Deterioration of Limits on the Use of Force and its Perils: A Rejection of the Kosovo Precedent

Ronald C. Santopadre
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RONALD C. SANTOPADRE*

INTRODUCTION

The United Nations Charter was designed to represent a higher ideal.1 Forged from the unprecedented destruction of the Second World War, the Charter was created to restrict recourse to the use of force in international affairs.2 However, the Charter's authority to restrain the use of force has been seriously questioned.3 Whereas human rights proponents once espoused the progressive humanitarian ideals of the Charter, these same advocates now reject its framework, grounded in the doctrine of

* J.D. Candidate, St. John's University School of Law, June 2004; B.A., Fordham University, 2001.

1 Michael J. Glennon, How War Left the Law Behind, N.Y. TIMES, Nov. 21, 2002, at A37 (stating the Charter was designed to be above the political realm); see also S. James Anaya, Essay, The Capacity of International Law to Advance Ethnic or Nationality Rights Claims, 75 IOWA L. REV. 837, 837 (1990) (explaining that nondiscrimination ideals are firmly embedded in the Charter).

2 The preamble to the U.N. Charter delineates the principles upon which it was founded:
   to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and 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.


3 See Glennon, supra note 1 (stating governments no longer consider the Charter's provisions restricting the use of force binding); see also David Wippman, Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict, 27 COLUM. HUM. RTS. L. REV. 435, 463 (1996) (noting legal scholars have been debating whether the Security Council has exceeded its authority under the Charter in attempts to reach international peace).
sovereignty. On March 24, 1999, the North Atlantic Treaty Organization ("NATO") commenced a seventy-eight day bombing campaign against the Federal Republic of Yugoslavia ("FRY"), which had neither threatened nor attacked any member country. By this action, the 19 members of NATO fashioned a new international legal precedent facilitating recourse to the use of force without Security Council authorization. Under the guise of humanitarian intervention, the war in Kosovo has

4 See Linda A. Malone, Kosovo: How Myths and Truths Started a War, 22 HOUS. J. INT'L L. 585, 591 (2000) (stating support for human rights and antipathy towards violence, once inextricably linked, no longer go hand in hand: today the hawks who disregard the Charter's restrictions on force and support humanitarian intervention are the former doves who favored the Charter's limits on the use of force).


6 See Aaron Schwabach, The Legality of the Nato Bombing Operation in the Federal Republic of Yugoslavia, 11 PAGE INT'L L. REV. 405, 410 (1999) (discussing NATO's claim of the collective right of anticipatory self-defense). The campaign against the FRY is unprecedented in another sphere: not for NATO's stated humanitarian motives, but for its military tactics. Extraordinarily, NATO sustained zero combat casualties during the operation. The so-called "zero-casualty" war was an important feature in NATO's military strategy. Avoiding causalities was primarily achieved through the use of high altitude aerial bombing and the pledge not to use ground troops. These elements of the war will be developed in greater depth below, in part V infra. NATO policy makers believed that a humanitarian intervention in Kosovo would not be possible without popular support, and this popular support for the war would be best sustained by avoiding a high casualty combat situation on the ground in Kosovo. See David Wippman, Kosovo and the Limits of International Law, 25 FORDHAM INT'L L.J. 129, 146 (2001). For a discussion on the precision weaponry used and the little risk to NATO pilots, see Andreas Laursen, NATO, the War Over Kosovo, and the ICTY Investigation, 17 AM. U. INT'L L. REV. 765, 766 (2002).

7 See Glennon, supra note 1, at A37. Glennon specifically noted the absence of Security Council authorization for the war against Yugoslavia. For a discussion on the Charter's limits, see Madeleine K. Albright, Enforcing International Law, 89 AM. SOC'Y INT'L L. PROC. 574, 575 (1995). Secretary Albright stated the role of the Security Council "lies near the heart of international politics today." Id. Secretary Albright continued: "We are privileged to live at a time when the enforcement of international standards of behavior through the actions of the Security Council is more possible, widespread and varied than it has ever been. It is also perhaps more necessary than it has ever been (emphasis supplied)." Id. Despite her statement, Sec. Albright was one of the most vocal proponents of waging war against Yugoslavia regardless of a lack of Security Council authorization.

8 See Andreas Laursen, NATO, the War Over Kosovo, and the ICTY Investigation, 17 Am. U. Int'l L. Rev. 765, 766 (2002) (stating NATO's primary justification for the war was on the grounds of humanitarian intervention); see also Medenica, supra note 5, at 348-49. (defining humanitarian intervention as "the doctrine of using force against one state in favor of the citizens of that state without the consent of its government"). Id. at 349. The doctrine can be traced back to the seventeenth century to Hugo Grotius who argued that a nation may intervene by the use of force in the affairs of another state to protect its oppressed citizens. He contended that there is a common humanity that supercedes any deference to national sovereignty. The doctrine fell into disfavor in the nineteenth century with the rise of the nation state and appeared to be eradicated entirely with the creation
essentially turned international law under the Charter on its head.\textsuperscript{10}

Western leaders and many human rights advocates hailed NATO’s military action against the FRY as the dawn of a New International Order, where antiquated notions of state sovereignty would succumb to a higher value: the protection of human rights.\textsuperscript{11} During the debate leading up to the war in Iraq, American leaders have pointed to the Kosovo precedent as sufficient international legal justification to initiate an attack.\textsuperscript{12}


10 \textit{See Glennon, supra note 1 (stating the Kosovo precedent has made it moot to seek Security Council authorization for the use of force); see also} Julie Mertus, \textit{The Imprint of Kosovo on the Law of Humanitarian Intervention}, 6 ILSA J. INT’L & COMP. L. 527, 529 (2000) (stating that international law does not support the means of force selected in the Kosovo campaign); Ved P. Nanda, \textit{NATO's Armed Intervention in Kosovo and International Law}, 10 USAFA J. LEG. STUD. 1, 2 (1999/2000) (quoting Professor Bruno Simma, who opines that "only a thin red line separates NATO's action on Kosovo from international legality").

11 \textit{See Antonio Cassese, Ex injuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?,} 10 EURO. J. INT’L L. 1, \textit{available at} http://www.ejil.org/journal/vol10/No1/com.html (last modified May 11, 1999) (last visited Aug. 26, 2003) (emphasizing that Kosovo was a desirable departure from international law and is justified on ethical grounds because it would lead to a greater protection of human rights). Professor Cassese, Former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Presiding Judge, Trial Chamber II, of the ICTY, stated that Kant’s prophecy that a "cosmopolitan or world law” would one day emerge has become reality. Kant wrote that “the narrower or wider community of all nations on earth has in fact progressed so far that a violation of law and right in one place is felt in all others.” \textit{Id.} at n.4. Others have speculated that the Kosovo intervention might set a new international norm as it simultaneously breached current international law. \textit{See Jonathan I. Charney, Anticipatory Humanitarian Intervention In Kosovo,} 32 VAND. J. TRANSNAT’L L. 1231, 1242 (1999).

12 \textit{See Iraq Briefing,} BBC News, \textit{available at} http://news.bbc.co.uk/2/hi/middle_east/2839695.stm (Mar. 11, 2003) (stating that although the U.N. Secretary General Kofi Annan has stated war with Iraq would violate the U.N. Charter, the Americans and the British have pointed to the Kosovo intervention as precedent to justify action in contravention of the Charter); \textit{see also} Hurst Hannum, \textit{Bellum Americanum,} 27
Security Council authorization has become an almost frivolous, political act after Kosovo.\(^{13}\)

This note argues against further deterioration of limits on the use of force, as embodied in the U.N. Charter. Despite NATO's stated humanitarian purposes, the Kosovo war must be judged by its overall impact on the long-term protection of human rights and its effect on the stability of international affairs. The NATO bombing of the FRY did little to advance the human rights of those living in Kosovo and in fact caused massive destruction and the death of many civilians.\(^{14}\)

The Kosovo precedent also seriously undermined the legitimacy of the United Nations by setting a new standard whereby states can resort to force outside the U.N. in an \textit{ad hoc}, unprincipled manner.\(^{15}\)

The lessons of Kosovo show the importance of maintaining the integrity of the U.N. system as the foundation of international political system.\(^{16}\)

The \textit{raison d'etre} of NATO's deployment of the latest precision weaponry against the FRY was illuminated by Vaclav Havel, the Czech President, in his proud statement to the Canadian Senate and House of Commons. Kosovo, Havel declared, was "the first war that has not been waged in the name of 'national interests,'..."

\(^{13}\) See Hannum, supra note 12, at n.2, (stating that Secretary of State Colin Powell explicitly mentioned in an October 2002 interview with National Public Radio that the NATO bombing of the FRY is sufficient legal justification to bomb Iraq, even in the absence of Security Council Authorization); see also Glennon, supra note 1 (noting Colin Powell's response when asked if the Bush administration will seek Security Council approval for an Iraq war: "The president has authority, as do other like-minded nations, just as we did in Kosovo"). See generally Suzanne Nossel, \textit{Battle Hymn of the Democrats}, 27 FLETCHER F. WORLD AFF. 71, 75 (2003) (discussing how the NATO action in Kosovo and the second Gulf war in Iraq have pushed the U.N. to sidelines).

\(^{14}\) See discussion \textit{infra} Part V (detailing NATO's military campaign in Kosovo).

\(^{15}\) See Barry Schweid, \textit{U.S. Gets Scant New Support for Iraq War}, A.P. ONLINE (Mar. 7, 2003) \textit{available at} 2003 WL 14960993 (stating that White House spokesman Ari Fleischer referred to the bombing of Yugoslavia as sufficient international legal precedent for waging war on Iraq without Security Council backing); see also Yoo, supra note 9, at 1675-76 (2000) (stating that the Kosovo intervention will likely set the paradigm for future uses of force). See generally Allan Gerson, Remarks at the Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law (Apr. 17, 1991) \textit{The Gulf War: Collective Security, War Powers and the Law of War}, 85 AM. SOC'Y INT'L L. PROC. 1, 4 (1991) (stating the alternative to international law under the U.N. Charter is an international system based on power politics); Andrew Sullivan, \textit{So Who Exactly Did Start This War?}, LONDON TIMES, Mar. 23, 2003, Sect. 4 (stating "the Clinton administration also created the clear precedent for the war we are witnessing today: Kosovo...the Kosovo campaign was the first and last test of a bizarre new world coalition, the coalition that would collapse in the first two months of 2003").

\(^{16}\) See discussion \textit{infra} Part V (noting results of military operations in Kosovo and fallout surrounding these operations).
but rather in the name of principles and values... [Yugoslav
President Slobodan] Milosevic does not threaten the territorial
integrity of any member of the alliance. And yet the alliance is at
war.\textsuperscript{17} For NATO, the war over Kosovo symbolized a new era
where states could no longer commit atrocities while hiding
behind their sovereignty.\textsuperscript{18} Although NATO leaders and human
rights activists applauded the war as the birth of this New World
Order, praise for the war was not universal.\textsuperscript{19} Opposition was
politically diverse, as questions surfaced over NATO’s stated
humanitarian objectives.\textsuperscript{20} Some notable opponents include
Alexander Solzhenytsin,\textsuperscript{21} Noam Chomsky,\textsuperscript{22} Patrick
Buchanan,\textsuperscript{23} Harold Pinter\textsuperscript{24} and Ramsey Clark.\textsuperscript{25}

\textsuperscript{17} Richard A. Falk, \textit{NATO’s Kosovo Intervention: Kosovo, World Order, and the Future
the world is witnessing “the end of the nation-state.” He added that the “enlightened
efforts of generations of democrats, the terrible experience of two world wars... and the
evolution of civilization have finally brought humanity to the recognition that human
beings are more important than the state.” \textit{NOAM CHOMSKY, THE NEW MILITARY
HUMANISM: LESSONS FROM KOSOVO} 87-88 (1999).

\textsuperscript{18} See Edward D. Re, \textit{The Universal Declaration of Human Rights and the Domestic
Courts}, 31 SUFFOLK U. L. REV. 585, 587 (1998) (stating that the “the very notion of the
existence of human rights of individuals necessarily implies a restriction or limitation
upon the sovereign power of states and governments”). Former Secretary of State Henry
Kissinger observed:

Whatever one’s view of the obsolescence of the doctrine of national sovereignty, the
combination of flagrant disregard of it by an alliance of democracies and its truculent
diplomacy amounted to a departure from the very international norms on which those
democracies has insisted throughout the Cold War.

\textit{HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR
THE 21ST CENTURY} 263 (2001). For a discussion of NATO’s stated objectives in entering
Kosovo, see Hannum, supra note 13, at 91.

\textsuperscript{19} See e.g. \textit{PATRICK J. BUCHANAN, THE DEATH OF THE WEST} 242 (2002) (stating,
“NATO has been converted into a neoimperialist bloc, which now asserts a sovereign right
to attack and invade small nations like Serbia in the name of democracy and human
rights); Kissinger, supra note 18, at 257 (explaining his reluctant support of the war not
for goals it embodied but rather fearing potential deleterious effects of military failure).

\textit{See generally Michael Mandel, Politics and Human Rights in International Criminal Law:
Our Case Against NATO and the Lessons to be Learned From It,} 25 FORDHAM INT’L L.J.
95, 96 (2001) (stating Amnesty International found NATO to have committed war crimes).

\textsuperscript{20} See Mandel, supra note 19, at 100-01 (stating that the war’s skeptics point to the
past military engagements of NATO countries, especially the United States, and find a
long history of interventionism that was not well-suited to protect civilian lives); \textit{see also
John J. Merriam, Kosovo and the Law of Humanitarian Intervention,} 33 CASE W. RES. J.
reasons, and problematic application of such efforts). \textit{See generally Wippman, supra note
6, at 135 (indicating interplay of humanitarian and U.N. Charter, implying Kosovo
conflict was situation where humanitarian efforts did not outweigh U.N. Charter values).}

\textsuperscript{21} The famous Russian writer who survived imprisonment by the Soviets in the
Gulag.

\textsuperscript{22} An American linguist and political activist.

\textsuperscript{23} A senior advisor to Richard Nixon, Gerald Ford and Ronald Reagan.

\textsuperscript{24} Preeminent British playwright. \textit{See Harold Pinter Takes on Nato, BBC NEWS,
The most striking aspect of the Kosovo War is that the bombing was most likely illegal under the current strictures of international law.26 There is no “humanitarian exception” for the use of force under the U.N. Charter.27 This realization has produced a great divergence of opinion among international lawyers and legal scholars about the desirability of NATO's humanitarian intervention, despite its illegality.28 Those in favor of NATO's actions argue that the realities of the modern world and humanity's greater concern for human rights have exposed the deficiencies of the U.N. system, especially its monopoly on the use of force and antiquated principles of sovereignty.29 These scholars state that international law has moved beyond the norms exemplified by the U.N. Charter and should focus more on the morality, rather than the legality of military action against sovereign states.30 On the other hand, many scholars reject


28 See discussion infra Part IV; see also Richard C. Hottelet, Ups and Downs in UN History, 5 WASH. U. J.L. & POLY 17, 24 (2001) (stating the U.N.’s goal is to protect human rights); Tiefer, supra note 26, at 489 (noting difference of interpreting U.N. Charter among scholars).


NATO's actions solely because it bypassed international law. According to the latter view, the U.N. Charter and principles of state sovereignty are the widely accepted foundation of the international system, and the morality of military force is no substitution for its illegality.

Both of these views have merit, but ultimately, the greatest danger rests in the abandonment of the U.N. system, despite apparent deficiencies. Although the Kantian notion of a universal morality has gained widespread acceptance, an emotional response coupled with military force will not necessarily provide a remedy to violations of human rights, and may even exacerbate a humanitarian crisis. As will be

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31 Russia and China view the U.N. Security Council veto as a device to prevent U.S. hegemony. Falk, supra note 17, at 850. Some scholars see the U.N. as the only equalizing factor that weak and poor nations have. Thomas M. Franck, Of Gnats and Camels: Is There a Double Standard at the United Nations, AM. J. INT'L L. 811, 831 (1984). While Western countries can rely on their economic and military dominance, poor countries will fear any contravention of the U.N. Id. Some commentators have noted that although humanitarian intervention may be illegal, support of the theory has been growing. Charney, supra note 17, at 1242.

32 See discussion infra Part IV (noting that involvement may be necessary to prevent continued violation of human rights); see also Lesile A. Burton, Kosovo: To Bomb or Not to Bomb? The Legality is the Question, 7 ANN. SURV. INT'L & COMP. L. 49, 59 (2001) (arguing that since WWII, international law has developed to allow the use of force to prevent human rights violations); Falk, supra note 17, at 850 (discussing theory that NATO's action was necessary to prevent further human rights violations).


