter. NATO without an authorization of the Security Council identified the existence of such a situation in Kosovo, and conducted military attacks upon Belgrade.

A New Just War Theory

Theoretically speaking, Tony Blair's view surpasses even this second standpoint. He admits the existence of a war. He asserted: "This is a just war, based not on any territorial ambitions but on values." He has no intention to engage in a debate about the definition of war. What is striking is that he does not care about the UN Security Council, and rather stresses a need to reform it.¹⁵ More explicit description of the action as just war came from Vaclav Havel, President of the Czech Republic. He stated in an address to the Canadian Senate and House of Commons on April 29, 1999, that:

But there is one thing no reasonable person can deny: this is probably the first war that has not been waged in the name of "national interests," but rather in the name of principles and values. If one can say of any war that it is ethical, or that it is being waged for ethical reasons, then it is true of this war. Kosovo has no oil fields to be coveted; no member nation in the alliance has any territorial demands on Kosovo; Milosevic does not threaten the territorial integrity of any member of the alliance. And yet the alliance is at war. It is fighting out of a concern for the fate of others. It is fighting because no decent person can stand by and watch the systematic, state-directed murder of other people. It cannot tolerate such a thing. It cannot fail to provide assistance if it is within its power to do so.¹⁶

It is probably true that the expression "war" gained ground, as the NATO action was unexpectedly prolonged and sending ground troops began to be seriously discussed. The Clinton administration has launched missiles to Iraq, Sudan, and Afghanistan as well unilaterally for the recent few years. The reason why only the operation in Kosovo has been widely described as war is largely due to the intensity and duration of its use of military weapons. But there are theoretical and historical meanings in not hesitating to use the word "war" in such a humanitarian intervention. Whether consciously or unconsciously, that leads to a rejection of general illegality of war in international law since the Kellogg-Briand pact and, in association with it, a rejection of the paramount status of the UN Charter. By introducing the idea of just war, Blair states that "War is an imperfect instrument for righting humanitarian distress, but armed force is sometimes the only means of dealing with dictators."¹⁷ Just war is identified, in Blair's words, when it is conducted not for territorial ambitions but for values. Values of human rights, humanitarianism, and possibly democracy justify a war. Blair calls this the security aspect of his "doctrine of the international community."

We may ask, as the representative of India did referring to the rejected draft resolution of the Security Council on 26 March 1999, what entitles NATO countries to speak in the name of the international community, given the broad opposition and suspicion among a number of UN member states.¹⁸ It seems that Blair and other NATO leaders' image of the international community is not based on technical consensus of all states. Blair confidently explains that "Just as within domestic politics, the notion of community - the belief that partnership and co-operation are essential to

¹⁵ "Doctrine of the International Community: Speech by the Prime Minister, Tony Blair, to the Economic Club of Chicago, Hilton Hotel, Chicago, USA, Thursday 22 April 1999 [<http://www.fco.gov.uk/news/speechtext.asp?2316>].

¹⁶ Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. Rev. Books, June 10, 1999, at 4, 6 (reprinting address to Canadian Senate and House of Commons, Apr. 29, 1999).

¹⁷ *Ibid.*

¹⁸ Press Release SC/6659.

advance self-interest - is coming into its own; so it needs to find its international echo."¹⁹ But this community is based on particular values which NATO leaders regard as the pillars of the international community. In the international community countries co-operate with each other not simply in accordance with procedural rules, but with fundamental values which they are supposed to share. The international community in the form of regional organizations like NATO may wage just war for the sake of fundamental values. This is anything but the just war theory of Michael Walzer, which is rigidly founded upon communitarian concerns and intended to preserve the sanctity of sovereign statehood. The new doctrine of the international community overcomes territorial considerations, and implements transnational values across borders. What is just in just war is no longer the traditional principles of international law; it is a set of values that creates the international community where international values and national interests (of states within the community) are to converge.

