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Operation Allied Force and the Legal Basis for Humanitarian Interventions

ROBERT TOMES

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On 24 March 1999, NATO initiated Operation Allied Force with the following objectives: stop the Serb offensive in Kosovo, force a withdrawal of Serb troops from Kosovo, allow democratic self-government in Kosovo, allow a NATO-led international peacekeeping force into Kosovo, and allow the safe and peaceful return of Kosovar Albanian refugees.[1]

From an international law perspective, Operation Allied Force garners mixed reviews. It was at once a violation of the principles of nonintervention and nonaggression, a new customary law precedent supporting the use of military force for humanitarian reasons, and a case study on the use of force by regional organizations without UN Security Council authorization. Allied Force will undoubtedly receive a great deal of attention from international relations scholars, foreign policy analysts, and others interested in the ramifications for global politics of NATO's bombing campaign. On the one hand, liberal internationalists are likely to applaud intervention to enforce human rights norms. On the other hand, ethicists, just war scholars, and noninterventionists will undoubtedly devote considerable time and effort to criticizing its legitimacy. Regardless of these academic arguments for or against intervention, the fact remains that few recourses are available to policymakers seeking to halt destabilizing ethnopolitical violence.

This article reviews international law arguments against NATO's bombing campaign, suggests that the operation should be considered legitimate, and concludes with a *jus cogens* argument--similar to a natural law argument--in support of intervention to stop gross violation of human rights.

Ethnopolitical Conflict as a Justification for Intervention in Yugoslavia

Why did NATO intervene in Yugoslavia? Like most important foreign policy decisions, intervention was based on a number of factors. Chief among them was the desire to contain Serbian military power and to stop Operation Horseshoe, Milosevic's plan to drive all or most Albanians out of Kosovo. A related reason for intervention may have been European fatigue with "Balkan crises." For years security crises in the Balkans have threatened regional peace and stability. An argument can be made that the Kosovo crisis was only the latest in an ongoing conflict characterized by Serbian nationalism and aggression.

Russia perceived Allied Force to be an example of NATO's attempt to change the organization's mission. Rather than collective defense, NATO would now employ its military forces to remake Europe in its own image. NATO enlargement, Moscow argued, would be complemented by NATO's increased willingness to bomb non-NATO members into accepting NATO's economic and political demands.

Other justifications could be added. Arguably the most important and compelling reason to intervene was to protect Yugoslavia's largest ethnic minority, the Kosovar Albanians, who had been systematically repressed by Serb forces since Milosevic renounced Kosovo's autonomous status in 1987. In this sense, Allied Force was the first prolonged air campaign waged specifically by a third party to manage an ethnopolitical conflict. It was, at least to some degree, successful, a fact that may lower the threshold to use military force in similar cases.

For Ted Robert Gurr, ethnopolitical conflicts involve "groups whose ethnicity has political consequences, resulting either in differential treatment of group members or in political action on behalf of group interests." [2] What strategies

work to facilitate the management of such conflicts? The best course of action is to prevent gross human rights violations before they occur, not waiting until after the killing starts and then bombing a country into submission.

The following options exist to manage ethnopolitical conflict; they are listed in rough order of magnitude from the least to the greatest in terms of resources and level of conflict:

- Preventive diplomacy
- Informal demarche/public statements
- Formal condemnation
- Ad hoc diplomatic missions
- Threaten to withdraw recognition
- Fact-finding missions
- Suspend from international organizations
- Sanctions/embargoes
- Limited show of force
- Establish safe havens for refugees
- Threaten intervention
- Conduct reconnaissance overflights
- Establish observer missions of borders
- Withdraw diplomatic missions
- Apply limited force
- Increase application of force/military intervention
- Establish international trusteeship
- Establish post-conflict occupation to monitor cease-fire
- Rebuild society and establish new government
- Long-term monitoring[3]

From a practical standpoint, it is unlikely that policymakers can incrementally escalate up this scale of conflict management. The key to successful conflict management is knowing when a situation is ripe for the implementation of one strategy or more, and how to best influence the target's decisionmaking process.

When diplomacy fails in the face of increasing violence and the international community cannot act within the boundaries of international law, questions faced by policymakers include: When is the use of military force authorized? When is it justified? When is it "just?" Should the international community withhold military action to forestall ethnic cleansing simply because the UN Security Council cannot agree that there is an existing threat to the peace? Or, should the international community fall back on customary international law (and previous state practice), violate the principles of nonintervention and nonaggression, and act to stabilize regional security threats before they escalate further?