34 The Kantian view asserts that violations of human rights in one place are felt in all others. Malone, supra note 4, at 591. Kant also espoused the view that good intentions should frame all actions. James Macdonald & Caryn L. Beck-Dudley, A Natural Law Defense to the Employment Law Question: A Reponse to Richard Epstein, 38 AM. BUS. L.J. 363, 401 (2001). However, he asserted that whatever is correct for one society, may not be correct for all. Heather Leawoods, Gustav Radbruch: An Extraordinary Legal Philosopher, 2 WASH. U. J.L. & POL'Y 489, 504 (2000).

illustrated, NATO's bombing of the FRY illustrates all of the unforeseen and inadvertent dangers that inevitably go hand in hand with the use of military force.\textsuperscript{36} Instead, NATO could have offered more lenient peace terms - which NATO ultimately did after the bombing - before making the decision to go to war in order to get an immediate peacekeeping force on the ground in Kosovo. Finally, even if NATO's intentions were genuinely humanitarian in nature, the military methods employed by NATO neutralized any success the operation may have accomplished.\textsuperscript{37}

I. THE UNITED NATIONS FRAMEWORK

The United Nations is the undisputed source of contemporary international law.\textsuperscript{38} The U.N. Charter and the Universal Declaration of Human Rights are universally considered the foundation of the international order and the primary documents ensuring the protection of human rights.\textsuperscript{39} The U.N. Charter and all Security Council decisions are considered a “higher law”\textsuperscript{40} and

\begin{itemize}
\item \textsuperscript{36} See discussion infra Part V (discussing the unintended consequences of the Kosovo War); see also Siegfried Wiessner & Andrew R. Williard, \textit{Policy-Oriented Jurisprudence and Human Rights Abuses in International Conflict: Toward a World Public Order of Human Dignity}, 93 AM. J. INT'L L. 316, 316-17 (1999) (remarking intervention may actually extend human rights violations). \textit{See generally} Christine M. Chinkin, Book Review, \textit{Human Rights in Global Politics}, 95 AM. J. INT'L L. 472, 476 (2001) (noting that there are many consequences which arise after the decision to intervene is made).
\item \textsuperscript{37} See discussion infra Part V (arguing NATO could have tailored its operations to avoid damage and death to the civilian population); \textit{see also} Charney, supra note 11, at 1247 (asserting Kosovo campaign was not tailored to protect ethnic Albanians in the country); Christine M. Chinkin, \textit{NATO's Kosovo Intervention: Kosovo: A "Good" of "Bad" War?}, 93 AM. J. INT'L L. 841, 841-42 (1999) (discussing affects of NATO bombing on the civilian population).
\item \textsuperscript{38} See Bruno Simma, \textit{NATO's Future "Strategic Concept": From “Out of Area” to “Out of Treaty”?}, EURO. J. INT'L L., available at http://www.ejil.org/journal/Vol10/No1/ab1-3.html#Heading3 (last modified April 26, 1999) (stating that the Charter is comparable to a Constitution of the international community); \textit{see also} Charney, supra note 11, at 1240 (noting the U.N. Charter restricts countries from pursuing use of force); Frederic L. Kirgis, Jr., \textit{Armed Intervention in Haiti}, AM. SOC'Y OF INT'L L. NEWSL., Sept. 1994 (noting the power of the U.N. in international relations).
\item \textsuperscript{40} See Bruno Simma, \textit{The Threat or Use of Force in International Law}, EURO. J. INT'L
override any inconsistent treaties made by U.N. member states, regardless of their date of inception. The U.N. Charter is a *jus cogens* norm, accepted by the international community, from which no derogation is allowed.

The U.N. Charter was created as a response to the destruction of World War II. The drafters of the Charter, in an effort to avoid future international hostilities among nations, sought to restrain the future use of force. As a result, the primary purpose of the U.N. is to encourage "the peaceful settlement of international disputes and to rely on the military instrument of
policy only as an extreme last resort.”

In order to effectuate this principle, the U.N. allocated all non-defensive uses of force to the Security Council.

There are two exceptions to the U.N.'s prohibition of the threat or use of force: the right of self-defense under Article 51 and enforcement actions under Chapter VII. Article 51 permits the use of force if an attack is directed against a Member state. This right to use force for self-defense is an “inherent right” and can be exercised even in the absence of Security Council authorization. The second situation where the use of force is permitted is Chapter VII. Chapter VII authorizes the U.N. to employ force against an aggressor state if the Security Council determines that there is a threat to peace and all peaceful means to resolve the dispute have been exhausted. Only at this point

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46 Medenica, supra note 5, at 347 (quoting the Preamble of the U.N. Charter).

47 See U.N. CHARTER art. 2, para. 4 (stating that “[a]ll 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 manner inconsistent with the Purposes of the United Nations.”); Falk, supra note 17, at 852 (pointing out that the structure of the Charter grants the five permanent members of the Security Council with a right to veto any use of force); see also Jules Lobel & Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and The Iraqi Inspection Regime, 93 AM. J. INT'L L. 124, 124 (1999) (noting that the Security Council is viewed as authorizing the use of force, not as a device to limit such use).


51 See Medenica, supra note 5, at 345 (stating that Chapter VII grants the United
can the Security Council authorize military force under Article 42. Therefore, any threat or use of force that is not justified as a measure of self-defense or as a Security Council authorization is a violation of international law under the framework of the U.N. Charter.

A. Tension Between The Protection of Human Rights and State Sovereignty in the Charter System

Because the U.N. Charter system was primarily formulated to restrain the use of force, a fundamental contradiction emerges between the Universal Declaration of Human Rights' guarantees and the U.N. Charter's restriction on the use of force. It is from this tension that NATO legitimized the use of force against the


See U.N. CHARTER art. 51 (stating that the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”); Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 37 (2001) (explaining that if Security Council authorizes the use of force under Article 51, it may do so pursuant to Article 42 by almost any means necessary to regain international peace); see also Rosemary E. Libera, Note, *Divide Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 293-94 (2001) (discussing the applicable provisions under Chapter VII for the U.N. to authorize force, most notably Article 42).

See Simma, supra note 40, at 1 (concluding that illegal use of force by any member state that does not fall within the justification of the U.N. Charter is a breach of international law). See generally David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 47 (1994) (noting that the use of force without justification is a violation of *jus cogens* or an internationally accepted norm); Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1, 28-29 (1994) (commenting that threats of the use of force, not only the use of force, is also a violation of international law and against the U.N. Charter).

FRY, as embodied in the doctrine of humanitarian intervention.\textsuperscript{55} The Charter system preserves states’ territorial integrity yet, at the same time, there are crimes that transcend the inviolability of national sovereignty.\textsuperscript{56} Conflict between the U.N.’s dual objectives arises when a dictator deprives his own people of their fundamental rights.\textsuperscript{57} The NATO action exposed this tension and the difficulties in reconciling these two important principles.\textsuperscript{58} In Kosovo, NATO faced a legal and moral dilemma between the prohibitions of the use of force and the duty to protect human rights.\textsuperscript{59}

Although the Charter is concerned with both human rights and security,\textsuperscript{60} it was primarily enacted to ensure international peace

\textsuperscript{55} See Chomsky, supra note 17, at 73 (discussing humanitarian intervention in terms of the use of force by NATO against FRY); see also Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AM. J. INT’L L. 757, 768 (2001) (commenting that due to NATO’s intervention against FRY unilateral humanitarian intervention may be established as a right). See generally George K. Walker, Principles for Collective Humanitarian Intervention to Succor Other Countries’ Imperiled Indigenous Nationals, 18 AM. U. INT’L L. REV. 35, 37-38 (2002) (defining humanitarian intervention as “the threat or use of force by a state, group of states, or international organization primarily for protecting nationals of the affected state from widespread deprivations of human rights or rights under humanitarian law”).

\textsuperscript{56} See Schwabach, supra note 6, at 417 (stating “there are some crimes that transcend the inviolability of nation states”); see also Lori Lyman Bruun, Note, Beyond the 1948 Convention – Emerging Principles Of Genocide In Customary International Law, 17 MD. J. INT’L L. & TRADE 193, 219 (1993) (noting that interventions are permissible in response to violations of international law); Alexander K.A. Greenawalt, Note, Rethinking Genocidal Intent: The Case for Knowledge-Based Interpretation, 99 COLUM. L. REV. 2259, 2260 (1999) (discussing genocide as transcending a state’s sovereignty).


\textsuperscript{58} See Chomsky, supra note 17, at 73 (stating that perhaps this tension is an outright contradiction); Nanda, supra note 10, at 2 (outlining argument that balance needed to be struck between NATO’s “illegal” use of force and need for humanitarian intervention); see also Falk, supra note 17, at 850 (noting that only effective humanitarian intervention seemed to violate the UN Charter).

\textsuperscript{59} See Charny, supra note 11, at 1232-33 (noting that the world has an obligation to prevent human rights violations); Nanda, supra note 10, at 1 (stating that NATO action may have been in violation of international law); see also Michael E. Smith, NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination, 2001 ARMY LAW. 1, 1 (2001) (writing about majority view that humanitarian intervention violates UN Charter).

\textsuperscript{60} The preamble to the U.N. Charter states that its founding principle was “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and 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
and security in the aftermath of World War II.\textsuperscript{61} To perpetuate the furtherance of international peace at the expense of other values, any enforcement of human rights by the use of force is always subject to Article 2(4),\textsuperscript{62} the fundamental rule from which any inquiry on the use of force proceeds.\textsuperscript{63} Thus, unless the use of force to protect human rights can fit into one of the two exceptions under the Charter,\textsuperscript{64} an oppressed group is essentially left with an unenforceable guarantee of fundamental human rights under the Declaration. NATO claimed to have adhered to the spirit of the U.N. in a moral sense, but it did not follow the Charter’s mechanisms for the use of force in the legal sense because they bypassed the Security Council in their deployment of the use of force.\textsuperscript{65} In effect, NATO reconciled this tension on
the side of protecting human rights at the expense of legality. Scholars have argued that NATO's resolution of this conflict, by favoring the protection of human rights over state sovereignty, has led to a new era in international affairs; an era in which the traditional notions of sovereign immunity play no part.\textsuperscript{66}

II. THE KOSOVO CRISIS

The NATO intervention cannot be understood without placing it in its larger historical context.\textsuperscript{67} Yugoslavia, and the Balkans in general, are no strangers to war.\textsuperscript{68} The conflicting religious and historical backgrounds of those living in the region have created a chronic state of ethnic tension which has resulted in bloodshed dating far back into historical memory.\textsuperscript{69} Kosovo, in particular, has been a particularly important region in the tension of the Balkans. To the Serbs, Kosovo is of symbolic importance because it is the site where the Ottoman Empire defeated the Serbian Army in the Battle of Kosovo in 1389.\textsuperscript{70}

Council during intervention in Kosovo); Sean D. Murphy, \textit{Contemporary Practice of the United States Relating to International Law}, 93 \textit{Am. J. Int'l L.} 628, 631 (1999) (discussing NATO authorization not clarified with UN Charter system); Smith, supra note 59, at 21 (discussing NATO’s justifications to intervene without Security Council authorization).


\textsuperscript{68} See Medenica, supra note 5, at 331 (stating that the seeds of the immediate conflict grew from events in the early 1990’s). \textit{See generally} Aird, supra note 67, at 30 (discussing history of conflict in Kosovo); Howard, supra note 67, at 264 (discussing the conflict in the early 1990’s).

\textsuperscript{69} See Robert W. Stannard, \textit{The Laws of War: An Examination of NATO’s Intervention in the Former Yugoslavia and the Role of the European Court of Human Rights in Redressing Claims for Civilian Casualties in War}, 30 \textit{Ga. J. Int’l L.} 617, 617-18 (2002) (discussing Yugoslavia as land of constant conflict for most of recorded history); see also Medenica, supra note 5, at 331 (noting the present conflict in Kosovo has been the result of centuries of conflict). US-NATO Bombs Fall on Serbia: The “New World Order” Takes Shape, World Socialist Web Site, at http://www.wsws.org/articles/1999/mar1999/nato-m25.shtml (Mar. 25, 1999) (rejecting the view that the Kosovo crisis can be reduced to the evil of Milosevic because complex historical and political forces were at work in Kosovo).

Although historically ethnic Serbian, in recent years Kosovo has become predominantly populated by ethnic Albanians. Under the communist leader Josep Broz Tito, Albanians enjoyed significant autonomy and economic and social independence. The death of Tito in 1980, the rise of Milosevic, and nationalism increased tensions in the province. Albanian dissatisfaction and protests led to harassment and reprisals against the Serbs living within Kosovo.

In 1989, on the anniversary of the Battle of Kosovo, the then Serbian President Milosevic called for the relinquishment of Kosovo's autonomous status. Later that year, Serbia's National Assembly centralized control over the province in Belgrade through a series of amendments to the Serbian Constitution.

...
These emergency measures included detentions, curfews, and the deployment of federal troops into the province. In September of 1990 the Albanian-controlled Assembly of Kosovo defiantly adopted its own Constitution and essentially created a parallel government to Belgrade's. In September of 1991, the Kosovar Parliament passed the "Resolution on Independence and Sovereignty of Kosovo," which was approved in a secret referendum by almost 100% of the vote. A month later, the Assembly declared Kosovo's independence from the FRY, which Albania immediately recognized. In 1992, Ibrahim Rugova was elected president of the Republic of Kosovo with 99.5% of the vote. In the following years Western attention was mostly focused on the fighting in Bosnia, but the same forces of nationalism and ethnic tension present in Bosnia were brewing in Kosovo.


See Medenica, supra note 5, at 334-35 (discussing the measures taken by the Assembly); Night Curfew Imposed in Yugoslav Province, DALLAS MORNING NEWS, Feb. 22, 1990, at 7A (reporting on the curfews imposed in the conflict region); Yugoslavia Sets Curfew in Kosovo Ethnic strife: Tanks patrol the streets of the province to prevent clashes between Albanians and Serbians, L.A. TIMES, Feb. 22, 1990, at 6 (stating that government of Yugoslavia imposed curfews "to defend the constitutional order and prevent violence").

See Chomsky, supra note 17, at 26-27 (stating the Constitution sought to resolve Kosovo's status in the framework of the FRY). See generally Dusko Doder, Serb Chief Ousts Yugoslav Rival: Ruling Group Won't Recognize Move, CHI. TRIB., Mar. 19, 1991, at 4 (describing the conflict as it unfolded); Landrey, supra note 75, at 2A (portraying the tragic conflict in Yugoslavia).

See Chomsky, supra note 17, at 26-27 (stating the West had just recognized the independence of Slovenia and Croatia, giving Kosovo hope for its own state); Murray Dubin, Yugoslav, Albanian Teen-agers in Michigan Copy Ethnic War, HOUS. CHRON., Oct. 27, 1991 (referring to the Kosovar declaration of independence); Albania Recognizes 'Independent' Kosovo, WASH. TIMES, Oct. 23, 1991, at A2 (stating that "[t]he Albanian parliament...recognized the sovereign and independent republic of Kosovo").


See Chomsky, supra note 17, at 27 (stating Rugova's party, The Democratic League of Kosovo (LDK) won 75% of the parliamentary seats). See generally Medenica, supra note 5, at 335 (acknowledging Rugova's victory); Thom Shanker, Yugoslavia to Reopen Albanians' Schools, CHI. TRIB., Oct. 30, 1992 (referring to Rugova as president).

See generally Medenica, supra note 5, at 335 (discussing the ethnic conflict); Mark J. Porubcansky, Peace at Last Coming to Bosnia, But New Conflicts Are Lurking, PORTLAND OREGONIAN, Mar. 20, 1994, at A8 (referring to the ethnic and national tension in the region); The Bosnian Burden, ECONOMIST, Jan. 29, 1994, at 15 (stating that conflict in Bosnia could trigger tension in Kosovo).
The Kosovo Liberation Army ("KLA") first emerged in 1996.\textsuperscript{83} The KLA, a guerilla unit of Albanian fighters committed to attacking Yugoslav forces,\textsuperscript{84} drew support from the growing frustration with Rugova’s pacifist strategies and demanded immediate rights for Albanians by any means possible.\textsuperscript{85} Although KLA operations were initially focused on Yugoslav Security forces, by February 1998, Serbian civilians became a legitimate target in their campaign to defy Belgrade.\textsuperscript{86} In response, Serb forces stepped up security measures in the province.\textsuperscript{87} The U.N. Security Council intervened in March 1998.\textsuperscript{88}

\textsuperscript{83} See Medenica, \textit{supra} note 5, at 335 (discussing the creation of the KLA). \textit{But see} Chomsky, \textit{supra} note 17, at 28-29 (noting, however, that the roots of the KLA can be traced back to 1991, when a few Kosovan clans and radicals in the Albanian diaspora linked together). \textit{See generally} Lewis Dolinsky, \textit{Notes from Here and There}, S.F. CHRON., Sept. 20, 1998, at A14 (describing the nature of army’s activities).

\textsuperscript{84} See Medenica, \textit{supra} note 5, at 335 (noting that the KLA’s first armed attack against Federal Yugoslav forces came in 1993, when they killed two and wounded five Serb police officers; \textit{see also} Chomsky, \textit{supra} note 17, at 29 (discussing the nature of the group’s activities); James Green, \textit{Albanians Attack Serbian Targets}, 29 JANE’S DEFENCE WKLY., Sept. 4, 1996 (describing the violent means used by the group).