These three standpoints of justification for the NATO operation are indicative of the conceptual orientations of NATO leaders. On the international law front, they sought room for legitimacy of their action by denying the existence of war. They insisted that they were complying with the UN Security Council Resolutions. If this theory did not succeed, a kind of *jus cogens* or peremptory general international law might allow them to resort to the legitimate use of force. In this case NATO itself becomes the judge of legitimacy of its own action. A theoretically great, although in reality quite small, step is needed to reach a just war theory from such justifications. If NATO conducted a war, it was a just war. In that case, NATO leaders would claim that the war was not waged in an old sense between sovereign states. It was a war between the international community and dictator Milošević. They explained that it was still not a war between NATO countries and the Federal Republic of Yugoslavia, because NATO did not attack Yugoslav people, at least intentionally. In short, they wished to claim in legal terms that it was not a war but a legitimate use of force. It could be a war from the political perspective, but a just and humanitarian war. NATO justifies its action legally and politically, although the ways they adopt do not verbally harmonize. What is really important for NATO is not to take perfectly defensible measures, but to defend their values and construct the international community in which they prevail. NATO declared during its air campaign,

The crisis in Kosovo represents a fundamental challenge to the values for which NATO has stood since its foundation: democracy, human rights and the rule of law. It is the culmination of a deliberate policy of oppression, ethnic cleansing and violence pursued by the Belgrade regime under the direction of President Milosevic. We will not allow this campaign of terror to succeed. NATO is determined to prevail.²⁰

NATO was determined to prevail over the violators of its fundamental values. It was determined to win the war against its enemies in the name of the international community.

It is evident that the pressing reason behind the decision on the air campaign by NATO leaders is the credibility of NATO. The Select Committee on Foreign Affairs of the House of Commons in Britain reports several evidences on the concerns about the credibility of NATO among decision-makers, as Tony Blair for instance stated that "to walk away now would...destroy NATO's credibility." On 25 March 1999 the Foreign Secretary of his cabinet emphasized in the House that "Our confidence in our peace and security depends upon the credibility of NATO. Last October, NATO guaranteed the cease-fire that President Milosevic signed. He has comprehensively shattered that cease-fire. What possible credibility would NATO have next time that our security was challenged if we did not honour that guarantee?"²¹ The Select Committee points out that after the

¹⁹ "Doctrine of the International Community."

²⁰ "Statement on Kosovo Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C. on 23rd and 24th April 1999," [http://www.nato.int/docu/pr/1999/p99-062e.htm].

²¹ Quoted in the Foreign Affairs Select Committee, House of Commons, *Fourth Report: Kosovo: Minutes of Evidence and Appendices* [http://www.publications.parliament.uk/pa/cm199900/cmselect/cmffaff/28/2810.htm].

bombing began, this justification for NATO's action was not emphasized. It remarks that "The reason for this is clear. NATO's credibility was indeed at stake by March 1999. However, reference to NATO's credibility begs the question of why NATO had got itself into the position of being forced to bomb Yugoslavia to defend its credibility....the legal justification which the Government advanced depended upon the humanitarian objectives....It is difficult to imagine a legal justification based upon the need to support any organisation's credibility."²²

It is probable that political concerns like the credibility of NATO were at stake when it comes to the hasty decision by NATO to launch the air campaign. Ian Brownlie put that "the official NATO position was...that the purpose of the bombing was to prevent a humanitarian catastrophe. It is impossible to reconcile this assertion with the other war aims as defined in official statements."²³ This observation illustrates the confusion and inability of the NATO bombing. But theoretically speaking, this does not mean that the fundamental values that NATO believes in are not relevant; they are the foundation to establish the normative credibility of NATO. Values expressed in politics are subject to political considerations. And this is to draw up the conceptual map of the political legitimacy of the NATO action concerning its values and interests.

The Implications of the NATO Intervention

Politics of Exceptions

NATO leaders' characterization of *Operation Allied Force* as an exception reminds us of Carl Schmitt's remark that exceptions decide on everything. Against the constitutional way of thinking, or arguments for limited sovereignty, Schmitt insisted that in an exceptional case a true sovereign appears to restore order, even if the sovereign person cannot be found in normal situations. What is more important is not the system of rules under normal circumstances, but decision-making in exceptional situations. Considering the significance of Schmitt's insight, it becomes apparent that NATO's action has general implications for the future. To regard it as an exception by no means reduces its importance, while this does not necessarily lead to Schmitt's "decisionism." Even if exceptions do not decide on everything, they certainly reflect certain rules. Through exceptions we may identify the existence of a certain value system which those who justify exceptions find fundamental.