Using armed force to moderate a state's policy toward indigenous ethnic minorities is not, of course, the most efficient strategy to manage regional conflict. Unfortunately, it may be the international community's only recourse to prevent gross violations of human rights and the disruption of regional political and economic affairs. Indeed, recent interventions bear witness to the international community's recognition of the necessity to use military force when other means proved unworkable--e.g., Iraq (1991), Somalia (1992), Yugoslavia (1992), Rwanda (1993), and Haiti (1993).

Humanitarian Intervention

Sean D. Murphy defines intervention as "the threat or use of force by a state, group of states, or international organization for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights." [4] Early doctrines of humanitarian intervention, expounded by Hugo Grotius and others in the 17th century, argued that the use of force by one or more states was a lawful recourse to halt the mistreatment of citizens by their sovereign. As did Grotius, today's humanitarian interventionists seek to erode international law prohibitions against interfering in the domestic affairs of a sovereign state and prohibitions against the use of armed force.

Aspects of state sovereignty relevant to discussions of intervention include territorial sovereignty (absolute authority over all persons and actions within a state's territory), personal sovereignty (absolute authority over all of its citizens, including those abroad), and jurisdiction (authority over legal claims, including juridical and legislative power). To many, state sovereignty over internal affairs and absolute authority over citizens renders any intervention abhorrent even with a UN Security Council resolution.

Is there some threshold at which human rights violations become unacceptable and a state's sovereignty no longer precludes intervention? Is it the 500th slain ethnic citizen or the next refugee after 10,000 have been forced to leave home that triggers intervention or makes it legitimate? Other thresholds for intervention seem to exist--they are somewhat less subjective in nature, but not by much.

An important example is the case of government collapse, which was one justification cited by the Economic Community of West African States (ECOWAS) when it chose to intervene in Liberia. The ECOWAS case arguably set a precedent for intervention when a government is no longer capable of protecting its citizens or able to govern. US intervention in Haiti offers another case where intervention was premised partly on the restoration of a legitimate government.

Humanitarian intervention is based on the belief that individuals should be the true subjects of international law, not states. A corollary is the idea that state sovereignty and state jurisdiction over its internal affairs are nullified if the state violates the rights of its citizens or fails to govern effectively.

Humanitarian intervention is, if nothing else, a deliberate check on the power of sovereign states in favor of less formal human rights norms. This check on state power stems from a belief that customary norms, or common law rights, contravene the formal rights accorded to states (e.g., the inviolability of territorial sovereignty).

Contrary to most arguments in favor of nonintervention, an argument exists that the UN Charter and other sources of formal international law establish a legitimate basis for intervention to uphold human rights norms. This seems to be the argument in a 1991 report by the Secretary General of the United Nations. It is cited at length below and will be referred to in later sections because it encapsulates the dilemma facing the international community: Which principle of international law--nonintervention or the protection of human rights--is more important in cases where the UN cannot act?

It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is threatened. . . . The case for not impinging on the sovereignty, territorial integrity, and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations. . . . What is involved is not the right of intervention but the collective obligations of States to bring relief and redress in human rights emergencies.[5]

Aggression and the Legalist Paradigm

In his discussion of "Law and Order in International Society," Michael Walzer summarizes six propositions that encompass the "legalist paradigm" encompassing the law of aggression:

1. There exists an international society of independent [and equal] states.
2. This international society has a law that establishes the rights of its members--above all, the rights of territorial integrity and political sovereignty.
3. Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
4. Aggression justifies two kinds of violent responses: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of the international society.

5. Nothing but aggression can justify war.

6. Once the aggressor state has been multilaterally repulsed, it can also be punished.[6]

Underscoring these propositions are international treaties and declarations prohibiting the use of force by one state against another and prohibiting a state from intervening in another's internal affairs.

The primary source of international law discussed in this article is the UN Charter, which was ratified in 1945 in the aftermath of World War II. In establishing a new international legal regime, the Charter's main objective was to prevent war by making the use of force illegal.

For most of the UN's 50-year history, the Cold War defined the boundaries of UN action. The veto power of the five permanent members of the Security Council stymied the organization from acting to stabilize regional conflicts or to stop human rights violations. Indeed, direct involvement in regional conflicts by the Security Council's five permanent members meant that issues relating to ethnopolitical conflict--issues the international community would urge the Security Council to address today--were all but ignored during the Cold War.