\textsuperscript{85} See Ljubomir Milasin, \textit{Serbs Kill 30 Kosovo Albanians, While Gunman Kills Four Serbs}, AGENCE FR.-PRESSE, Dec. 14, 1998 (noting the differences between violent KLA and moderate Rugova); \textit{see also} Chomsky, \textit{supra} note 17, at 28-29 (blaming Washington for not including Kosovo in the Dayton peace accord, which created conditions upon which radical Albanian forces would feel compelled to turn to violence to reach their goals). \textit{See generally} Gillian Sandford, \textit{Lessons of Bosnia Loom Over Countdown to Kosovo}, EUROPEAN, Oct. 12, 1998 (presenting an account of the conflict).

\textsuperscript{86} See Mandel, \textit{supra} note 19, at 97 (stating that the U.N. Security Council and independent observers accused the KLA of terrorism and stated that they instigated the increased violence and reprisals by Serb forces; \textit{see also} Medenica, \textit{supra} note 5, at 336, 384-85 (stating that the United States also regarded the KLA as a terrorist organization, although they would later supply them with close air support against Serb forces). \textit{See generally} Kissinger, \textit{supra} note 18, at 262 (noting Kissinger’s observation that the KLA was not an ordinary political movement struggling for autonomy, and has been described as a terrorist group).


A. U.N. Involvement in Kosovo

In March 1998 the Security Council passed Resolution 1160, which called for the FRY and Albanians in Kosovo to reach a political solution and placed an arms embargo on both sides. Despite these measures, by the summer of 1998, the KLA launched offensives by which they took control of 40% of Kosovo; Serb forces reacted with a major military offensive inside the province. Serb tactics included killings, torture, burning Kosovan villages and expelling residents. As the situation worsened, the Security Council adopted Resolution 1199 in September 1998 declaring that the conditions in Kosovo were “a threat to peace and security in the region.” The Security Council demanded a ceasefire, an end to hostilities, and that the parties take steps to negotiate with international participation.


90 See Medenica, supra note 5, at 384-85 (stating the Resolution also warned that the Security Council would pursue additional measures if there is no peaceful solution of the parties’ differences); see also Randy W. Stone, Comment, Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO’s Use of Armed Force in Kosovo, 50 CATH. U. L. REV. 501, 518 (2001) (noting that the Resolution called upon the parties to use meaningful dialogue to reach a political solution); Wippman, supra note 6, at 133 (noting that the Resolution called for a cessation of action affecting civilians).

91 See Medenica, supra note 5, at 337 (indicating that the situation deteriorated); see also Chomsky, supra note 17, at 31 (stating the FRY believed they had a “green light” from Washington to retaliate); Clinton W. Alexander, NATO’s Intervention in Kosovo: The Legal Case for Violating Yugoslavia’s National Sovereignty in the Absence of Security Council Approval, 22 HOUS. J. INT’L L. 403, 405-06 (2000) (indicating the dramatic surge in violence between February 1998 and March 1999).

92 See Medenica, supra note 5, at 380 (describing the brutality of the Serb tactics); see also Chomsky, supra note 17, at 134-35 (stating that NATO had mixed reports of responsibility on both sides, and although Serbs were committing atrocities, NATO understood this as a reaction to the 40% takeover of Kosovo by the KLA); Alan Little, Behind the Kosovo Crisis, BBC News, available at http://news.bbc.co.uk/2/hi/world/europe/674056.stm (Mar. 12, 2000) (reporting that “the KLA played a subtle but deadly game in which the willingness of the Serb police and Yugoslav army to commit atrocities against civilians was skillfully manipulated to coax the international community into action”).


94 Id. at 2 (acknowledging the threat to peace and security); see also Dale Carson, Contemporary International Law Issues: The Kosovo Question, 2 FLA. COASTAL L.J. 167, 168 (2000) (noting the need to take action to prevent a humanitarian catastrophe); Judith A. Miller, Reflections on National Security and International Law Issues During the Clinton Administration, 3 CHI. J. INT’L L. 219, 223 (2002) (indicating that the rationale behind the Resolution was the threat to peace in the region).

95 See Stone, supra note 91, at 519 (noting the demand of the Resolution to cease hostility); Tania Voon, Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo, 7 UCLA J. INT’L & FOREIGN AFF. 31, 50 (2002) (discussing the Resolution’s declaration that the event was a threat to peace and
Furthermore, the Security Council decided that "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, [it will] consider further action and additional measures to maintain or restore peace and stability in the region." 96

At this crucial juncture NATO began to explore the possibility of acting outside of the framework of the Security Council. Though Resolution 1199 (1998) alluded to "further action," this alone was a legally insufficient phrase to supply a groundwork for the U.N. or NATO to threaten or use force against the FRY. 97 This is because any threat or use of armed force must be approved by all five permanent members of the Security Council. 98 In this instance it was all but certain that Russia and China would exercise their veto power to thwart any use of force against the FRY. 99 To NATO, this legal restraint on action was unacceptable. NATO regarded the "veto paralysis" in the Security Council as the major flaw of operating within the U.N. system. 100 Because a veto was certain, NATO never actually

security); Wippman, supra note 6, at 133 (discussing the same).


97 See Simma, supra note 40 (stating that Resolution 1199 was not sufficient by itself for UN Member States or international organizations to intervene in the conflict militarily); see also Michael Ashkouri, Note, Has United States Foreign Policy Towards Libya, Iraq, and Serbia Violated Executive Order 12333: Prohibition on Assassination?, 7 NEW ENG. INT'L & COMP. L. ANN. 155, 171 (2001) (indicating that the Resolution’s text does not authorize the use of force). But see Alexander, supra note 92, at 441 (noting disagreement about whether the use of force was authorized).

98 See Thomas D. Grant, Extending Decolonization: How the United Nations Might have Addressed Kosovo, 28 GA. J. INT'L & COMP. L. 9, 12 (1999) (stating that the Security Council may only use force if all five permanent members authorize its use); see also Chomsky, supra note 17, at 73 (stating that the threat or use of force is illegal unless the Security Council explicitly authorizes its use). See generally Inocencio Arias, Humanitarian Intervention: Could the Security Council Kill the United Nations?, 23 FORDHAM INT'L L.J. 1005, 1019 (2000) (criticizing the U.N.’s structure as undemocratic because the only members of the Security Council who wield veto power do not stand up for election).

99 See Simma, supra note 40 (discussing Russia’s intention to veto); see also Carson, supra note 94, at 169 (indicating Russia’s and China’s expressed intention to veto anything authorizing intervention in Kosovo); Robert F. Turner, Kosovo: Legal and Policy Considerations, 10 USAFA J. LEG. STUD. 67, 72 (1999/2000) (noting Russia’s and China’s decision to veto effective action).

100 See Chomsky, supra note 17, at 11 n.19 (pointing out that since the 1960’s, the U.S. and Great Britain actually lead in vetoing Security Council Resolutions, despite the fact that NATO accused Russia and China of paralyzing the U.N.’s effectiveness); see also Makau wa Mutua, Looking Past the Human Rights Committee: An Argument for De-marginalizing Enforcement, 4 BUFF. HUM. RTS. L. REV. 211, 344 (1998) (discussing the effects of veto paralysis); Sompong Sucharitkul, Jurisdictional Terrorism and the Rule of International Law, Speech Before the Students at Golden Gate University (Oct. 2001), in
sought Security Council authorization for the threat or use of force against the FRY. The Alliance then clearly broke free from the constraints of the U.N. system governing force when it threatened the FRY with immediate air strikes.

The legal principle that NATO espoused in acting outside of the U.N. framework was the doctrine of humanitarian intervention. Interestingly, at the same time that NATO decided not to follow the U.N.’s formal restraints on the threat or use of force, it publicly declared that their threat of force (and later action) against the FRY was based on the spirit and principles of the Charter itself. NATO needed to contravene the Charter framework while simultaneously enforcing it because the U.N. was “paralyzed” by the Security Council veto mechanism and could not act. The situation from NATO’s perspective was summed up by NATO Secretary-General Javier Solana in a letter to the permanent representatives of the Alliance on October 9, 1998, where he delineated NATO’s objectives:

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**GOLDEN GATE U. L. REV., Spring 2002, at 312** (explaining that vetoes result in some paralysis).


104 See Simma, supra note 38 (discussing the U.N. Charter’s basic principle; see also Medenica, supra note 5, at 337-38 (noting that the Alliance declared that any use of force against the FRY closely paralleled the principles of the Charter). See generally Burton, supra note 32, at 55 (stating that the use of force is not authorized by the U.N. Charter but may be lawful if it conforms with customary international law).

105 See Grant, supra note 98, at 12 (analyzing the inner workings of the U.N. Security Council); Voon, supra note 95, at 33 (claiming that NATO’s intervention was illegal since it was done in contravention of UN Charter); see also Medenica, supra note 5, at 341 (noting NATO justifications for attack).
The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC 1199 of 23 September 1998, both acting under Chapter VII of the U.N. Charter.

The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of an humanitarian disaster in Kosovo. The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.

The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.

The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten and if necessary, to use force.106

Solana's letter induced a series of intensive negotiations between NATO and the FRY, culminating in a deal between Richard Holbrook, former U.S. ambassador to the United Nations, and Milosevic.107 The deal included a cease-fire agreement and an authorization for the Organization for Security and Cooperation in Europe (OSCE) to establish a verification mission in Kosovo.108 There was considerable but temporary improvement on the ground in Kosovo.109 Events took a turn for the worst on January 15, 1999 when Serb forces attacked the

106 Simma, supra note 38.
107 See Medenica, supra note 5, at 339-40 (stating Holbrook and Milosevic reached a deal); see also Little, supra note 92 (submitting that Holbrook was responsible for negotiating the deal); Simma, supra note 38 (discussing Holbrook's negotiating role).
108 See Simma, supra note 38 (noting that the agreement included a cease-fire and established a verification mission); see also Medenica, supra note 5, at 339 (stating that the Security Council approved these diplomatic measures in Resolution 1203). See generally Little, supra note 92 (intimating that a ceasefire had been achieved).
109 See Simma, supra note 38 (noting that humanitarianism and security improved in the region); see also Medenica, supra note 5, at 340 (stating the Security Council cautiously restated that the conflict constituted a continuing threat to peace in the region). See generally Little, supra note 92 (insinuating improvements in the area just prior to Racak).
village of Racak, resulting in the death of forty-five Albanians. Media coverage placed the incident squarely on the world stage and could have been the determinative factor in NATO’s decision to use force.

B. The Rambouillet Peace Efforts – Were All Peaceful Means Exhausted?

In a final effort to reach a peaceful settlement, Serb representatives and members of the KLA met at the Rambouillet Castle in France. The Rambouillet meeting was less a negotiation than it was an ultimatum issued by NATO to the FRY. The proposals demanded that Kosovo become an autonomous region within Yugoslavia, but under NATO control. In three years it called for a referendum on Kosovo’s formal independence. The KLA was also to hand in its weapons to NATO. However, the harshest term of the proposals demanded that NATO, instead of the U.N., be

110 See Medenica, supra note 5, at 340 (stating that all killed at Racak were civilians); Simma, supra note 38 (describing that violence ensued once again in Racak); see also Little, supra note 92 (calling the Serb attack in Racak a massacre).
111 See Medenica, supra note 5, at 340 (stating that NATO reaffirmed their threats of air strikes, which a Yugoslav representative denounced as illegal threats to the sovereignty of the FRY); see also Little, supra note 92 (discussing US Secretary of State Madeleine Albright’s feelings that post-Racak it was time for action); Simma, supra note 38 (quoting UN Secretary-General Kofi Annan’s speech made shortly after the events at Racak at a press conference in Brussels where he commented regarding the preconditions for the use of force against the FRY - stating that “normally a UN Security Council Resolution is required”).
112 See Kissinger, supra note 18, at 262 (stating the Rambouillet talks were held under the chairmanship of the British and French foreign ministers but actually under the auspices of the U.S. Secretary of State); see also Medenica, supra note 5, at 340 (stating that the meeting was held under direction of the Alliance); Little, supra note 92 (referring to Rambouillet meeting as a last ditch effort at settlement).
113 See Kissinger, supra note 18, at 262 (stating that the Rambouillet proposals were essentially an ultimatum); see also Chomsky, supra note 17, at 108 (referring to Rambouillet as a “take it or leave it” plan). See generally Medenica, supra note 5, at 341 (noting that rejection of terms resulted air strikes).

115 See Mandel, supra note 19, at 103 n.29 (explaining Rambouillet process); Jane Perlez, U.S. Running Out of Time to Decide on Kosovo Force, N.Y. TIMES, Feb. 17, 1999, at A3 (stating three year time frame had been laid out within which to determine Kosovo’s autonomy); Jane Perlez, U.S. Negotiator at the Kosovo Talks Visits Milosevic, N.Y. TIMES, Feb. 12, 1999, at A12 (noting three-year time frame).

116 See Kissinger, supra note 18, at 262 (stating the KLA was to turn in its arms to NATO); see also Mandel, supra note 19, at 103 n.29 (intimating hand-over of arms by reference to a call to end hostilities). See generally Voon, supra note 95, at 49 (discussing arms embargo imposed on Yugoslavia).
117 See Little, supra note 92 (explaining sentiments that NATO be the primary force).
awarded unfettered access throughout the entire territory of Yugoslavia as well as occupation of Kosovo.\textsuperscript{118} BBC correspondent Alan Little stated that Rambouillet's insistence on NATO's complete occupation of all of the FRY, and the call for NATO forces instead of U.N. peacekeepers, made it highly unlikely that the Serbs would accept the deal.\textsuperscript{119}

Prior to Rambouillet, the FRY declared it was willing to withdraw forces from Kosovo, accept a U.N. presence in the province, and grant Kosovo limited autonomy.\textsuperscript{120} But NATO insisted that the Alliance must retain control over Kosovo.\textsuperscript{121} Henry Kissinger, former U.S. Secretary of State under Richard Nixon, observed: "for anyone familiar with Serbian history, the Rambouillet proposals were certain to lead to war."\textsuperscript{122} As speculated, the Serbian National Assembly rejected the terms of

\begin{quote}
See generally Mandel, supra note 19, at 103 n.29 (noting a call for OSCE authority); Medenica, supra note 5, at 387-88 (alluding to strict NATO control of the area).
\end{quote}

\textsuperscript{118} Appendix B, § 8 of the Rambouillet proposals reads:

8. NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the FRY including associated airspace and territorial waters. This shall include, but not be limited to, the right of bivouac, maneuver, billet, and utilization of any areas or facilities as required for support, training, and operations.

\textsuperscript{119} See Little, supra note 92 (posing that Americans expected the Serbs to reject the deal); see also Kissinger, supra note 18, at 262 (predicting that the harsh proposals would lead to war); Mandel, supra note 19, at 104 (suggesting that total NATO occupation was intended to impossible to accept).

\textsuperscript{120} See Chomsky, supra note 17, at 111-22 (suggesting Milosevic's acceptance of some agreements); Medenica, supra note 5, at 388-89 (discussing Milosevic's one time willingness toward an international presence); Jane Perlez, Crisis in the Balkans: The Serbian Leader, Milosevic Defiant but Offers a Pact, N.Y. TIMES, May 1, 1999, at A1 (outlining terms Milosevic would have agreed to).

\textsuperscript{121} See generally Mandel, supra note 19, at 105-06 (discussing generally NATO demands); Medenica, supra note 5, at 390 (alluding to NATO insistence); Voon, supra note 95, at 50-51 (articulating broadly the NATO mindset).

\textsuperscript{122} Kissinger explained that "the country [Serbia] that had fought the Ottoman and Austrian empires, often alone, and had fiercely resisted Hitler and Stalin without the help of allies, would never permit transit of foreign troops or turn a province containing its historic shrines over to NATO." Kissinger, supra note 18, at 262. Professor Chomsky asserted that no country would accept the harsh terms of Rambouillet except in the case of an unconditional surrender, and bringing attention to the fact that despite the immense coverage the Kosovo crisis received, he could find no accurate reporting of the terms of Rambouillet, which he calls a "take it or leave it" plan. Chomsky questions whether the 'diplomatic failure' of Rambouillet was an intentional failure so that NATO could implement the air strikes it had threatened for so long. Chomsky, supra note 17, at 107-08.
Rambouillet on March 23, 1999.\textsuperscript{123} NATO air strikes began the next day.\textsuperscript{124}

Because the Rambouillet was the final push for peace before hostilities were initiated, it becomes necessary to compare its terms to the final peace settlement in order to see whether there was room for further negotiation and a peaceful means of settlement before the leap to war was made. The final resolution that ended the Kosovo bombing was the Kosovo Peace Accord signed on June 3, 1999.\textsuperscript{125} Many scholars criticized NATO for not negotiating the Rambouillet proposals in good faith because their rigid take it or leave it nature.\textsuperscript{126} These critics point to the fact that the Kosovo Peace Accord’s terms were very close to what the FRY was willing to accept before Rambouillet.\textsuperscript{127} Under the final agreement the FRY agreed to an international presence with only substantial, not exclusive, NATO participation.\textsuperscript{128} The province of Kosovo was to be controlled by the U.N. instead of NATO.\textsuperscript{129} Eradicated from the final peace plan were the very terms that the FRY adamantly refused to accept at Rambouillet: free NATO access to the entire FRY, full military and political control over Kosovo in NATO, and an independence referendum for Kosovo after three years.\textsuperscript{130} Serious questions can be raised as to whether NATO had actually exhausted all peaceful means to settle the crisis before the decision was made to go to war.\textsuperscript{131} If NATO had offered more lenient terms at Rambouillet, war may

\textsuperscript{123} See Chomsky, supra note 17, at 108-09 (stating the FRY rejected any occupying force in its territory); Mandel, supra note 19, at 98 (stating that Serbs rejected the proposals); Little, supra note 92 (reporting Serbian rejection).