Just as Schmitt distinguished between legality and legitimacy, we may find the same dual logic in international relations, and in the case of the Kosovo crisis in particular. To put it simply, the distinction is made between the realm of law and that of politics. Legitimacy sustains legal credibility, but is also a matter of justification for political actions. The three justifications for the NATO action that the present paper has demonstrated are all efforts to legitimize the NATO intervention by practitioners. The first is a justification that seeks conventional legal support. The second is a modified and thus ambiguous standpoint between law and politics, based on peremptory norms and self-authorization. The third claim on just war is a candid expression of political legitimacy of the NATO action in defiance of legal arguments. What is remarkable in international society is the fact that international law is not like any kind of domestic law and is politically vulnerable.

In interesting debates on Kosovo in *American Journal of International Law*, prominent American lawyers like Louis Henkin, W. Michael Reisman, and Ruth Wedgwood frankly acknowledge the difficulty in legally justifying the NATO action.²⁴ Surprisingly or not, then the international lawyers pointed out the defects of international law, rather than condemned the intervening states. For instance, Henkin observes that "Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the UN Charter." What he has in mind is "what the law ought to be."²⁵ Wedgwood asks "How can an effort so broadly supported in its objectives--to stem Belgrade's expulsion of ethnic Albanians from Kosovo and block a gross

²² *Ibid.*

²³ Quoted in *ibid.*

²⁴ "Editorial Comments: NATO's Kosovo Intervention," *American Journal of International Law*, Vol. 93, No. 4, October 1999 [<http://www.asil.org/kosovo.htm>].

²⁵ Louis Henkin, "Kosovo and the Law of Humanitarian Intervention," in *ibid.*

violation of international law--be so uncertain in its legal basis?" Then he goes on to argue that "state practice remains key to the shaping of legal norms. When an action is deemed morally urgent by a majority of states--even an action involving the use of force--it is likely to shape a legal justification to match." According to Wedgwood, the ideal of multilateral action seeks "to invoke the authority of a broad normative community." "Legitimacy--and legality--represent a complex cultural process not confined to the Council chamber."²⁶ Lawyers candidly argue that the reason why NATO leaders avoided an explicit authorization by the Council is understandable due to vetoes of Russia and China. They interestingly argue that, therefore, the United Nations, not NATO, is defunct, and international law must proceed in a more progressive direction.

The intervention in Kosovo was an exception, while this does not mean that exceptions are less important, or less frequent. What can be regarded as the principle of international legal order like the bulk of Chapter VII of the UN Charter has not been used fully, while deviations have taken place more often in politically serious situations. At the same time, an option to resort to the principles like non-intervention still secures room for political maneuvering. Some prominent lawyers as well as practitioners of NATO countries resort to law when desirable, but still admits the area where law does not override politics. The gap between principles and exceptions over the bridge between law and politics is the realm in which NATO acted.

I shall further examine the implications of the discrepancy between law and politics that the NATO action revealed in the conceptual framework of international society, in reference to the role of the Security Council, *jus cogens*, and political responsibility.

The Security Council and Legitimacy Making

The NATO action was an apparent challenge to the authority of the Security Council. Yet, of course, this does not mean that the Council was almighty before the NATO action. There are many interventions conducted without the authorization of the Council. The United States in Guatemala and Panama, the Soviet Union and other Warsaw Pact countries in Hungary and Czechoslovakia, Vietnam in Cambodia, Tanzania in Uganda, India in Bangladesh. However, the intervening states in these cases during the Cold War more or less tried to justify their action as self-defense. Even the precedent of the Gulf War did not simply point to a revival of the authority of the Security Council. The UN Charter prohibits member countries from resorting to self-defense, once the Council began to take necessary measures to restore international peace and security.²⁷ What actually happened in the Gulf War was that collective self-defense could continue regardless of the limit set in the Charter as a result of the limitless authorization by the Council. The Council simply declared that it authorize any measures by any states trying to restore sovereignty of Kuwait, which is in fact a simple affirmation of the principle of collective self-defense.²⁸

The other interventions authorized by the Council like those in Somalia and Haiti are categorically different from the Gulf War. The latter was a war of Kuwait and the other intervening states against Iraq, "just war" between sovereign states in the sense of Michael Walzer. The use of force in the war was legitimate and legal with or without the Council's authorization. In other interventions that were not called wars, it was not international legal rules like self-defense that made interventions legitimate and legal. The legitimacy and legality of the use of force and other enforcement were all guaranteed by the de-fact law-making power of the Security Council. The interventions in such cases were not wars, because they would not have escaped from general illegality of war without concurrent authorizations of the Council. In short, these examples show

²⁶ Ruth Wedgwood, "NATO's Campaign in Yugoslavia," in *ibid.*

²⁷ See UN Charter Article 51.