Arguably this is no longer the case. However, this does not mean that intervention is any more probable after the Cold War. Nor does it mean that intervention for any reason, including humanitarian, is more palatable to those adhering to the six propositions embodying Walzer's legalist paradigm.

While politically motivated vetoes might weaken the UN Security Council's ability to reinforce international norms, some would argue that excessive unilateral or multilateral intervention would so weaken international law norms of nonintervention and nonaggression that the state system on which the UN is built would fragment and dissolve.

Nonintervention

What prohibitions exist against armed intervention to stop or roll back human rights violations? The first and most important prohibition arguing against intervention, even to prevent human rights violations, is Article 2(7) of the UN Charter. It embodies the UN's general stance on uninvited interference in the domestic affairs of a state:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The principle is straightforward: the UN as a matter of principle will not intervene in the domestic affairs of any state. This so-called principle of nonintervention upholds state sovereignty and reinforces the principle that the only true "subjects" of international law are state entities (in other words, individuals or groups are not the proper subjects of international law).

Ambiguity surrounding the UN Charter's prohibition against intervention was addressed by the UN General Assembly in its 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Declaration on Intervention). The declaration, passed without any dissenting votes and only one abstention (Great Britain), asserts:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural element, are condemned;

2. No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

These principles were reiterated in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (the so-called Friendly Relations Declaration), which has the status of a unanimous agreement because it passed without a vote. The 1970 declaration was intended to give the 1965 principles legal force and is widely seen as an authoritative interpretation of the UN Charter's statements on intervention.

UN Charter Chapter VII Enforcement Measures

What about Article 2(7)'s mention of Chapter VII "enforcement measures?" One relevant passage in Chapter VII is Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

This Article locates within the Security Council sole authority to make decisions concerning the existence of threats to the peace or acts of aggression. It reifies the authority of the Security Council to decide when a human rights violation constitutes a violation of international law. Reserving this right for the Security Council effectively limits UN intervention to those cases where Security Council consensus exists, which again questions the moral fortitude of the international community when it ignores human rights violations simply because no Security Council consensus is achieved.

Proponents of the requirement for a formal legal authorization to intervene argue that political agreement in the Security Council cannot be sidestepped unless a General Assembly vote can be taken to legitimize an intervention. Those in favor of more liberal interventionist policies are right to question the logic of inaction based on the uncertainty of Security Council voting. After all, Security Council members base their voting on factors wholly unrelated to the issue itself--is that the international norm we want to use as the foundation for human rights-based interventions?

The definition of what constitutes a threat to peace or security (and thus the decision to intervene) is also first and foremost a subjective political matter. This renders the decision to authorize humanitarian intervention dependent upon a process that is not oriented on humanitarian issues. Protecting the rights of ethnic minorities facing state-sponsored ethnic cleansing or worse should not be a matter of political whim. However, if a rationale for justifying preemptory humanitarian intervention can be established, it must be based on more than an argument discrediting the Security Council voting process. Therefore we must probe further into the UN Charter:

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Articles 41 and 42 establish that in certain cases intervention to restore peace and security is justified, again contingent on a decision by the Security Council that a situation or state action is a threat to peace and security. There are exceptions, as described in Article 51:

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

Thus explicit exceptions to the prohibition on the use of force by one state against another exist in the form of a right to collective self-defense and a right to collective security. Herein lies further erosion of the formal argument against the prohibition on the use of force, although the erosion is limited to specific situations.

These exceptions require an existing threat to a state's peace and security. Was there one in the case of Kosovo? Macedonia and Albania invited NATO forces onto their territories to prevent Milosevic from widening the conflict and to limit the destabilizing effect of the massive refugee flight. That fact allows one to make a "collective right to self-defense" argument for the NATO buildup in those countries. But the argument cannot be extended to NATO intervention in Kosovo or the bombing of Belgrade.

International Law and the Use of Force

Despite arguments against intervention, Article 2(7) of the UN Charter establishes that the prohibition against intervention is not absolute. In stating that nonintervention should not "prejudice any enforcement measures taken in accordance with Chapter VII," the UN Charter promotes the idea of community will (in the form of the Security Council) over state sovereignty. Because the Security Council has invoked Chapter VII when dealing with threats to the peace concerning human rights abuses (e.g., Kurds in Iraq, Bosnia, Haiti), an argument can be made that Security Council actions have promoted a doctrine of collective humanitarian intervention.