\textsuperscript{124} See Chomsky, supra note 17, at 134 (noting the campaign was initiated on March 24).

\textsuperscript{125} See Medenica, supra note 5, at 389-90 (stating that the Kosovo Peace accord, agreed to by NATO and Serbia, halted the Alliance’s bombing).

\textsuperscript{126} See Thomas Michael McDonnell, Cluster Bombs Over Kosovo: A Violation of International Law?, 44 ARIZ. L. REV. 31, 36 n.12 (2002); see also Falk, supra note 17, at 850-51, 855 (stating that NATO’s failure to negotiate in good faith “casts a dark shadow over the NATO initiative”); Wippman, supra note 6, at 139.

\textsuperscript{127} See Medenica, supra note 5, at 389, 390 n.453 (stating that NATO rejected the more lenient Serbian resolution proposed by the Group of Eight (G-8), consisting of Russia and the major Western nations).

\textsuperscript{128} See id. (stating that NATO was largely left out of the Kosovo Peace Accord and was only mentioned in their capacity as a security presence).

\textsuperscript{129} See id. (noting military control of the province was the U.N.’s responsibility).

\textsuperscript{130} See id. (adding that the Security Council resolution that endorsed the Kosovo Peace Accord does not mention NATO).

\textsuperscript{131} See Chomsky, supra note 17, at 107-08 (asserting NATO intentionally failed on the diplomatic front at Rambouillet in order to legitimize their initiation of air strikes).
not only have been avoided, but peacekeepers could have been on the ground in Kosovo immediately to avert a deterioration of the humanitarian situation, which that the bombing would initiate.

III. THE LEGALITY OF THE OPERATION: THE CLASH BETWEEN INTERNATIONAL LAW AND UNIVERSAL MORALITY

Although NATO asserted that its rationale for threatening and ultimately using force against the FRY mirrored the spirit of the U.N. Charter, most international law scholars agree that NATO made little effort to justify the intervention under the U.N. framework. Professor Antonio Cassese, although a proponent of the war, points out that such legitimization - that NATO followed the spirit of the U.N. - is an insufficient legal ground for commencing an armed intervention against another sovereign state. It is, for the most part, uncontested that NATO’s justification for the use of force lay primarily with the doctrine of humanitarian intervention. Because there is no “humanitarian exception” for the use of force under the Charter, most scholars agree that the Kosovo intervention violated international law.

For some international lawyers, the fact that the NATO operation was unauthorized by the Security Council would be the

132 See Wippman, supra note 6, at 131 (stating that NATO’s breach of the UN Charter was “clear and apparent”); see also Cassese, supra note 11 (stating the Charter was breached).
133 Former President of the International Criminal Tribunal for the former Yugoslavia and former Presiding Judge of Trial Chamber II of the ICTY. See note 11 supra.
134 See Cassese, supra note 11 (stating NATO’s argument force was justified based on the U.N. Resolutions that had declared the situation in Kosovo as a “threat to peace” also do not withstand legal scrutiny because that language is insufficient to invoke the use of force under the Charter); see also Malone, supra note 4, at 591 (stating moral justification for the use of force is no substitute for legal justification).
135 See Stannard, supra note 69, at 619-20; see also Charney, supra note 11, at 1232.
136 See Mandel, supra note 19, at 109; see also Charney, supra note 11, at 1235. Cassese agrees that force was taken outside the UN framework. He says that the intervention was without a Security Council authorization under Chapter VII and force could not be justified as self-defense pursuant to Article 51. He adds that the intervention “radically departs from the Charter system for collective security. . .there is no gainsaying that the Charter system has been transgressed, in that a group of states has deliberately resorted to armed action against a sovereign state without authorization to do so by the Security Council.” Cassese, supra note 11. For a discussion advocating a new legal paradigm to replace the U.N. framework, see generally Colonel Guy B. Roberts, The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction, 27 DENV. J. INT’L L. & POL’Y 483, 484-85 (1999).
end of the analysis.\textsuperscript{137} In this view, because the U.N. Charter is a \textit{jus cogens} norm and the NATO bombing clearly violated its precepts, no further inquiry is needed; its illegality compels a rejection.\textsuperscript{138} In light of the universal recognition that the protection of human rights is a peremptory norm, this view seems unacceptable. Professor Cassese sums up this point:

[A]ny person of common sense is justified in asking him or herself the following dramatic question: Faced with such an enormous human-made tragedy and given the inaction of the UN Security Council due to the refusal of Russia and China to countenance any significant involvement by the international community to stop the massacres and expulsions, should one sit idly by and watch thousands of human beings being slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?\textsuperscript{139}

Professor Cassese's argument is emotionally intriguing, yet ultimately simplistic. Cassese asserts that the anti-interventionist camp rejected the NATO bombing based on sheer legalism, disregarding the \textit{moral} considerations of nonintervention.\textsuperscript{140} For Professor Cassese, the bombing was indeed illegal, yet it was moral. Cassese continued: "from an ethical viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that his moral action is \textit{contrary to international law.}"\textsuperscript{141} Professor Cassese reasoned that there is a universal obligation on the part of all countries to respect human rights, \textit{erga omnes}. Accordingly, no law could justly prevent an

\textsuperscript{137} See Wippman, \textit{supra} note 6, at 131 (asserting that merely labeling the campaign as illegal is inadequate).

\textsuperscript{138} See id. (observing that the Charter's main purpose was to reduce armed conflict so all non-defensive uses of force must be approved by a supermajority of the Security Council).

\textsuperscript{139} Cassese, \textit{supra} note 11.

\textsuperscript{140} See id. (stating that NATO's intervention was legitimate because it was morally justified by "contemporary trends of the international community" and the intervention should not be rejected for merely being against current international law). Cassese uses this premise as a segue to his eventual conclusion that current international law should bend to these emerging moral trends.

\textsuperscript{141} Cassese, \textit{supra} note 11 (emphasis in original).
intervention for humanitarian purposes, and so the U.N. mandates against intervention should be disregarded.\footnote{42}{See id. (stating that a "unilateral resort to armed violence [outside of Security Council authorization] is justified... to terminate violations of human rights").}

Professor Cassese is correct to assert that there is a moral imperative to prevent the trampling of human rights anywhere in the world. However, I present the view that the anti-interventionist stance is a well-grounded moral position and in the end will do more to ensure the protection of human rights. This position is not based upon the inherent good of notions of sovereignty based on tradition. Rather, it affirms the strictures of the U.N. system as having exclusive control over any use of force because the U.N. best advances the protection of international human rights. When NATO's bombing is examined as a whole, all of the mishaps of the operation can be taken as proof of the dangers and unintended consequences of deploying armed force. What NATO called the "veto paralysis" of the U.N. system is actually the U.N. system functioning smoothly.\footnote{43}{But see Maj. Joseph P. "Dutch" Bialke, \textit{United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict}, 50 A.F. L. REV. 1, 6 (2001) (noting that during the Cold War the veto power of permanent members thwarted UN's security and peacekeeping efforts); Jonathan Charney, \textit{Asia Publication: Highlights of October ASIL}, AM. SOC'y OF INT'L L. NEWSL. (Sept. 1993) (contending that the Security Council is dominated by a few that use the veto as a threat); Mutua, supra note 100, at 244 (suggesting that intervention into human rights violations is subject to a veto by one of the five permanent members of the Security Council).
\footnote{44}{See discussion \textit{infra} Part V; see also Charney & Prescott, supra note 64, at 476 (claiming that peaceful solutions will only result from cooperative efforts from adversarial parties); Falk, supra note 17, at 855 (reasoning that force should be a secondary consideration to diplomacy).
deviation from the U.N. Charter would do more to hurt the cause of international human rights than they do to promote it.146

Even if NATO was justified to use force on moral grounds, the intervention cannot escape scrutiny for the manner in which force was used. When nations resort to force, it still must be deployed according to principles of proportionality and just war.147 The *jus in bello*, proper conduct in war, must be separately analyzed from the *jus ad bellum*, the decision to fight a war.148 Upon examination of NATO’s wartime conduct, grave questions can be raised about its military decision-making according to the laws of war.

IV. THE OPERATION

NATO’s campaign against the FRY, code-named “Operation Allied Force”, was commenced on March 24, 1999 and was suspended on June 10, 1999.149 In 78 days of around-the-clock bombing150 NATO flew over 38,000 sorties, dropped 25,000

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148 See generally Michael J. Matheson, The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, 91 Am. J. Int’l L. 417 (1997) (discussing the concepts of jus ad bello and jus ad bellum in the context of nuclear war); Meyer, supra note 26, at 143 n.3 (explaining the distinction between the terms); Steven R. Ratner, Jus Ad Bellum and Jus Ad Bello After September 11, 96 Am. J. Int’l L. 905, 905-06 (2002) (explicating that jus ad bello concepts predated jus ad bellum concepts).


150 See Kissinger, supra note 18, at 254 (stating that NATO bombed continuously); see also Hottelet, supra note 149, at 24 (noting that the bombing of Yugoslavia was
bombs that caused 60 to 100 billion dollars worth of damage on the FRY.\textsuperscript{151} Approximately 2,000 Yugoslav civilians died.\textsuperscript{152}

\textit{A. The Doctrine of Proportionality in Protocol I to the Geneva Convention of 1949}

Adopted in 1977, Protocol I Additional to the Geneva Conventions of 1949, which relates to the Protection of Victims of International Armed Conflicts, is perhaps the most authoritative statement of the principles which govern international armed conflicts.\textsuperscript{153} This Protocol has been ratified by over 150 states, although three of the nineteen members of NATO are not parties to the Protocol.\textsuperscript{154} The provisions of the Protocol are universally accepted as customary international law and are binding authority on all nations.\textsuperscript{155} One of the most essential principles of
international law is that a country must exhaust all efforts to distinguish between civilians and civilian objects from military objectives.\textsuperscript{156} Embodied in Article 48 of Protocol I is the principle of distinction regarding the protection of civilians: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all time distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."\textsuperscript{157} Article 51(2) of Protocol I states that the civilian population "shall not be the object of attack."\textsuperscript{158} The proportionality doctrine emerges from Article 51 (5), which describes a discriminate attack as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."\textsuperscript{159} The proportionality doctrine demands that any military intervention must balance the military advantage of the attack with the expected civilian injury the attack will inflict.\textsuperscript{160} According to this principle, an indiscriminate attack occurs if it violates the principle of distinction by attacking a military target without considering the potential impact on civilians.\textsuperscript{161} An assessment of the NATO bombing reveals that NATO military commanders did

\begin{itemize}
\item \textsuperscript{156} See Richard C. Schneider, Jr., \textit{ASIL Insight: Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law}, AM. SOC'Y OF INT'L L. NEWSL. (Nov. 1995) (offering that Additional Protocol II was designed to protect children and civilians during combative efforts). \textit{See generally} Sopf, \textit{supra} note 149 (maintaining that civilians' rights are not suspended during war efforts); Turner \& Norton, \textit{supra} note 153 (remarking on the different roles that civilians play during wartime).
\item \textsuperscript{157} Amnesty Report, \textit{supra} note 151, at § 3.1.
\item \textsuperscript{158} Amnesty Report, \textit{supra} note 151, at § 2.1.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} See Medenica, \textit{supra} note 5, at 360-61 (tracing the foundations of the proportionality doctrine back to the Middle Ages and Christian Just War theory); Stone, \textit{supra} note 90, at 506-07 (noting that the proportionality doctrine accepts that there will be civilian casualties during war). \textit{See generally} Judith Gail Graham, \textit{Proportionality and Force in International Law}, 87 AM. J. INT'L L. 391, 391 (1993) (stating that the proportionality doctrine is a fundamental concept in the law of force).
\item \textsuperscript{161} See Meyer, \textit{supra} note 26, at 151 n.46 (stating that the burden is on the attacker to show that the attack could not have been avoided); \textit{see also} Hanseman, \textit{supra} note 155, at 190 (noting that vulnerability to indiscriminate attacks is a constant concern); Maj. Thomas J. Hertel, \textit{On the Chopping Block: Cluster Munitions and the Law of War}, 51 A.F. L. REV. 229, 261 (2001) (citing Article 51 of Protocol I as prohibiting indiscriminate attacks).
\end{itemize}
A REJECTION OF THE KOSOVO PRECEDENT

not always put the protection of civilians ahead of military objectives, as discussed below.162

1. Choice of Targets

NATO drastically miscalculated the length of the war. NATO commanders, as well as President Clinton, predicted that the Milosevic would surrender and the war would end in a matter of days.163 Because of the small size of the FRY, roughly the size of Ohio, purely military targets were successfully destroyed within the first few days of the military operation.164 As a result, the category of legitimate strike targets was extended to facilities used by civilians.165 These targets included electrical power plants, city bridges, railways, public buildings, factories, market places, hospitals, embassies, water supplies, and residential neighborhoods.166 Although NATO carried out strikes against

162 See McDonnell, supra note 126, at 37 n.14 (explaining how Kosovar Albanians left Kosovo as a result of NATO bombings); see also Tania Voon, Pointing the Finger: Civilian Casualties of NATO Bombing in Kosovo Conflict, 16 AM. U. INT'L L. REV. 1083, 1098 (2001) (criticizing NATO's use of air bombardment as disproportionate to the protection of civilians). See generally Mertus, supra note 10, at 538 (noting that the NATO bombing was an attempt at avoiding allied casualties, thereby creating a greater risk of civilian casualties).

163 See Falk, supra note 17, at 851 (noting President Clinton acknowledged he believed Milosevic would withdraw early); see also Little, supra note 92 (noting Washington believed war would have ended quickly but was shocked when it continued); Johanna McGeary, The Road to Hell... Was Paved with Good Intentions—But Muddled Planning. Now What?, TIME, Apr. 12, 1999 (stating White House believed Milosevic would "fold" a few days after NATO's bombings on Kosovo).

164 See Steven Lee Myers, Chinese Embassy Bombing: A Wide Net of Blame, N.Y.TIMES, Apr. 17, 2000, at A1 (stating that this scramble for new targets led to such mishaps as the bombing of the Chinese Embassy in Belgrade, one of the greatest embarrassments of the war); see also Falk, supra note 17, at 851 (noting NATO bombing was initially confined to military targets). See generally Stephen Lee Meyers, NATO Hits Belgrade Center For First Time, Razing Command Sites For Kosovo Fighting, N.Y. TIMES, Apr. 3, 1999, at A1 (discussing first air strikes on Milosevic's security headquarters).

165 The International Committee of the Red Cross (ICRC) stated that "[d]uring the first week or so of airstrikes, the number of civilians casualties did in fact appear to be low. As the air campaign intensified, however... both a corresponding rise in the number of Serbian civilians victims and increased damage to civilian objects have been observed..." Amnesty Report, supra note 151, at § 1. For example, it has been reported that a Serbian television station was bombed. Robert Hayden, Biased "Justice": Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia, 47 CLEV. ST. L.REV. 549, 556 (1999). For an argument criticizing NATO bombing for targeting civilian structures because Milosevic was not submitting as quickly as they had expected, see Falk, supra note 17, at 851.

166 See Richard Bilder, Kosovo And The "New Interventionism": Promise or Peril?, 9 J. TRANSNAT'L L. & POL'Y 153, 168-69 (listing NATO's targets of civilian infrastructures); see also Wippman, supra note 6, at 147 (listing NATO's targets); Mandel, supra note 19, at 114 (noting NATO military commanders choice of infrastructure targets); Laursen, supra note 6, at 779 (discussing NATO's choice of targets); Medenica, supra note 5, at 410 (criticizing NATO's choice of civilian targets).
these targets for their military value, attacks on infrastructure of this type can foreseeably cause extensive civilian causalities and hardship.167 One of the most controversial attacks of the war was the NATO bombing of the Serbian state television and radio station in Belgrade,168 which killed 16 civilians but only blacked out the Serbian government’s broadcast of “propaganda” for three hours.169 Although NATO made efforts to limit civilian causalities, attacks such as the one against the television station suggest they could have done more to protect civilian life.170 Some analysts believe this widening of legitimate targets to include civilian-used infrastructure shows that NATO was interested in trying to break civilian morale, which would put popular pressure on Milosevic to capitulate.171 Such an objective — attempting to break civilian morale for military purposes — is illegal under the proportionality doctrine of the Geneva Convention.172

167 See Mandel, supra note 19, at 114-15 (criticizing NATO targets as having little military value and therefore were more likely civilian targets); see also Mertus, supra note 10, at 539 (examining whether NATO’s targets were legitimate “dual use” targets under Geneva Convention’s Protocol I to justify their bombing); see, e.g., Medenica, supra note 5, at 422 (questioning legitimacy of bridges as military targets and noting some bridges were next to populated areas).