²⁸ Abram Chayes argues that while the United States never formally acknowledged that Resolution 678 was legally required, the US use of force in the Gulf with the authorization of the Security Council enhances its legal and political positions at, the maximum. See Abram Chayes, "The Use of Force in the Persian Gulf" in Lori Fisler Damrosch and David J. Scheffer (ed.), *Law and Force in the New International Order* (Boulder: Westview, 1991), pp. 8-11. Among skeptical views on the authority of the Council are W. Michael Reisman, "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects", Richard Gardner, "Commentary on the Law of Self-Defense," David B. Rivkin, Jr., "Commentary on Aggression and Self-Defense," in *ibid.*

that there are either war of self-defense or the use of force authorized by the Security Council.

Significant precedents are ECOWAS's interventions in Liberia and Sierra Leone and SADC's in Lesotho. They intervened without the authorization of the Council, and without claiming on the protection of their nationals or collective self-defense. Interestingly, the Council did not condemn the interventions, and rather appreciated ECOWAS's intervention afterwards. It remained ambiguous as a result, whether the interventions were legitimate and legal or not.²⁹ Neither of the only two ways of justifying the use of force in international law, self-defense and Security Council authorization, legalized the ECOWAS intervention. Nevertheless, few formal condemnations in the name of international law appeared after the interventions. The fact that the Council neither authorized nor condemned the action indicated that there is a gray area in the international legal system in which certain actions remain somewhere between being legitimate and illegitimate, between legal and illegal. NATO aimed at the gray area that was revealed by the ECOWAS intervention. In the end, humanitarian interventions, not for self-defense or the protection of nationals of intervening states, and without the Council's authorization, are not perfectly legal, which NATO leaders seemed to realize. At the same time, it may not be perfectly illegal, unless it is explicitly against the will of the Council. NATO strategically entered in the gray area and remained just not illegal.

But still it is crucial to recognize the peculiarity of NATO's war. One significant characteristic in the NATO intervention was that the allied force did not pretend to keep its mission to a form of peace-keeping. It unequivocally identified its enemy and attacked him. That is why the NATO intervention almost for the first time created a category of "humanitarian war."³⁰ The ECOWAS precedent was still an intervention for negative peace observed by the neutral third force. NATO was rather enthusiastic about fighting a war under the banner of human rights and humanitarianism. The ECOWAS legitimacy relied on its contribution to negative peace. The NATO legitimacy was claimed to be founded upon the fundamental values its leaders believe in. The initial omission to seek Security Council authorization by states in Western Africa could be understood as a technical issue. By contrast, the avoidance of it by NATO member countries is a serious challenge in the name of universal values to the institutional authority of the Council. The Security Council was powerless in the face of the confrontation between the superpowers during the Cold War. Now the NATO action shows that the Council may be powerless in the face of the fundamental values of the international community.

The point is, as far as the NATO leaders are concerned, whether or not we admit the existence of such an international community that is founded upon fundamental values of human rights and humanitarianism. Russia, China and Namibia that voted for the draft resolution to stop the NATO air strikes would not admit the credibility and the universality of such a community. Their notion of the international community is still in the world of sovereign states that are linked to each other through treaties like the UN Charter. For NATO member countries and others that support its intervention, there exists *the* international community where they advance their fundamental values. The NATO intervention indicates the existence of a gray area where the international community of NATO's fundamental values can act exceptionally and independently.

The Hierarchy of Norms

It is not the intention of NATO countries to deny thoroughly the role of the Security Council. They insisted that there were fundamental values to be protected even when the Council's explicit endorsement was missing. This logic requires a certain hierarchy of international norms. Scholars for many years regarded the society of sovereign states as having only a horizontal system of rules, which they believe is a logical consequence of the principle of sovereignty. The UN Charter declares itself as having primacy over other treaties,³¹ which is the only provision in positive international law that suggests a possible hierarchy of rules. NATO's action apparently challenges

²⁹ Danilo Türk, Representative of Slovenia at the UN Security Council pointed out in the debate on the NATO bombing that "the Council had chosen to remain silent at times when regional organizations sought to remove regional threats to peace and security". Press Release SC/6659.

³⁰ See Adam Roberts, "NATO's 'Humanitarian War' over Kosovo".