Opponents of humanitarian intervention in the absence of UN Security Council sanction contend that the most important international legal prohibition against intervention concerns the use of force. Article 2(4) of the UN Charter states:

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

It has been argued that Article 2(4) limits the prohibition against the use of force to only those cases where a state's "territorial integrity" or "political independence" is at risk, concluding that unless a portion of a state's territory is permanently lost the article does not apply. But this rigid interpretation of 2(4) so weakens the Article, and the fundamental principle of state sovereignty on which modern international law rests, that it should not be taken seriously. It also ignores what has been called the Article's "center of gravity": the use of force is prohibited in cases in which it is "inconsistent with the Purposes of the United Nations." [7]

Indeed, the prohibition against the threat or use of force is an important constraint against aggression, and is as crucial to international norms protecting human rights as the requirement to obtain UN approval before engaging in armed intervention.

Also addressing the use of force is Article 2(3), which states:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

What are the "Purposes of the United Nations" mentioned in Article 2(4)? The most relevant to this discussion are the purposes stated in Article 1(1) of the Charter:

To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

As these several statements demonstrate, there is a threshold running throughout the UN Charter that must be crossed

before the Security Council acts. There must be a legitimate "threat to the peace, breach of the peace, or act of aggression." In other words, the UN can act only when there is agreement concerning a legitimate threat to peace or security, a condition that renders UN intervention a matter of judgment and sentiment rather than one of objective community interest.

But critics of the UN Security Council system rightly point out that this renders all collective responses to human rights violations, and the collective management of ethnopolitical conflict, a question of relative, or situational, ethics in the form of Security Council voting.

Threats to the Peace and Intervention

In practice, UN resolutions authorizing an intervention to stop human rights violations center on the need to counter "a threat to peace and security." For many this means that the UN Security Council has not established a clear precedent that human rights violations are sufficient in and of themselves as a basis for intervention; thus, no norm exists for intervening to stop human rights violations.

Further, by premising intervention on a "peace and security" declaration, the UN has complicated arguments for or against intervention with yet a further subjective decisionmaking process: When is there a threat to the peace? In the case of Kosovo, a threat to regional peace was clearly identified by bordering states. The mass flight of refugees surely would have been destabilizing had the international community failed to respond. In addition, NATO spokesmen would undoubtedly claim that a broader justification for NATO intervention in Yugoslavia did exist.

Because NATO bombing was portrayed as being necessary to prevent a threat to regional peace and security (e.g., uncontrolled refugee flight, drawing Albania into the conflict), and because the UN did support attempts to resolve conflict in Bosnia, it can be argued that a threat to the peace was identified as early as 1991 by the Security Council itself.

Continuing this argument suggests that the NATO intervention was justified precisely because the UN recognized that the larger (or successive) crises in the Balkans threatened regional peace. Failure to act because of tangentially related political dynamics involving NATO-Russia and US-China relations should not be the final factor in weighing the "justness" of NATO's actions.

In general, an argument can be made that moral obligations, if they in fact exist, should not be determined by votes in the Security Council. If human rights violations are a legitimate reason for claiming a threat to peace in one region, then they must be in others. Of course, this begs the question as to why NATO or the United States fails to act in all similar cases, a question that is answered by looking at other motives for intervention not addressed in this article.

It may be that the international community, which seems willing to give up progressively larger shares of state economic sovereignty, is willing to accept a more liberal approach to intervention in cases where human rights abuses threaten regional stability. Indeed, the international community needs to reassess humanitarian intervention without Security Council authorization as a legitimate means to prevent destabilizing human rights violations if the bedrock of international law is going to mature. Seven hundred thousand Kosovar refugees--and an unknown number of dead, raped, maimed, and tortured--provide a sufficient reminder that humanity is as brutal and cruel as ever.

There is a paucity of evidence or material in international law to support Allied Force. From a formal legal standpoint, NATO's actions were illegitimate. From a natural law standpoint they were more legitimate, but still questionable because of the physical and emotional harm the bombing had on noncombatants--the Serbian citizens.