168 See Amnesty Report, supra note 151, at § 5.3 (stating that NATO viewed the station as a propaganda machine); see also Voon, supra note 162, at 1105-06 (explaining NATO justified bombing of Serbian broadcasting station because it viewed it as a propaganda machine and used for FRY’s military purposes). See generally Herman Reinhold, Target Lists: A 1923 Idea With Applications For The Future, 10 TULSA J. COMP. & INT’L L. 1, 62 n.172 (2002) (noting bombing of TV station as one of most controversial NATO bombings in Kosovo).

169 See Stannard, supra note 69, at 618 (noting bombing of television station led to civilian deaths); see also Voon, supra note 162, at 1105 (discussing bombing of Serbian television station by NATO led to civilian casualties). See generally Chinkin, supra note 37, at 38.

170 NATO pilots didn’t necessarily do all they could have to avoid civilian casualties. See McDonnell, supra note 126, at 38-39. Amnesty International also points out that NATO could have issued warnings prior to attacks to protect the civilian populations, in accordance with Additional Protocol I, Article 57, 2(c), but NATO rejected such a policy on the basis that it may endanger the pilots of the attacking aircraft. See Amnesty Report, supra note 151, at 3.4. A Human Rights Watch Report asserted NATO could have avoided civilian causalities if “NATO had followed the rules.” Elizabeth Becker, Rights Group Says NATO Killed 500 Civilians in Kosovo War, N.Y.TIMES, Feb. 7, 2000, at A10.

171 Mandel, supra note 19, at 104, 113 (stating NATO bombing of Kosovo was simply meant to break civilian morale); see also Bilder, supra note 166, at 171-72 (arguing attacking civilian targets was meant with the hope civilians would force Milosevic to give up to NATO’s demands); Meyer, supra note 26, at 176-77 (stating NATO intended to effect civilian morale with its chosen targets).

172 See Amnesty Report, supra note 151, at § 5.3 (discussing illegitimacy of military targets meant to break civilian morale). See generally Mertus, supra note 10, at 540 (arguing NATO’s choice of continuing its bombing was not advancing military objectives but causing a detrimental effect upon Serb population thereby violating proportionality
2. High Altitude Aerial Bombing

Throughout the 78-day bombing campaign NATO sustained zero combat casualties - an unprecedented accomplishment in the history of warfare. See Wippman, supra note 6, at 146 (noting that NATO fought the first “zero-casualty” war); see also Voon, supra note 95, at 88 (noting NATO’s intervention in Kosovo resulted in “zero NATO casualties”). Richard Valk, A Just Response; United States To Terrorists, NATION, Oct. 8, 2001, at 11 (noting NATO war is labeled as “zero casualties”). See generally Voon, supra note 95, at 95, at 89 (discussing NATO’s decision to not fly less than 15,000 feet in order to avoid military casualties).

NATO avoided combat casualties primarily because of its policy against flying aircraft below 15,000 feet. See Wippman, supra note 6, at 146 (stating NATO had a policy of flying aircraft at 15,000 feet or higher); see also Amnesty Report, supra note 151, at § 3.4 (stating that NATO officials concede that the high-altitude bombing reduced the bombing effectiveness). See generally Voon, supra note 95, at 95, at 89 (discussing NATO’s decision to not fly less than 15,000 feet in order to avoid military casualties).

At such an altitude NATO aircraft and bombers were well beyond the reach of Yugoslav anti-aircraft artillery. See Wippman, supra note 6, at 146 (observing high-altitude bombings protected NATO pilots from anti-aircraft fire); see also Medenica, supra note 5, at 406 (explaining one reason NATO chose to fly aircraft at 15,000 feet was to avoid ground fire); Voon, supra note 162, at 1103 (stating NATO pilots flew at altitudes of above 15,000 to avoid Yugoslav air defenses).

Although the majority of NATO’s weaponry was laser-guided, a considerable amount of NATO’s arsenal required pilots to physically see the target during the attack. See generally Voon, supra note 95, at 89 (discussing NATO’s decision to not fly less than 15,000 feet in order to avoid military casualties).

Thus, the higher the altitude at which aircraft operated, the less clearly the pilot could discern the true nature of a target. In a number of incidents NATO pilots mistakenly attacked groups of refugees in their belief that they...
were military convoys. Lower altitudes would have exposed NATO pilots to greater risks, yet such unintended attacks on civilians would have been minimized. The effect of NATO's policy was to shift the risk of casualties from NATO pilots to civilians on the ground in the FRY.

Another aspect of the high altitude aerial bombing relates to NATO's stated objective. We must recall that the purpose of initiating aggression against the FRY was to thwart atrocities that federal Serbian forces were committing in Kosovo against ethnic Albanians. These atrocities were occurring on the ground within villages and in houses and often under cover of night. It is apparent that NATO was less effective in stopping atrocities occurring on the ground in Kosovo because of the altitude restrictions placed on NATO pilots. If the stated humanitarian purpose was to stop the violence in Kosovo, high altitude aerial

179 See Medenica, supra note 5, at 406-07 (describing two incidents in which NATO mistook a group of tractors to be military tanks, and a refugee camp to be a military camp, killing 160 refugees); see also Aaron Schwabach, NATO's War in Kosovo and the Final Report To the Prosecutor of the International Criminal Tribunal For the Former Yugoslavia, 9 Tul. J. Int'l & Comp. L. 167, 177-78 (2001) (discussing attack on Albanian convoy of civilians fleeing Djakovica). See generally Voon, supra note 162, at 1103-04 (discussing mistaken attack on Albanian refugee convoy believed to be military vehicle).

180 See Amnesty Report, supra note 151, at § 3.4 (stating that NATO could have avoided as many civilian deaths if it had chosen to fly at altitudes less than 15,000 feet thereby allowing pilots to have clearer visibility of targets); see also Medenica, supra note 5, at 408-09 (arguing NATO did not do everything possible to avoid civilian deaths when it limited its pilots to fly at altitudes not lower than 15,000 feet with weaponry that required them to see their targets, which could not accurately have been done as is evidenced in the number of mistaken bombings on civilians); Voon, supra note 162, at 1104 (stating that NATO even recognized if its pilots had flown at altitudes lower than 15,000 feet, they would have distinguished civilian groups from military groups).

181 See id. (stating that priority was given to the safety of NATO pilots over Yugoslav civilians); Jack Kelly, The Balkan Morass: Clinton's Folly Proved by Subsequent Events, Pittsburgh Post-Gazette, Mar. 11, 2001, at E-3 (arguing that it was NATO's “attacks” on civilian targets that forced Serbia to seek peace); Letters, Wash. Post, Nov. 4, 2001, at T12 (arguing that high altitude bombing led to bombing of civilian infrastructure).

182 See Nicolas Rothwell, Cold War Survivor Boils Over – Revolt in Yugoslavia, Weekend Australian, Oct. 7, 2000, at 2 (discussing the many atrocities that occurred in Yugoslavia after the fall of the Soviet Union); Timothy Gordon Ash, The war we almost lost: Was NATO's Kosovo campaign a legitimate response to humanitarian catastrophe or did it cause one? How did a poor Balkan country make a mockery of the world's greatest powers for more than a month? And why did Slobodan Milosevic finally capitulate? Now that the smoke has cleared Timothy Gordon Ash searches for answers, Guardian, Sept. 4, 2000, at 2 (noting that Milosevic was engaging in ethnic cleansing before the war began).

183 See Wippman, supra note 6, at 146 (noting high latitude bombing was little use in saving Kosovars from ethnic cleansing on the ground); see also Kelly, supra note 181 (arguing that high altitude bombing was ineffective and caused civilian casualties). See generally Ash, supra note 182, at 2 (insinuating that for first stages of war NATO actually seemed to be losing).
bombing is not an effective means of preventing Yugoslav forces from murdering Albanians in their villages.\textsuperscript{184}

3. Ruling Out Ground Troops

An important element in NATO's war plan was maintaining popular support for the war on the home front.\textsuperscript{185} With media in the Western countries flashing images of the plight of the ethnic Albanians and mass graves, there was a sympathetic push to take up arms against the FRY.\textsuperscript{186} In order to keep this popular domestic support for the Kosovo war high, NATO publicly ruled out the use of ground troops even before the campaign began.\textsuperscript{187} Avoiding casualties were especially a concern for the United States, where another Vietnam would produce a public outrage.\textsuperscript{188} NATO commanders believed that popular support for

\textsuperscript{184} See Charney, supra note 11, at 1247 (arguing that NATO strategy would not and could not stop ground atrocities from occurring); Kelly, supra note 181 (arguing that high altitude bombing was a cause of civilian casualties and did not accomplish what it was set out to accomplish); see also Ash, supra note 182 (arguing that it was a mistake to believe that high altitude bombing could stop the atrocities).

\textsuperscript{185} See Roger Cohen, Crisis in the Balkans Diplomacy: Schroder's Blunt 'No' to Ground Troops in Kosovo Reflects Depth of German Sensitivities, N.Y. TIMES, May 20, 1999, at 14 (noting that Germany insisted on no ground troops in order to maintain popular support for the war); Ash, supra note 182 (noting that State Department officials did not publicly state their opinions on the duration of the war in order to keep unity on the home front); Michael R. Gordon, General in Balkan War Says Pentagon Hampered NATO, N.Y. TIMES, May 21, 2001, at A1 (discussing Gen. Wesley Clark's memoirs in which the head of NATO forces in Yugoslavia says that the Pentagon went to great lengths to avoid ground offensive).

\textsuperscript{186} See Walter Goodman, Fighting but Not Fighting: Step by Step in the Balkans, N.Y. TIMES, May 11, 1999, at E5 (noting that the atrocities taking place in Yugoslavia turned former "doves" into "hawks" within the Clinton administration); Raymond Bonner, Conflict in the Balkans: The Tribunal; Tactics Were Barrier to Tops Serb's Serb's Indictment, N.Y. TIMES, Mar. 29, 1999, at A5 (discussing the evidence the Clinton Administration had of atrocities being committed in the former Yugoslavia); Marlise Simons, Milosevic, Indicted Again Is Charged With Crimes in Croatia, N.Y. TIMES, Oct. 10, 2001, at A8 (noting the second Hague indictment of Slobodan Milosevic and the evidence of atrocities that he committed in the former Yugoslavia).

\textsuperscript{187} See Paul R. Williams & Karina M. Waller, Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime, 36 NEW ENG. L. REV. 825, 875 (2002) (noting NATO's public refusal to even consider ground troops as a military option, which severely undercut the impact the bombing had in preventing Serbian brutality); Ash, supra note 182 (stating that Pres. Clinton's original address to nation had a sentence promising no ground troops would be used in the war); Bill McSweeney, Virtual Reality? There's nothing virtual about killing. Virtual War: Kosovo and Beyond, IRISH TIMES, Mar. 11, 2000, at 68 (stating that the use of no ground troops in Kosovo led to new age of war).

\textsuperscript{188} See Reinhold, supra note 168, at 28-29 (stating that heightened media scrutiny has made the public increasingly unwilling to tolerate both military and civilian casualties in war time); Cohen, supra note 185 (quoting a German political analyst who believed the use of ground troops would change popular opinion of the war); Ash, supra note 182 (referring to the desire to have no casualties as an American obsession).
the war could only be maintained insofar as NATO troops were not perishing for this humanitarian cause.\textsuperscript{189}

The military policy to preliminarily rule out ground troops is questionable.\textsuperscript{190} Because NATO's stated purpose of deploying force was to combat ethnic cleansing on the ground in Kosovo, the decision not to deploy ground troops is not tailored to the stated humanitarian purpose.\textsuperscript{191} It is difficult to conceive of how bombing targets throughout Serbia, many of them hundreds of kilometers away from Kosovo, would prevent the human rights violations occurring on the ground, within the province of Kosovo province. Only a military strategy that utilized a ground force with the support of low flying planes and helicopters could achieve the stated humanitarian end and prevent Serb forces from committing atrocities.\textsuperscript{192} The decision not to use ground troops can also be criticized because it gave away NATO's military strategy to the FRY, unthinkable in war planning. The FRY knew that ground troops would not be deployed and were even able to step up their campaign against ethnic Albanians without fear of a NATO ground invasion.\textsuperscript{193} Another element of this policy was that while the Serb forces were being bombed, their NATO enemy was beyond their reach.\textsuperscript{194} This frustration likely caused Serb forces to act more brutally against Albanians

\textsuperscript{189} See Cohen, supra note 185 (implying that NATO strategy from the outset of the war was not to use troops); Goodman, \textit{supra} note 186 (stating Gen. Colin Powell's belief that only war the U.S. engages in must have the support of the American people); Gordon, \textit{supra} note 185 (stating that Gen. Clark issued a secret memo which stated that the first priority was to ensure no loss of aircraft due to "preoccupation" with loss of American life).

\textsuperscript{190} See Williams & Waller, \textit{supra} note 187, at 878 (noting that Prime Minister Blair was forthright in his assertion that ruling out ground troops would cause the air campaign to be unsuccessful); see also Gordon, \textit{supra} note 185 (noting Gen. Clark's concern with the strategy used in Kosovo from the outset).

\textsuperscript{191} See Wippman, \textit{supra} note 6, at 146 (arguing that only ground troops backed up by low-flying aircraft could prevent Serbian atrocities); see also Gordon, \textit{supra} note 185 (noting that Gen. Clark has admitted his command did not foresee the mass expulsions that proceeded to occur in Yugoslavia once the conflict began). \textit{But see} Goodman, \textit{supra} note 186 (noting that some U.S. generals believe the use of troops would amount to U.S. soldiers acting as policeman, a job which the general's believed the soldiers were unqualified to do).

\textsuperscript{192} See Wippman, \textit{supra} note 6, at 146-48 (believing that U.S. strategy was not sufficient to achieve stated goals); see also Gordon, \textit{supra} note 185 (noting the debates NATO allies had regarding the bombing strategy).

\textsuperscript{193} See Kelly \textit{supra} note 181 (insinuating that bombing increased brutality); see also Ash, \textit{supra} note 182 (implying that rate of atrocities increased after the bombing had started).

\textsuperscript{194} See Ash, \textit{supra} note 182 (discussing the high altitude that U.S. fighter jets flew at); Kelly, \textit{supra} note 181 (arguing that the U.S. high altitude bombing did more harm than good).
whom they perceived as NATO allies, and who were the only enemy they could reach.195

4. The Use of Depleted Uranium

NATO released that its U.S. A-10 Warthog assault aircraft fired 31,000 rounds of ammunition consisting of depleted uranium (DU) in Yugoslavia.196 DU is used for its efficiency in destroying enemy tanks, however, it possesses radioactive and toxic properties known to cause severe adverse health consequences to civilian populations and military troops who come into contact with it.197 When DU particles are released into the air they can enter the body though inhalation, hand-to-mouth contact, via contaminated vehicles, or in food and water contaminated with DU dust.198 Once in the body, it remains in the liver, kidney and bones for years, causing cancer, genetic deformities, herpes, leukemia, and severe immuno-deficiencies.199 NATO denies these dangerous effects of DU despite the call by leading scientists to ban its use, and evidence linking the use of DU in the Gulf War to disturbing increases in cancer rates of U.S. veterans and Iraqi soldiers who fought in that war.200 After the bombing in Yugoslavia, increased amounts

195 See Chomsky, supra note 17, at 26 (stating NATO openly supported KLA attacks and used them to lure Serb forces into the open where they could be bombed); Kelly, supra note 181 (arguing that more brutal attacks were incurred because of the bombing); see also Ash, supra note 182 (stating that United States did not expect the rate at which Milosevic was able to carry out mass expulsions once the war began).

196 See Medenica, supra note 5, at 399-05 (noting how much depleted uranium was used in Yugoslavia); Alex Kirby, Pentagon Confirms Depleted Uranium Use, BBC News, available at http://news.bbc.co.uk/2hi/science/nature/337855.stm (May 7, 1999); see also Amnesty Report, supra note 151, at § 3.5 (stating how much depleted uranium was used by NATO forces).

197 See Kirby, supra note 194; see also Colum Lynch, WHO Team Will Study a Weapon’s Toll in Iraq, WASH. POST, Aug. 24, 2001, at A20 (noting that studies were conducted to determine whether depleted uranium shells increase cancer rates); David B. Rivkin Jr. & Lee A. Casey, That’s Why They Call it War, WASH. POST, Mar. 16, 2003, at B4 (noting that depleted uranium has serious health side effects).

198 See Howard Schneider, WHO to Study Health Effects of Depleted Uranium in Iraq, WASH. POST, Mar. 15, 2001, at A20 (discussing how depleted uranium operates); Future Looks Bleak for Iraq’s Fragile Environment: Damage Sustained by Kuwait during the First Gulf War gives some indication of he possible effects of war in Iraq – on the desert, water supplies and biodiversity, NEW SCIENTIST, Mar. 15, 2003, at 12 (discussing how depleted uranium tipped bombs operate).