³¹ See Article 103 of the UN Charter.

the traditional view of horizontal international law, as the Russian representative in the Council correctly described.

As Jonathan I. Charney noted, human rights and humanitarian law are duties owed *erga omnes*, to all the world.³² Furthermore, the ground for overriding the duties under the Charter is, theoretically, the existence of higher norms, which could be called *jus cogens* or peremptory norms. *Jus cogens* is said to originate from the old natural law thinking, but provisioned in Article 53 of the Law of Treaties. No derogation from *jus cogens* is permitted in a treaty. In other words, *jus cogens* is a body of norms which even the will of sovereign states cannot violate. It is said to include the prohibitions of slavery, aggressive war, genocide, and so on, although there are no specific provisions on the contents of *jus cogens*. As Charney also notes, "The necessary international consensus might be established either by superseding general international law at the level of a *jus cogens* norm or by reinterpreting the UN Charter on the basis of agreement of the UN member states." In other words, "because the Charter restrictions on the use of force are themselves *jus cogens* norms, it would take a new norm of that quality to override them."³³ The Genocide Convention is part of *jus cogens* and is supposed to justify the objective of the NATO action. That was also the ground on which the Security Council recognized a threat to international peace in Kosovo.

However, *jus cogens* does not clarify the subject and the method for enforcement actions. The first question is whether *jus cogens* legitimizes attempts for enforcement actions by a regional organization. It is one thing to point to violations of rules, but it is another to resort to enforcement actions to stop violations. The decision to take, or not to take, preventive measures is essentially a political act. International law ordains the UN Security Council to discharge such a duty. But that is almost the only channel between political legitimacy and legal provisions. The question is whether political legitimacy may override legal technicality in the international community. NATO's emphasis on exceptionality of the intervention is in effect an affirmative answer to this question and established a precedent for a "humanitarian war" at a regional level.

The next question would be about particular methods for enforcement. The method of air strikes was apparently taken by the allies for their domestic reason. As a result, they succeeded in minimizing the victims on their side, but not so on the other side. It is quite doubtful whether the air campaign was an appropriate method for the intervention. While the past studies on interventions have virtually neglected the issue of methods of interventions, as Adam Roberts pointed out,³⁴ NATO allies must verify the presupposition that the air strikes are a justifiable method to stop a massive violation of fundamental values. The practical question is how they can justify their killings of ordinary Serbs and other citizens, who have nothing to do with the atrocity of Milošević. As NATO leaders asserted when a bomb hit the Chinese embassy in Belgrade, the casualties of citizens or foreigners are unavoidable in such a massive air campaign.

The purpose and the method are distinct objects of legitimacy, just as the legality of *jus ad bellum* and *jus in bello* are different. The objective of the intervention in the case is widely held legitimate and justifiable, although NATO failed to fulfill procedural rules for the use of force. NATO's resort to air strikes was extraordinary in the history of humanitarian intervention. That is the reason why it is now often called "war" despite NATO officials' avoidance of the expression. The military extent of the prolonged air strikes made the intervention appear a "war" and created an exceptional precedent of a "humanitarian war." War is prohibited in international law except in case of self-defense. The expression of war indicates that the legitimacy of the NATO action apparently goes beyond the sphere of legality, and the framework of the international community that NATO leaders propound is constructed on such high political legitimacy. The concept of *jus cogens* applicable in the case of the NATO intervention is a bridge between legal justifiability and political legitimacy. Law is subject to fundamental moral norms. Political judgement in the name of those

³² Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo," in *American Journal of International Law*, Vol. 93, No. 4, October 1999.

³³ *Ibid.* Charney argued that "In the Nicaragua case, the International Court of Justice found that, to challenge a rule of international law, the state practice relied upon must be clearly predicated on an alternative rule of law; but NATO has not justified its actions on the basis of a specific rule of law--even humanitarian intervention--new or old. Throughout the campaign, NATO offered no legal justification for it." *Ibid.*

³⁴ Roberts, "NATO's 'Humanitarian War' over Kosovo," pp. 110-112.

norms may transgress legal technicality. The NATO intervention revitalizes the function of such higher norms and connected law and politics in an unprecedented way.