A useful starting point to rebut arguments against any humanitarian intervention not sanctioned by the UN is to explore further whether the UN Charter contains any purposes or principles that imply an obligation to intervene in cases where gross human rights violations are imminent or ongoing. The first such statement is found in the Charter's preamble, which lists the following among the UN's purposes:

. . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . [and] to establish conditions under

which justice and respect for the obligations arising from Treaties and other sources of international law can be maintained.

As stated above, appeals to international norms have been used to justify intervention in pursuit of the purposes stated in the UN Preamble and Charter. There are numerous "other sources of international law" promoting the existence of an obligation to uphold human rights, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These and other customary international law arguments contend that intervention on behalf of individuals or groups suffering maltreatment is in fact justified, since the moral fabric of the international community suffers if states are allowed to violate basic human rights. In other words, there can be no state rights without individual rights.

These same arguments use the UN Charter, and past practice by the Security Council, to demonstrate that the UN has established the practice of intervention as an international norm, although past practice does include Security Council approval. However, as mentioned previously, it is specious to argue that the political act of securing Security Council consensus is the pivot on which humanitarian intervention should hinge.

Conclusion: Is there a "Jus Cogens" Argument to be Made?

How does the preceding discussion illuminate the use of force as a method to manage ethnopolitical conflict? One thing is clear: existing international law as portrayed in the "legalist paradigm" is prejudicial to humanitarian intervention without a UN resolution. However, if Allied Force, or the idea of Allied Force, is legitimized after the fact by UN resolutions and international support for NATO's actions, it may be that international law is in need of adaptation. Perhaps there is a *jus cogens* argument applicable to cases where the UN cannot act to prevent gross human rights violations.

Jus cogens arguments, which are similar to natural law arguments, are loosely defined as "compelling law" arguments: "*Jus cogens* is a norm thought to be so fundamental that it invalidates rules consented to by states in treaties or customs." [8]

Article 53 of the Vienna Convention on the Law of the Treaties refers to *jus cogens*, using its English translation "peremptory norm":

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. . . . [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States . . . as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 63 of the Vienna Law of Treaties states:

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norms becomes void and terminates.

Jus cogens arguments in favor of humanitarian intervention to prevent ethnic cleansing and gross violations of human rights have not yet been offered to invalidate international law prohibitions against the use of force or intervention in a state's domestic affairs, primarily because doing so would require wholesale agreement by the majority of states encompassing the international community. It would, for some, weaken prohibitions against intervention and lead to violations of sovereignty.

There is also the danger that a humanitarian intervention justification for the use of military force would be abused--recall that Hitler justified his invasion of Czechoslovakia on the grounds that he was protecting German nationals from mistreatment.

A *jus cogens* argument may, however, be the only route to preventing human rights violations within the international conflict management system structured on UN Security Council resolutions. Military force is not and should never be the best way to manage and resolve ethnopolitical conflict--bombing cities indiscriminately cannot be legitimized.

Unfortunately, until rogue regimes and genocide are things of the past, military intervention may be the only recourse when diplomacy fails, human rights are being violated, and regional peace and stability are threatened.

NOTES

The author thanks Rhonda Armstrong and Ted Gurr for their comments and suggestions.

1. Allied Force objectives cited on US European Command official Allied Force website, <http://www.eucom.mil/operations/af/>.
 2. Ted Robert Gurr, *Peoples Versus States: Ethnopolitical Conflict and Accommodation at the End of the 20th Century* (Washington: US Institute of Peace Press, forthcoming), January 1999 revision, ch. 3, p. 3.
 3. List developed and adapted from conversations with Professor Ted Robert Gurr.
 4. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: Univ. of Pennsylvania Press, 1996), pp. 11-12.
 5. Secretary General of the United Nations Report on the Work of the Organization, UN Document A/46/1, September 1991, pp. 10-11. Cited in Louis Henkin et al., eds., *International Law: Cases and Materials* (St. Paul: West Publishing, 1993), p. 982.
 6. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2d. ed.; New York: Basic Books, 1977), pp. 61-62.
 7. See Yoram Dinstein, *War, Aggression, and Self Defense* (2d. ed.; New York: Cambridge Univ. Press, 1994), pp. 84-85.
 8. Anthony D'Amato, ed., *International Law Anthology* (Cincinnati: Anderson Publishing, 1994), p. 115.
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Reviewed 8 February 2000. Please send comments or corrections to carl_Parameters@conus.army.mil