199 See Amnesty Report, supra note 151, at § 3.5 (noting these adverse health effects); see also Lynch, supra note 197 (fearing that increased cancer and kidney disease rates in Iraq are caused by depleted uranium shelling during the Cold War).

200 See Campaign Against Depleted Uranium, Depleted Uranium in Iraq and Gulf War Veterans, CADU News 7 (Spring 2001) available at http://www.cadu.org.uk/info/
of radioactive air pollution were detected, and an unpublished report for the European Commission stated that NATO's use of DU was "the most dangerous of the cancer-causing and toxic substances released during the bombing."201 A British scientist calculated that NATO's use of DU would eventually cause 10,000 additional civilian deaths from cancer.202 Thus, any military advantages achieved by the use of DU seem severely offset by the consequences this chemical agent has on civilians.

5. The Use of Cluster Bombs

Throughout the bombing campaign, NATO dropped over 330,000 cluster bombs over the FRY.203 A cluster bomb is a bomb dispenser containing many small bomblets.204 These small bomblets are released and dispersed well before impact with the earth.205 Cluster bombs are considered an "area weapon" because they explode into thousands of tiny little bomblets and spread

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201 Medenica, supra note 5, at 403-04 (describing the dangers associated with DU); see also Graham N. Greene, Kosovo Fallout: Canadian Personnel May Be Exposed to Radiation Contamination, NAT'L POST, July 26, 1999, at A14 (detailing harmful effects of DU).


203 See McDonnell, supra note 126, at 52 (discussing NATO's reliance on cluster bombing); see also Herthel, supra note 161, at 231 (noting the heavy use of cluster bombs in Yugoslavia); Wiebe, supra note 103, at 129 (noting the high use of cluster bombs in Yugoslav conflict).

204 See Robert A. Coe & Michael N. Schmitt, Fighter Ops for Shoe Clerks, 42 A.F. L. REV. 49, 69 (1997) (discussing bomblets in cluster bombs); Herthel, supra note 161, at 235 (discussing the components of cluster bombs); McDonnell, supra note 126, at 44 (noting a cluster bomb's use of tiny "bomblets").

205 See McDonnell, supra note 126, at 44 (stating that exploding them prior to impact increases the range of the bomb); see also Matthew Lippman, Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War 1 to Afghanistan, 33 CAL. W. INT'L L.J. 1, 32 (2002) (noting the large area cluster bomb's can reach); Medenica, supra note 5, at 395-96 (discussing the wide range cluster bombs can reach).
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over a very large geographical area. Each small cluster bomb contains anywhere from 10 to 500 pieces of shrapnel, called bomblets. Because the bomblets spread over such a wide distance, they are nearly impossible to control so their use by NATO caused extensive civilian damage whenever a cluster bomb landed in an urban area. Many bomblet packages also tend to remain unexploded on the ground, where they virtually act as unexploded landmines. Especially dangerous is the fact that these bomblets are the size of a soda can and are brightly colored yellow with a red stripe. Children are often attracted to them because the bright colors make them look like toys, and when picked up the result is often death or amputation. It is estimated that 11,000 unexploded bomblets remain within the FRY.

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206 See McDonnell, supra note 126, at 41-42 (stating that cluster bombs spread over an area up to 5 football fields); see also Hayden, supra note 165, at 552 (describing the "lethal radius" of cluster bombs); Medenica, supra note 5, at 396 (discussing how each bomblet can reach a radius between 250 and 500 feet).

207 See McDonnell, supra note 126, at 44-45 (stating that the United States Air Force preferred the CBU-87B cluster bomb, which contains 202 bomblets); see also Wiebe, supra note 103, at 89 (discussing use of ball bearings along with other shrapnel in cluster bombs); UN to Clear Coalition Cluster Bombs, UN Integrated Regional Information Network, available at http://www.globalpolicy.org/security/issues/afghan/2002/0102cluster.htm (Jan. 2, 2002) (stating that cluster bombs, "are designed to fragment at high velocity into hundreds of pieces of shrapnel").

208 See McDonnell, supra note 126, at 41-42 (noting that cluster bombs also inflict civilian casualties because a high percentage of the bomblets are duds that do not explode, but remain active essentially acting like a land mine); Richard Norton-Taylor, NATO Cluster Bombs Kill 15 in Hospital and Crowded Market, GUARDIAN UNLIMITED, available at http://www.guardian.co.uk/international/story/0,3604,298422,00.html (May 8, 1999) (noting destruction in urban setting using cluster bombs); see also Lippman, supra note 205, at 50 (noting the increased risk of attacking urban targets with cluster bombs).

209 See Herthel, supra note 161, at 249 (discussing how unexploded cluster bombs create a hazardous situation because the bombs can not determine who is a combatant or who is an innocent bystander); Laursen, supra note 6, at 778 (discussing unexploded cluster bombs left in Serbia and Kosovo); McDonnell, supra note 126, at 42 (noting the danger an unexploded cluster bomb poses to civilians).

210 See Herthel, supra note 161, at 265 (noting the dangers of "duds"); Lippman, supra note 205, at 60 (discussing how unexploded bomblets in Afghanistan are similar to food packets being dropped by coalition forces); McDonnell, supra note 126, at 42 (stating the bomblets appear as a high tech toy).

211 See McDonnell, supra note 126, at 50 (stating that aside from nuclear weapons, biological weapons and poison gas, cluster bombs are perhaps the most dangerous weapons in modern warfare); Wiebe, supra note 103, at 114 (noting how the shape and colors of unexploded cluster bombs, "make them irresistible to children and adults alike"); see also Christoper M. Van de Kieft, Note, Uncertain Risk: The United States Military and the International Criminal Court, 23 CARDOZO L. REV. 2325, 2361 n.288 (2002) (noting similarity between soda cans and unexploded cluster bombs).

212 See Medenica, supra note 5, at 385-99 (noting amount of unexploded bomblets); see also McDonnell, supra note 126, at 59 (discussing numbers of unexploded bomblets left in Kosovo); Stannard, supra note 69, at 631 (discussing large amount of unexploded...
6. Environmental Damage

Widespread environmental damages resulted from the bombing of oil refineries and chemical factories in the FRY.\textsuperscript{213} Despite the obvious military gains from bombing such targets, the severe long-term damage inflicted on the natural environment calls the legitimacy of these targets into question.\textsuperscript{214} Because these industrial targets are typically located in highly-populated areas, toxic pollutants and contaminants released into the atmosphere can cause widespread harm when released into the groundwater.\textsuperscript{215} The extent of this impact on the future of the FRY's natural environment is yet to be calculated.

Considering all the above factors, NATO appeared to have placed greater importance on military objectives than on their duty to minimize civilian casualties.\textsuperscript{216} Not all civilian deaths in times of war are unlawful;\textsuperscript{217} indeed, one should expect some civilian casualties. However, the choice of military means that disproportionately impacts civilians must be avoided.\textsuperscript{218} In
choosing high altitude aerial bombing, the use of depleted uranium, the use of cluster bombs and the decision not to risk the lives of ground troops, NATO inevitably shifted all these risks from their military personnel to Yugoslav civilians.\(^{219}\) NATO's claim that the bombing campaign was the "most precise and lowest-collateral damage air campaign in history"\(^{220}\) seems to be mere rhetoric in light of the above stated facts. Time and again, NATO has apologized for the "collateral damage" inflicted by its warplanes.\(^{221}\) Yet, as suggested, NATO military planners could have conducted the war in ways that were safer to both Albanian and Serb civilians.\(^{222}\)

\(^{219}\) See Voon, supra note 95, at 89-90 (stating that there were approximately 500 confirmed civilians deaths and 6,000 wounded by the NATO air campaign despite the use of high tech and sophisticated weaponry); see also Falk, supra note 17, at 851-52 (quoting Robert Fisk's opinion that the strategies implemented by NATO in Kosovo, "killed hundreds of innocent Serb civilians... while being too cowardly to risk a single NATO life in defense of the poor and weak for whom it meretriciously claimed to be fighting" and mentioning that the high altitude bombing caused severe damage to the water supply, electricity systems, caused severe pollution, and was still expanded to use cluster bombs and depleted uranium); Herthel, supra note 161, at 242 (narrating and citing that on May 8, 1999, at least two cluster bombs missed their targets and "landed in two residential areas of Nis in Serbia, around the market place near the center of town and near a hospital several blocks away" killing fourteen and injuring thirty civilians).

\(^{220}\) Amnesty Report, supra note 151, at § 1.

\(^{221}\) See McDonnell, supra note 126, at 77 (stating that the phrase "collateral damage" is an Orwellian euphemism for civilian casualties); see also Richard Gwyn, NATO Has Lost Its Moral Compass, TORONTO STAR, May 12, 1999 (making note of what Mary Robinson, United Nations Commissioner for Human Rights, had observed after the Kosovo bombings "[NATO] remains sole judge of what is or is not acceptable to bomb"). See generally Marko Djuranovic, America's Obsession with the Sound Bite, Univ. Wire, Nov. 10, 1999 (taking note that "As the war progressed, civilian deaths caused by NATO bombs were at first reported as 'collateral damage.' Later, NATO officials no longer even apologized for such 'expected errors'").

\(^{222}\) See Amnesty Report, supra note 151, at § 1; see also Wieb, supra note 103, at 126 (noting that some states believe that "equipping bomblets with self-destruct and/or self-deactivate mechanisms" would cause them to be safer to civilians, and also making a point that only cluster bombs leave an unidentifiable number of live bombs, which can explode at any moment after the intended bombing, causing severe injuries to unsuspecting civilians); William Pfaff, NATO Can't Justify this Cowardly Strategy, Balt. Sun, May 13, 1999, at 17A (stating that NATO's conduct in the Kosovo conflict demonstrated an "assumption that the lives of NATO's soldiers and airmen are more valuable than the lives of Yugoslavs"); Paul Watson & Lisa Getter, Response to Terror; Civilians in Danger; Silent Peril Lies in Wait for Afghanistan's People; Weapons: Unexploded bomblets' toll on civilians has renewed controversy over their use, L.A. Times, Dec. 1, 2001, at A1 (comparing the military value of cluster bombs on masses of troops, to the lethal effects of cluster bombs on civilians beyond the conflict in which they were utilized, and quoting William Arkin, a former Army intelligence analyst who studied the bombs as having said, "Clearly, cluster bombs have shown to be a greater hazard to civilians than virtually any other weapon that is legal").
V. THE CHARGES AGAINST NATO

Scrutiny of NATO’s operation and its impact on civilians will only benefit the cause of human rights for any future military conflicts.\textsuperscript{223} Non-governmental organizations such as Amnesty International (AI)\textsuperscript{224} and Human Rights Watch (HRW)\textsuperscript{225} are devoted to the protection of international human rights. The role that these groups play are especially important because they derive no funding from governments and are not subject to internal political pressure, so they can publish their findings without internal pressure.\textsuperscript{226}

On June 7, 2000, a report published by AI accused NATO of committing war crimes in its bombing campaign over the FRY.\textsuperscript{227}

\textsuperscript{223} See Laursen, supra note 6, at 776 (imploring the reader to consider NATO actions in the context of WWII aerial bombardments, at least indicating NATO’s conduct in the Kosovo conflict was a measure to use in the future, impliedly to future war conduct with reference to impact on civilians); see also Burton, supra note 32, at 62 (commenting proudly on NATO’s efforts in Kosovo, yet highlighting that “[i]n the future, the United Nations should consider establishing specific criteria for such interventions, to prevent potential abuses.”); Van de Kieft, supra note 211, at 2360 (noting that there may be a “significant effect on future military operations” because of NATO’s conduct, for example, use of depleted uranium on ammunition tips may aid in cutting armor, but cause leukemia and cancer to troops and civilians, as well as have the potential to contaminate drinking water).

\textsuperscript{224} See Laursen, supra note 6, at 772 (noting that Amnesty International promotes adherence to the Universal Declaration of Human Rights along with other internationally accepted instruments that promote human rights); see also Jack Healey, Confronting the Challenge of Realizing Human Rights Now: Final Keynote: You Can Make A Difference, 34 HOW. L.J. 82, 85 (1991) (positing by the executive director of Amnesty International that one of its purposes is to attempt to be a voice for those who would otherwise be submitted to torture without chance of being heard; and making a difference in that effort); Anthony C. Infanti, Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime, 35 VAND. J. TRANSNAT’L L. 1105, 1181 (2002) (referring to Amnesty International as an NGO—a non-governmental, not-for-profit organization).

\textsuperscript{225} See Johann Hari, If this War with Iraq is to be a Moral War, It must be fought in a Moral Way, INDEPENDENT, Mar. 7, 2003 (noting that Human Rights Watch’s purpose is “not to stop the war, but to make sure the war does as little damage as possible to the civilian population of Iraq”); Yaman Akdeniz, Anonymity, Democracy, and Cyberspace; Part V: Democratic Process and Nonpublic Politics, SOC. RES., Mar. 22, 2002, at 223 (citing HRW with AI as organizations dealing with human rights abuses worldwide). See generally Human Rights Watch, About HRW, available at http://www.hrw.org/about/ (last visited Sept. 8, 2002) (stating that Human Rights Watch fights for the respect of international human rights law and expose violations).

\textsuperscript{226} See Laursen, supra note 6, at 772 (indicating that organizations such as AI and HRW use information campaigns as a formidable method of reaching their goals); see also Gerald Steinberg, Propaganda Has Taken Over From Humanitarianism, AUSTL. FIN. REV., June 7, 2002, at 75 (purporting that organizations such as AI and HRW do actually receive funding from governments, but without any explicit allegation that such funding carries political pressure). But see False Claims Will Not Deter Amnesty, AUSTL. FIN. REV., June 18, 2002, at 66 (citing the President of Amnesty International as remarking “Amnesty International accepts no funding from any government”).

\textsuperscript{227} See Amnesty Report, supra note 151, at § 4 (concluding that if NATO more closely
The report names three types of war crimes that it alleges NATO committed. The first category is for attacks against civilian targets, such as against the Serbian state television and radio station in Belgrade.\textsuperscript{228} AI believed that such attacks against civilian objects violated Article 52(1) of Protocol I of the Geneva Convention (1977) because the military gain was not proportional to the civilian loss of life.\textsuperscript{229} The second category is for NATO’s daylight attacks that killed civilians on bridges.\textsuperscript{230} AI concluded that NATO failed to suspend attacks even after it became clear from cockpit monitors that the missiles would strike civilians.\textsuperscript{231} According to AI, these attacks violate Article 57(2)(b) because the anticipated military advantage did not outweigh the loss of civilian life.\textsuperscript{232} Third, AI accused NATO of taking insufficient precautions to minimize loss of civilian life in choosing to bomb at followed the law of war, civilian deaths could have been reduced); see also Reinhold, supra note 168, at 3 n.6 (highlighting AI’s accusation against NATO for war crimes in the Kosovo campaign).

\textsuperscript{228} See Van de Kieft, supra note 211, at n.273 (highlighting the bombing of Belgrade headquarters of Radio Television Serbia on April 23, 1999, which was condemned by Amnesty International as “a deliberate attack on a civilian target”); see also Hayden, supra note 165, at 556-57, n.49 (commenting that Radio Television Serbia (RTS) was clearly a civilian target and that AI called the NATO attack a war crime); Mandel, supra note 19, at 116 (stating “the attack on the headquarters of Serbian state radio and television (RTS), NATO launched a direct attack on a civilian object, killing 16 civilians”).

\textsuperscript{229} See Mandel, supra note 19, at 116 (noting that “the attacks on civilian targets such as the Belgrade RTS radio and television building were contrary to Article 52(1) of Protocol I of the Geneva Convention (1977), and made criminal by Article 2 of the Tribunal Statute.”); Meyer, supra note 26, at 166 (citing AI’s statement that “the attack on the [station] violated the prohibition to attack civilian objects contained in Article 52(1) and therefore constitutes a war crime”); Walker, supra note 55, at 81 n.122 (2002) (highlighting that 52(1) prohibits attacks upon civilian objects).

\textsuperscript{230} See Mandel, supra note 19, at 116 (listing the bridges upon which there was “NATO killing of civilians . . . (Gredelica, Luzane, and Varvarin”)); Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 AM. J. INT’L L. 677, 691 (2000) (quoting AI as enumerating the “attacks, including the Gredelica railroad bridge, the automobile bridge in Luzane, and Varvarin bridge”); Voon, supra note 162, at 1100-02 (giving a detailed account of the events of the “military” attack on the Passenger Train at Gredelica Gorge using the Leskovac railway bridge in eastern Serbia).

\textsuperscript{231} See Mandel, supra note 19, at 116 (positing that “NATO failed to suspend attacks even after it became clear that it would cause loss of civilian life”); Murphy, supra note 230, at 691 (citing AI’s statement that “NATO forces failed to suspend their attack after it was evident that they had struck civilians”); Anne-Marie Slaughter & William Burke-White, An International Constitutional Moment, 43 HARV. INT’L L.J. 1, 16 n.76 (2002) (recognizing a problem with the bombing of bridges because of the likelihood of civilian casualties).