Legitimacy of Responsibility

One lesson of the NATO intervention, which this paper has observed was conducted in a gray area between law and politics, is a need to discuss the issue of responsibility and accountability in the context of humanitarian intervention. Max Weber's classical text teaches us that in the field of politics we need to distinguish between "the ethics of intention" and "the ethics of responsibility." Political legitimacy derives from the appropriateness and importance of moral concerns. NATO leaders' beliefs and the reluctant acceptance of its intervention by many other nations was a sign of recognition of its political legitimacy. Few people deny the legitimacy of the ethics of intention on the side of NATO, given the atrocities of the Belgrade regime in Kosovo. However, the ethics of responsibility, which concerns the result, not the motivation, is the target of criticisms and suspicions. Richard Falk commits himself to "a double condemnation" of genocidal behavior and "unauthorized uses of force delivered in an excessive and inappropriate manner" and concludes that the NATO action "was justifiable to act, but not in the manner undertaken."³⁵

If NATO's use of force had been authorized by the Security Council and limited to a more moderate intervention, the expression, war, would not have been used. The action was massive to the extent that it deserves such an expression. The belief in their justifiable intention urged some NATO leaders like Blair and Havel to characterize their conduct as a just war and locate it in the context of "ethical foreign policies." But we need not only the ethics of intention, but also the ethics of responsibility to make a war really justifiable. Christine M. Chinkin denies NATO's "good war", by stating that humanitarian interventions "encompass a duty not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians."³⁶ Furthermore, the intervenors take responsibility in "the predicament of large numbers of unprotected civilians was foreseeable, as was widespread damage to the social infrastructure, the environment and the cultural heritage, and the disruption of communication routes." There is a doubt about the permissibility of the disproportionate and excessive bombing by NATO without ground forces to protect civilians. Thomas M. Franck remarks that taking responsibility leads to "the civil reconstruction of destroyed civic cultures," which "requires a dedicated, rapidly deployable reserve of police, judges, magistrates, health care providers and administrators." But "The limits of an ad hoc approach, already apparent in Cambodia, became manifest in Kosovo."³⁷

These observations cast a doubt upon the repeated statement by NATO leaders that only Milošević's regime is responsible for all atrocities including those following NATO's air strikes. NATO is committed, and share responsibility, not legally, but politically.³⁸ Their legitimacy stems from what they call fundamental values, so they are engaged in protecting and preserving those values in Kosovo. When they fail, their legitimacy diminishes. It is wrong to assume that political deliberations that override legal technicality are an act of irresponsibility. On the contrary, new political responsibility is born out of a transgression of politics over law. Political legitimacy is based on the burden of responsibility, which NATO has to take in order to uphold their "humanitarian war."

But is it not the case that the first responsibility in international society is to observe international law? Is it not true that the value of "the rule of law," which NATO leaders claim to be one of their fundamental values, is protected by those who observe law? For NATO, the law that prevails over legal technicality is the law of fundamental values. An application of the law according to a certain hierarchy of values is intrinsically a political act, but intended to be within a certain

³⁵ Richard Falk, "Kosovo, World Order, and the Future of International Law," in *American Journal of International Law*, Vol. 93, No. 4, October 1999.

³⁶ Christine M. Chinkin, "Kosovo: A 'Good' or 'Bad' War?", in *ibid.*

³⁷ Thomas M. Franck, "Lessons of Kosovo", in *ibid.*

³⁸ Noam Chomsky succinctly points out that "One choice, always, is to follow the Hippocratic principle: 'First, do no harm.'" Chomsky, "The Current Bombings: Behind the Rhetoric" [http://www.zmag.org/chomsky/articles/9903-current_bombings.htm].

framework of the rule of law. The NATO action makes us take seriously the statement by US Secretary of State, Madeleine Albright that NATO is acting "within the law to uphold the law."³⁹ The legitimacy that works in such a rule of fundamental law over law comes out of the ethics of responsibility as well as the ethics of intention. We all know that NATO countries now have, and will have, difficulty in maintaining political stability in Kosovo. But NATO cannot be exempt from political responsibility, even if it is from legal duties, of keeping peace there in a foreseeable future. A commentator rightly says in observing the current situation in Kosovo that "Bombs are not the solution but the creation of an obligation."⁴⁰ "The UN defends and polices Kosovo. It imposes and collects the taxes, makes the law, appoints the officials and runs the public services from prisons to schools. This is an unprecedented constitutional role for the UN, and an unprecedented and extremely challenging test of the ability of the international community to take the place of a government which has abused its own citizens in the way the Milosevic government did in respect of the majority population of Kosovo. It is not an exaggeration to say that a new type of international responsibility is on trial."⁴¹

NATO is committed to a construction of the rule of fundamental law over law in order to sustain the legitimacy of their action.