\textsuperscript{232} See Mandel, supra note 19, at 116 (opining that the attacks were “excessive in relation to the concrete military advantage to be anticipated, and in contravention of Article 57(2)(b)”); Murphy, supra note 230, at 691 (stating AI’s indication that these attacks were “in contravention of Article 57(2)(b”); see also McDonnell, supra note 126, at n.22 (pointing out that there was no “definite military advantage” for NATO in targeting the bridges).
above 15,000 feet and for deploying cluster bombs, which make "full adherence to international humanitarian law virtually impossible."  

HRW documented ninety separate incidents during the campaign in which civilians were killed. The report stated that thirty-three civilians were killed from attacks against targets in highly populated urban areas. Although HRW found no evidence of war crimes, it concluded that NATO violated international humanitarian law, including principles of proportionality under Protocol I. Civilian deaths during Operation Allied Force, says HRW "occurred as a result of decisions regarding target and weapons selection." Finally, it called for a formal investigation. Unfortunately, a special committee from The Office of the Prosecution (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY) reviewed NATO's operations but determined that the facts did not justify any formal investigation of the NATO operation. The ICTY concluded "that there was insufficient evidence of intentional criminal acts to justify further

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233 Mandel, supra note 19, at 116 (stating that "Third, . . . in bombings that killed . . . civilians . . ., insufficient precautions were taken to minimize civilian casualties, contrary to 57(2)(a)" and the 15,000 foot NATO bombing tactic made "full adherence to international humanitarian law virtually impossible"); Murphy, supra note 230, at 691-692 (quoting AI "In . . . the attacks on displaced civilians in Djakovica and Korisa, insufficient precautions were taken to minimize civilian casualties" and that 15,000 foot altitude bombing by aircraft made "full adherence to international humanitarian law virtually impossible").

234 See Human Rights Watch, Civilian Deaths in the NATO Air Campaign, Feb. 2000, available at http://www.hrw.org/reports/2000/nato/ (last visited Sept. 8, 2003) (providing detailed statistics regarding the 90 incident reports on civilians casualties from the Kosovo-Operation Allied Force attacks) [hereinafter "Civilian Deaths"]; Murphy, supra note 230, at 127 n.1 (referencing the 90 NATO attacks documented by HRW); see also McDonnell, supra note 126, at 98-99 (Human Rights Watch (HRW) documented ninety confirmed incidents in which civilians died from NATO bombing).

235 See Civilian Deaths, supra note 234.

236 Id. See Laursen, supra note 6, at n.26 (comparing AI's report accusing NATO of war crimes to where "Human Rights Watch found 'no evidence of war crimes'"); Hayden, supra note 165, at 569 (stating that "NATO violated international humanitarian law," although it prefaced this conclusion with the interesting distinction that it had "found no evidence of war crimes").

237 Civilian Deaths, supra note 234.

238 See Wippman, supra note 6, at 147 (indicating that the ICTY did not find any grounds to justify pursuing prosecution of the NATO operations); ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available at http://www.un.org/icty/pressreal/nato061300.htm (last visited Sept. 8, 2003); Lippman, supra note 205, at 54 (commenting that ICTY found a "lack of credible information" to justify pursuing prosecution).
investigation." The decision not to investigate faced much criticism because the protection of human rights in times of war could only benefit from such an investigation.

A. NATO's Motives

Despite reservations about the military means used in NATO's bombing campaign, some scholars have hesitated to question NATO's stated humanitarian purpose in deploying force. They point to the lack of resources in the Kosovo as proof that NATO had no other motives than humanitarianism in intervening. However, Professor Chomsky suggests this simplistic argument demonstrates a lack of understanding of both history and policy, namely because the Balkans has important strategic value. Some scholars suggest that the U.S. has had a long history of justifying war as humanitarian despite reality being to the contrary. Particularly compelling is the fact that Turkey, a

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239 See Wippman, supra note 6, at 147.
240 See Laursen, supra note 6, at 771-72 (describing the public and academic outcry for the investigation of NATO war crimes); Jelena Pejic, Legal Perspectives and Analyses the Yugoslavia Truth and Reconciliation Commission: A Shaky Start, 25 FORDHAM INT'L L.J. 1, 3 n.6 (2001) (indicating that the failure to investigate caused irreparable harm to NATO's reputation in the Federal Republic of Yugoslavia); see also Charles Trueheart, U.N. Tribunal Rejects Calls for Probe of NATO; No Kosovo War Crimes Found, WASH. POST, June 3, 2000, at A9 (reporting on the chief prosecutor's decision to follow the committee's recommendation not to initiate an investigation).
241 See Lobel, supra note 103, at 27-30 (elucidating the grounds for humanitarian intervention in Kosovo and noting the inconsistency in U.S. application of the rationale); Wippman, supra note 6, at 149-50 (indicating that the casualties in humanitarian actions should not dissuade the U.S. from engaging in such actions). But see Chomsky, supra note 17, at 136 (rejecting acceptance of the stated humanitarian purpose).
242 See Chomsky, supra note 17, at 136 (pointing out that Kosovo's lack of resources is a common argument to justify the humanitarian motives of the bombing campaign); see also Judith A. Miller, NATO's Use of Force in the Balkans, 45 N.Y.L. SCH. L. REV. 91, 99 (2001) (stating that NATO was not seeking to exploit any natural resources in Kosovo); America's Double-Edged Sword, BOSTON GLOBE, July 5, 1999, at A14 (quoting Vaclav Havel as stating, "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. Kosovo has no oil fields to be coveted.").
244 See Mandel, supra note 19, at 101 (explaining the reasons for not believing in asserted humanitarian interest); see also Bilder, supra note 166, at 163 (pointing out the United States' unfortunate support of regimes that abused human rights in Vietnam,
NATO member, has committed serious human rights violations against the Kurds, including ethnic cleansing, torture, laws banning their language and disappearances.\textsuperscript{245} The Council of Europe and the European Court of Human Rights have found Turkey "responsible for burning villages, inhuman and degrading treatment" and maltreatment by security forces.\textsuperscript{246} Professor Chomsky questions NATO's stated humanitarian use of force in Kosovo while some of Europe's worst human rights violations were occurring in their own jurisdiction.\textsuperscript{247} NATO also remained silent while Russia stepped up its operations in Chechnya a few months after the bombing.\textsuperscript{248} In Chechnya, just as in Kosovo, a ruling country was using military force to maintain its grip over a province of different ethnic and religious makeup.\textsuperscript{249} Also,

Guatemala, El Salvador, Nicaragua and Indonesia); Voon, supra note 95, at 79 (stating that the U.S. has maintained an inconsistent position on human rights because at the same time that it declares the inviolability of human rights, it refuses to ratify important treaties promoting human rights such as the one banning landmines or submitting to the jurisdiction of the International Criminal Court).

\textsuperscript{245} See Mandel, supra note 19, at 102 (indicating that the Turks have killed over 30,000 Kurds); see also McDonnell, supra note 126, at 37 n.14 (elucidating the sources chronicling Turkey's humanitarian abuses); Amnesty International, Turkey: An end to torture and impunity is overdue! (2001), available at http://web.amnesty.org/ ai.nsf/Index/EUR440722001?OpenDocument&of=COUNTRIES\TURKEY (last visited Sept. 8, 2003); Human Rights Watch, Turkey: Human Rights Developments, available at http://www.hrw.org/wr2kl/europe/turkey.html (2001) (last visited Sept. 8, 2003) (elucidating that although the law banning Kurdish was eventually repealed in 1989, restrictions on its use continue, including bans on Kurdish radio and television, the use of Kurdish in schools and advertisements, and giving children Kurdish names); Chomsky, supra note 17, at 52 (detailing the various forms that Turkey's repression of the Kurds has taken).


\textsuperscript{247} See Chomsky, supra note 17, at 52 (stating Turkey's human rights violations are one of the sticking points in Turkey's drive for European Union membership); see also Lobel, supra note 103, at 28 (providing that the position towards Kosovo is inconsistent with the lack of action taken against Turkey's human rights violations); McDonnell, supra note 126, at 37 n.14 (indicating Turkey's human rights violations).


\textsuperscript{249} See Charney, supra note 248, at 460 n.18 (providing a comparison of the sources of the conflicts in Chechnya and Kosovo); Duncan B. Hollis, Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms, 36 B.C. L. REV. 793, 798–99 (1995) (indicating the ethnic and religious differences that led to the Russian intervention). See generally Yavuz Akhmadov et al., Islam in the North Caucasus, 26 J. SOC. POL. & ECON. STUD. 569 (2001) (describing the history of Chechnya's
Russia's Chechyan campaign was even more brutal and on a larger scale than the Serb's suppression of the Albanians, yet NATO did not respond.\textsuperscript{250}

B. NATO's Continued Relevance

Now that NATO has lost its original aim – to counter the threat from the Soviet Union, the relevance of the Alliance must necessarily come into question.\textsuperscript{251} NATO seized its 50\textsuperscript{th} Anniversary summit in Washington, in the midst of the bombing campaign, to show the world that it has re-invented itself to stay relevant to the 21\textsuperscript{st} century.\textsuperscript{252} Scholars have asserted that NATO seized the Kosovo opportunity to demonstrate that the Alliance is still relevant to modern affairs.\textsuperscript{253} In this task to remain relevant, NATO has converted itself from a defensive alliance into an offensive power.\textsuperscript{254} Furthermore, some concluded

Muslim roots and its ethnic differences).

\textsuperscript{250} See Doug Bandow, \textit{A Foreign Policy for a Republic, Not an Empire}, 21 WHITTIER L. REV. 353, 367 (1999) (indicating that the civilian casualties in Chechnya far outweighed those in Kosovo); Kissenger, supra note 18, at 257 (noting that NATO also evaded the imperative to act on humanitarian principles in Sierra Leone, where the murder and atrocities were even more widespread than in Kosovo or Chechnya); Johanna Nichols, \textit{The Chechen Refugees}, 18 BERKLEY J. INT'L L. 241, 244 (2000) (indicating that most human rights estimate that 50,000 civilians were killed during the war between Russia and Chechnya).


\textsuperscript{252} See Simma, supra note 38 (indicating that reinvention of NATO after the end of the Cold War was important to the continuing relevance of NATO); see also Falk, supra note 17, at 851 (stating that NATO was under pressure to maintain its relevance in the post Cold War setting); Judith A. Miller, \textit{Reflections on National Security and International Law Issues During the Clinton Administration}, 3 CHI. J. INT'L L. 219, 224 (2002) (indicating that the Kosovo bombing was a means of reasserting NATO's relevance); Smith, supra note 59, at 3 (noting that the bombings in Kosovo coincided with the fiftieth anniversary of NATO and its attempts to assert its continuing relevance).

\textsuperscript{253} See Bilder, supra note 166, at 163 (providing that the less altruistic motives of credibility and self-preservation were at the heart of NATO's involvement in Kosovo); Wedgwood, supra note 144, at 399 (indicating that maintaining the credibility of NATO was one of the stated goals of the Kosovo intervention); John C. Yoo, \textit{UN Wars, US War Powers}, 1 CHI. J. INT'L L. 355, 369 (2000) (indicating that if NATO had not become involved, its relevance and credibility would have been open to critical attacks signaling its demise).

\textsuperscript{254} See Buchanan, supra note 19 (asserting that NATO was once an alliance of free nations formed to thwart any invasion by Stalin into Western Europe but has become a
that NATO had no choice but prove to Belgrade that its threats were not empty.\footnote{See Voon, supra note 95, at 79 (2002) (stating that some have asserted that one of NATO's motives for the bombing was to keep the Alliance relevant); \textit{see also} Chomsky, supra note 17, at 134 (noting NATO leaders publicly noted that credibility was an issue); \textit{see also} Wippman, supra note 6, at 140 (indicating that various commentator have determined that the real reason for NATO involvement in Kosovo was founded upon credibility concerns); Mandel, supra note 19, at 106 (declaring the need to invent a new role as a purpose of NATO's involvement in Kosovo).

\textit{C. Test New Weaponry}

The \textit{Wall Street Journal} stated that the Kosovo war would be a huge stimulus for military production and sales.\footnote{See Anne Marie Squeo, \textit{For Defense Sales, War Is Potent Ammo–Combat Records Help Missiles, Jets Fly Off the Shelf}, \textit{WALL ST. J.}, Aug. 23, 1999, at B1 (stating "In the defense business, there is no better showcase than a war, and America's major defense companies are rapidly incorporating the one in Kosovo into sales pitches."); \textit{see also} Chomsky, supra note 17, at 138 (citing the Wall Street Journal as stating that Raytheon alone expected that the war would bring in over a billion dollars of orders); \textit{Kosovo: An Uneasy Peace}, BBC News, available at http://news.bbc.co.uk/hi/english/static/nato_gallery/nato_1.stm (last visited Mar. 31, 2003) (stating that America's B-2 Bombers, which cost $812 million each, were used for the first time in the war against the FRY).} The most lucrative contracts go to major U.S. construction companies, who expected to rebuild the bridges, buildings and roads that were destroyed in the FRY during the bombing.\footnote{See Chomsky, supra note 17, at 138-39 (estimating that reconstruction contracts could amount to $2 to $3.5 billion); Alan Cowell, \textit{British Industry Seeking Share of Balkan Rebuilding Work}, \textit{N.Y. TIMES}, Jun. 15, 1999, at C4 (indicating that the likely cost to rebuild infrastructure such as power supply installations, roads, bridges, and will range between $30 and $50 billion); David Gow, \textit{UK firms in race for Kosovo contracts Rebuilding: Task force bids to win orders worth up to pounds 30bn}, \textit{GUARDIAN}, Jun. 19, 1999, at 4 (indicating that the contracts for the rebuilding of Kosovo could amount to £30 billion).} Hence, the view has been advanced that the war must be looked at with suspicion because it greatly benefited the military-industrial complex of the West.\footnote{See Linda Killian, \textit{Kosovo's Hidden Costs}, \textit{AM. SPECTATOR}, July 1999, at 54 (indicating that military contractors gained from the $15 billion increases in military neoimperialist bloc that invaded a small nation like Serbia in the name of democracy and human rights); \textit{see also} Hayden, supra note 165, at 570–71 (indicating that NATO action was offensive rather than defensive, although it maintained the language of defensive action against genocide); Kissinger, supra note 18, at 263 (stating the NATO demands marked a shift in the Alliance's policy from a defensive union to an "insistence on war").} This view sees the bombing of the FRY merely as a humanitarian pretext to test new weaponry.\footnote{\textit{C. Test New Weaponry}}
VI. THE AFTERMATH OF THE BOMBING

The NATO bombing finally ceased on June 10, 1999 when NATO and Serbian authorities signed the Kosovo Peace Accord. The destruction upon the civilian population of the FRY was immense. Over 120,000 buildings were razed and 25 percent of all Yugoslav schools were destroyed. The number of civilians without shelter rose to as high as 500,000 and 40,000 mines lay scattered throughout the FRY. Widespread confusion gripped the province – everything from the legal code to property rights was in disarray. The majority of criminal spending due to the war in Kosovo); Graham Stewart, Pedalling into Politics, SPECTATOR, Sept. 21, 2002, available at 2002 WL 14839063 (stating that some have asserted that the military-industrial complex controlling the Pentagon was behind the Kosovo bombing campaign); Nicholas Watts & Dan Atkinson, Making a Killing on the Cash Front Conflict Winners: How the Arms Manufacturers, Profiteers and Contractors Enjoy Rich Pickings, GUARDIAN, May 22, 1999, at 6 (indicating that the war in Kosovo represented an increase of $15 billion in military spending and $20 billion in construction contracts).

See Mandel, supra note 19, at 106 (positing “there were, in fact, many war-making interests that converged here: the need to invent a new role for NATO after the Cold War, arms manufacturers’ profits, a good place to test weapons, lucrative reconstruction contracts . . .”); see also Nanda, supra note 10, at 19 (concluding “there are serious questions about the validity of NATO’s ‘humanitarian intervention’ in Kosovo under international law”); Wippman, supra note 6, at 140 (noting “critics of NATO’s intervention even question whether NATO acted out of humanitarian motives, and whether it in fact achieved humanitarian ends”).


See Falk, supra note 17, at 851-52 (claiming the bombing campaign caused hundreds, if not thousands of deaths among civilians); Voon, supra note 162, at 1085 (noting approximately 500 confirmed deaths and 6,000 injuries due to the bombing); see also Lippman, supra note 205, at 49-50 (discussing the civilian deaths caused by the bombing of Korisa).

Kosovo: An Uneasy Peace: Reconstruction, BBC News, available at http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/uneasy_peace/reconstruction.stm (last visited Mar. 21, 2003); see also Falk, supra note 17, at 851 (recognizing “the bombing campaign resulted in heavy damage to the water supply and electricity systems; caused severe pollution through the destruction of chemical factories and oil refineries . . .”); Petar Teofilovic, Crisis in Yugoslav Public Law, 6 ANN. SURV. INT’L & COMP. L. 71, 93 (2000) (stating “NATO’s aggression resulted in massive destruction all over Yugoslavia—its infrastructure (bridges, roads, heating and electricity plants, networks for distribution of drinking water, homes) was devastated, numerous industrial plants of all kinds . . . were obliterated or heavily damaged”).

Kosovo, An Uneasy Peace: Reconstruction, supra note 263; see Falk, supra note 17, at 851 (noting the bombing induced a migration of refugees that approached one million); see also McDonnell, supra note 126, at 59 (discussing casualties during and after the war from minefields and unexploded cluster bombs).

suspects were immediately released or disappeared after arrest. The BBC accused police and judges of bias, as they have been unwilling to arrest ethnic Albanians or put them in jail. There have also been incidents of reprisals against NATO troops by Albanians as they have become frustrated by the realization that NATO is not willing to hand them independence from the FRY. The senior UN official in Kosovo, Bernard Kouchner, complained about insufficient humanitarian funding to pay the salaries of essential workers like doctors and teachers.


See Kosovo, An Uneasy Peace: Law and Order, supra note 265 (noting both widespread crime and release of suspects after arrest); see also Paul Watson, Kosovo Justice System Tries Patience of Serbs, Albanians, L. A. TIMES, Aug. 23, 2000, at (stating "both Serbs and ethnic Albanians are accusing its criminal courts of excessive delays, bias among judges, widespread witness tampering and other serious violations of the right to a fair trial"); SerbiaInfo, Detained ethnic Albanians released, at http://www.serbia-info.com/news/2001-05/11/23437.html (last visited Apr. 1, 2003) (discussing the release of forty-two ethnic Albanians after an investigated judge allowed a stipulated time to prosecute to lapse).

See Emma Batha, Kosovo: What happened to peace?, BBC News, available at http://news.bbc.co.uk/2/hi/world/europe/655591.stm (Feb. 25 2000) (asserting "there are accusations of bias as police have appeared reluctant to arrest ethnic Albanians and judges will not put them behind bars"); see also Darryl A. Mundis, Current Development: New Mechanisms for the Enforcement of International Humanitarian Law, 95 AM. J.INT'L L. 934, 952 (2001) (suggesting "[i]nternational prosecutors will meet with tremendous pressure to prosecute Kosovo Albanians for crimes committed against Kosovo Serbs in that province, as well as local resistance to any such trials"); Scharf, supra note 265, at 1422 (explaining "[j]ustice is hard to come by, and the province of Kosovo has neither police nor the legal institutions necessary for a functioning justice system").

See Batha, supra note 267 (noting "[s]ome analysts fear that when Kosovo's Albanians realise the UN is not about to hand them independence on a plate, they will turn their firepower on the peacekeepers"); French Soldiers Kill Sniper in Mitrovica, at http://www.rte.ie/news/2000/0213/kosovo.html (last visited Apr. 3, 2003) (discussing French peacekeeping forces' response to Albanian sniper fire); see also British troops kill two ethnic Albanians as tensions rise, at http://www.ardmoreite.com/stories/070499/new_gree.shtml (last visited Apr. 3, 2003) (recognizing rising tensions after an altercation between British troops and ethnic Albanians).

See Rocket Attack on Serb Bus, BBC News, available at http://news.bbc.co.uk/2/hi/world/europe/628880.stm (Feb. 3 2000) (stating that many in the West believed the problems to be over at the end of the war, ignoring that very difficult logistical problems would arise with the peacekeeping efforts); see also Committee on Migration, Refugees and Demography Report, Humanitarian situation of the Kosovo refugees and displaced persons, at http://assembly.coe.int/Documents/WorkingDocs/doc99/ edoc8392.htm (last visited Apr. 3, 2003) (suggesting "emergency relief should be followed up by financial assistance from the international community on a huge scale both for reconstruction and rehabilitation in Kosovo"); Jerry White, UN relief agencies warn of humanitarian disaster in Yugoslavia, at http://www.converge.org.nz/pma/
A. Reverse Ethnic Cleansing

The NATO bombing succeeded in securing the return of all but 35,000 of the 800,000 Albanian refugees. There was, however, an exodus of half of Kosovo's Serb population after NATO's bombs ceased. Over 200,000 Serbs are still abroad and those that remain in Kosovo are the targets of violence and often murder from revenge attack by Albanians. NATO leadership has pleaded with the remaining Serbs not to flee Kosovo, but K- FOR's commander has admitted that his troops have not done enough to protect the remaining Serbs in the province. The
process by which most Serbs have been expelled from Kosovo after the bombing and the failed efforts of peacekeepers to prevent their exodus has been called a “reverse ethnic cleansing.”

This is a serious failure of the international community and particularly NATO. NATO deployed less than half of the police force it had promised to prevent violence in the aftermath of the bombing and NATO governments have been unwilling to provide the funding or the necessary peacekeeping troops. What is particularly surprising is that NATO has allowed members of the KLA, which had been deemed a terrorist organization by most of the West, to disband into a civilian police force (now the TMK), despite the fact that the Organization for Security and Co-operation in Europe has held the KLA responsible for most of the revenge killings against the Serbs.

Questions also emerged about the nature of the refugee crisis both before and after the bombing. Many analysts accused...
NATO of precipitating the greater part of the refugee crisis. There is at least compelling evidence that the refugee crisis dramatically increased the night the first NATO bombs fell. U.S.-NATO Commanding General Wesley Clark stated that it was "entirely predictable" that Serb violence would intensify after the bombing. After the dramatic increase in the number of refugees after the bombing began, Clark stated that this did not surprise him: "[t]he military authorities fully anticipated the vicious approach that Milosevic would adopt, as well as the terrible efficient with which he would carry it out."

VII. THE FUTURE OF INTERNATIONAL LAW: KOSOVO AS PRECEDENT?

If NATO abided by established international law and the guidelines for military intervention under the U.N. Charter, there would have been no bombing. Only by acting outside of the Charter could action be taken against the FRY. Does this mean that the Charter provisions are inadequate as a framework for the 21st century? Some scholars suggest that the veto paralysis of the U.N. Security Council and its monopoly on the use of force make it a flawed foundation for the future. These

279 See Voon, supra note 95, at 90-91 (asserting the NATO bombing precipitated the refugee catastrophe); see also Bilder, supra note 166, at 170 (stating NATO was aware the bombing would create a refugee crisis). But see Could it Have Been Done Better?, Kosovo Crisis, available at http://www.nato.int/kosovo/repo2000/better.htm (last visited Apr. 4, 2003) (asserting "[s]ome claim the brutal ethnic cleansing, violence and refugee exodus was precipitated by NATO's air campaign. The facts do not support this").

280 See Wippman, supra note 6, at 134 (stating that the greater part of the exodus - when 800,000 Albanians were forced to flee Kosovo and as many as 10,000 were killed - did not occur until after the bombing began); see also Bilder, supra note 166, at 170 (explaining NATO's greatest fear was that the bombing would deteriorate the refugee situation). See generally Brigadier General Daniel P. Leaf, NATO's Role In Kosovo, Press Conference, at http://www.nato.int/kosovo/press/p990419b.htm (Apr. 19, 1999) (recounting observations during a bombing sortie in Kosovo in which houses were being set ablaze on the ground by a convoy of vehicles and civilian refugees were inadvertently killed by NATO bombing).

281 See Chomsky, supra note 17, at 20 (quoting Commanding General Wesley Clark's announcement that violence would increase after the bombing); see also Bilder, supra note 166, at 170 (quoting Special Envoy Holbrooke as saying that NATO's greatest fear was that the bombing would deteriorate the refugee situation). See generally Leaf, supra note 280 (describing the general chaos that ensued during the bombing campaign).

282 Chomsky, supra note 17, at 21.

283 See Stannard, supra note 69, at 619 (alleging NATO's actions violated the laws of war); see also Schwabach, supra note 6, at 405 (questioning the legality of NATO's bombing). See generally U.N. CHARTER pmbl. (setting forth the United Nations international agreements).

284 See Kai Ambros, Comment, NATO, the UN and the Use of Force: Legal Aspects,
scholars view Kosovo as a turning point in international affairs, the beginning of a New International Order where morality, not sovereignty, is the preeminent principle. They argue that the Charter, with its archaic principle of sovereignty, has become inadequate and organizations such as NATO should be free to use force to carry our international justice. Normative developments such as globalization, the spread of democracy, and instantaneous media coverage have eroded "domestic jurisdiction" and have made events anywhere in the world everyone's concern. This view holds that:

[T]he organization in danger of sliding into irrelevance seems to be not NATO but the United Nations. In a political variant of free-market competition, the U.N. Security Council risks disappearing as a serious security body as the genuinely powerful prefer to work through a more convenient instrument. All that the Security Council can offer is "legitimacy," in the view of some Western governments - and NATO may provide the desired multilateral cover, with less obstruction.

I believe the advocates of this New International Order fail to take into account the many dangers of casting aside the U.N.


See Ambros, supra note 284 (noting the change in international law); see also Charney, supra note 11, at 1239-40 (asserting that the Kosovo intervention is perhaps the birth of a new international law from state practice); Stannard, supra note 69, at 619 (stating that “[i]t has been stated that this war was waged, not ‘in the name of national interests, but rather in the name of principles and values’”).

See Charney, supra note 11, at 1244 (setting out the basis upon which regional organizations, such as NATO, can resort to force when the U.N. fails to act); see also Doctors without Borders, supra note 285, (describing how political motivations prevented the UN from intervening in Rwanda). See generally U.N. CHARTER pmbl.


framework that I have laid out above. Foremost, this New Interventionism has no well-defined limitations.\textsuperscript{289} The Kosovo experience was an \textit{ad hoc} approach instead of a clear set of rules for action and deliberation.\textsuperscript{290} The Western countries of NATO decided that Kosovo was a situation that demanded military intervention and they used force without Security Council authorization.\textsuperscript{291} Logically, the question must be asked: who else can decide when and where to use force for humanitarian ends? May other regional groups besides NATO assert their right of humanitarian intervention in contravention of the U.N. Charter? One could hardly conceive of the West allowing the Arab League to attack Israel to protect Palestinian civilians because in their view atrocities were being committed. Would the United States allow China to bomb Jakarta to prevent Indonesia’s mistreatment of its Chinese minority? \textsuperscript{292} Yet, once we step outside of the U.N. framework there is nothing to prevent the anarchic situation that would result.\textsuperscript{293}

Neither can the U.N. Security Council’s veto system be considered a stalling device.\textsuperscript{294} The likely vetoes from Russia and

\textsuperscript{289} See Charney, supra note 11, at 1247 (discussing how NATO’s action was not narrowly tailored in Kosovo); See also Statement of H. Rep.Adam Schiff, available at http://www.house.gov/schiff/oped_iraq.htm (Oct. 8, 2002) (discussing the danger of intervention in Iraq without support from the international community). See generally George Washington’s Farewell Address, available at http://www.civnet.org/resources/teach/basic/part8/49.htm (last visited Sept. 9, 2003) (warning us to avoid the entangling alliances).

\textsuperscript{290} See Charney, supra note 11 at 48-49 (stating that the Kosovo intervention displays the dangers of asserting an undeveloped rule of law); see also Amnesty International, NATO broke rules of war in Kosovo campaign, at http://www.balkanpeace.org/ched/archive/june00/ched190.shtml (last visited Sept. 9, 2003) (claiming NATO bombing actually violated laws of war).

\textsuperscript{291} See Voon, supra note 95, at 34 (noting the Kosovo War was fought in the absence of Security Council authorization); see also Richard J. Goldstone, Whither Kosovo? Whither democracy? Global Insights, 8 GLOBAL GOVERNANCE, Apr.1, 2002, at 143 (concluding that, “in the absence of United Nations Security Council authorization, the NATO military response violated international law but was nonetheless politically and morally legitimate”).

\textsuperscript{292} See Wippman, supra note 6, at 135 (posing these hypotheticals); see also Bilder, supra note 166, at 162-63 (questioning whether this expanded interventionist policy could invoke action in other contexts); Ambros, supra note 284 (suggesting we may have opened Pandora’s box by breaking rules).

\textsuperscript{293} See Bilder supra note 166, at 63 (questioning the U.N.’s ability to uphold its rules in light of NATO’s actions); see also Charney, supra note 11, at 1248 (stating that the Kosovo precedent is dangerous because it would allow powerful states to use for in violation of international law); Gerson, supra note 15, at 15 (stating power politics would be the norm if the U.N. international framework is not adhered to).

\textsuperscript{294} See Schwabach, supra note 6, at 407-08 (explaining how NATO and the US justified circumventing the U.N. by saying Russia and China’s veto power was standing in the way of proper intervention in Kosovo); see also Ambros, supra note 284 (suggesting to
China cannot be considered a failure of the U.N. system. The U.N. is pluralistic system where all countries have a voice in the international political process regardless of their economic and military power. Citizens of Russia and China represent a significant percentage of the world’s population, and if India’s opposition to the war is included, representatives of more than half the world’s population opposed NATO’s intervention. Thus, NATO’s contention that it acted on the part of the international community when it took up arms against the FRY is mere hyperbole.

CONCLUSION

The NATO bombing of Yugoslavia is a defining event in the future of international affairs. The failures of the war in Kosovo should reaffirm the principles of the U.N. Charter, which although imperfect, is the most widely accepted international instrument for the maintenance of peace. Nations should not shy away from troubled regions, but rather work within the procedures of the U.N. to negotiate peaceful solutions to remove veto power of the permanent Security Council Members to make way for new interventions; Doctors without Borders, supra note 284 (advocating the removal of Security Council’s veto power to clear the way for future humanitarian intervention); World Federalist Association, Reform of UN Decision Making Structures, available at http://www.endgenocide.org/ceg-dms/ (last visited Sept. 9, 2003) (stating “it is neither morally right or politically sensible to leave veto power in the Security Council in the hands of the five nuclear powers”).

Russia and China had a right to veto military action in Kosovo that was enshrined in the U.N. Charter and wholly proper. See Schwabach, supra note 6, at 408. It is our circumvention of the U.N. that is improper, not the veto power itself. There is such a sense of our lawlessness that it was suggested France may not exercise its veto power in the recent conflict in Iraq because they are aware it will be disregarded in any event. See James S. Robbins, Will France Veto?, NAT’L REV. ONLINE, Mar. 10, 2003. Frustrated with not being able to wholly manipulate international law William F. Buckley has recently suggested revamping the U.N. veto system or eliminating it altogether. See William F. Buckley Jr., Who/What To Be Mad At, Vol. LV, NAT’L REV. 7 (Apr. 21, 2003).

Schwabach, supra note 6, at 417 (explaining that three of the world’s most populous countries, containing more than half the world’s population condemned military action in Kosovo); see Buckley supra note 295 (recognizing that India should be given veto power if population were measured). But see James Kitfield, Why Nato’s Credibility Is at Stake, NAT’L J., Oct. 10, 1998, at 2381 (arguing the credibility of NATO would be damaged if they could not provide stability as a result of a veto).

See generally Samuel P. Huntington, The Clash of Civilizations, FOREIGN AFF. AGENDA, The New Shape of World Politics: Contending Paradigms in International Relations, 81 (1997) (stating that the term ‘the world community’ is a euphemism used to provide legitimacy to actions reflecting the interest of Western powers); see also Chomsky, supra note 17, at 139 (stating “international community” signifies rich industrial western societies); Schwabach, supra note 6, at 417 (pointing out nearly half the world’s population condemned the action).
international disputes. In this case, NATO should have offered more lenient peace terms prior to entering into hostilities – such as the terms that were actually accepted in the Kosovo Peace Accord – in order to immediately place a U.N. peacekeeping force on the ground. The use of force in contravention of the Charter will only hinder the protection of international human rights. The collateral consequences of NATO’s intervention, including its devastating impact on civilians, the environment, the exacerbation of the refugee crisis and the ill-preparedness of NATO to build local Kosovan institutions, show the aftereffects endemic to the use of military force.

Some of the lessons of Kosovo seem to have changed the way the Bush administration carried out the war in Iraq. For example, in Iraq there was an immediate push to get troops on the ground despite the obvious dangers to the military. There was no prolonged air campaign in Iraq as in Kosovo. This change in strategy may be due to the ineffectiveness of the seventy-eight day bombing campaign in Kosovo, and an acknowledgment that a sustained air campaign at 15,000 feet without ground troops maximizes the dangers to civilians. Furthermore, despite ultimately acting outside the U.N. in using force against Iraq, the Bush administration made a sustained effort to work within the U.N., perhaps conceding the importance of working within this body.

The recent events over Iraq also reveal a fragmentation of the West, in contrast to its unity during the NATO campaign. In Kosovo, there was no major dissent from any Western country against using force on the FRY, despite the absence of Security Council authorization. In the war in Iraq, on the other hand, there was a glaring split between the U.S. and most of Europe on the question of the use of force outside of the United Nations. In the War on Terrorism, President Bush has reiterated that the U.S. is prepared to use force to obtain its objectives, and the U.N. Charter’s prohibition on the use of force will not restrain the U.S.’s freedom of action. This poses the question: Why are the European powers now committed to handling international crises, including Iraq, through the U.N.? Is this new emphasis on the U.N. due to a perceived failure in Kosovo? These questions are increasingly important as the U.S. works to build a
coalition in the War on Terrorism and possibly open new theaters of war.