Concluding Remarks: Liberal Legitimacy, Just War and Positive Peace

We have so far examined some incoherent self-descriptions of the intervention by NATO leaders and the problems involved in understanding the action. I make a distinction political legitimacy and legal justification, and pointed out that NATO trembled in a gray area between them. Also, once self-legitimization reaches the point of a just war theory, the superiority of political legitimacy becomes evident. However, in the light of the ethics of responsibility, not of intention, the NATO action has only dubious legitimacy.

The issue of legitimacy not only relies on legal technicality, but also on political intention as well as political responsibility. And the incident of NATO's war against FRY shows that what NATO leaders call "the international community", a bulk of countries apparently led by the United States and its Western allies, is cultivating a precedent that interventions based upon fundamental values are permissible. A just war or humanitarian war was waged according to the legitimacy of liberal values.⁴²

This incident would eventually affect the concept of peace. Since the end of the Second World War, the concept of peace has been broadly interpreted and applied. The United Nations does not only deal with security affairs, but also economic and social affairs, all of which are understood to contribute to peace. Johan Galtung's famous distinction between negative and positive peace explains this trend, because the sense of positive peace cannot be achieved without value-judgement about economic and social conditions. It is rather familiar nowadays to claim that the protection of human rights is part of the effort for peace-building. A just war is conceivable under the premise of positive peace, because a war for fundamental values of human rights is then a legitimate war. This dramatic change in the discourses of war and peace in the contemporary world was in this sense promised in the emancipation of the concept of peace from negative understanding as the absence of war and the pursuit of positive peace as the realization of human values.

The NATO intervention seems to be intended to advance a broader sense of peace regardless of procedural rules of international law. Peace may be promoted by a just war in the name of the international community of fundamental values. The political application of the rule of

³⁹ "Secretary of State Madeleine K. Albright Remarks at a Dinner Hosted by the American Bar Association - Central and East European Law Initiative, in Honor of Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, Washington, DC, April 5, 1999," [<http://secretary.state.gov/www/statements/1999/990405a.html>].

⁴⁰ Flora Lewis, "The Kosovo Mission of the United Nations Is Being Left to Fail," *International Herald Tribune*, March 10, 2000.

⁴¹ Foreign Affairs Select Committee, *Fourth Report* [<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2815.htm#n450>].

⁴² As a study of legitimacy as liberal order, see John Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (London: Macmillan, 1998).

fundamental law over law could be a means to achieve positive peace in the future. In other words, political legitimacy of "just war" like the NATO action in Serbia relies on the achievement of such peace. If traditional international law is mainly concerned with negative peace among nations, the post-Cold War intervention by NATO creates room for a new relationship between political legitimacy, just war, and positive peace.

There was a gap between security and humanitarian needs, as shown by the gray area between the traditional legal framework and the Western ethical politics. However, under the circumstances where negative and positive peace are not perceived to be demarcated, one could point out that "the longer-term and more important objective of avoiding civil war had to yield precedence to the immediate requirement to bolster NATO credibility by punishing Milosevic for taking issue with its demands."⁴³ MccGwire points out that the precedence of image over substance in the real world of politics led to the description of "humanitarian intervention" by NATO leaders, which he says "really grotesque".⁴⁴ NATO's simultaneous pursuit of two objectives, in my words, long-term negative peace and immediate humanitarian concerns, were not fully compatible. But the leaders of NATO believed, or behaved as if they believed, that the two were inseparable and exist as the one problem, as Blair insisted that national interests demand humanitarian war.

What is intrinsically political and problematic under such a circumstance is the fact that this trend has been enthusiastically facilitated by the Western allies. This does not mean that the values of human rights and humanitarianism are simply Western, and other civilizations do not respect such values. Nevertheless, it is also true that NATO was "determined to prevail" in the world where such fundamental values may override legal provisions. The West claims to be the protector of those values and takes pride in such a position. It is the Western allies, not others, that politically link those values to their prestige in international society. The responsibility they are taking may deserve such a high status in politics of legitimacy. But when they fail, they will risk the legitimate ground on which they are constructing a new world order.

⁴³ Michael Mccgwire, "Why Did We Bomb Belgrade?," *International Affairs*, vol. 76, no. 1, January 2000, p. 20.

⁴⁴ *Ibid.*